CASE AND COMMENT

BILLS AND NOTES—ADMISSIBILITY OF EXTRINSIC EVIDENCE —PROOF OF MISTAKE OR OF TRUE RELATION OF PARTIES.—The case of *Kupferschmidt* v. *Ammoneit and Russwurm*[1] has been quadruply unfortunate. Twice it has been the subject of extra-judicial critical comment[2], and twice, namely, in *Fry* v. *Johnston and Griffith*[3] and *Fox* v. *Toronto General Trusts Corporation*,[4] it has been the subject of judicial explanation. The judgment of the trial judge in the *Kupferschmidt* case was based mainly on an admittedly untenable ground, which no one has come forward to defend. The first judicial explanation justified the affirmation of the trial judgment on another ground which on principle seems somewhat dubious,[5] and this explanation was confirmed by the second explanation, given by one of the judges who heard the appeal in the *Kupferschmidt* case.

A much more serious feature of the two judicial explanations of the *Kupferschmidt* case is that they seem themselves to stand in some need of further elucidation and that they have the appearance of lending the authority of the Court of Appeal for Ontario to some doubtful propositions of law. These propositions are more important and of more general application than the rather special secondary ground upon which it has been sought to justify the decision in the *Kupferschmidt* case.

The decision in the *Fry* case was obviously right in the result. A maker of a note is of course not entitled to notice of dishonour, and he is none the less a maker if to the knowledge of the payee he has signed as one of two co-makers for the accommodation of the other maker. It does not appear that there was any evidence that either of the makers intended to sign as endorser or that the payee understood that either of the makers intended to sign as endorser. That is enough to justify the decision, but what the court says is that "there is no warrant whatever for the suggestion that by parol evidence one of the makers of a promissory note can be transformed to an endorser," and the natural meaning of these words would

[1] [1931] O.R. 678; 4 D.L.R. 550, Raney, J., affirmed, C.A. (Latchford, C.J., Masten, J. A., and Fisher, J.A.), [1932] 4 D.L.R. 720.

[2] J. T. MacQuarrie, 10 Can. Bar Rev. 60 (1932), and the present writer, *ibid.*, 379 (1932).

[3] [1932] O.R. 667, 4 D.L.R. 416, C.A. (Mulock, C.J.O., Magee, J.A., and Middleton, J.A.).

[4] [1934] O.R. 671, 4 D.L.R. 759, C.A. (Riddell, Masten and Macdonnell, JJ.A.).

[5] 10 Can. Bar Rev. at pp. 63-4, 381.

seem to be that extrinsic evidence at least if it is oral is inadmissible even between immediate parties to show that a person whose name appears as maker is really an endorser. This at least appears to be the meaning attached to the words in the *Fox* case, following the *Fry* case. The decision in the *Fox* case was also clearly right in the result because although there was some slight evidence that the apparent maker in question intended to sign as endorser, there was no evidence that the payee understood that the apparent maker intended to sign as endorser. If such evidence had been given, it is submitted that it would have been admissible, and it is clear that in *Carrique* v. *Beaty*[6] the Court of Appeal regarded such evidence as admissible, but found it was not proved in fact that the apparent maker was anything but maker. Again, in *A. D. Gorrie Co.* v. *Whitfield*,[7] evidence of this kind was regarded as admissible, though found to be insufficient. It is respectfully submitted that the court in the *Fry* case and the court in the *Fox* case might reasonably have discussed the earlier cases as a preliminary step to stating a proposition which seems on its face to be inconsistent with the reasoning of the earlier cases. To avoid misunderstanding, it should perhaps be stated that if the instrument is in the hands of a remote party, evidence is inadmissible as against him to vary the liability of a party as it appears on the instrument, and that all that is now contended for is that the evidence is admissible as between immediate parties, in effect to show that by mistake the intended endorser signed in the wrong place.

Still more serious is the proposition stated absolutely, and again without citation of earlier cases, by one member of the court in the *Fox* case, that the rule that oral evidence is inadmissible to contradict or vary the written contract of the parties is subject to no exception other than that oral evidence may be admissible as against an immediate party "(1) to show that what purports to be a complete contract has never come into operative existence, (2) or to impeach the consideration for the contract, or (3) to show that the contract has been discharged by payment, release or otherwise". The words enclosed between quotation marks are presumably taken from *Chalmers*

[6] (1897), 24 O.A.R. 302.

[7] (1920), 48 O.L.R. 605, 58 D.L.R. 326. See also *Simonin* v. *Philion* (1922; 16 Sask. L.R. 276, 66 D.L.R. 673, [1922] 2 W.W.R. 1280; *Triggs* v. *English*, [1924] 4 D.L.R. 937, 3 W.W.R. 566 (Man.); *Wadgery* v. *Fall*, [1926, 4 D.L.R. 333, 2 W.W.R. 657 (Sask.); but *cf. Manufacturers Finance Corporation* v. *Wise* (1932), Q.R. 71 S.C. 348, citing *inter alia*, *Fry* v. *Johnston*, *supra*.

on *Bills of Exchange*, inasmuch as the words appear in that book,[8] but Chalmers subsequently states that "though the terms of a bill or note may not be contradicted by oral evidence, yet, as between immediate parties, effects may be given to a collateral or prior oral agreement." It is true that Chalmers then quotes a passage which would seem to limit the operation of the oral agreement to matters on which the bill or note is silent, but he refers in a foot note to the cases of *Macdonald* v. *Whitfield*[9] and *McDonald* v. *Nash*,[10] which deserve more consideration in this connection than he gives to them. *Phipson* on *Evidence* discusses at some length the main rule as to the exclusion of extrinsic evidence and the exceptions. It is true that Phipson says that some of the exceptions might perhaps be treated as falling outside of the rule altogether, but it would seem plain that any rule which in particular circumstances renders admissible oral evidence which will have the effect of varying or contradicting the written instrument must be mentioned in any statement of the main exclusionary rule, whether it is treated or might be treated as an exception to the main rule or as a limitation of the scope of the main rule. The two chief exceptions or limitations which are of especial interest in the present discussion and which are mentioned by Phipson are (1) evidence to prove mistake, and (2) evidence to prove the true relation of the parties.

If by common mistake a written instrument does not express what the parties intended that it should express, a claim for rectification may be combined with a claim for specific performance, notwithstanding that the effect of ordering rectification is to grant specific performance of a written agreement with a parol variation;[11] and it would seem to be clear that a defendant in an action for specific performance may by way of defence set up a claim to rectification on the ground of mistake.[12] It would also seem to be clear on principle that even in what would formerly have been an action at law upon a written instrument a defendant should be entitled to allege, and prove by oral evidence, that the instrument sued on does not, owing to a mistake common to the parties, express what the parties

[8] 9th ed. 1927, by Chalmers, pp. 65-66; 10th ed. 1932, by A.D. Gibb, p. 66.

[9] (1883), 8 App. Cas. 733.

[10] [1924] A.C. 625.

[11] *Craddock Bros.* v. *Hunt*, [1923] 2 Ch. 136, approved in *United States of America* v. *Motor Trucks*, [1924] A.C. 196.

[12] Cf. Phipson, Evidence, 7th. ed. 1930, p. 563.

intended it to express, and that as rectified the instrument does not support the plaintiff's claim.[13]

As regards evidence to prove the true relation of the parties, Phipson does not suggest that the exception in favour of the admissibility of oral evidence to vary or contradict the terms of a written instrument is limited to cases of ambiguity,[14] or to implied terms as distinguished from express terms.[15] In *Macdonald* v. *Whitfield*[16] Lord Watson said that "it is a well established rule of law that the whole facts and circumstances attendant upon the making, issue, and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as indorsers; and that reasonable inferences, derived from these facts and circumstances, are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law merchant would otherwise assign to them." In the earlier case of *Steele* v. *M'Kinlay*[17] he had said that "it is undoubtedly competent for parties to a bill, by contract *inter se*, express or implied, to alter and even invert the positions and liabilities assigned to them by the law merchant," so that while, as regards third parties, the character and consequent liabilities of drawer and acceptor are conclusively fixed by the tenor of the instrument, on the other hand, *inter se*, the acceptor may have the rights of a drawer and the drawer may be subject to the liabilities of an acceptor. The decision in *Steele* v. *M'Kinlay*, as explained in *Macdonald* v. *Whitfield*[18] and in *McDonald* v. *Nash*,[19] was based, not upon the inadmissi-

[13] Cf. *Cortauld* v. *Saunders*, (1867), 16 L.T.N.S. 468, 562; action upon a note and an equitable plea alleging the form of the note to have been due to mistake; oral evidence of the intention of the parties was admitted, but was found to be insufficient to support the plea; *Wake* v. *Harrop*, (1862), 1 H. & C. 202; *Thomson* v. *Feeley*, (1877), 41 U.C.Q.B. 229, at pp. 235-236; *Hagarty* v. *Squier*, (1877), 42 U.C.Q.B. 165; *Loczka* v. *Ruthenian Farmers Co-operative Co.*, (1922), 32 Man. R. 137, 68 D.L.R. 535, [1922] 2 W.W.R. 782.

[14] As to bills and notes, Halsbury, Laws of England, Hailsham edition, vol. 2, p. 673, states that "if there is ambiguity as to the capacity in which a party signed an instrument, the whole facts and circumstances attendant upon the making, issue and transfer of the instrument may be legitimately referred to for the purpose of ascertaining the true relation of the parties to each other," etc.

[15] So stated in MacRae, article on Evidence, 4 C.E.D. (Ont.) 823, following Wigmore. Some account of Wigmore's doctrine is given in Russell on Bills, 2nd ed. 1921, pp. 43 ff; see 5 Wigmore, Evidence, 2nd. ed. 1923, ‡‡ 2443 ff., and Supplement (1934).

[16] (1883) 8 App. Cas. 733, at p. 745.

[17] (1880), 5 App. Cas. 754, at p. 778.

[18] 8 App. Cas. 733, at pp. 748-749.

[19] [1924] A.C. 625, at pp. 635, 641, 650.

bility of evidence of the character in which or the purpose for which the defendant had signed, but upon the fact that no sufficient evidence of this kind was given. *McDonald* v. *Nash* shows the inclination of the House of Lords to admit amendments to cure the errors and to carry out the intentions of the parties,[20] and to refuse to allow the intentions of the parties to be defeated by the fact that they have stupidly signed in the wrong order in point of time[21] or in the wrong place on the instrument.[22] Again, it has been held, as between immediate parties, that provisions of the Bills of Exchange Act defining the liability of a given party do not conclusively establish a liability to pay, and that the fact of signature in a particular place on an instrument is only prima facie evidence of an undertaking to pay.[23] It is submitted, with all respect, that at least some members of the Court of Appeal for Ontario, as appears by the *Fry* case and the *Fox* case, seem inclined to extend unduly the scope of the rule excluding oral evidence to vary or contradict a written instrument.

JOHN D. FALCONBRIDGE.

Osgoode Hall Law School, Toronto.

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CONTRACTS—CHARITABLE SUBSCRIPTIONS—CONSIDERATION.—It is a matter of satisfaction that the Supreme Court of Canada, in *The Governors of Dalhousie College at Halifax* v. *The Estate of Arthur Boutilier, Deceased*,[1] has dealt squarely and decisively with the disturbed problem of consideration in charitable subscriptions. The necessity for some authoritative pronouncement on the subject has of late years become increasingly apparent in view of the developing case law in Ontario and the Western Provinces.[2] In the *Boutilier* case, Mr. Boutilier had signed a "Subscription Card" in which he promised to pay the treasurer of Dalhousie College five thousand dollars, "for the purpose of enabling Dalhousie College to maintain and improve the efficiency

[20] [1924] A.C. 625, at p. 649, Lord Sumner,

[21] [1924] A.C. 625 at p. 641, Lord Atkinson.

[22] *National Sales Corporation* v. *Bernardi*, [1931] 2 Ch. 188, Wright J., who considered that the point was implied in *McDonald* v. *Nash*.

[23] Cf. *Lee* v. *Blake* (1924), 55 O.L.R. 310, [1924] 4 D.L.R. 369. This case related to the liability of an endorser, but presumably the principle is applicable to any party. "Prima facie evidence" implies the admissibility of evidence to the contrary.

[1] [1934] S.C.R. 642, [1934] 3 D.L.R. 593; on appeal from *Re Boutilier*, [1933] 1 D.L.R. 699.

[2] For an excellent discussion of the earlier Canadian cases, see R.A. Kanigsberg, "Subscription Contracts," in [1931] 4 D.L.R. 702.

of its teaching, to construct new buildings . . . . . and in consideration of the subscription of others". On his death, the subscription remaining unpaid, a claim was made by the College against his estate. The Registrar of the Probate Court allowed the claim, as did the County Court Judge on appeal. On a further appeal to the Supreme Court of Nova Scotia en banc, the claim was disallowed. The Supreme Court of Canada upheld the latter decision.

While charity seems quite inconsistent with the bargain-theory of contracts, various attempts have been made to impose liability on a subscriber, either by the form in which the subscription card is drafted, or by a forced construction placed on such card viewed in the light of subsequent events. Courts who have done the latter, have evidently felt that the social desirability of enforcing such promises might compensate for any resulting strain on the accepted doctrines of consideration. The present case furnishes illustrations of both these methods. The term in the card, "in consideration of the subscription of others", may have been inserted, as Haggart, J.A., stated in *Sargent* v. *Nicholson*,[3] with an intention "to bind the subscriber". In view of the fact that it is axiomatic in English law that consideration must move from the promisee,[4] it seems difficult to understand why so many subscription cards are drawn in this form. The Supreme Court on this ground definitely rejected the possibility of other subscriptions forming consideration enabling the College to sue.[5] The importance of the decision, however, lies not so much in this point, but in the decisive manner in which both the Supreme Court of Canada and the Court of Appeal in Nova Scotia rejected certain views of consideration which were in process of becoming established in other provinces.

It seems clear that if a subscription promise is so worded as to require either the doing of an act or the making of a return promise by the promisee as the price of the subscription promise,

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[3] (1915), 26 Man. L.R. 53, 25 D.L.R. 638, 9 W.W.R. 883.

[4] "Consideration means something which is of some value in the eye of the law, moving *from the plaintiff*."—Patteson, J., in *Thomas* v. *Thomas* (1842), 2 Q.B. 851.

[5] This had been decided earlier in *Thomas* v. *Grace* (1865), 15 U.C.C.P. 462. But see *Sargent* v. *Nicholson, supra.* In composition agreements made between a debtor and his creditors, it is stated that the promise of each creditor is consideration for the promise of every other creditor. *Good* v. *Cheesman* (1831), 2 B. & Ad. 328. As it is the debtor who seeks the protection of such agreements, such doctrine seems theoretically unsound, but there is no doubt that such agreements are valid.

there would be consideration.[6] The difficulty with the former (aside from the fact that the subscriber in most cases asks for nothing) is that the contract would not be formed until the act asked for was completed.[7] Thus, if money is promised "to build a rectory", even if it were possible to say that the promisor asks that a rectory be built as the price of his promise, the promise should not become binding until the rectory is completed, whereas the money was undoubtedly required for that very purpose.[8] To meet such a case, a doctrine which Professor Williston has described as "promissory estoppel"[9] developed in a number of American jurisdictions,[10] and, prior to the *Boutilier* decision, seemed established in several provincial courts. In its simplest form, it might be defined by stating that a promise on the faith of which the promisee has acted to his detriment becomes binding. Such doctrine has been emphatically denied by English courts,[11] on the ground that "estoppel" deals with representations of fact and not with representations of future intentions, which latter can only become binding as a contract; that is, if they are made for consideration. The method by which this unorthodox doctrine was given an appearance of consistency with the law of contracts, was to state that the subsequent action taken by the promisee was an act asked for by the promisor.[12] The fictitious and misleading nature of such argument is clearly shown in the judgments of Chisholm, C.J., in the Nova Scotia Court and of Crocket, J., in the Supreme Court of Canada. Both the Registrar and the County Court Judge in the present case had given effect to the argument, holding that the expenditures made by the College in reliance on this and other like promises furnished consideration. The Supreme Court of Canada

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[6] See illustrations in *In re Soames* (1897), 13 T.L.R. 439; *Re Ross, Hutchison* v. *Royal Institute for Advancement of Learning*, [1932] S.C.R. 57, [1931] 4 D.L.R. 689. By slightly different wording than that used in the subscription card in the present case, it would seem possible to make the procuring, or promise of procuring other subscriptions valid consideration.

[7] By analogy to the reward cases, and other situations of offers of unilateral contracts.

[8] See *Thomas* v. *Grace, supra*, where it was said it was "not a condition precedent that . . . the rectory be built". If this be so, at what stage was a contract formed?

[9] 1 Williston, Contracts, sec. 139.

[10] See, T. C. Billig, *The Problem of Consideration in Charitable Subscriptions* (1927), 12 Cornell Law Quarterly 467.

[11] *Jorden* v. *Money* (1854), 5 H.L.C. 185; *Maddison* v. *Alderson* (1883), 8 App. Cas. 467 at 473; *Re Hudson* (1885), 54 L.J. Ch. 811.

[12] *Sargent* v. *Nicholson, supra; Y.M.C.A.* v. *Rankin* (1916), 22 B.C.R. 588, 27 D.L.R. 417, 10 W.W.R. 482; *Re Loblaw*, [1933] O.R. 764, [1933] 4 D.L.R. 264, and the cases collected in Kanigsberg, *supra*.

in rejecting the argument not only brings Canadian doctrine back to the principle of the English cases, but overrules many decisions in Ontario and the Western Provinces which had proceeded on this line.[13] In so doing, the Court was much influenced by Professor Williston's trenchant criticism of the "promissory estoppel" doctrine as it had developed in the American Courts. It is not without interest that the American Law Institute Restatement of Contracts (for which Professor Williston was Reporter) has recently adopted as a statement of existing law, a section which supports the doctrine rejected in the present case.[14] In so doing, however, the Restatement classifies the situations in which it applies as promises binding without consideration.[15] Strange as this may sound to the common-law lawyer, it seems clear that there are such cases in our law.[16] We usually cover such cases by some other form of words, however, and so do not always appreciate their inconsistency with the doctrine of consideration.[17] In addition to the charitable subscription cases, there are other situations where, although no specific act is requested by a promisor, our courts have in effect followed the doctrine in question, and have found consideration merely because some detrimental action was taken in reliance upon a promise.[18] The present case should draw attention to the fact that consideration exists only when certain definite acts are requested as the price of the promise. It would seem that if it is deemed desirable to enforce charitable

[13] *op. cit.*

[14] Contracts Restatement, sec. 90: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Sir F. Pollock has stated his inability to understand the section. See 47 Harv. L. Rev. at p. 365. He believes it to be a strange way of describing "a promise for an act". It was designed, however, to cover cases where there was no act requested.

[15] The section is found under the heading, "Informal Contracts without Assent or Consideration". This at least prevents the cases under discussion from confusing consideration doctrine.

[16] Gratuitous bailments, promises to pay statute-barred debts or debts incurred in infancy, are illustrative.

[17] E.g., we speak of promises to pay statute-barred debts as "reviving" the former contractual obligation. *Spencer* v. *Hemmerde*, [1922] 2 A.C. 507. It seems clear that it is the latter promise that is enforced. See *Rogers* v. *Quinn* [1889], L.R. 26 Ir. 136; *Watson* v. *Sample*, 12 Man. L. R. 373 at 379. Likewise, "waiver" often covers the fact that we are enforcing a promise not to take advantage of a defence. See *Mayhew* v. *Crickett* (1818), 2 Swans. at p. 192; *Martin Hargreaves* v. *Wrigley* (1914), 30 W.L.R. 92.

[18] See *Hubbs* v. *Black* (1918), 44 O.L.R. 545, in which an unrequested expenditure of money was held to "make the consideration perfect even if otherwise defective". Compare *Loranger* v. *Haines* (1921), 50 O.L.R. 268.

subscriptions on the faith of which many public undertakings are begun, it would be comparatively simple to pass legislation on the subject. Particularly on the death of a promisor before payment such legislation would seem desirable, since the promisor would undoubtedly have fulfilled his promise had he lived, and in competition with other beneficiaries of the deceased's bounty, there seems no reason to reject the charity.[19]

Another method by which charitable subscriptions have been held binding is to imply a counter-promise to apply the money subscribed for the objects set out in the subscription card.[20] The present decision would seem to deny the validity of such an approach on the ground that this "duty of the payee would arise from trusteeship rather than a contractual promise".[21] On this view, even assuming such a promise, it would not furnish consideration as it would be merely a promise to perform an existing legal duty, and as such would furnish no detriment sufficient to support the subscription promise.

If it is desired to turn promised "charity" into a legal obligation, the magic device of a seal is always open to the collector. The fact that seals are practically never used would seem to support the opinion that it is not believed wise to let the subscriber think he is entering any binding obligation. If that is the impression sought to be created, there is no reason for courts to be astute in transmuting charity into a commercial transaction.

C. A. W.

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TORTS—NEGLIGENCE—DUTY OF CARE—LIABILITY OF CONTRACTOR TO THIRD PERSON.—Any case dealing with the principles involved in the decision of *Donoghue* v. *Stevenson*,[1] must be one of considerable interest, and a case which extends those principles, as the recent decision of Lawrence, J., in *Brown* v. *T. and E. C. Cotterill*[2] appears to do, is of special interest. In *Brown* v.

[19] Nova Scotia has a statute concerning "Subscriptions to Public Undertakings", R.S.N.S. 1923, c. 209, which makes binding any subscription to a public undertaking "notwithstanding any apparent want of consideration". Apparently this is only to bind the promisor in his lifetime, for it provides that the representatives of the subscriber are not to be liable unless it expressly appears that the subscriber intended to bind his estate.

[20] See *Re Loblaw, supra*. For other cases of implication of promises in order to hold the subscriber, see E. H. Carver, *Consideration in Charitable Subscriptions* (1928), 13 Cornell Law Quarterly 270.

[21] [1934] S.C.R. at 649.

[1] [1932] A.C. 562.

[2] (1934), 51 T.L.R. 21.

Cotterill, the defendants, who were monumental masons, had, under a contract with third persons, erected a tombstone at the head of a grave. The infant plaintiff was, with her parents, tending the flowers on the neighbouring grave of her grandmother when the stone toppled over, pinning the child to the ground and breaking her leg. The action was brought by the child's father on his own behalf and on behalf of the child. He alleged that the defendants had been negligent in the manner in which they had erected the stone. Lawrence, J., giving judgment for the plaintiffs, found that the defendants had been negligent and that they owed a duty of care to the plaintiffs.

It is the latter finding concerning the duty of care which is of interest. Lawrence, J. purports merely to apply the *Donoghue*, case; but the decision in the latter case would not seem to go so far as to cover the present situation. The language of Lords Atkin,[3] Thankerton,[4] and Macmillan[5] in the *Donoghue* case, bears out the proposition stated earlier in this REVIEW that "the duty, which is the basis of liability, arises out of the manufacturer's *intention* that his goods shall be consumed by a person other than his immediate vendee, in the form in which he sends them forth".[6] As stated by Lord Macmillan,

> ". . . he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities, and that relationship which he assumes and desires for his own ends imposes upon him a duty to take care to avoid injuring them."[7]

It is true that Lord Atkin attempted to state a much more generalized principle of liability when he said,

> "You must take reasonable care to avoid acts or ommissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or ommissions which are called in question."[8]

[3] [1932] A.C. at p. 599.
[4] at p. 603.
[5] at p. 620.
[6] V.C. MacDonald in 10 Can. Bar Rev. 478 at 485.
[7] supra, n. 5.
[8] [1932] A.C. at p. 580.

Plainly the tombstone case falls within this statement, and it is this test of foreseeability which Lawrence, J., applied. In view of the rest of the judgments in the *Donoghue* case (including the remainder of Lord Atkin's judgment) it is doubtful whether foreseeability alone is sufficient to found a duty in situations of this kind.

The decision in the *Donoghue* case was one of good sense and social necessity, but social necessity and good sense require some limits. The question has historically been obscured and encumbered by the importation of irrelevant concepts from the law of contracts. The *Donoghue* case cleared away this débris. Liability in tort, however, is based upon two factors which must coincide-carelessness and a duty towards the plaintiff to take care. A perusal of the judgments in the *Donoghue* case makes it clear that the duty in that case depended on a "special relationship", as Lord Thankerton styled it,[9] and that such relationship arose not merely from a casual or accidental propinquity of the plaintiff to the defective chattel, but because the defendants "intended and contemplated" just such a direct connexion as subsequently ensued. This narrow view of the case had been adopted by the English Court of Appeal in *Farr* v. *Butters Brothers and Company*.[10]

Does this test of "intention and contemplation" apply to cases like the present? What "special relationship" did the erector of the stone "intend" that he or his stone might enter with third persons? The only relationship that appears in the case is one of accidental propinquity. Does the *Donoghue* case require that such propinquity be "intentional"? A case might arise where a sign for advertising purposes was erected with the "intention and contemplation" of the erector that persons would gather to view it. If injury resulted to such persons from the negligent construction of the sign, the erector on this view might be held liable, whereas in the tombstone case, it would seem that there should be no liability at all. In the latter case the defendants might have foreseen the possible proximity of passers-by, but did they put the stone out with the "intention" that passers-by walk close to it? It does not even appear what size the plot was on which the defendants erected the stone. If the size were considerable, even on foreseeability, there might be a serious question as to the right of the plaintiff to be in such close proximity. It is difficult to see why "intention" in one

[9] supra, n. 4.
[10] [1932] 2 K.B. 606.

type of case is a requisite of liability and not in another. It may be that the "contemplation" element which is linked with "intention", reduces this limitation of the *Donoghue* case to mere foreseeability, although "contemplation" would seem to require a more specific type of foresight than is generally understood by "foreseeability". It would seem that despite attempts to curb the generality of Lord Atkin's wider principle, it is likely to be applied more frequently than the so-called limitations.

In any event, Lawrence, J., by relying on the more general "foreseeability" rule, should recall many problems that still await a satisfactory solution. For instance, would the negligent manufacturer of a motor-car which explodes and injures a workman in an adjoining field be liable to that workman? No relationship could be more casual or fortuitous, but it might have been foreseen. Pollock suggests that there would be liability in such a case,[11] but as yet no English case has gone so far. Again, if the exploding bottle in *Bates* v. *Batey and Company, Limited* [12] had injured a casual bystander instead of the consumer, would the court have held the relationship sufficiently close to found a duty? American courts have held the manufacturer liable in both instances,[13] and they seem indistinguishable in principle from the tombstone case. On the other hand, the reasoning of the judgments in the *Donoghue* case would seem, in language at least, to negative liability in such cases.

In dealing with the effects of the contract between the defendants and the persons who ordered the stone, the remarks of Lawrence, J., are interesting even though a little difficult to follow. He says,

> "The contract does not exempt the defendant from such a duty if the circumstances are such that an ordinary prudent man would foresee danger to third parties. The only exception to this is where the terms of the contract are such that an ordinary prudent man would consider that the approval of the other party in accordance with the contract discharges him from any further liability."

If the defendants owed a duty of care to the plaintiff, it is difficult to understand how the act of some third person could relieve them of that duty. Lawrence, J., mentions *Beven* on

[11] 49 L.Q.R. 22 et seqq.

[12] [1913] 3 K.B. 351.

[13] *Stolle* v. *Amheuser-Bush* (1925), 271 S.W. 497; *Flies* v. *Fox Bros. Buick Co.* (1928), 218 N.W. 855.

Negligence,[14] and it may be that he is adopting the suggestion there made, that the last conscious agent in the handling of the article should alone be liable. If so, it is apparently the first judicial sanction of such doctrine. The fact that someone else passes on the danger that I have created may make him liable, but it is hard to see why it relieves me of my liability for creating the danger. On the other hand, Lawrence, J., may be referring to the suggestion in the *Donoghue* case that the opportunity for intermediate inspection may relieve the producer of the article from liability. Such a rule (if, indeed, there is such a rule) would seem to be merely one of the factors to be considered in deciding whether the defendant had exercised due care in producing the article. He would be relieved of liability, if at all, not because of the contract, but because as a reasonable man he would expect the first person into whose hands the article came, to discover and eliminate any possible dangers. In other words, it would go to the question whether he had acted reasonably under all the circumstances.

W. E. P. DeRoche.

Toronto.

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Agency—"Authority" to Commit Torts—Secretary of a Company.—The judgment of the House of Lords in *Kleinwort* v. *Associated Automatic Machine Corporation, Limited*,[1] again brings into prominence the confused state of English law concerning the liability of a principal for the acts of his agent. The decision being an unanimous one, that confusion is only apparent from a comparison of the case with other decisions.

In the present case, the plaintiffs agreed to loan a considerable sum of money to a third company on the security of certain shares in the defendant company. On advancing the money, the plaintiffs received a transfer of shares in the defendant company, in the margin of which the secretary of the defendant company stated in the company's name that the certificate for the shares mentioned was at the defendant's office. No such shares had in fact been received by the defendant company, and the borrower having failed to repay the loan, the plaintiffs sued the defendant company for damages occasioned by fraudulent misrepresentation. At the trial, Avory J. held the certification on the transfer was made fraudulently by the secretary,

[14] 4th ed., p. 44.

[1] (1934), 39 Com. Cas. 189.

and that it induced the plaintiffs to make the loan. On these findings he entered judgment in the plaintiffs' favour against the company. This judgment was reversed in the Court of Appeal, and the latter judgment was upheld by the House of Lords.

The reasoning of Lord Russell, speaking for the House, is simple and clear. He states that the plaintiff, in order to succeed, had to prove the statement which induced the plaintiffs' action was the defendant's statement. This could only be the case if the secretary had authority to make such statement. The authority of the secretary was merely to certify the receipt of shares which had actually been lodged with the company. As no shares had been so lodged, there was no authority and therefore no liability. This conclusion was supported by a previous House of Lords decision on similar facts in *George Whitechurch and Co., Limited* v. *Cavanagh.*[2]

As a matter of logic, on the question of "authority," the decision is impeccable. The difficulty is, that if liability in tort is made to depend on "authority," practically all the cases of a master's liability for a servant's torts, as well as many cases of contractual liability, are erroneously decided. The notion that the master's liability for a servant's torts depended on "authority" or "consent" long prevented the full development of vicarious liability.[3] Today there seems little excuse for talk of authority in such cases, because since *Limpus* v. *London Genera Omnibus Company*[4] at least, we have become accustomed to imposing liability for acts that the master has actually forbidden. If the master has consented or authorized a wrong, we do not need any agency doctrine to render him liable. In such case he is truly a joint tort-feasor. We do not speak of the "master's torts" in the agency cases. We know he has committed none, but we hold him liable as a matter of economic and social policy.[5] The uses of "authority" in tort cases has been condemned in many decisions.[6] Despite that, some courts still use it, with rather astounding results.[7]

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[2] [1902] A.C. 117.

[3] See Baty, Vicarious Liability, (Oxford, 1912).

[4] (1862), 1 H. & C. 526.

[5] Likewise in the present case, the statement cannot be the defendant's statement, as Lord Russel puts it, because the company can make no statement. The question is whether it is a statement for which the company should be responsible.

[6] Lord Esher in *Smith* v. *N. Met. Tram. Co.* (1891), 55 J.P. 630; Martin, B., in *Seymour* v. *Greenwood* (1861), 6 H. & N. at 364; Duke, L.J.,

(*Coutinued on page 118*)

Prior to 1912, it was generally believed that when a servant acted solely for his own benefit the master was not liable. In that year the House of Lords, in the famous case of *Lloyd* v. *Grace, Smith and Company*,[8] held that a solicitor was liable for the fraudulent conversion of a client's property by his clerk, the client having dealt with the clerk in the ordinary way of business. There is quite patently no "authority" in such a case, for the clerk was employed to act for his master, not for himself. There is, it is true, a difference, not always appreciated,[9] between such a case and the ordinary tort case, because here the client did rely on the fact that the clerk appeared to be doing the things he was put out to do. It therefore approaches the "apparent authority" cases, to which, either under that name or the misleading term of "estoppel",[10] we are accustomed in the contract cases. By talking "scope of employment" in the *Lloyd* case, the Court did not become enmeshed in the quicksands of "authority", "real" or "apparent." The difficulty with invoking the latter, is that if the third person knows that authority is dependent on the happening of a given event, the burden is said to be on him of proving that the event has happened. This is typified in the bill of lading cases, such as *Grant* v. *Norway*,[11] relied on by the House of Lords in the *Whitechurch* case. As a third person knows that a ship captain is not "authorized" to issue a bill unless goods are actually received, there is no liability of the employer to a third person who relies on a bill of lading unless goods are in fact received. The reasoning is again logically simple on the ground that an agent cannot himself create an

(*Continued from page 117*)

in *Janvier* v. *Sweeney*, [1919] 2 K.B. 316. See the excellent discussion in *Bugge* v. *Brown* (1919), 20 C. L.R. 110 (Aust.).

[7] Compare *Abrahams* v. *Deakin*, [1891] 1Q. B. 516, and *Hanson* v. *Waller*, [1901] 1 K.B. 390, in which the master was held not liable for arrests made by the servant in the mistaken belief that goods had been stolen. The courts treated the servant as "authorized" only if the goods were actually stolen. For a criticism of such cases, see Laski *Basis of Vicarious Liability*, 26 Yale L.J. at 117; Baty, *op. cit.* at 103. Cases of "ultra vires" torts involve a peculiar application of "authority". See *Poulton* v. *London & S. W. Ry. Co.* (1867), L.R. 2 Q.B. 534; *Ormiston* v. *Gt. Western Ry.*, [1917] 1 K.B. 598, and compare the way the doctrine was applied in *Emerson* v. *Niagara Nav. Co.* (1883), 2 O.R. 528, to relieve a company from liability for an assault made by its servant in an attempt to seize a valise for non-payment of a fare.

[8] [1912] A.C. 716.

[9] Compare Salmond, Torts, 6th ed., 103-105 with the 7th ed. (Stallybrass) 118-119, and see Duff, J., in *National Union Fire Insurance Company* v. *Martin*. [1924] S.C.R. at 356.

[10] For a discussion of "estoppel" in this connection, see 42 Harv. L.R. 570.

[11] (1851), 10 C.B. 665; See also *Coleman* v. *Riches* (1855), 16 C.B. 104; *Erb* v. *Great Western Railway Company* (1881), 5 Can. S.C.R. 179.

"apparent authority." As a practical matter, however, it is impossible for the third person ever to find out whether goods were received save through the particular agent who made the representation. The inconsistency of such a line of cases with the *Lloyd* v. *Grace, Smith* doctrine is self-evident.[12] Carried to its logical extreme, the doctrine of such cases, together with the present case, should result in a denial of liability in situations like *Lloyd* v. *Grace, Smith*, for everyone knows that the "authority" given an agent is confined to acting for the benefit of the master; therefore authority is conditional on honesty, and therefore the third person should take subject to that condition being fulfilled. Surely if a bank clerk, who has "authority" to certify a cheque if the drawer is in funds, certifies one when funds are lacking, we are not going to be told that the Bank is not liable to the holder, who came to the clerk put there by the Bank, to find out the very thing on which his "authority" depended?[13] Such an absurd result seems not improbable in view of the *Kleinwort* case. As agency is "a commercial device and not a metaphysical toy",[14] why, as a practical matter, should the facts in all these cases not be sufficient to create in the agent a power, dependent neither on authority or apparent authority, to subject his principal to liability just as in the tort cases.[15]

The whole body of law known as the "indoor management" rule in companies, following from *Royal British Bank* v. *Turquand*,[16] is a plain denial of the principle the House of Lords found so compelling in the present case. Every officer's "authority" to

[12] Bowstead, Agency, 7th ed., at p. 355 suggested that the "bill of lading" cases were now of doubtful authority in view of the *Lloyd* v. *Grace Smith* decision. The present case seems to reaffirm them. Likewise, Wegenast, Canadian Companies, at p. 586 suggested that the *Whitechurch* case was overruled by the *Lloyd* case. Certainly the reasoning in the two is absolutely inconsistent. See Wegenast at 434, 585.

[13] Mechem, Agency, 2nd ed., sec. 1801.

[14] Seavey, *The Rationale of Agency* (1920), 29 Yale L.J. 859.

[15] The idea of an agent as the holder of a power to affect the rights and liabilities of his principal, which power is wider than authority or apparent authority, is worked out in Seavey, *op. cit.*, and is adopted by the American Law Institute's Restatement of the Law of Agency. See Agency. Restatement, ss. 12, 140, 161-178, 194-202, particularly s. 171. The decision of the New York Court in *Bank of Batavia* v. *New York etc., Ry.* (1887), 106 N.Y. 195; 12 N.E. 433 in a fraudulent "bill of lading" case indicates the approach suggested. Per Finch J.: "Where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice."

[16] (1856), 6 E. & B. 327; 5 E. & B. 248. See the cases collected and discussed in a reporter's note, [1932] 2 K.B. 183.

bind the company is dependent on proper by-laws or resolutions having been passed. Third persons know this. The practical difficulty of ascertaining the true facts has led to the rule that, in many cases, if the officer acts when those by-laws or resolutions have not been passed, a third person can hold the company just as though all things had been properly done. There is neither "real" nor "apparent" authority in such cases.[17] The basis of liability is the eminently practical view already suggested, that if authority is conditioned on facts peculiarly within the agent's knowledge, his representation, express or implied, that such things have happened, binds the principal. Why this doctrine should not apply to such a situation as that in the *Kleinwert* case, no one has yet explained. Until it is realized that "authority" is not, and has not for years been the sole basis of liability in agency cases,[18] decisions opposed to business expediency, no matter how logically satisfying, must be expected. In view of the *Lloyd* case and the "indoor management" cases, the House of Lords had an excellent opportunity of clarifying the whole situation in the present case. The result is an intensification of confusion.

C. A. W.

[17] In *Houghton* v. *Northard Lowe*, [1927] 1 K.B. 246, some members of the Court attempted to link the doctrine with "apparent authority" by making the plaintiff's knowledge of a power of delegation in the articles a condition of invoking the rule. But see the cases in [1932] 2 K.B. 183.

[18] In *Hambro* v. *Burnand*, [1903] 2 K.B. 399, where an agent made a contract for his own benefit, and the third person relied only on the agent's assertion of authority, the principal was held liable because the act done was covered in terms by the written power of attorney. It seems clear that there was no real authority in such a case, and the Court denied any "holding-out". To say that "the apparent authority is the real authority" is merely a way of saying the court felt the risk of loss should fall on the principal even though there was neither real or apparent authority. Likewise in *Waiteau* v. *Fenwick*, [1893] 1 Q.B. 346, an undisclosed principal was held liable on a contract made by the agent in excess of authority. Naturally there was no apparent authority in such case, as the fact of agency was unsuspected. A recent English writer approves of the decision as based on "estoppel by conduct". See Goodhart and Hamson, Undisclosed Principal in *Contracts* (1932), 4 Camb. L.J. 320. Such an unwarranted use of "estoppel" seems difficult to justify.