CASE AND COMMENT.

TRUST—TRUSTEE—PERSONAL INTEREST—CONFLICT WITH THAT OF BENEFICIARIES.—In that decisive battle of the law, *Keech* v. *Sandford*,[1] Lord Chancellor King decided that a trustee of a lease could not have the lease renewed for his own benefit, notwithstanding that it was proven that the lessor refused to renew it for the benefit of the *cestui que trust*. The members of the courts who have applied and extended the doctrine of *Keech* v. *Sandford* have not worshipped at a shrine of legalistic lore but have given effect to a moral rule of conduct which is as necessary and wise for the regulation of fiduciary relations as it was two hundred years ago. In *City of Toronto* v. *Bowes*,[2] Chancellor Blake, quoting from *York Building Society* v. *Mackenzie*,[3] said: "The wise policy of the law has therefore put the sting of a disability into the temptation as a defensive weapon against the strength of the danger which lies in the situation. . . . This conflict of interest is the rock, for shunning which the disability under consideration has obtained its force, by making the person who has one post entrusted to him incapable of acting on the other side, that he may not be seduced by temptation and opportunity from the duty of his trust."

The rationale of the judgment of Clauson, J., in *Re Thomson, Thomson* v. *Allen*,[4] is to be found likewise in the injunction that no man can serve two masters. The testator in carrying on business as a yacht agent was assisted by Allen. Allen was in no way bound by any covenant or agreement to Thomson, and he was free to leave Thomson's service at any moment and to open a competing business if he thought proper. By his will, Thomson appointed three persons, one of whom was Allen, to be executors and trustees, and directed, *inter alia*, that they, or any two of them, should carry on the testator's business of yacht agent. After the testator's death Allen declared his intention of setting up a business of yacht agent on his own account. Clauson, J., decided that Allen, while he remained a trustee, should not be allowed to set up such a business.

[1] (1726), Sel. Cas. T. King 61; 25 E.R. 223. The Lord Chancellor said: "This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease on refusal to renew to the *cestui que use*."

[2] (1854), 4 Gr. 489 (affirmed 11 Moo. P.C. 463) at p. 506.

[3] (1795), 8 Bro. Parl. Cas. 42.

[4] [1930] 1 Ch. 203; 142 L.T. 253.

In *In re Sykes, Sykes* v. *Sykes*,[5] the Court of Appeal, in view of the following clause in the trust instrument: "I declare that my trustees may exercise or concur in exercising all powers and discretions hereby or by law given to them notwithstanding that they or any of them may have a direct or other personal interest in the mode or result of exercising such power or discretion," decided that the trustees were entitled to retain for their own benefit and keep in their own pockets the profits which they derived from selling to the trust business certain of their own goods.

Anglin, J., in *Meagher* v. *Meagher*[6] said: "I know of no rule of equity which prevents a devisee of property upon trust from taking out of it a benefit which it was the intention of the testator that he should have. No doubt the intention to benefit the trustee personally must clearly appear." In the *Thomson* case, Allen had a freedom to engage in a competing business if he thought proper during the lifetime of the testator, but there was nothing in the will to indicate that the testator intended that he, in his capacity of trustee, could properly do so.

In the *Thomson* case the testator's business after the commencement of the action was transferred to the beneficiary. As the duties of the trustees to carry it on had ceased, it was admitted that Allen was now free to engage in a competing business. If the trust had not been terminated it would appear, however, that Allen could not have qualified himself to carry on a competing business by retiring from the trusteeship with that in view.[7] Even if he retired without any intention of carrying on such a business it is also apparent that he would be disqualified from competing if he uses information about the testator's business which he obtained as trustee.[8]

The doctrine of *Keech* v. *Sandford* has been applied in Canada in varied circumstances but always with the same result.[9] A trustee

[5] [1909] 2 Ch. 241.
[6] (1916), 53 Can. S.C.R. 393 at p. 403.
[7] See *Ex parte James* (1803), 8 Ves. 337.
[8] See *In re Boles and British Land Co.'s Contract*, [1902] 1 Ch. 244.
[9] See *Taylor* v. *Wallbridge* (1879), 2 Can. S.C.R. 616; *In re Wilson and Toronto General Trusts Corporation* (1906), 13 O.L.R. 82; *Re Prittie's Trusts* (1908), 12 O.W.R. 264; *North American* v. *Green* (1913), 4 O.W.N. 1485; *Rose* v. *Rose* (1914), 32 O.L.R. 481; 22 D.L.R. 572; *O'Flynn* v. *Jaffray* (1914), 6 O.W.N. 648; *Stephen* v. *Miller* (1918), 25 B.C.R. 388; 40 D.L.R. 418; affirmed 59 Can. S.C.R. 690; 49 D.L.R. 698; *Campbell* v. *Keast* (1922), 67 D.L.R. 315; *Thompson* v. *Northern Trusts*, [1925] 4 D.L.R. 184; *Taylor* v. *Davies*, [1920] A.C. 636. See also article: The Development of the Rule in *Keech* v. *Sandford*, (1905), 21 Law Q. Rev. 258. *Cf. Heron* v. *Moffatt* (1876), 23 Gr. 196, where the Court considered that the intention of the trustee in bidding in trust property was material. Did he bid it in in order to prevent the property going for too low a price or did he buy it for himself? *Cf. McKnight* v. *McKnight* (1866), 12 Gr. 363, where one of two executors, empowered to sell, purchased with the concurrence of the widow and the

for sale is no more competent to purchase trust property as agent for a stranger to the trust, than he is to buy it for himself.[10] Even an agent of a trustee is disqualified by his special knowledge from purchasing the trust property.[11] A trustee, authorized to buy, cannot buy from himself however fair the price.[12] If a person standing in a fiduciary relation purchases other property so immediately connected with the trust estate that it must be used with the trust estate, and the independent ownership of which would seriously affect the use and value of the trust property, he cannot retain it for his own benefit but he must hold it in trust for his beneficiary.[13] Where a testator died entitled to shares in a company, and upon fresh allotments of stock being made, his executrix took up the additional shares, paying the premium out of her own money as to some of the shares and selling her right to others, it was held that she was not entitled as against the estate to the new shares, but only to a lien thereon for the amount advanced by her to take them up.[14]

The court may permit a trustee to buy trust property.[15] The doctrine of *Keech* v. *Sandford* will not be applied as against a trustee if he proves that the *cestuis que trust* were *sui juris* and that they and he were at arm's length; that they had the fullest information upon all material facts; and that, having this information, they agreed to and adopted what was done.[16]

S. E. S.

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RIGHTS OF THIRD PARTIES ARISING FROM NEGLIGENT PERFORMANCE OF CONTRACT.—In *Humphreys* v. *Bowers*,[1] Rowlatt, J., reiterates principles which are well recognized in English law. Notwithstanding that the decision involves the legitimate application of well-established principles, the result is interesting and important, and, to the lay-

eldest son of the testator, aged 18 or 19 years, part of the testator's property and the Court refused to set aside the transaction for it was considered that the sale was beneficial to infant *cestuis que trust*.

[10] *Stahl* v. *Miller* (1918), 56 Can. S.C.R. 312.

[11] *McLennan* v. *Newton*, [1928] 1 D.L.R. 189.

[12] *Harrison* v. *Harrison* (1868), 14 Gr. 586.

[13] *Miller* v. *Halifax Power Co.* (1915), 48 N.S.R. 370; 24 D.L.R. 39.

[14] *In re Sinclair, Clark* v. *Sinclair* (1901), 2 O.L.R. 349. See also *Roberts* v. *National Trust Co.* (1915), 23 D.L.R. 890.

[15] *Hutton* v. *Justin* (1902), 1 O.W.R. 64; *Farmer* v. *Dean* (1863), 32 Beav. 327. *Cf. Ricker* v. *Ricker* (1882), 7 O.A.R. 282.

[16] See *Williams* v. *Scott*, [1900] A.C. 499; *Hope* v. *Beard* (1860), 8 Gr. 380; *Blain* v. *Terryberry* (1865), 11 Gr. 286; *Fish* v. *Fraser* (1875), 9 N.S.R. 514; *Inglis* v. *Beaty* (1878), 2 O.A.R. 453; *Rountree* v. *Sydney Land and Loan Co.* (1907), 39 Can. S.C.R. 614, especially at p. 619; *Stahl* v. *Miller* (1918), 56 Can. S.C.R. 312; 40 D.L.R. 388; *Lamb* v. *Franklin* (1910), 10 O.W.N. 1010. *Cf. Bonney* v. *Bonney* (1893), 9 Man. R. 280.

[1] (1929), 45 T.L.R. 297.

man, it may seem somewhat startling. The plaintiff, who was the owner of a yacht, entered into a contract with a society known as "Lloyd's Register," for the survey and classification of the yacht. This contract, by its terms, excluded liability on the part of the society for damage arising out of its performance of the contract. The survey was conducted by two of the society's surveyors, and, in the result, the yacht was classed as "A1." The defendant was one of the surveyors who took part in the survey, and he was responsible to his employers for the examination of the mainmast. He was negligent in his examination and failed to discover that the mainmast was rotten and useless. The plaintiff (so it was assumed) relied on the classification given him by the society as the result of the survey. The rottenness of the mainmast was discovered before the yacht put to sea, but the plaintiff alleged that he sustained damage by reason of the delay, etc., resulting from the late discovery of the defective condition of the mast. The plaintiff, being precluded by the terms of his contract from suing the society with whom he stood in contractual relations, brought an action against the "negligent" surveyor to recover the damages occasioned by the defendant's alleged negligence and breach of duty in the making of the survey. The action failed. There was no contractual privity as between the plaintiff and the defendant he had chosen to sue. There was, therefore, no duty owed by the defendant to the plaintiff, under the circumstances, to exercise care and skill in making his examination of the boat. Negligence cannot be said to exist, in the legal sense, in the absence of an antecedent legal duty to take care. Here the defendant's contract was with his employer and not with the plaintiff. The duties which arose out of that contract were owed to his immediate employer and not to remote persons who might be prejudiced by his omission to live up to its terms. A duty to use care in making the examination could not arise from the contract which was, as far as the parties to the action were concerned, *res inter alios acta.*

The fact that the defective mainmast might have caused loss of life or injury to property if its condition had not been discovered before the yacht put to sea was, in the present case, immaterial. The damage which the plaintiff had in fact suffered was the same as would have accrued "if the mast had not been dangerous but merely a useless thing like an engine which refused to start." There are cases in which "one person's body or property is endangered by the want of care and skill of another" who is a sub-contractor of one with whom the injured party is in direct contractual priv-

ity, and an action may sometimes be brought in such cases by the injured party against the sub-contractor of the third person for damages sustained as a result of such sub-contractor's *positive* or *active* misconduct. Such action is not founded on contract. It does not lie for a mere nonfeasance or omission to act. The sub-contractor has been guilty of a misfeasance or malfeasance which, apart from his contract with his principal, would have given a cause of action to the injured party. The mere fact that "the interests of one party depend really upon the care and skill of another," does not, *per se*, give rise to a duty towards the person, whose interests are affected, actively to take care. A sub-contractor may know that his failure to carry out his contract may occasion serious damage to a third person, but that fact alone does not generate any duty towards such third party. Failure to take care in the form of a mere omission to do something must, of course, be distinguished from the *doing* of an act carelessly; the doing of the act in a careless manner being, in some cases, a breach of a general duty owed by the doer to the injured party and to the world by reason of the provisions of the general law and not because of the existence of any contract or special relationship.

It is quite clear, of course, under English law, that a third person cannot claim rights or be subject to duties under a contract not made with himself, either immediately or mediately through an agent. It is clear, further, that a person who is nominally a party to an unsealed contract cannot enforce promises contained in it unless consideration has moved *from him* in return for such promises.[2] Although this is true, a sub-contractor or servant may be

[2] *Tweddle* v. *Atkinson*, 1 B. & S. 393; *Melhado, etc.* v. *Porto, etc.*, L.R. 9 C.P. 503; *Price* v. *Easton*, 4 B. & Ad. 433; *Ely* v. *Positive, etc.*, 1 Ex. D. 80. *In re Rotherham Alum, etc.*, 25 Ch. D. 103, 111; *Dunlop* v. *Selfridge*, [1915] A.C. 847; *In re Harrington Motor Co.*, [1928] Ch. 105; *Hood's Trustees* v. *Southern Union, etc.*, [1928] Ch. 793; *Barker* v. *Stickney*, [1919] 1 K.B. 121; *Gallagher* v. *Murphy*, [1929] S.C.R. 288; *Cavalier* v. *Pope*, [1906] A.C. 428; *Dickson* v. *Reuter's Telegram Co.*, 3 C.P.D. 1; *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491; *Re Fitzpatrick*, 54 O.L.R. 3; *Holgate* v. *Bleazard*, [1917] 1 K.B. 443; *Canadian Moline* v. *Trca*, [1918] 1 W.W.R. 645; *Drughorn* v. *Red, etc.*, [1919] A.C. 203; *Australian, etc.* v. *Devitt*, 33 T.L.R. 178; *Red, etc.*, v. *Hani*, [1918] 2 K.B. 247; *In re Englebach*, [1924] 2 Ch. 348; *Exall* v. *Partridge*, 8 T.R. 308; *Schmaling* v. *Thomlinson*, 6 Taunt. 147; 15 Harv. L. Rev. 767, (Williston); *McCully* v. *Maritime, etc.*, [1926] 4 D.L.R. 730. Of course a third party may acquire by assignment rights under a contract to which he was originally a stranger. But that involves different considerations. Cf. *Grant* v. *Morgan*, [1924] 2 W.W.R. 503; the case of *West Yorkshire, etc.* v. *Coleridge*, [1911] 2 K.B. 326 seems, in the main part of its reasoning, to be inconsistent with the weight of authority and particularly with the subsequent case of *Dunlop* v. *Selfridge, supra.* Probably the *Coleridge* case and the case of *Hirachand, etc.* v. *Temple*, [1911] 2 K.B. 330, ought to be placed upon a ground not involving the doctrine of consideration or privity at all. If A owes B money and C furnishes value to B and in return B agrees to discharge A, the court will not allow B to enforce his original claim against A on the

ground that to do so would make the court a participant in the fraud of B. Composition agreements generally, in which it is sometimes difficult to find a consideration moving from the debtor to support the discharge, may be put on this basis. The case of *Lord Strathcona Steamship* v. *Dominion Coal*, [1926] A.C. 108, looks, on the face of it, as one in which a third party is subjected to liability under a contract to which he was not a party. Although part of the judgment draws an analogy between the doctrine of *Tulk* v. *Moxhay* and seems to recognize some form of covenant running with goods in equity, the judgment also bases the rights of the plaintiff upon a trust which would be binding upon a stranger purchasing with notice. The former owner by granting the charter party, as it were, broke off a fragment of his beneficial ownership and sold it to the plaintiff. A subsequent purchaser buying with notice of that deduction of ownership would take subject to it in equity. The case, in this point of view, would pertain more to the field of property than to the field of contract. The purchaser was not brought under any relation of implied contractual privity with the person taking the charter so as to make him liable to a decree of specific performance of the contractual terms contained in the charter party. Rights acquired under the charter party could be enforced by the plaintiff only by way of injunction. The case was not one of a mere restriction of user during a term of years. It was one in which the former owner had parted with the whole beneficial enjoyment of the use of his ship for the years during which the charter party was to continue. The fact probably makes the case supportable apart from the dubious application of the idea of restrictive covenants to chattels. See 42 Law Q. Rev. 139; 44 Law Q. Rev. 51; 41 Harv. L. Rev. 945; cf. *Barker* v. *Stickney*, [1921] 1 K.B. 121. In some of the cases the English and Canadian Courts, applying the doctrines enunciated in England with respect to the rights of third party beneficiaries, have found that an ostensible party to the contract was really an agent for the person who, on the surface of things, was merely a stranger-beneficiary. See *The Satanita*, [1897] A.C. 59; *McCannell* v. *Mabee-MacLaren Motors*, [1926] 1 D.L.R. 282; *Laidlaw* v. *Hartford, etc.*, 10 W.W.R. 1067; *Re McMillan*, [1929] 4 D.L.R. 640. In some cases the agreement is looked upon as a tripartite one to which the beneficiary is a party. *Hirachand, etc.* v. *Temple, supra*, at p. 341; *Laidlaw* v. *Hartford, supra*, at p. 1067; *Re McMillan, supra*. The fact that the beneficiary is a party to the contract would seem immaterial if consideration did not flow from the beneficiary. See the speech of Lord Haldane, in *Dunlop* v. *Selfridge, supra*.

There are many cases of attempts, sometimes successful, to give third parties rights by means of an arrangement which the courts have construed as resulting in a trust. *Cleaver* v. *Mutual*, [1892] 1 Q.B. 147; *Affreteurs, etc.* v. *Walford*, [1919] A.C. 801; *Faulkner* v. *Faulkner*, 23 O.R. 252; *Laidlaw* v. *Hartford, supra; Re McMillan, supra; In re Fleetwood's Policy*, [1926] Ch. 48; *London, etc.* v. *Union, etc.*, [1925] 4 D.L.R. 676; *Beatty* v. *Best*, 61 Can. S.C.R. 576; and cases cited in Smith's Cases in Trusts at p. 75 *et seq*. Cf. *Hopler* v. *Aston*, [1920] 2 Ch. 420; *Hirachand* v. *Temple, supra*, at p. 337. American writers have criticized the doctrine of the English Courts whereby third party beneficiaries are excluded from recovery. It is said, with some justice, that the strict application of that doctrine has resulted in the courts finding a relation of agency or a trust in cases in which there is no true trust or agency. Undoubtedly the English Courts have had to resort to fiction or artificial construction in some hard cases to save the face of the general doctrine. However, this is not the only case in which the law has got itself into a *cul de sac* and has had to escape over a wall by the use of a ladder from which some rungs are probably missing. See 15 Harv. L. Rev. 767, 775; 32 Harv. L. Rev. 289; Journ. Comp. Leg., 3rd ser., Vol. XI. at pp. 187-188.

There are also many cases involving no contractual element in which the plaintiff has suffered serious damage as the result of the defendant's conduct but the plaintiff has failed to recover for it because the defendant's duty to abstain from such conduct was not owed to the plaintiff but to a third person. See Salmond on Torts, 6th ed., at pp. 134-135; *Cattle* v. *Stockton, etc.*, L.R. 10 Q.B. 453; *Malone* v. *Lasky*, [1907] 2 K.B. 141; *Anglo-Algerian, etc.* v. *The Holder Line*, [1908] 1 K.B. 659.

liable to third parties, whether in contractual privity with his master or employer or not, for damages occasioned by his active misconduct in the carrying out of his employment, and an active wrongdoer may be liable to persons towards whom he stands in no contractual relation, although his wrongdoing is at the same time a breach of a contract with a third person. In such cases the existence of a contract is immaterial. Its existence may, in some cases, be proved as a mere matter of inducement, but the duty which the defendant has failed to fulfill is not one voluntarily undertaken. It is imposed *ab extra* by the State.[3] Similarly, a defendant may be liable in tort to remote parties if he puts into circulation defective or mislabelled things of a class which is inherently and normally dangerous to life and limb (and probably property) if improperly or carelessly constructed or labelled. The liability in such cases is likewise obviously *ex delicto*. The duty does not arise from contract or direct privity, but it is an illustration of the general duty, which the law imposes, to refrain from acts dangerous to the lives of others.[4] Defamation and estoppel apart,

[3] "As to an action in the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another receives injury is liable in an action for the injury received. If the man who receives a penny to carry the letters to the post loses any of them he is answerable; so is the sorter in the business of the defendant; so is the postmaster for any default of his own:" Lord Mansfield, C.J., in *Whitfield* v. *Lord le Dispencer*, 2 Cowp. 754 at p. 765.

"It was objected at the bar that they have this remedy again—St. Breese—I agree; if they could prove that he took out the bills, they might sue him for it; so they might anyone else in whom they could fix that fact; but for a neglect of him they can have no remedy against him; for they must consider him as only a servant; and then this neglect is only chargeable to his master or principal; for a servant or deputy, *quatenus* such, cannot be charged for neglect, but the principal shall be charged for it; but for a misfeasance an action will lie against a servant or deputy but not *quatenus* a deputy or servant, but as a wrongdoer." Per Holt, C.J., in *Lane* v. *Cotton*, 12 Mod. 472, 488; see also *Le Lievre* v. *Gould, supra;* see cases such as *Meux* v. *G. E. R.*, [1895] 2 Q.B. 387; *Martin* v. *G. I. P. R.*, L.R. 3 Ex. 9; Story on Agency, 308, 309

[4] See, *inter alia, Thomas* v. *Winchester*, 6 N.Y. (2 Selden) 397, approved by the Judicial Committee in *Dominion Natural Gas, etc.* v. *Collins*, [1909] A.C. 640; *Langridge* v. *Levy*, 2 M. & W. 519; *British South Africa Co.* v. *Lennon Ltd.*, 85 L.J.P.C. 111; *Anglo-Celtic Shipping* v. *Elliott & Jeffrey*, 42 T.L.R. 297; *Ross* v. *Dunstall*, 62 Can. S.C.R. 393; *Chapman* v. *Saddler*, [1929] A.C. 584; *Buckley* v. *Mott*, 50 D.L.R. 408; *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382; 45 Law Q. Rev. 343; 3 Cambridge Law Journal 376; *George* v. *Skivington*, L.R. 5 Ex. 1. The case last cited has been subjected to harsh criticism in some quarters. See *Blacker* v. *Lake*, 106 L.T. 533; *Bates* v. *Batey*, [1913] 3 K.B. 351; *Heaven* v. *Pender*, 9 Q.B.D. 307; 45 Law Q. Rev. 344. However, Salmond approves of it, Law of Torts, 6th ed., 471. See also Pollock on Torts, 13th ed., at pp. 525 and 571. It was followed by the Divisional Court in Ontario in the case of *Stretton* v. *Holmstead*, 19 O.R. 286. In *Ross* v. *Dunstall, supra*, Duff, J., expressly approved of it notwithstanding the criticisms levelled at it, 62 Can. S.C.R. 396. Anglin, J. (now C.J.), does the same, 62 Can. S.C.R. 402. Compare with the fore-

one who negligently but honestly puts into circulation a statement which is untrue in fact is not liable to persons with whom he has no contractual or fiduciary relations for the detrimental consequences resulting from their acting in reliance on the truth of such statement.[5] Non-defamatory false statements are not treated as being in the same category as poisons, electricity, guns or firebrands. Negligence in the making of the untrue statement may be indicative or suggestive of fraud but it is not, in itself, fraud.

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going cases, on the general question: *Winterbottom* v. *Wright*, 10 M. & W. 109; *Clarke* v. *Army, etc.*, [1903] 1 K.B. 155; *Parry* v. *Smith*, 4 C.P.D. 325; *Collis* v. *Selden*, L.R. 3 C.P. 495; *Longmeid* v. *Holliday*, 6 Ex. 76; *Earl* v. *Lubbock*, [1905] 1 K.B. 252; *Caledonian Ry.* v. *Mulholland*, [1898] A.C. 216; *Chapman* v. *Saddler*, [1929] A.C. 584; *Smith* v. *Onderdonk*, 25 O.A.R. 171; *Hill* v. *Lewis*, 12 D.L.R. 588. A question has arisen as to the liability of a remote purveyor of an article, not known by him to be dangerous, to a party towards whom the purveyor did not stand in any contractual relation, in the event of its appearing that the particular article was dangerous although the class to which it belonged was not normally so, i.e. the article was not dangerous *per se* but only *sub modo*, 106 L.T. 533. If there was actual knowledge of the danger, the remote purveyor, apparently, is in the same position he would have been in had the article belonged to a normally dangerous class (dangerous *per se*). The difficulty arises in cases in which the remote purveyor had in fact no knowledge of the danger but he might have acquired it by the exercise of ordinary care. See *Blacker* v. *Lake, supra; White* v. *Steadman*, [1913] 3 K.B. 340; *Bates* v. *Batey*, [1913] 3 K.B. 351. In a note in 45 Law Q. Rev. 421, 'F.P.' (presumably Sir Frederick Pollock) doubts whether cases such as *MacPherson* v. *Buick, etc., supra*, represent the English law. In that case the plaintiff was injured by the collapse of a motor car bought from a third party, such car having a rotten wheel. Recovery was allowed by a strong New York Court. The car was not of a category which is normally of a dangerous nature if properly made of sound material. 'F.P.' thinks liability on the part of the manufacturer to remote purchasers in such cases is negatived, as to English law, by such cases as *Longmeid* v. *Holliday, supra; Earl* v. *Lubbock, supra*. Liability on his part would rest on actual knowldege of the defect and nothing less (citing *Bates* v. *Batey, supra*). Duff, J., cites the *MacPherson* case in *Ross* v. *Dunstall, supra*, apparently with approval. See *Chapman* v. *Saddler*, [1929] A.C. 584; 3 Cambridge Law Journal 376.

[5] *Derry* v. *Peek*, 14 App. Cas. 337; *Le Lievre* v. *Gould, supra; Australian, etc.* v. *Devitt*, 33 T.L.R. 178; *Dickson* v. *Reuter's Telegram Co., supra*. "There is no general duty to use care, much or little, in making statements of fact on which other persons are to act. If there is no contract and no breach of specific duty, nothing short of fraud or specific duty will suffice. And we have to remember that estoppel does not give a cause of action but only supplies a kind of artificial evidence": Pollock on Torts, 13th ed., at p. 302. "There is a special line of cases relating to things supposed to be dangerous in themselves:—horses and gas lamps and hair washes, railway trucks and railway turntables, but a document has been expressly held not to belong to this category, *Le Lievre* v. *Gould*." Lord Sumner in *Weld-Blundell* v. *Stephen*, [1920] A.C. at p. 985. *Nocton* v. *Ashburton*, [1914] A.C. 932, is an illustration of a case in which a defendant was under a special duty arising from a fiduciary relationship to refrain from merely negligent statements. Even a defamatory letter is not treated as being in the same category as an explosive. "The letter could not 'go off' of itself. If left alone it was quite harmless:" Lord Sumner in *Weld-Blundell* v. *Stephens*, [1920] A.C. at p. 985. A negligent misstatement of fact involving a breach of contract as distinguished from a deceitful misrepresentation may be actionable and is not within Lord Tenterden's Act: *Banbury* v. *Bank of Montreal*, [1918] A. C. 626.

Scienter must be proved to make the statement legally deceitful.[6] In the principal case the defendant would have been liable in deceit if his certification had been false to his knowledge.[7] The plaintiff was known to the defendant to be the one to whom his report would be communicated. (See *Langridge* v. *Levy*, cited in notes.) Fraud apparently was not alleged or proved, and it did not enter into the decision. That being so, the only ground upon which liability could be predicated would be breach of a duty arising out of contract or out of a fiduciary relationship. Neither of these situations existing, the damage resulting from reliance on the innocent, though careless, misrepresentation is treated as *damnum sine injuria*.

Rowlatt, J., raises the question whether different considerations might apply if the defendant had erroneously and carelessly reported that a sound mast was unsound and the plaintiff, relying on the report, had caused the mast to be destroyed. Apparently the learned judge thought the answer would have been the same in the supposititious case. It may be, too (although this was not much discussed) that different considerations, might have applied if the boat had put to sea with the defective mainmast and the defect, undiscovered by the plaintiff, had resulted in serious injury to the plaintiff or to his guests or to his boat. But it is not clear on what ground liability could be based in such a case. The seriousness of the consequences normally has no effect on the existence of the antecedent duty unless it be in connection with the supplying of goods dangerous *per se*, and this was not that type of case.[8] By a coincidence, a case involving somewhat similar principles came before the Supreme Court of New York about the same time as the principal case. (*Ultra Mares* v. *Touche, etc.*, reported in New York Law Journal, June 14, 1929.) The defendants, public accountants, were employed by the "X" company to audit its books and to prepare a balance sheet. An audit was accordingly conducted and a balance sheet was prepared, to which was attached a certification by the defendants that the balance sheet was, in the defendants' opinion, a true statement of the "X" company's financial condition as of a certain date. The jury found the defendants

[6] *Derry* v. *Peek, supra.*

[7] *Le Leivre* v. *Gould, supra; Dickson* v. *Reuter's Telegram Co., supra.*

[8] It may be that in Canada the "negligent" servant might be civilly liable to a plaintiff injured by defendant's carelessness in the performance of a contract with his master where danger to property or life was known or ought to have been known to be a probable consequence of the "negligent" manner in which the contract of service was performed. See Criminal Code, (1927), sec. 492; *Fowell* v. *Grafton*, 20 O.L.R. 639, 22 O.L.R. 550; *Hagle* v. *LaPlante*, 20 O.L.R. 339; *Little* v. *Smith*, 20 D.L.R. 399.

"negligent" in the preparation of the report and the company was represented as a solvent going concern although it was in fact insolvent. A careful auditing would have disclosed the true state of affairs. The defendants did not know that the balance sheet was to be used by the company for submission to the plaintiffs in particular, but they knew, in a general way, that it would be used by the company to evidence its financial position to outsiders. The plaintiffs advanced large sums to the company in reliance on the balance sheet. Later, when the facts became known and the company was adjudged bankrupt, the plaintiffs sued the defendants to recover the amount of their unpaid advances to the company. The Court held that the defendants were not liable. The defendants owed no duty, contractual or otherwise, to the plaintiffs to take care in the preparation of the balance sheet of the "X" company. An examination of the judgment of Walsh, J., suggests that a different result might have been reached by the New York Court if the defendants had known that the balance sheet was intended for submission to the plaintiffs specifically, with a view to guiding them in their financial relations with the company. In such case, apparently, the Court would have concluded that the contract between the company and the defendants would have been intended for the plaintiffs' direct benefit. This suggestion of liability rests upon the doctrine of some of the American Courts that a person having a known and direct beneficial interest in a contract may sue on it, although he was not a party to it and no consideration moved from him. The facts of the New York case did not bring it within this rule. The defendants did not assume a potential liability to practically the whole world. Even the American law in its solicitude for third-party beneficiaries does not go so far, but limits the liability to those for whose direct benefit, to the defendant's knowledge, the work was performed.[9] The English law would not recognize the defendant's liability, even in the limited circumstances just mentioned. If this principle were recognized it would seem that the defendant would have been liable in *Humphrey* v. *Bowers*. It was clear that the defendant knew that the categorizing of the ship was intended primarily and directly for the plaintiff's information and benefit. Nevertheless, the Court, applying the well recognized doctrine of the English Courts, could

[9] Apparently in the United States "it is not necessary that the third party beneficiary be determined at the time of the formation of the contract . . But it is essential that the third person be one contemplated as a beneficiary and not merely one fortuitously benefited." 39 Harv. L. Rev. 896. See also 8 Harv. L. Rev. 93, 104; 11 Harv. L. Rev 415; 15 Harv. L. Rev. 785.

not treat the plaintiff as deriving any rights under the contract to which he was not a party.

The New York Court might have reached a different result under similar circumstances. However that may be, the editors of the Journal of Accountancy,[10] appear to regard the New York decision as a bulwark of their professional liberty. The prospect of accountants incurring a pecuniary liability to the world at large, without a corresponding and appropriate augmentation of fees, seems to have struck fear into the hearts of the profession, or at least of that portion of it which is responsible for the editorial note just mentioned. That fear has been removed, at least temporarily, by the decision just mentioned. English law seems to go considerably further in allowing one to be "negligent" with impunity.

J. A. WEIR.

University of Alberta.

* * *

WILL — CONSTRUCTION — BEQUEST OF "ALL MY PERSONAL EFFECTS."—The judgment of Kelly, J., in *Re Estate of Clotilde Lappan*,[1] will remind solicitors that the words "all my personal effects" must be used with more than ordinary care and precision if they are to be understood as including the entire personal estate of the testator or testatrix. The material clauses of the will under consideration in this case were as follows: "I give, devise and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say—to my dear sister J., I give, devise and bequeath all my personal effects and the sum of $1,000.00 in cash." There were then several bequests of money and finally a residuary clause: "All the residue of my estate not hereinbefore disposed of I give, devise and bequeath unto the survivors of the children of the said W., etc."

The personal estate apparently consisted of cash on hand and on deposit in a bank, wearing apparel, jewellery, an umbrella and certain articles of furniture, including a bedroom suite, bed-linen, a radio, etc. The executors delivered to J. all clothing and jewellery and held, pending judgment, the furniture, including the linen, etc.

It was argued on behalf of J. that "personal effects" should include all the personal estate of the testatrix, other than cash on hand or money on deposit in a bank, but the learned judge refused to give

[10] Vol. 48, p. 124.

[1] (1929), 37 O.W.N. 255.

effect to this contention and held on reading the will as a whole, that only articles of a nature which were personal to the testatrix, that is, the wearing apparel, jewellery, umbrella, etc., were intended by the term "personal effects."

At first glance, this decision seems to restrict unduly words which appear to be general in their application, but upon analysis it is clearly in harmony with a number of cases in which they have been interpreted.

In Jarman on Wills,[2] the principle is thus stated: "The word 'effects' and even the word 'goods' or 'chattels' will, it seems, comprise the entire personal estate of a testator unless restrained by the context within narrower limits." In discussing cases favouring an unrestricted construction, the editor, citing Jarman, continues: "It is to be observed, however, that in all the preceding cases, there was no other bequest capable of operating on the general residue of the testator's personal estate, if the clause in question did not. Where there is such a bequest, it supplies an argument of no inconsiderable weight in favour of the restricted construction, which is then recommended by the anxiety always felt to give to a will such a construction as will render every part of it sensible, consistent and effective."[3]

Re Hammersley, Heasman v. *Hammersley,*[4] where there was a gift of "my household furniture, books, pictures, paintings, engravings, plate, linen, china and other effects" to A. and B. in equal proportions it was held that the word "effects" must be limited to things of the same kind as previously enumerated—that jewellery did not, but carriages and horses did, fall under the designation. Stirling, J., in his judgment, adopts the language of the Vice-Chancellor in *Parker* v. *Marchant*:[5] "A will may be so worded as to show that according to a reasonable construction of it the testator must have intended to use these terms in a limited and restricted sense; and when this appears, the intention so collected must have effect given to it. It is, however, incumbent on those who contend for the limited construction to show that a rational interpretation of the will requires a departure from that which ordinarily and *prima facie* is the sense and meaning of the words." In this case there was a subsequent residuary gift.

In *Rawlings* v. *Jennings,*[6] the testator gave to his wife "part of the monies I now have in Bank Security together with all my household furniture and effects, of what nature or kind soever that I may

[2] 1910, ed. at p. 1022.
[3] *Op. cit.* p. 1032.
[4] (1899), 81 L.T. 150.
[5] (1842), 1 Y. & C.C. 290.
[6] (1806), 13 Ves. 39.

be possessed of at the time of my decease;" and then bequeathed certain stock and pecuniary legacies to other persons. The widow claimed the whole residue of the personal estate as passing to her under the general word "effects." The Master of the Rolls held that part of the testator's property being particularly given to her afterwards, the word "effects" must receive a more limited interpretation and must be confined to articles *ejusdem generis* with those specified in the preceding part of the sentence, viz.: household furniture, though the consequence was a residue undisposed of.

In *Wrench* v. *Jutting*,[7] the testator bequeathed "all my household furniture, plate, linen, books, china, pictures and all other goods of whatever kind" to A. and then gave a number of pecuniary legacies. The Master of the Rolls said: "It is not necessary to say what would be the effect of these words; if they had stood by themselves and if they were the only clause in the will, there would be strong reason for extending their operation; but that he (the testator) did not intend all his estate to pass, is shown by his subsequently stating what were his intentions as to a particular part of it." Here too the general residue was undisposed of.

In *Re Pink*,[8] there were two clauses as follows: "I give and bequeath all my clothing, wearing apparel and personal effects to my brother R.," and "I give, and bequeath all my household furniture and other personal property to my sister M." In giving judgment Street, J., said: "It is plain that the testator intended to give part of his personal estate to his brother R. and part of it to his sister M. It being necessary to limit the gift to R. in order to leave something for M., a strict construction must be placed upon the gift to R. and this is readily done by applying the principle of *ejusdem generis* to it. I think I must hold that all that R. took was the clothing and wearing apparel and watch and chain because the testator has limited the bequest to his strictly personal effects, that is to say, to the effects connected with his person, such as his clothing and wearing apparel."

So in the *Lappan* case, the bequests of money indicated clearly that "all my personal effects" was not intended to be synonymous with "all my personal estate," but as the balance of the personal estate included only articles personal to the testatrix (such as wearing apparel and jewellery) and household furniture, it was reasonable to argue that at least all these articles could be included in the bequest to J. The unsatisfactory result of this interpretation would have been that the residuary clause, assuming all the real estate to have

[7] (1841), 3 Beav. 521, particularly at p. 523.
[8] (1902), 4 O.L.R. 718.

been specifically devised, would then have had nothing upon which tc operate. No assistance could be obtained from the application of the rule of *ejusdem generis* because no articles were enumerated in the bequest to J., but by limiting "personal effects" to articles of a nature personal to the testatrix and letting the furniture and linen fall into the residue, as the learned judge held was proper, a meaning could be given to both clauses and effect to the will as a whole.

V. L. PARSONS.

Toronto.

* * *

NEGLIGENCE—OF BOTH PARTIES—BURDEN OF PROOF.—Arising as it did at a time when the problems of law concerning the question of negligence have long been considered settled, the case of *Service* v. *Sundell*,[1] has raised an interesting problem. The result in this case and in several cases which have followed it since it was decided last June came as a distinct surprise to the profession in England and has given rise to much discussion in legal circles.

The case was tried before Lord Hewart, C.J., with a special jury. The facts were the following: While driving his car the plaintiff had a collision with another car driven by the defendant. The plaintiff sued to recover damages for the personal injuries suffered. His Lordship directed the jury that the plaintiff could not succeed unless they were satisfied that there was no negligence on his part, or, if there was negligence on his part, nevertheless the real cause of the collision was the negligence on the part of the defendant. The jury gave an intimation that (1) they were agreed that there was negligence on both sides, (2) they were not agreed on which side the negligence was the greater. His Lordship thereupon asked the jury to consider the question, "Whose negligence was the greater?" The jury was unable to agree in answering the question and replied that they considered both parties contributed to the accident. The defendant thereupon asked for judgment in his favour, relying on the dictum of Lord Campbell, C.J., in the case of *Dowell* v. *General Steam Navigation Company*,[2] where the learned Lord Chief Justice, in delivering the judgment of the Court of King's Bench, said:[3] "According to the rule which prevails in the Court of Admiralty in case of a collision, if both vessels are at fault the loss is equally divided between them, but in a court of common law the

[1] (1929), 45 T.L.R. 569.
[2] (1855), 5 E. & B. 195.
[3] (1855), 5 E. & B. 195 at p. 206.

plaintiff has no remedy if his negligence *in any degree* contributed to the accident."

After referring to the cases of *Radley* v. *London and North Western Railway Company*[4] and *British Columbia Electric Railway Co., Ltd.* v. *Loach*,[5] Lord Hewart held that, in view of the later authorities, this passage could not be regarded as a correct statement of the law. The disagreement of the jury on the question, whose negligence was really responsible for the accident, made it impossible to give a judgment on the verdict for either side.

This decision was appealed by the defendant, and the Court of Appeal[6] held that the disagreement of the jury on the question as to whose negligence was the real cause of the accident rendered it impossible for the trial judge to give a judgment. Accordingly the appeal was dismissed.

The fact that the judgment has already been the precedent for several cases in the short space of time that has elapsed since it was rendered serves to emphasize the importance of its relation to the extremely lengthy list of cases arising from negligence in driving automobiles with which our courts have to deal every year, all of which involve the principles of the law governing this wide subject of negligence.

What are those principles? What must the plaintiff establish in an action for damages arising out of negligence in order to succeed? Lord Campbell's statement in *Dowell* v. *General Steam Navigation Company* (*supra*), although it may once have been correct, is no longer in accordance with the modern conception of liability as laid down by the House of Lords in the case of *Radley* v. *London and North Western Railway Company* (*supra*). In that case Lord Penzance thus declared the law with regard to collisions on land:

> The first proposition is a general one to this effect that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has been guilty of negligence or want of ordinary care which contributed to cause the accident. But there is another proposition which is equally well established and it is a qualification on the first, namely, that though the plaintiff may have been guilty of negligence and although he may have contributed to the accident, yet if the defendant could in the result by the use of ordinary care have avoided the mischief which happened, the plaintiff's negligence will not excuse him. This proposition as one of law cannot be questioned.

[4] (1876), 1 App. Cas. 754.
[5] [1916] 1 A.C. 719.
[6] (1929), 46 T.L.R. 12.

The problem that provides many vexing problems to be solved, is in the application of the principle to the actual cases which arise, and the modification of the first proposition by the second is the source of many errors. Thus, Scrutton, L.J. in *Service* v. *Sundell,* said that given certain facts which establish the negligence of both the plaintiff and the defendant, neither can recover "because the negligence of each contributed to the accident." Obviously this is not the principle which is to be inferred from the two propositions so well defined by Lord Penzance, and it is not surprising therefore to find Scrutton, L.J., stating in the case of *Cooper* v. *Swadling,*[7] that if he made the statement above quoted, it was an inadvertent error and did not represent his considered opinion on the subject. As indicated in the case of *Cooper* v. *Swadling,* the true test whether one or the other could recover would depend on the determination as to which of the two had the last opportunity of avoiding the accident by the use of reasonable care. This of course is none other than the doctrine of ultimate negligence, long since established in the case of *Davies* v. *Mann.*[8]

It would seem that the Court in *Service* v. *Sundell* established the principle that unless negligence on the part of the defendant alone, or in the face of contributory negligence, ultimate negligence on the part of the defendant, is established, no judgment can be given. It is submitted that this principle should be somewhat modified and should read that at common law, where the responsibility for the accident is due to the negligence of both parties and there is no finding of ultimate negligence, no judgment for damages can be recovered by the party who sues. That is to say, in such event at common law, the loss lies where it has fallen.

In this case it is submitted that the action should have been dismissed with costs. It is a well understood principle that usually the burden of proof lies on the plaintiff. The onus is on the plaintiff to persuade the court that he is entitled to the relief claimed. Although in the ordinary case a secondary burden, that is, that of adducing evidence in rebuttal, may be shifted to the defendant, the primary burden of persuasion rests throughout on the plaintiff. If the plaintiff fails to persuade the court, he fails. Here the onus was on the plaintiff to prove to the satisfaction of the Court that it was the negligence of the defendant, either in the primary sense, or in the sense of ultimate negligence if the defendant has established that there was contributory negligence on the part of the plaintiff which was the cause of the accident and therefore rendered the defendant liable. The

[7] [1930] 1 K.B. 403; 46 T.L.R. 73.
[8] (1842), 10 M. & W. 546.

verdict rendered by the jury in this case showed clearly that the defendant had established to their complete satisfaction that the plaintiff had contributed to the accident by his negligence. The fact that they refused to find that the defendant had been guilty of ultimate negligence shows on the other hand, however, that the plaintiff had failed in his effort to perform the obligation which he undertook when he instituted the action. Therefore it is respectfully submitted that the action should have been dismissed with costs. The case of *Hargrove* v. *Burn*[9] which is very similar to *Service* v. *Sundell,* contains an admirable commentary on the duty of the plaintiff in an action such as this for damages on account of negligence.

There is, however, much more involved in this case than the mere question of burden of proof. The real point in issue is the determination of the rights of the parties and the apportionment of the damages suffered between them. The necessity of some fair basis on which these may be determined is emphasized when the large number of cases of a similar nature which are daily arising is considered, and when we realize that the congestion of our highways will tend to increase rather than diminish that number. Law must be adapted to meet the new conditions and problems. If the existing law cannot meet the situation adequately then there must be legislation to supplement it. Otherwise justice becomes injustice and our system of law must defeat the very purpose for which it was created. In the words of Raney, J., of the Supreme Court of Ontario in the case of *Dent* v. *Usher*:[10] "Common law ought to be reasonably consonant with common sense and justice, and when the courts find themselves shackled with precedent and compelled to give judgments that cannot be defended on principles of equity, the law-making authority that can ignore precedent ought to intervene."

In the case of *Admiralty Commissioners* v. *S.S. Volute,*[11] Lord Birkenhead used words which indicated the solution to the difficulties presented to us by this intricate question of contributory negligence when he said: "Upon the whole, I think the question of contributory negligence must be dealt with somewhat broadly and on commonsense principles as a jury would probably deal with it." And while no doubt when a clear line can be drawn, the ultimate negligence is the only one to look at in determining the liability, there are bound to be innumerable cases, such as *Service* v. *Sundell,* where the two acts come so closely together, and the second act of negligence is so

[9] (1929), 46 T.L.R. 59.
[10] (1929), 64 O.L.R. 323.
[11] [1922] 1 A.C. 129 at p. 144.

hopelessly mixed up with the state of things brought about by the first, that it is impossible for any judge or jury to determine which had the last clear chance to avoid the accident. On the other hand in most of these cases the jury would have little difficulty in arriving at a fairly just division of the liability for the accident and in apportioning the amount of total damage caused between the parties responsible in relation to their share of responsibility for the accident. Legislation indeed might be passed covering such cases as these, and well might be extended to cover the liability to third parties who suffer injury from the accident. By such means the inequitable result that is found in the case of *Dent* v. *Usher* (*supra*) would then be obviated.

The Province of Ontario has passed a statute of this nature, the *Contributory Negligence Act* of 1924, [12] which provides that in cases where ultimate negligence is not found, and contributory negligence is proven, the responsibility for the damages suffered by each of the parties shall be apportioned by the jury, and the amount of damages payable by each party shall bear the same proportion to the damage suffered as the jury have found their respective negligence bears to the cause of the accident. In the event of the jury not being able to reach a finding as to the respective liability of the parties, the apportionment shall be made on a fifty-fifty basis.

E. H. CHARLESON.

Ottawa.

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NEGLIGENCE — CONTRIBUTORY AND ULTIMATE — CONTRIBUTORY NEGLIGENCE ACT.—The decision in *Service* v. *Sundell*[1] affords an example of the difficulty in applying the law of negligence. The solution is not always easy, although in 1916, Lord Sumner said in the well-known case of *British Columbia Electric Co., Ltd.* v. *Loach*,[2] that "the whole law of negligence in accident cases is now very well settled, and beyond the difficulty of explaining it to a jury in terms of the decided cases, its application is plain enough."

In the *Service* case, although the plaintiff suffered damages, Lord Hewart, C.J., at the trial declined to give judgment for either the plaintiff or defendant on the answers of the jury, finding both the plaintiff and the defendant guilty of negligence and his judgment was upheld on appeal. The reason for this decision was that the jury were unable to say whether the plaintiff or defendant was really

[12] R.S.O. 1927, c. 103.

[1] (1929), 45 T.L.R. 569.
[2] [1916] 1 A.C. 719 at p. 727.

responsible for the accident, although they were asked to reconsider "whose negligence was really responsible for the accident," and told that the plaintiff was not entitled to succeed "unless they were satisfied either that there was no negligence on his part, or that, if there was, nevertheless the real cause of the collision was negligence on the part of the defendant." One would have thought that it was a case for the application of the principle applied in the leading case of *Tuff* v. *Warman*.[3] "The plaintiff's contributory negligence will not disentitle him, however, if the defendant might by the exercise of care on his part, have avoided the consequence of the neglect or carelessness of the plaintiff." Should that question have been put to the jury and on answer to that question judgment given for or against the plaintiff? The inquiries put to the jury show that the Court endeavoured to secure their views in regard to whose negligence was responsible, but that it is not the same thing exactly as the question in the usual form. Indeed the Court of Appeal mentioned the inadequate direction given by the Lord Chief Justice on the question of contributory negligence, but did not direct a new trial as might have been expected. As this was so unusual, inquiries have been made in England with respect to the situation, and the information is that "the case will not be taken to the House of Lords and that it is down for trial and may come on" early in December. Thus it seems that the dismissal of the appeal is the equivalent of an order for a new trial, as the judgment at the trial was merely a refusal to enter judgment for either party in view of the answers of the jury; in other words, there is no judgment yet for either party and so it will be re-tried automatically, and no order for a new trial was really necessary. This case is similar to *Weinreb* v. *Haynes*,[4] where no question as to ultimate negligence was submitted to the jury, and the Appellate Division said that there should be a new trial, if on the evidence, such a finding was possible, but the Court concluded that it was not.

In Ontario, we have the *Contributory Negligence Act*, and that, apart from any question of ultimate negligence, would prevent such a result as happened in the English case because, if contributory negligence is established, the court or the jury, as the case may be, are directed as to how they should deal with the situation.

Ultimate negligence may still determine liability, notwithstanding our *Contributory Negligence Act*. It has been decided[5] that the Act does not interfere in any way with the doctrine of ultimate negligence, and that if ultimate negligence is found in such a way as that

[3] (1858), 5 C.B.N.S. 573 at p. 585.
[4] (1921), 21 O.W.N. 124.
[5] See *Walker* v. *Forbes* (1925), 56 O.L.R. 532.

before the operation of the Act, the plaintiff would have succeeded, the finding clearly excludes the statute. Where there is concurrent negligence continuing down to and contributing to the accident, then there can be no recovery, *Jones* v. *Toronto and York Radial Railway Company*,[6] *Rice* v. *Toronto Street Railway*.[7] These cases were decided before the *Contributory Negligence Act*, but the *Jones* case applied the doctrine of contributory negligence and the plaintiff succeeded, and it is interesting to note that it was an early case clearly setting forth ultimate negligence as later defined in the *Loach* case. In the *Jones* and *Rice* cases there is stated the doctrine that it is only when the negligence continues on both sides down to the happening of the accident that there is such concurrent negligence which at common law prevents recovery. This class of cases both before and after the Act must be analysed to see if they are really cases of ultimate negligence.[8]

The Court of Appeal in the *Service* case stated that "the appeal raised a question of some general importance with regard to the findings of the jury on the question of contributory negligence." The question is settled to some extent at least by the statement of the Court as to the inadequacy of the direction to the jury. In *Dancier* v. *Hollis*,[9] a case very similar to the *Service* case, tried a few days after this appeal was argued (when possibly the judgment was given) the Lord Chief Justice in an interesting direction to the jury, said: "But if the defendant could, by the exercise of ordinary care and diligence, have avoided the accident, the plaintiff's negligence would not excuse the defendant." Then a few days later still the Lord Chief Justice gave a very complete review of the law of negligence and contributory negligence in *Hargrove* v. *Burn*.[10] Going back to the case of *Davies* v. *Mann*,[11] the Chief Justice graphically illustrated the principle that the mere fact of the plaintiff's negligence in leaving his tethered donkey on the highway did not justify the defendant in running over it negligently.

The very last case in the Court of Appeal in England on the subject is *Cooper* v. *Swadling*.[12] In that case the trial judge had merely directed the jury that "if they found the accident was due to the negligence of both parties substantially, there would be contributory negligence" on both sides and the jury would have to find for the defendant. On appeal, however, it was held that the jury

[6] (1911), 23 O.L.R. 331.
[7] (1910), 22 O.L.R. 446.
[8] See *Smith* v. *Welland* (1921), 50 O.L.R. 252.
[9] (Reported in the Times Newspaper on Nov. 2, 1929.)
[10] (1929), 46 T.L.R. 59.
[11] (1842), 10 M. & W. 546.
[12] [1930] 1 K.B. 403; 46 T.L.R. 737.

should have been directed that if the deceased man was guilty of negligence, but the defendant could by exercising reasonable care, have avoided the accident, they were still entitled to find for the plaintiff. In the result, a new trial was directed, which was in effect done in the *Service* case. Scrutton, L.J., made an explanation of a dictum of his in the *Service* case in which he appeared to concur in the principle of ultimate negligence as defined in the *Loach* case, and he corrected that view and said: "I desire to reserve my view on the question whether the English Courts should adopt the judgment of the Privy Council in that case."

A. C. HEIGHINGTON.

Toronto.

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ILLEGALITY OF COVENANTS SET UP AS DEFENCE TO ACTION ON MORTGAGES—TRUE CONSIDERATION—RULES OF COURT.—*Harwood & Cooper* v. *Wilkinson*[1] deals with many interesting points of law and fact and is well worth careful reading. W. had obtained at different times two sums of money from C. for which he gave as security two mortgages, one for $5,000 dated December, 1922, and one for $12,500 dated February, 1926, against which a credit of $3,703 was allowed.

C. was engaged in the business of importing liquors into the United States, and after the advance of $5,000 W. was induced by C. to permit the registration in his name of a ship used by C. in the liquor business. Later C. persuaded W. to go into the hardware business and advanced, in all, for this purpose, the sum of $12,500 which was subsequently secured by mortgage. These mortgages were assigned to H. who was an agent of C. but C. was joined as co-plaintiff in the action.

The learned trial judge considered that the real consideration for the advances made by C. to W. was not the securities given by W. but rather the participation by W. in the scheme of C. which involved the defrauding of the Government of Canada in the matter of sales or income tax (or possibly both) and also the smuggling of liquor into the United States, and accepted W.'s statement that C. promised that the first mortgage and later the moneys advanced for the hardware business would be taken care of in whole or in part by the profits of the smuggling operations. Neither of the plaintiffs was called as a witness at the trial, and the plaintiff C., on examination for discovery, declined to answer many questions on advice of counsel.

[1] (1929), 64 O.L.R. 392.

In his reasons for judgment the learned judge referred to the decisions in *Blatch* v. *Archer*,[2] *Lightfoot* v. *Tenant*,[3] *Foster* v. *Driscoll*,[4] *and Walkerville Brewing Co.* v. *Mayrand*,[5] and held the consideration for the mortgages to be illegal and dismissed the action on this ground, and also on the ground of Court Rule 331 which empowers a judge in certain circumstances to dismiss an action where a plaintiff refuses to answer proper questions put to him on his examination for discovery.

Rule 331, which was discussed by the trial judge, reads as follows:

> Any person who refuses or neglects to attend at the time and place appointed for his examination, or refuses to be sworn or to answer any proper question put to him, shall be deemed guilty of a contempt of Court and proceedings may forthwith be had by attachment. He shall also be liable, if a plaintiff, to have his action dismissed, and if a defendant, to have his defence, if any, struck out.

He held it to be a "clear case of contempt of court carried down to the close of the evidence and argument without explanation or apology . . . so that in effect the contempt was just as great as it would have been if Cooper had been a witness at the trial and if he had flouted the court in the witness box as he did before the special examiner . . . a plaintiff who refuses to answer relevant questions, whether on the advice of counsel or not, has not just ground of complaint if his action is dismissed."

The Appellate Division, in reversing the judgment in the present case,[6] referred to the mortgages and stated that the defendant had received very substantial sums of money from the plaintiff for "perfectly legitimate purposes," namely, "to buy a house to live in and to buy hardware wherewith to carry on business, but the learned trial judge has refused to give him judgment for the money so advanced for two reasons, the one based upon a supposed ground of public policy and the other upon a ground wholly novel and unprecedented." The judgment deals with the second ground first, namely, contempt of court under Rule 331, and states, "this contempt of court is not of the nature of the contempt of court of which the court takes notice *proprio motu* such as is found in disrespect of the court, *in facie curiae;* it is the kind of contempt of court of which the other side may take advantage if so advised;" and it is therein

[2] (1774), 1 Cowp. 63.
[3] (1796), 1 Bos. & P. 551.
[4] [19291 1 K.B. 470.
[5] (1928), 63 O.L.R. 5; (1929), 63 O.L.R. 573. See also note: (1929), 7 C. B. Rev. 326.
[6] (1929) 31 O.W.N. 284; 64 O.L.R. 658.

set out that the learned judge erred in considering that the rule went as far as to permit the dismissing of an action "except as a last resort" for "the dismissal of an action is only to be ordered in the case of a wilfully disobedient party, not one who has made a mistake on the advice of counsel or otherwise" and usually "another opportunity is given to act properly and answer the questions even after an order has been disobeyed."[7] The judgment also states that a plaintiff who refuses on the advice of counsel to answer relevant questions has "just ground for complaint if his action is dismissed without giving him notice that such a course is to be followed and giving him a reasonable time to obey any order the Court may make." "If the defendant takes no steps to enforce his rights under Rule 331 before the trial, he must be deemed to have been satisfied with the answers given. Once he embarks upon the trial his right to resort to Rule 331 for a dismissal of the action has gone."

Even assuming that the trade in liquor was illegal there was no connection with the trade and the loans so as to affect the loans with illegality, nor was there anything in the evidence before the Court to justify a finding that the loans could not be recovered by reason of their being tainted with the liquor trade.

The plaintiff proved his case by the production and proof of the mortgage-deeds and did not require any aid "from an illegal transaction in order to establish his case." If the aid of an illegal transaction is required by a plaintiff to establish his case the court will not entertain his claim.[8]

The defendant was not assisted by his allegation that he was "deceived into thinking" he would make a profit out of an illegal transaction. There is no "principle whereby the illegality of one transaction can be made to attach to an entirely distinct transaction in such a way as to destroy its efficacy."

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[7] *Denham* v. *Gooch* (1890), 13 P.R. 344.

[8] Brooms Legal Maxims, 9th ed., 466; *Collins* v. *Blantern* (1765), 2 Wils. K.B. 341.