Case and Comment

INSURANCE — PRODUCTS LIABILITY — PROPERTY DAMAGE BY UNSUITABLE PRODUCT — ASSUMED LIABILITY — FUNCTIONAL REASONING.— The subject of the following comment is the case of *Andrews and George Company Limited* v. *Canadian Indemnity Company*, in which an assured sued an insurer for indemnity under the products liability provisions of a "comprehensive" liability policy. The action was dismissed by the Supreme Court of British Columbia on December 14th, 1950,[1] allowed unanimously by the Court of Appeal on October 15th, 1951,[2] and dismissed unanimously by the Supreme Court of Canada on October 7th, 1952.[3] The case was initiated after December 23rd, 1949, and is therefore not susceptible of appeal to the Privy Council.

The facts presented no difficulties; the issues arose over the effects of the policy. The assured manufactured glue, which he sold regularly to a plywood manufacturer. He knew the purpose for which the glue would be used, and manufactured it with that purpose in mind, but in the contract of sale there was no express warranty. A certain lot of glue was defective, owing to a mistake in the manufacture (how the mistake happened was not ascertained, but it escaped detection by the manufacturer because, unknown to him, his equipment for testing the glue had become defective). The plywood made with the glue was below standard and had to be sold at a reduced price. The assured paid the plywood manufacturer $9,159.79 by way of damages, and sued the insurer for indemnity. For the purposes of the litigation between assured and insurer, it was agreed that the amount paid by the assured was due, that all the events concerned took place during the term of the policy, and that the assured had complied with the claims procedure stipulated in the policy.

The policy provisions directly concerned were the following,

[1] [1951] 1 D.L.R. 783; [1951] I.L.R. 1-016.
[2] [1952] 1 D.L.R. 180; (1951) 4 W.W.R. (N.S.) 37; [1951] I.L.R. 1-056.
[3] [1953] 1 S.C.R. 19; [1952] 1 I.L.R. 1-089.

which are part of the products liability insuring agreement, this being set out in an endorsement No. 10:

> TO INDEMNIFY the Insured against the liability imposed by law upon the Insured for damage to or destruction of property of others caused by accident during the policy period and arising out of the handling or use of or the existence of any condition in merchandise products or containers manufactured, sold, or handled by the Insured after the Insured has relinquished possession of such merchandise products or containers to others and away from premises owned by, leased to or controlled by the Insured.
>
> THIS POLICY SHALL NOT COVER:
> Exclusions
> (a) Damage to or destruction of property where the Insured has assumed liability therefor under the terms of any contract or agreement.
> (b) . . . .

The substantial issues as presented are conveniently expressed in terms of the insurer's defences and may, I think, be fairly rendered as follows:

(1) (a) that the occurrence of the defect in the glue was not an "accident", and (b) that the policy contemplated only accidents happening after the assured had relinquished possession of the product and away from the premises of the assured, as for instance an explosion, and that if the occurring of the defect in the glue was an "accident", it happened before the assured had relinquished possession of the glue, and was therefore not covered;

(2) that the liability of the assured was not "imposed by law" and was therefore outside the scope of the insuring clause, and, furthermore, that it was an assumed liability, and therefore excluded by exception (a) in endorsement No. 10.

In the following notes I discuss the two numbered issues separately. Upon the accident issue the judge of first instance, Farris C.J. B.C., held that the defect in the glue was evidently the result of a mistake in manufacture, and that the mistake must be considered an accident, but he then went on to say that, for coverage, the accident must occur after the product had left the assured's possession, so that there was no coverage.

The Court of Appeal agreed that the occurring of the defect was an accident, but came to the conclusion that the policy required only that the resulting damage occur after the assured had relinquished possession of the product. Robertson J.A., speaking for the court, says:

> The appellants were seeking insurance with reference to the manufacture of their glue. There was nothing in the glue ingredients or in the glue itself which was inflammable or explosive, nor was any damage

> to be apprehended in connection with its manufacture. There was not any danger of this sort to be feared by its customers. There would only be one thing for which it required protection, viz., some accidental fault in the manufacture of the glue which affected its value or rendered it unfit for the purpose for which it was being sold.
>
> . . . . .
>
> The policy did not entitle the appellants to damages for any fault in the glue so long as it held it in its possession; if the glue was properly manufactured there could be no accident. Damage could only happen if there was a fault in the manufacture of the glue. Unless the accident applies to something in the manufacture of the glue and damage to property of a purchaser resulting from such accident, the appellant got no advantage from the insurance. I think therefore that the word 'accident' applies to some defect arising in the manufacture of the glue.

In the Supreme Court, Rand and Kellock JJ. (in separate judgments) rejected the reasoning of the Court of Appeal on the ground that no evidence had been adduced to show that glue would not explode or start a fire; they held that the policy applied only to accidents occurring after the goods had left the assured's possession, and found that there was no such accident.

Rand J. confined the term "accident" to "explosion and similar mishaps" and said that what the parties "really did not aim at were direct and expectable damages from the daily risks which it was part of their business of production and sales to face and eliminate". Commenting upon this immediately, one may, I think, remark that it is the well-accepted function of insurance to take care of damages whose possibility is foreseen even though it be the assured's business to try to prevent them.

Kerwin and Estey JJ. confirmed the ruling of the Court of Appeal on the two aspects of the "accident" defence—that the occurring of the defect was an accident, and that the accident need not occur after delivery of the product—but upon the second they proceeded by reasoning different from that of the Court of Appeal. They pointed out that a clause B in the basic policy provided that the insurance "applies only to accidents or occurrences which originate during the policy period", and they reasoned that therefore the words "during the policy period" were redundant and so could be read out of the insuring clause, which would then read:

> To INDEMNIFY the Insured against the liability imposed by law upon the Insured for damage to or destruction of property of others caused by accident and arising out of the handling or use. . . .

They concluded that the syntax then justified the proposition that, for coverage, only the damage need occur after the product left

the possession of the assured. Commenting upon this, although I agree with the conclusion, I have to say, with respect, that the method of reasoning is unconvincing, since its outcome is unpredictable, as witness the fact that Farris C.J.B.C. thought that the phrase "during the policy period and" could be eliminated, and came to the opposite conclusion.

Cartwright J. did not pronounce on the "accident" defence.

The division in the Supreme Court leaves the "accident" issue without a definite ruling, at least so far as that court is concerned; but more than that, with five different approaches among the eight judges who dealt with it in the various courts, the issue is confused, and it seems advisable to make an attempt at clarification.

Assuming for the moment, but under reserve, that the insuring clause was concerned with *an* "accident", an event to be localized in time and space, we may first consider the question whether the policy covered only an accident occurring after the product had left the assured's possession, that is, whether the latter part of the insuring clause, from "arising out of the handling . . .", qualifies "damage to or destruction of" or "accident".

The Court of Appeal reasoned that since glue would not explode or start a fire, the only "accident" could be an accidental fault in its manufacture, so that if "arising out of . . ." qualified "accident", the clause could give no coverage; wherefore "arising out of . . ." must qualify "damage or destruction". Rand and Kellock JJ. rejected this reasoning on the ground that no evidence was adduced to show that glue would not explode or start a fire. This seems to me to be a conclusive objection, and I think it must be accepted that in principle there might be an "accident" either before or after the glue left the assured's possession. This conclusion does not, of course, involve as a necessary consequence that, to be covered, an "accident" must occur after the glue left the assured's possession; and to support that interpretation of the clause, all that there is in the judgments of Rand and Kellock JJ. is an unmotivated statement, and on the part of Farris C.J.B.C., the reasoning based on the elimination of "during the policy period". For these three judges the primary or natural meaning of the clause was that the accident must occur after the product had left the assured's possession; and indeed it seems that this may have been the primary meaning for the Court of Appeal and Kerwin and Estey JJ., since they felt obliged to do more than express a preference, and had recourse to considerable argument in arriving at the conclusion that "arising out of . . ." qualified "damage" rather than "accident".

I suggest, with respect, that upon the considerations to be set out "arising out of . . ." qualifies "damage or destruction", not "accident", and I submit that the following grouping of the phrases of the clause commends itself as the natural one, showing the primary meaning:

> To INDEMNIFY the Insured against the liability imposed by law upon the Insured for damage to or destruction of property of others
> caused by accident during the policy period
> and
> arising out of the handling or use of or the existence of any condition in merchandise products or containers manufactured, sold or handled by the Insured after the Insured has relinquished possession of such merchandise products or containers to others and away from premises owned by, leased to or controlled by the Insured.

For the other interpretation it is necessary to group the phrases thus:

> . . . damage to or destruction of property of others caused by accident during the policy period
> and
> arising out of the handling . . .

This interpretation disregards the function of the "and" (Farris C.J.B.C. deleted it); and it involves the paralleling of "arising out of . . ." with "during the policy period", which is (a) to treat "during" as a verb like "arising" rather than as the preposition that it is, or in other words, implicitly to rephrase "during the policy period" as "happening during the policy period" or (with Kellock J.) as "which occurred during the term of the policy", and (b) to disregard the parallel of the two verbs actually used, "caused" and "arising". There is no justification for thus assuming that the drafting was defective, and I suggest that by its syntax the clause carries as its primary or natural meaning that "arising out of . . ." qualifies "damage or destruction".

If this is the primary meaning of the clause, and if in the circumstances of the contract it makes sense, that should dispose of the matter. In fact it harmonizes better than the other with the circumstances of the contract: an assured who buys a products liability policy is moved—as the insurer must know—by the fact that he is exposed to liability for damages caused by his products after he has delivered them; he is equally liable whether the causative "accident" occurs on or off his premises, and to read the clause as carrying a distinction between the one case and the other is to deny the legal pertinence of this fact, which factually or semantic-

ally is highly pertinent. Risks come before insurance and insurance is intended to cover risks and meet assured's needs; risks cannot be changed so as to fit a policy.

At the beginning of my remarks on whether "arising out of . . ." qualified "damage or destruction" or "accident", I made a reservation as to the sense of the word "accident" in the phrase "damage to or destruction of property of others caused by accident". I suggest that the basic question of coverage, so far as the word "accident" is concerned, was not brought out in the issues as formulated and dealt with—that we are not concerned with *an* "accident", in the sense of an event to be localized in time and space.

The pertinent words read "damage to or destruction of property of others caused by accident", not "damage to or destruction of property caused by *an* accident". For convenience hereafter, I shall use the phrase "damage caused by accident"— I do not think that the abbreviation will prejudice the question. "Damage caused by accident" is a unitary idea, and the pertinent questions would clearly seem to be: Was the damage expected? Was it intended? Manifestly it was neither. So there was "damage caused by accident" and, having recognized this sense of the term, the rest of the words of the insuring clause fall into place easily and one sees that there was "damage to or destruction of property of others caused by accident during the policy period and arising out of . . .".

An objection to this interpretation can be based on the clause B of the policy, which provides that "this policy applies only to accidents or occurrences which originate during the policy period". Here the term "accident" evidently connotes localization in time and space. The question is whether this compels abandonment of the above interpretation, obliging one to read the phrase in the insuring clause as if it said: "damage caused by *an* accident". I suggest not, for the reason that the insuring clause is the one that sets out to define the insured peril and therefore that, as between the two phrases, it is the one in the policy period clause that must be reconciled with the other. And this is not difficult: the word "accident" in the policy period clause may be seen as the happening of the damage. Add that the phrase "during the policy period" in the insuring clause, which must also be taken into account, will qualify "caused" at least as readily as it will "accident".

Furthermore, if "accident" means an event to be localized in time and space independently of the happening of the damage, and which therefore need not occur at the same time as the damage, it means that an insurer on risk for a certain period would

have to answer for claims on account of damage occurring after that period, perhaps long after, and could therefore not close his books. I am confident that if under a policy in the present wording an assured claimed in respect of damage occurring after the policy period but owing to a mistake made during that period, the insurer could plead with reasonable hope of success that the period applied to the happening of the damage (as being the "accident" for the purposes of the policy period clause).

To sum up my argument so far, if "accident" in the insuring clause signifies an event to be localized in time and space, the clause still requires only that the damage occur after the product has left the assured's possession; but in fact we are concerned, not with such an event, but with "damage caused by accident" whose "timing" is when the damage occurs.

There remains one point to be discussed, in furtherance of my purpose of trying to clarify the "accident" question in products liability policies; and the following remarks may incidentally provide the answer to a question that will have troubled some of the readers of the judgments: Why did the insurer resist the claim?

As an incident to the defence that the occurrence of the defect in the glue was not an "accident" the insurer pleaded that "accident" meant an explosion or similar mishap. The plea was summarily dismissed by six judges, and equally summarily accepted by Rand J. There is almost no discussion of it in the reported reasons, but perhaps it reflects the insurer's reason for resisting the claim, namely, the opinion that products liability insurance is not intended to cover an assured's liability for the mere spoiling of his client's products through his having supplied an unsuitable ingredient. One does not know whether the point was raised explicitly in the argument, but it is a serious one, for the case may well be seen as a boundary-line one; and it is regrettable that the point was not fully discussed in the judgments.

The objection to the claim would seemingly be that the policy contemplates positive physical destruction of an existing object, as by burning or tearing, but not the spoiling of a product by an unsuitable ingredient that inhibits the productive process. It is evident that we are concerned with a qualification of the term "damage to property" rather than of the term "caused by accident" (for the physical effect would have been the same whether or not the presence of the unsuitable ingredient was accidental). The first question therefore is: Is the spoiling damage to property?

The question can conveniently be discussed in the terms of the

present case. Consider four possible consequences of defect in the glue: (a) that by mistake on the part of the assured the glue contained an explosive or inflammable substance which, igniting, damaged the buyer's property; (b) that by its natural action, without violence, the defect in the glue rendered the plywood valueless; (c) the defect in the glue caused a reduction in the value of the plywood from its normal price (the present case); (d) the defect was discovered before any damage was done. And for all cases suppose liability for the defect on the part of the assured.

Case (d) is the subject of an express exclusion in the policy (as in all products liability policies); the insurer does not pay for the replacement or repair of the defective goods. Case (a) is unquestionably covered. What concerns us is (b) and (c). Do they constitute "damage to or destruction of property"? If one argues on syntax alone, this is probably an open question, and there must be an arbitrary element in a yes or a no answer. Cases (b) and (c) represent a destruction of an existing material object only as raw material used in the manufacture is destroyed, and they would at least to that degree be covered. Apart from that, they represent the inhibiting of a process that would produce a material object of value. This in turn may be seen as the destruction of immaterial elements entering into the process—the use of capital assets, labour, technique, managerial organization. These, entering the process, would have gone to make up a part of the value of the finished product and thus to have become property. They did not go into the product and may therefore be said to have become property, but their value was wholly or partly destroyed by the presence of the unsuitable ingredient. It seems reasonable to say that this destruction is destruction of property. It is evident, I think, that if the defect in the glue had been such as to set the plywood afire, no distinction would be made between the material and immaterial elements whose value was destroyed; and I suggest that, for the purpose of the insurance, the two cases are in principle the same.

This is essentially an argument from words, and I think that we should look to the circumstances to see what meaning they would tend to give to the term "damage to property". A manufacturer knows that he is answerable for a defect in his products: he is liable to make good the defect and to pay for damages caused by it. Insurance offers him protection against the latter risk, that is, of liability for damage to property of others caused by accident and arising out of a condition in his products. If by reason of defect his product destroys his client's goods, say by setting them afire,

or destroys a batch of his client's products in which it is an ingredient, he will be equally liable in damages; he would reasonably expect his products liability policy to cover in one case as well as the other, in sum, to fit his risk, and he would certainly not expect a distinction to be founded upon the words "damage to or destruction of property", especially in view of the major distinction between "bodily injury" and "property damage" running through liability policies, including this one.

There remains to consider whether the damage by way of spoiling of the client's products by an unsuitable ingredient supplied by the assured by mistake is damage to property "caused by accident". The question then is: Does "caused by accident" connote fire, explosion or a similar mishap, to the exclusion of the negative, or perhaps one should say "quiet", action of an unsuitable ingredient, like glue with adhesive quality inadequate for the plywood to be made? If one looks into the dictionaries, one will find that in its first meaning the essential quality of "accident" is unexpectedness, and that the quality of violence implied in the term "fire, explosion, or similar mishap" is but an occasional association of "accident", not a connotation. Therefore, if one wishes to ascertain whether the spoiling was "caused by accident", one may properly ask whether it was unexpected, unforeseen. And the answer in the present instance must be affirmative.

The assumed liability issue was the decisive one in the Supreme Court; all but Kellock J. dismissed the assured's claim upon it. The holdings against the assured are all in substance alike: the assured's liability towards his client lay in contract, not in tort, and it was not a liability imposed by law but an "assumed liability", because the assured was not under obligation imposed by law to sell his goods but was free to sell or not to sell them, and therefore when he sold them he contracted the obligation under the warranty which the law makes part of a contract of sale.

I do not think that there can be any doubt that the assured's liability was under the legal warranty, and therefore in contract, not tort. Many compelling authorities are cited for this proposition. But I suggest that it does not follow that the assured's liability towards his client was therefore not "imposed by law" but an "assumed liability". What we are concerned with in the present case is to ascertain not a rule of law as in a case of tort but the intention of parties to a contract; and I suggest, with respect, that to use the proposition as a premise from which to infer an intention is to impose what can only be called a fictitious intention, or in other words that this is procrustean jurisprudence.

The insurer sold a products liability policy to a manufacturer of glue. The coverage was on liability imposed by law, excluding assumed liabilities. On the Supreme Court's reasoning, what would this mean? The answer would apparently be that only where the liability lies in tort, rather than contract, is there coverage. But most liabilities of one who sells goods will be towards buyers, and a great many of them will lie in contract, under the warranty imposed by law on the vendor. Thus a principal risk for which the assured bought the insurance would be struck out of it. Such an astonishing result should not obtain without justification in the wording of the contract.

The insuring clause covers liability imposed by law for third-party damage caused by accident during the policy period and arising out of the handling or use of or the existence of any condition in merchandise products or containers *sold* by the assured. It contemplates goods *sold* as the agent of the liability. In ascertaining the intention of the parties, are we to attach no significance to the word "sold" or to the fact that the person to whom an insurer sells a products liability policy is one who parts with his goods under a contract? A reasonable inference from the word "sold" is that the insurer contemplates liabilities arising out of the warranty which the law attaches to a contract of sale. But in fact there is express confirmation of this: in exclusion (d) of the policy (quoted in the judgment in first instance) it is provided that the policy shall not cover "damage to or destruction of the merchandise, products, containers or completed work out of which the occurrence arises". What is the need for this exclusion except to strike out of the coverage a part of the liability under the legal warranty? Its presence postulates that the insuring clause covers liability under the legal warranty.

One of the reasons in the judgments of Kerwin, Estey and Rand JJ., concurred in by Cartwright J., is based on a comparison of the products liability insuring clause and the "operations" insuring clause, which provides that the insurer is "to pay on behalf of the Assured all sums which the Assured shall be obligated to pay by reason of the liability imposed by law . . . or by written contract for damage . . .". The learned judges note the absence from the products liability clause of the words "or by written contract". One cannot question that this argument is pertinent, but I would point out that while the "operations" insuring agreement is independent of the products liability insuring agreement, the exclusion (d) is part of it and therefore has direct significance in ascertaining its meaning.

To the distinction made in the contract between liability imposed by law and that assumed under contract there is a reasonable meaning that can be given, a meaning that is sustainable by legal argument. It is that the policy does not cover liabilities assumed by the assured over and above the legal warranty. The insurer who issues a products liability policy has received disclosure of the assured's operations and must be taken to contemplate that the assured, if a manufacturer or middleman, will sell goods, and therefore to contemplate the ordinary risks of liability for third-party damage thus created, by the law of tort or by the law of sale; and this risk is normal and so can be underwritten. The assured could not expect the insurer to cover liabilities specifically assumed beyond this, without express agreement in the policy, for they could be anything, wherefore assumed liabilities are excluded, the term being given a meaning that corresponds to a real or functional distinction. And if we seek a dialetical justification, we may say that, as between assured and buyer, and between assured and insurer, the legal warranty is not "assumed", for the contract of sale, and therefore the legal warranty, are already postulated; and so "assumed liability" must mean something in addition to the legal warranty. In this connection note the words of the exclusion: "where the Insured has assumed liability therefor under the terms of any contract or agreement"— not "under any contract" but "under the terms of any contract". To a lawyer this may indeed mean express or implied terms; to contracting parties who are not lawyers, and particularly in the circumstances of a policy like the present one, a more reasonable interpretation is that it refers to the express terms. Furthermore, in psychological fact, the principal elements of the contract are the delivery of the goods and the price, and the legal warranty is not "assumed", for the vendor does not give it a thought, nor, if he did and gave it expression, would he add anything to his obligations under the sale, while, on the other hand, if the vendor adds to his warranty obligations it is by a positive act of assumption of liability and the term is then appropriate. It is laymen who make and use language and give it its meaning; can one imagine a layman saying that he was free to sell or not to sell his products, and that therefore he assumed the legal warranty that the law imposes on him?

To conclude: the judgment of the Supreme Court of Canada upon the "assumed liability" issue means that many products liability insurances may not be counted upon to accomplish a primary purpose and therefore are of doubtful value; and it does the same

for most other liability policies, in so far as they are intended (without express stipulation) to cover the liability of the assured when that liability exists as a legal incident to a contract.

It is unfortunate also that the question whether "damage caused by accident" includes spoiling of a client's product by an unsuitable ingredient supplied by the assured was not squarely raised and dealt with in the judgments.

Of greater significance, however, is the question of how Canadian courts will approach the interpretation of insurance policies. Our social system depends on insurance. The social function of insurance is to provide protection against risks to which persons are exposed, and the purpose of the courts must necessarily be to implement that function, within the limits of insurability, good faith, public policy, and the contract. A contract is an intention that the law will enforce, and a rational intention is based upon a logically pre-existing set of facts—in the case of insurance one of relationships and activities and consequent risks—and a pattern that is known to both parties. The writing evidencing the intention is an arrangement of words. Words and phrases are conventional symbols, and the intention for which they stand in any contract is not general but particular, being that meaning, within the general or dictionary definition, that is given them by the functional pattern with reference to which they are used. By recognizing this principle Lord Mansfield and others established our insurance as a reliable and therefore viable institution; and they thereby served the public well, and insurers also. If now it is to be rendered unreliable, where shall we be?

DOUGLAS BARLOW*

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DIVORCE—STANDARD OF PROOF OF ADULTERY—BINDING EFFECT OF ENGLISH DECISIONS IN AUSTRALIA.—Some time ago there appeared in the Law Quarterly Review[1] an interesting discussion as to how far the decisions of English courts are binding on those in the Australian jurisdiction and, in particular, as to the effect of Court of Appeal pronouncements on judgments of the High Court of Australia. It was noted there that the High Court, following a principle applicable where a particular view of the law has been taken in England from which there is unlikely to be any departure, elected in *Waghorn* v. *Waghorn*[2] to follow the Court

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[1] (1944), 60 L. Q. Rev. 378. [2] (1942), 65 C.L.R. 289.

of Appeal decision in *Earnshaw* v. *Earnshaw*[3] rather than its own previous judgment in *Solicitor (South Australia)* v. *Gilbert*,[4] notwithstanding that some of the justices still believed in the correctness of their former views.

It was perhaps a little surprising then that the same court in *Wright* v. *Wright*[5] adopted a different attitude to the decision of the Court of Appeal in *Genesi* v. *Genesi*,[6] which ran contrary to the earlier Australian High Court case of *Briginshaw* v. *Briginshaw*.[7] For reasons which were discussed in the 1950 volume of the Law Quarterly Review at page 35 the opinion of the court was that it had made a survey of the subject, which it felt, rightly or wrongly, was a much more careful and comprehensive treatment of the issue (the standard of proof in divorce petitions based on adultery) than it had been accorded in *Genesi* v. *Genesi*. The court fully recognized that diversity in the common law must be avoided even at the sacrifice of what it regarded as sounder principle, yet it did not think that *Genesi* v. *Genesi* required it to reconsider *Briginshaw* v. *Briginshaw*, "though some other decision, more particularly, of the House of Lords" might make it necessary.

That "other decision" was not long in appearing. In *Preston-Jones* v. *Preston-Jones*[8] the House of Lords was confronted with the problem in a case which, however, was complicated by the fact that, if a decree were granted, it would have the effect of bastardizing a child. The law lords held, on the facts before them, that the standard of proof required was proof beyond reasonable doubt.

This decision, obviously, had to be given very serious consideration in Australia despite what some regarded as its special facts, and serious consideration it received to the extent that in *Stone* v. *Stone*[9] and *Mackie* v. *Mackie*[10] a judge of the Supreme Court of New South Wales and the full court of Queensland, respectively, held that *Preston-Jones* v. *Preston-Jones* required proof beyond reasonable doubt in divorce suits based upon adultery. Indeed, in *Mackie* v. *Mackie* the Queensland court said that this standard was to be applied not only in adultery cases but for all matrimonial offences. There are other unreported Australian cases, the great majority of them undefended, in which state supreme court judges, following the principle of the High Court

[3] [1939] 2 All E.R. 698.
[4] (1937), 59 C.L.R. 322.
[5] (1948), 77 C.L.R. 191.
[6] [1948] 1 All E.R. 373.
[7] (1938), 60 C.L.R. 336.
[8] [1951] 1 All E.R. 124.
[9] 69 N.S.W. W.N. 275.
[10] [1952] S.R. Q'land 25.

decision in *Piro* v. *Foster*[11] and believing that *Preston-Jones* v. *Preston-Jones* required "proof beyond reasonable doubt", applied that standard in preference to the civil phrasing formulated in *Waghorn* v. *Waghorn*.

It was, accordingly, with some anticipation that the High Court's consideration of the new situation was awaited. Its views have now been expressed in *Watts* v. *Watts and Another*.[12] This was an appeal to the High Court from a judgment of Clark J. of the Supreme Court of Tasmania dismissing a petition for divorce founded on allegations of adultery. In his reasons for judgment Clark J. stated on the adultery issue that, considering the evidence as a whole, he was not satisfied beyond reasonable doubt, which in his view, on a reading of *Preston-Jones* v. *Preston-Jones*, was the standard of proof required from the petitioner.

The appeal, heard by Fullagar, Kitto and Taylor JJ., was unanimously dismissed. In their joint judgment Kitto and Taylor JJ. carefully examined the individual opinions of the law lords in *Preston-Jones* v. *Preston-Jones* and reached two main conclusions: firstly, since in *Preston-Jones* v. *Preston-Jones* a finding of adultery would have had the effect of bastardizing the respondent's child, in such a case "a very high degree of proof" was required; secondly, in *Preston-Jones* v. *Preston-Jones* the House of Lords did apply the standard of proof beyond reasonable doubt, but did not, "as a final appeal tribunal, consider or decide that this standard of proof was applicable in all suits for dissolution on the grounds of adultery or for any matrimonial offence". Accordingly, it was not necessary for the High Court to reconsider its decision in *Briginshaw* v. *Briginshaw*.

Nevertheless, the judgment proceeded to point out that the relevant section of the Tasmanian Matrimonial Causes Act of 1860 required that the court *should be satisfied* on the evidence that the case of the petitioner had been proved and in the opinion of Kitto and Taylor JJ. "satisfied" here meant, satisfied with regard to the gravity of the issues involved. If "satisfied beyond reasonable doubt" amounted to no more than that, then, in their view, to substitute such phraseology taken from the criminal law for the words "satisfied on the evidence" at most afforded a "temptation . . . to give effect to shadowy or fanciful doubts" (*per* Denning L.J. in *Davis* v. *Davis*[13]), whilst, if it meant something

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[11] Discussed in (1944), 60 L.Q.Rev. 378, at pp. 380-1.
[12] To be reported in 1953 C.L.R.
[13] [1950] P. 125, at p. 129.

different, there was no ground "for any such substitution and consequential amendment of the statute".

In the result, Kitto and Taylor JJ. held that Clark J. had applied the wrong standard of proof; nevertheless, they further held that the appeal should be dismissed, because, they said, it was clear from the reasons for judgment given by Clark J. that he would not have been satisfied on any test that adultery had taken place and "that would be sufficient to dispose of the Appeal". The use of the word "would" saves the earlier views as to the effect of *Preston-Jones* v. *Preston-Jones* from being obiter, but even if they had been obiter, they would have been sufficient in the writer's opinion to serve as a directive to Australian courts that *Preston-Jones* v. *Preston-Jones* does not require the abandonment of *Briginshaw* v. *Briginshaw*.

Fullagar J.'s judgment agreed in general with that of Kitto and Taylor JJ. He stressed that the actual form of words used to describe the standard of proof in adultery cases seemed to him to be of little practical importance, because he could not see any respectable tribunal making a finding of adultery "in the absence of a real conviction endorsed by evidence that it has been committed". (In passing, it may be commented that this is good sense when a judge is sitting without a jury, but if there is a jury the form of words to be used in the direction to them by the judge is the crux of the matter.) Nevertheless, *Preston-Jones* v. *Preston-Jones* being in his opinion a case of an exceptional kind, it was not correct to describe the standard of proof required of a petitioner in divorce actions founded on allegations of adultery by the words "beyond reasonable doubt". They were words which had been long used in the criminal courts to bring emphatically to the minds of juries the force of the presumption of innocence in cases where findings against the accused would involve serious consequences, including, perhaps, loss of liberty. It would be contrary to much previous authority, the learned judge said, and against long established practice, to transfer such a formula into the divorce jurisdiction. Nevertheless, though he disagreed with Clark J. on these matters, the learned judge joined with Kitto and Taylor JJ. in dismissing the appeal because the doubts expressed by the trial judge made it plain that, even if he had approached the case without reference to a "too stringent standard of proof", the result would have been the same.

In the event, until there comes before the House of Lords a case unencumbered with a bastardization issue, Australian courts,

like those of Canada,[14] will continue to differ from English courts on this vexed point, though in practice it would appear to mean in many cases only a difference in words.

R. W. BAKER*

* * *

WILLS—MISTAKE—HUSBAND AND WIFE EXECUTING WILLS DRAWN FOR EACH OTHER.—In supplement to my comment in the February issue on this subject[1] and the discussion there of *Re Brander*,[2] I should add a few words about a second case with very similar facts, also decided by Wilson J. of the British Columbia Supreme Court. In *Re Duck*[3] the husband John Duck had signed the document drawn for the wife Laura Gertrude Duck, and she had signed the document drawn for him. Application was first made for letters of administration in the estate of John Duck on the basis of an intestacy, the material disclosing, however, the existence of the irregularly executed documents. It would appear that counsel was directed to file an application for probate with an affidavit of the solicitor who attended at the execution of the will as to the nature of the irregularity in the signatures. The affidavit in effect states that the obvious mistake was made. Probate is then granted as follows:

> It is ordered that the will prepared for execution by Laura Gertrude Duck but actually executed by John Duck be altered by inserting the words JOHN DUCK in place of the words LAURA GERTRUDE DUCK in line . . . [five other changes follow].
>
> It is further ordered that the said will be admitted to probate with the aforesaid alterations.

The alterations are (a) change in the name of the testator in the opening and testimonium clauses from Laura Gertrude Duck to John Duck; (b) deletion of the description of the testator "wife of John Duck"; (c) change in the name of the sole beneficiary from "husband John Duck" to "wife Laura Gertrude Duck"; (d) change in name of the personal representative from my said

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[14] See the decision of the Supreme Court of Canada in *Smith* v. *Smith and Smedman*, [1952] 3 D.L.R. 449; commented upon at (1952), 30 Can. Bar Rev. 753.

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[1] (1953), 31 Can. Bar Rev. 185.

[2] [1952] 4 D.L.R. 688; 6 W.W.R. 702.

[3] April 9th, 1953, Vancouver Registry #51005/53. No reasons for judgment were given, but I am advised by counsel that Wilson J. referred to *Re Brander* and treated that case as governing *Re Duck*.

"husband" to "wife"; (e) consequential changes in the gender of one pronoun and one adjective.

We noted earlier what we thought were the two problems involved: the admissibility of the document at all to probate in cases of mistake of this sort and, when found to be admissible, the extent to which changes may be made in the court of probate before the grant of probate. We there submitted the soundness of the action of Wilson J. in finding that the document in the circumstances before him in *Re Brander* was admissible as the will of John Brander, but questioned his action in *inserting* words into the document — a document which had been executed as a will. The power to *delete* is unquestioned where it does not alter the sense of what remains and it is shown that the words to be deleted were not part of the testator's true will. In the present case, it would appear that there is no question as to what the document was originally intended to be—the last will of Mrs. Duck; as to what happened—that Mr. Duck signed the paper drawn for his wife (and she signed his); or as to the finding of admissibility of the document to probate. John Duck's intention to execute, and execution of, the document he signed as his last will and testament was clear. The case does not on this aspect differ from *Re Brander*. The gift by the testator to himself is in each case in similar language: "to my husband John Brander", "unto my dear husband John Duck".

But one interesting feature is added by the *Duck* case—the naming of the executor. This must normally be sufficiently clear to enable the court of probate to make a grant to some one. If not, letters of administration with the will annexed will have to issue. In both cases the court of probate *inserted* words describing the executor—her actual name in *Re Brander*, her relationship ("wife") in *Re Duck*. In the *Brander* case the appointment had been "I appoint my husband John Brander". We submitted that there was no jurisdiction to insert words, only to delete and take to a court of construction for interpretation of what remains, except, as pointed out at pages 195-6, where the court of probate may have to construe in order to appoint an executor. In the *Re Brander* comment we suggested that the action of Wilson J. may have been right in result but wrong, in this connection, in actually inserting in the probated copy of the will the name Margaret for John. By construction, without inserting, and after deletion of the incorrect "John", the court of probate could easily have found that by the language used ("my Brander") the testator intended

to appoint his wife Margaret as executrix and then have granted probate to her without actual insertion of her name in the will. See alternative (*b*) suggested at the bottom of page 198 in the previous comment. However, in the *Duck* case, the language is, "I appoint my said husband sole executor". If the word "husband" is struck out as there by mistake, and the court has no power to insert, what construction can the court put upon the words that remain: "I appoint my said [blank] sole executor"? Previously he has left everything "to my dear Duck". This is the only person previously referred to. If this is sufficient, as we submitted was possible on proper evidence in the *Brander* case to constitute a *gift* to the wife, is it then in the *Duck* case a sufficient previous identification of the wife to constitute a *grant* to her? "My said —". The only "said", that is, the only person so far mentioned, has been identified as the wife. Are the words "my said —" sufficient to name an executor? Is this filling a total blank, upon which the courts frown? Or is it construing a blank in the clause appointing an executor by reference to the clause of beneficial gift?[4]

GILBERT D. KENNEDY*

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COMPANY LAW—DIRECTORS ACCEPTING GIFT OF COMPANY SHARES —REMEDY—COMPANY HOLDING ITS OWN SHARES—SURRENDER AND CANCELLATION.—Although the problem involved in a company accepting the surrender of its own shares has remained quite dormant in Canada, it was raised as one of the issues in a recent Nova Scotia case, *Zwicker* v. *Stanbury*.[1] In that case the defendants, directors of the Lord Nelson Hotel Co. Ltd., acquired by way of gift from the Canadian Pacific Railway a large block of fully paid shares in the hotel company. The company had a poor financial record and the shares were considered to be valueless; it had outstanding bonds in the sum of $600,000 nearing maturity and its assets were subject to a second mortgage of $241,500 held by the C.P.R. At a shareholders meeting, the problem of refunding the bonds was referred to the directors for solution. The C.P.R., as mortgagee and shareholder, gave notice that it was not interested in increasing its investment in the company. The defendant directors devised a plan whereby the matured bonds were to be ex-

[4] See footnote 52 and text at p. 199 of earlier comment.
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[1] [1952] 3 D.L.R. 273; varied on appeal, [1952] 4 D.L.R. 344.

changed for new bonds. In order to carry out their scheme they induced the C.P.R. to surrender its shares to them by way of gift, thus giving them actual control of the company. To give added assurance to acceptance of the scheme, they acquired controlling interest in the bondholders class by purchasing bonds on the open market. At meetings of the shareholders and bondholders the scheme was approved by the required majority. Subsequently, certain interests appeared on the scene, who wished to purchase the assets of the hotel company. The shares became valuable.

In this action, the shareholders sued for a declaration that the shares surrendered by the C.P.R. to the defendants were the beneficial property of the company and for a further order that the shares be surrendered to the company for cancellation. The defendants claimed that they received the shares in their personal capacity and not as directors of the company. The court, however, found no difficulty in holding that the shares were acquired and retained by the defendants in breach of their fiduciary obligations to the company in their capacity as directors. The plaintiffs' contention that the shares were held by the defendants for the benefit of the company was rejected by the trial judge. In his lordship's opinion to allow such a contention would be contrary to the principle that a company cannot be a member of itself. The court also felt it had no power to order a surrender and cancellation of the shares on the view that the effect would be a reduction of capital and, further, that surrender is essentially the voluntary act of a shareholder. To order a surrender was regarded as tantamount to ordering a forfeiture of the shares.

On appeal the plaintiffs were partly successful. But the remedies prescribed by the court are not wholly satisfactory. The majority decision, delivered by Doull J., accepted the view that the shares under dispute were held by the defendants for the benefit of the company. The legal obstacles to such a declaration entertained by the lower court were not even discussed by the appellate judges. With respect to the voting rights attached to the shares, his lordship says at page 359:

> I am of the opinion that the shares were given to the directors for the purpose of giving them control of the company and the reason that they cannot hold them beneficially is that a director cannot, in connection with company business, obtain a benefit for himself. Under present circumstances I see no reason why the directors cannot vote the shares, at any rate until directed otherwise by the company.

The defendants, however, were ordered not to vote the shares so

as to relieve themselves of the obligation to account to the company for any profit which they might receive from the "holding or sale" of the shares.

Hall J., dissenting, departed from the majority view and was prepared to give a remedy to the plaintiffs by way of surrender and cancellation of the shares. Preliminary to making an order, however, his lordship would have allowed an amendment to the statement of claim adding a specific claim for a reduction of capital. It is submitted that there was no need for a reduction of capital. The proper remedy should have been a simple order requiring the surrender of the shares to the company. The directors had acquired the shares by way of gift and the company paid nothing for them. In these circumstances, a surrender would not be a reduction of capital and therefore would be quite in order. Authority for this view is not lacking.

In *Rowell* v. *John Rowell Ltd.*,[2] quoted with approval in *British American Timber Co., Ltd.* v. *Jones*,[3] the defendant company accepted a surrender of its fully paid shares from the shareholders in exchange for the issue to them of shares of another class. Warrington J. observed that ". . . the capital of the company remains as it was" and that "surrender of fully paid shares means, of course, a reduction of capital if the shares are surrendered upon terms which do not permit their reissue. In the present case the shares are surrendered on terms which do permit their reissue, and, with all respect, I really fail to see how in that case there is any reduction of capital at all."

In the case under review cancellation would be superfluous and would not benefit the plaintiff. Yet Hall J. states at page 354, "Without cancellation the benefits of an accounting would accrue preponderantly to the [defendant] holders of the . . . shares . . .". This view is based upon the argument that a company cannot hold its own shares. (A simple surrender would, of course, have that result.) Again, this rule does not seem to be supported by authority. The English decision of *Re Buckingham*[4] suggests that there is no such principle of law.[5] Moreover, in the case of forfeited shares a company is certainly the holder of its own shares. It is conceivable that shares surrendered to a company may be part of the assets of that company[6] which on a distribution may

[2] [1912] 2 Ch. 609.
[3] [1944] 2 D.L.R. 487.
[4] (1944), L.J. 113 Ch. 23.
[5] See also *Kirby* v. *Wilkins*, [1929] 2 Ch. 444.
[6] See Report of the Royal Commission on Price Spreads (1935), where

be divided *pro rata* among the shareholders. The authorities are not conclusive on this point, but a similar view was suggested, though in different form, by Warrington J. in the *Rowell* case. Commenting on shares surrendered but not cancelled, he states, at page 620, ". . . the shares are there ready to be issued, still forming part of the capital . . .". In an earlier case[7] Lindley L.J. expressed the same opinion. One writer[8] has summed up the issue in this way:

> It may be confidently added that the shares so surrendered without any consideration are not vested in the company, or the crown; that they are not *in nubibus* but are lying side by side, with the not fully paid up forfeited shares, in the Company's treasury and the Company's trading capital is not by the surrender either 'reduced' or 'diminished'; if the shares are reissued, it is increased.

If in *Zwicker* v. *Stanbury* an order had been made for a surrender of the shares to the company, no problem would have arisen with respect to the voting rights in the shares as it did in the majority judgment on appeal. Surrendered shares are held by the company and for voting purposes may be considered to be neutral shares.[9]

Finally, there remains to consider the view of the trial judge, Ilsley C.J., that the court could not order a surrender since surrender is essentially a voluntary act by a shareholder. It is no doubt true that, in distinguishing between surrender and forfeiture, the former is said to be a procedure initiated by the shareholder, while the latter procedure is initiated by the company upon default of payment of calls. But this distinction is made so that a company through friendly directors may not, under the guise of accepting a surrender of shares, release a shareholder from liability on his unpaid shares.[10]

The main objection to a surrender is to be found in cases where the company is being in some way divested of part of its capital while the shareholder benefits either by relief from liability on his surrendered shares[11] or by direct gain. In *Zwicker* v. *Stanbury*, the court could have ordered a surrender which could only

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it is related how the Canadian Canning Co., Ltd., purchased its own shares and carried them as an asset of the company.

[7] *Re Denver Hotel Co. Ltd.*, [1893] 1 Ch. 509.

[8] Frank Evans, Returning Shares to Treasury (1920), 36 L. Q. Rev. 187.

[9] It appears that in the United States surrendered shares are not capable of being voted until they are reissued. See Graham and Katz, Accounting in Law Practice (2nd ed.) p. 163.

[10] *Bellerby* v. *Rowland & Marwood's SS. Co.*, [1902] 2 Ch. 14.

[11] *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409.

have been to the advantage of the company. It would have been the simpler procedure, in line with justice and certainly not in opposition to authority.

E. A. SHAKER*

Fear of Fear Itself

The second attack by the forces of fear is on the home front. Here the problem is one which should neither be minimized nor exaggerated. In every period of serious external danger, the threat from outside is accompanied by, and indeed often brings about, an internal threat inside. And so it is at present.

In such a situation — as in all-out war itself — we inevitably and understandably emphasize the security of the society above the rights of the individual. In all-out war, this indeed is essential, if victory and thereby salvation is to be ensured. In what we call 'cold war', certain individual rights may also have to be subordinated to the interests of security. When, however, measures for this purpose go beyond the immediate and urgent necessities of the situation, they produce a new fear, which the Communists can and do exploit, fear for the weakening or the loss of our fundamental freedoms.

The necessity for domestic security measures at this time of international danger is made more real and more obvious by the presence in our midst of members or followers of the Communist party; men who are tied body and soul to the Kremlin, who follow obediently and automatically every twist and turn of its policy; who have boasted that they would not defend their own land if there were armed attack from that quarter. These are the 'crypto-Canadians'. There is nothing more hypocritical than their prating or scribbling about Canadian nationalism and independence, or about Canadian political and personal liberties. This domestic threat from local Communists — like the external danger — is a real one. It requires vigilance, protective measures and, whenever necessary, effective action. . . .

While certain Communist leaders behind the Iron Curtain are literally losing their heads these days, we must not figuratively lose ours as we confront their few followers in Canada. Nor should we permit our legitimate concern with their treacherous activities to obscure the other threat which I have already mentioned: that to those freedoms of speech, of worship, of thought and of action which we have won over the years, and which now distinguish us from those who live under despotism either of the right or the left. We should not falter now in our support of those well-tried principles of justice and the rule of law, of tolerance and understanding which constitute the foundation on which democratic society is based and without which it cannot survive. (Lester B. Pearson, Secretary of State for External Affairs, at a meeting sponsored by B'nai B'rith at Guelph, Ontario, February 2nd, 1953)

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