THE CANADIAN BAR REVIEW

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CASE AND COMMENT

CONTRACTS—INSANITY—AGENCY—KNOWLEDGE OF AGENT IMPUTED TO A PRINCIPAL—LIABILITY OF THE CROWN. — The decision of the Supreme Court of Canada in *Wilson* v. *The King*[1] raises several points of unusual interest. The deceased Wilson, who was, according to the undisputed evidence, admittedly insane, made application in 1928 to the Government of Canada for the purchase of an annuity, under the Government Annuities Act,[2] to provide him with monthly payments of some $125. In investing practically all his money, $10,000, in this purchase, Wilson was influenced by the insane delusion that his wife was endeavouring to cheat him out of his money, and the purchase was designed to leave his wife destitute on his death. At the time the application was made Wilson was aged seventy-four. The Government accepted his application and payments were made to him for seven months, at the end of which time he died. His widow, and sole beneficiary, sought by petition of right to recover from the Crown the money paid by the deceased for the purchase of the annuity, alleging that Wilson at the time of contracting with the Crown was so insane as to be incapable of managing his affairs.

The claim presented by the widow raised three questions, none of them free from difficulty : (1) Can the insane contract under any circumstances, and if so what is the nature of insanity as an invalidating factor in contractual relations? (2) If, as many cases state, knowledge by one contracting party of the other's insanity is necessary to invalidate contracts of insane

[1] [1938] 3 D.L.R. 433, on appeal from [1938] 1 D.L.R. 729.
[2] R.S.C. 1927, c. 7.

persons, is the knowledge of an agent who merely receives the consideration or application for the contract, but who has no power himself to conclude the contract, imputable to his principal? (3) If the party who contracts with the insane person be the Crown, does this affect the result which would obtain between private individuals?

As to the first question concerning the validity or invalidity of the contracts of an insane person, the law has struggled between two extremes. On the one hand the fundamental doctrine of contract law, protection of the reasonable expectations of the parties, may have been responsible for the view at one time prevalent that insanity could not be pleaded as a defence to any contract action, and *a fortiori* could not be relied on to recover money paid under a contract.[3] This view, while extremely harsh on the estate of an insane person, did protect innocent persons who may have contracted in good faith with a lunatic. On the other hand the principle that a contract requires consent of two parties leads to the view that the contracts of a lunatic who is incapable of performing a legal act or of giving consent are void *ab initio*. This last view seems to have the weight of logic behind it, and it is extremely difficult to distinguish the *non est factum* cases in which the defence that a man's mind did not accompany his act has always been treated as negativing consent.[4] Decisions which state that powers of attorney given by a lunatic are absolutely void seem to proceed on this basis and raise difficulties which have not been satisfactorily solved.[5]

The English courts seem to have taken a middle path between these two extremes. In *Molton* v. *Camroux*[6] it was held that an executed contract could not be rescinded and restitution ordered "when a person, apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and bona fide". In *Imperial*

[3] See the cases collected in Brown, *Can the Insane Contract?* (1933), 11 Can. Bar Rev. 600.

[4] See the discussion by the High Court of Australia in *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (1904), 1 Comm. L.R. 243; leave to appeal to Privy Council refused, [1904] A.C. 776. See also Cook, *Mental Deficiency and the Law of Contracts* (1921), 21 Col. L.R. 424; Brown, *Can the Insane Contract?* (1933), 11 Can. Bar Rev. 600.

[5] *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.*, *supra*; *Tarbuck* v. *Bispham*, 2 M. & W. 2; *Stead* v. *Thornton*, 3 B. & Ad. 357. See *Drew* v. *Nunn* (1879), 4 Q. B.W. 661, in which insanity was held to terminate an agent's authority automatically; *Yonge* v. *Toynbee*, [1910] 1 K.B. 215, is to the same effect. In *Kerr* v. *Town of Petralia* (1921), 51 O.L.R. 74 at p. 81, Mulock C.J. Ex. doubts this rule and considers that insanity merely renders an authority voidable at the option of the insane person.

[6] (1848), 4 Exch. 17; 2 Exch. 487.

Loan Co. Ltd. v. *Stone*,[7] the view stated in *Molton* v. *Camroux* was extended to an executory contract, with the result that unless the other contracting party knew of the insanity at the time the contract was entered into, incapacity was no defence to the enforcement of the contract against the person suffering from the infirmity. This view has been affirmed in England,[8] and in the present case the trial judge, Maclean J., Duff C.J.C. and Kerwin J. all took the view that it was necessary, in order to invalidate the contract of annuity, to prove knowledge of Wilson's insanity on the part of the Crown.

Davis J. took another view. He was willing to grant relief under the circumstances disclosed in the present case, whether the Crown had knowledge of Wilson's incapacity or not. His view, if not an actual breaking of new ground, seems at least to be an application of a doctrine which, while found in judicial dicta, has rarely been carried into practice. Davis J. held that the Court had jurisdiction to invalidate any contract made with an insane person if the Court was convinced that such contract was not a "fair bargain". In both *Imperial Loan Co.* v. *Stone* and in the later English case, *York Glass Co. Ltd.* v. *Jubb*, expressions are found which support this view. Thus, in the *Stone Case*, Lopes L. J. stated that "in order to avoid a *fair contract* on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties". Likewise, in the *Jubb Case*, Sargant L.J. expressly reserved the question "whether the fairness of the bargain is an essential element to the enforceability of the bargain, against a person who was in fact a lunatic although not known to be such by the other contracting party". The difficulty arises in determining the exact meaning of the word "fair". Davis J. considered that the present case was unfair "in the sense that no man with normal mentality would have purchased the annuity in the physical condition Wilson was in at the time of the purchase and no one if he knew the physical and mental condition of Wilson would honestly have entertained the application".[9] This view would seem to deprive the innocent contracting party of practically all the benefits of the rule in *Imperial Loan Company* v. *Stone*, since in most cases it is unfair to denude a lunatic's estate of assets if the insane person does not know what he is doing at the time of making a contract. For example, in *York Glass*

[7] [1892] 1 Q.B. 599.
[8] *York Glass Company* v. *Jubb* (1925), 42 T.L.R. 1; on appeal from 131 L.T. 559.
[9] [1938] 3 D.L.R. at p. 447.

Company v. *Jubb*, the insane person, having all his money invested in his own business, entered into a contract for the purchase of the property, works and business of the plaintiff company. According to the Court, who held this agreement enforceable against the lunatic, the latter had no reasonable prospect of being able to raise money to pay for this property. Can such a contract be called fair from the standpoint taken by Davis J.? In the *Jubb Case* the Court discussed fairness as a question of fairness of the terms of the contract itself, and the view seems to be that if these terms would be fair between normal parties, it is impossible to say they are unfair with respect to an insane person. Fairness, in this connection, seems to be linked up with the notion of "overreaching". Admittedly there was nothing of that nature in the present case and to take the view which Davis J. did seems tantamount to invalidating a contract merely because of insanity. This view seems inconsistent with the protection which the English cases have endeavoured to give to innocent contracting parties.

Assuming, as Duff C.J.C. and Kerwin J. did, that knowledge on the part of the Crown of Wilson's insanity was necessary in order to invalidate the annuity contract, difficulty arises in determining when the knowledge of an agent will be imputed to the principal. In the present case, under the Act, all contracts for annuities had to be signed by the Actuary and Deputy Minister or Superintendent of Annuities. The Act authorized the making of regulations by Order in Council regarding the appointment of agents to assist in carrying out the Act, and under the regulations so made postmasters were "authorized and required" to receive payments for annuities and to remit them as instructed by the Superintendent of Annuities. Provision was also made for commissions payable to postmasters for remitting money so received and for inducing the purchase of an annuity when the remittance was made directly. In the present case Wilson had paid $10,000 to the local postmaster, Schooley, who had forwarded it to Ottawa. Schooley had been otherwise instrumental in procuring information regarding annuities for Wilson. He knew of Wilson's insanity and the delusions under which he acted and he seems to have made some attempt to prevent Wilson from going on with the scheme. At no time, however, did Schooley pass on his information to the authorities in Ottawa.

On these facts the question was whether Schooley's knowledge should be treated as the knowledge of the Crown. This

seems to be the crux of the case. The trial judge held that Schooley's knowledge was not to be attributed to the Crown, saying that Schooley was not the agent "in the sale of the annuity". For this reason the trial judge dismissed the petition to recover the money paid to the Crown. In the Supreme Court of Canada, Kerwin J., dissenting, reached the same result, namely that Schooley's knowledge could not be attributed to the Crown. Duff C.J.C. took the opposite view and held that the Crown was fixed with the knowledge possessed by Schooley. Davis J., for reasons previously mentioned, did not have to decide the question, and Crocket J. merely agreed in allowing recovery without giving reasons. Therefore, of all the judges who heard the case, only one, Duff C.J.C., expressly found that Schooley's knowledge must be held to be the knowledge of the Crown.

There seems no doubt that Schooley was an agent of some kind, even though he had no power to conclude a contract for an annuity. It is true, as stated in *Blackburn, Low & Company* v. *Vigors*,[10] that it is not every agent's knowledge which is imputed to the principal.

> Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal. Other agents may have so limited and narrow an authority both in fact and in the common understanding of their form of employment that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge or intentions of his principal; and whether his acts are the acts of his principal depends upon the specific authority he has received.

In that case the knowledge of an agent employed to effect insurance, but who did not subsequently enter into the contract of insurance, was held not attributable to the principal. On the other hand as Lord Halsbury pointed out, if he had been the agent who had effected the insurance, there would have been no difficulty of fixing his principal with the knowledge which he possessed at that time because, he would then have acted in a situation in which such knowledge was material. The difficulty in the cases imputing knowledge, is to discover when the principal is fixed with knowledge of an agent who has not actually acted in the acquisition of rights for the principal. In such cases, for example the solicitor who searches a title for a client, it is common to speak of the agent being under a duty to communicate his knowledge to the principal.[11] In the present

[10] (1887), 12 App. Cas. 531 at p. 537.
[11] See a comment by the present writer in (1937), 15 Can. Bar Rev. 716.

case Duff C.J.C. held that Schooley was under a duty to communicate information to the Crown. Kerwin J. and the trial judge held that he was not. In none of the judgments are there any reasons given for either conclusion. In view of the fact that the postmaster was employed in a minor capacity it is difficult to say that it was part of his employment to gather information for the Crown or to pass on information. On the other hand it is submitted that knowledge of such an agent should affect the principal, not on the elusive basis of duty, but on a narrower ground. Is it not possible to say that if a principal acquires property through an agent he can only accept that property subject to the same knowledge which the agent possessed in obtaining it for his principal? This is a view which has been clearly stated by American writers[12] and finds a place in the recent Restatement of Agency.[13] If Schooley received the money on behalf of the Minister, as he did, all material facts concerning that payment should be attributed to the man on whose behalf the payment was received, and this must include not only the name of the person paying the money and the proposition for which it was paid, but also the knowledge of any facts affecting the capacity of such person to make the payment for the purpose indicated.

Such a view simplifies the approach to many problems which involve imputing an agent's knowledge to his principal, and in particular it clears up the difficulty which frequently arises when the evidence shows that the agent is acting in his own interest and in a manner adverse to the principal. For example, it is usually said that notice will not be imputed to a principal unless the circumstances are such as to justify the opinion that "the agent would be likely to communicate the information" to his principal.[14] This is no doubt true in many cases, in the sense that the agent taking a position adverse to the principal can

[12] See, for example, Seavey, *Notice Through an Agent* (1916), 65 U. of Penn. L.R. 1 at p. 16.

[13] AMERICAN LAW INSTITUTE'S RESTATEMENT OF THE LAW OF AGENCY sec. 274: "The knowledge of an agent who acquires property for his principal affects the interests of his principal in the subject matter to the same extent as if the principal had acquired it with the same knowledge." If in the present case Schooley had known, for instance, that Wilson had stolen the $10,000 from X, could the Crown have held the money freed from the claim of X?

[14] "Notice to or knowledge of an agent is not notice to or knowledge by the company unless the circumstances are such as to justify the opinion that the agent would be likely to communicate the information to those in charge of the affairs of the company." — Middleton J.A. in *Rocco* v. *Northwestern Insurance Co.* (1929), 64 O.L.R. 559 at p. 562.

no longer be said to be acting for his principal.[15] But if the principal acquires rights to property through an agent, even though that agent may be acting for his own purpose and in fraud of the principal, it would nevertheless seem proper that the principal could only obtain that property affected with knowledge of the material facts under which he, through his agent, received it. This view has not been clearly stated in any of the English cases.[16] The writer believes, however, that it is extremely useful in reaching a conclusion on difficult sets of facts and avoids the uncertainty which inheres in the language of "duty" found in cases like the present. It is submitted, with respect, that the conclusion of Duff C.J.C. is right, since the Crown only became possessed of Wilson's money through the act of Schooley and therefore the Crown could not retain the benefit of Schooley's act without also accepting the consequences of his knowledge.[17]

The third point raised by the facts in the present case is whether the petitioner might have been met with the defence that the present action was an indirect method of making the Crown respond for the fraud of one of its servants. Expressions are found in many cases that a man contracting knowingly with an insane person is committing a fraud or something in the

[15] See Lord Chelmsford in *Espin* v. *Pemberton* (1859), 3 DeG. & J. at p. 555: "I have already shown that imputed knowledge does not depend upon whether it was communicated or not, and therefore the presumption of non-communication does not seem to be the proper principle to apply. I would rather say that the commission of the fraud broke off the relation of principal and agent . . . . . and therefore it prevented the possibility of imputing the knowledge of the agent to the principal."

[16] Indeed, in *Rural Municipality of Mount Hope* v. *Findlay*, [1921] 3 W.W.R. 658, the majority of the court seem to have taken the view than when an agent acquires property for a principal, knowing that the property belongs to X, the principal is not affected by the agent's knowledge when the agent is knowingly using the money of X to cover his own shortages with his principal. Lamont J.A. merely stated that there was no duty on the part of the agent to disclose how, or in what manner he came into possession of the money. The dissenting judgment of Taylor J.A. seems to adopt the view suggested here. He stated that in his capacity as agent (treasurer for the municipality) he placed the principal's endorsement on the cheque of X. "It cannot be said that on the one hand in his capacity as treasurer he can receive, endorse and deposit the cheque to the credit of the municipality, and because he be a party to the theft divest the municipality of the knowledge ordinarily imputed to it by notice to its agent."

With this case, compare *Atlantic Cotton Mills* v. *Indian Orchard Mills* (1888), 147 Mass. 268; 17 N.E. 496.

[17] See Seavey, *op. cit.*: "For if the act of the agent who had the information was the sole act by which the property was acquired . . . the principal has to rely upon the consciousness of his 'extended personality' in order to have any effect given to the transaction, and this consciousness cannot be divided."

nature of a fraud.[18] Presume that in the present case Schooley had accepted the money knowing of the insanity but remaining silent in order to obtain his commission. In a sense this might be called a fraud on Wilson. It might be suggested on the basis of the maxim, "the King can do no wrong", that the Crown should not be held responsible for this act of its agent. The answer to such an argument would seem to lie in the distinction between suing the Crown for damages for the wrong, which is impossible, and an action to recover property obtained by the wrongful act of one of its servants. In *Brocklebank Ltd.* v. *The King*[19] Scrutton L.J. spoke as follows :

> But it is said that the money was obtained by a wrong, and that the Crown could do no wrong, therefore petition of right could not lie for an alleged wrong, and, therefore, there was no tort to waive, and, therefore, I gather, it was argued that the Crown who had taken the money obtained by the wrong of its servant into its Exchequer could keep the money so obtained. I hope this is not accurate, as it does not seem a very creditable position for the Crown by its advisers to take up. I do not see why the fact that the Crown could not be sued for damages for the wrong of its servants prevents proceedings by petition of right, based on the implied contract to return resulting from its taking possession of the money of the plaintiff obtained by the wrong of its servant. The executors of a dead man are not liable in damages for his tort, but may be liable if money or property has been taken from the plaintiff's estate and retained in the estate of the deceased.

When the view prevailed that an incorporated company could not be called on to answer for the fraud of its agents, the same distinction allowed recovery of money which had found its way into the coffers of a company through the fraudulent acts of its servants.[20] The Supreme Court of Canada apparently treated the question of the Crown's duty to refund as free from doubt, because no mention is made of the point in any of the judgments.

C. A. W.

[18] See, for example Wigram V.C., in *Price* v. *Berrington*, 7 Hare 394 at p. 402. And see *Bawlf Grain Co.* v. *Ross* (1917), 55 Can. S.C.R. 232.
[19] [1925] 1 K.B. at p. 67.
[20] *Western Bank of Scotland* v. *Addie* (1867), L.R. 1 H.L. (Sc.) 145.

ULTIMATE NEGLIGENCE — RIGHTS OF INNOCENT THIRD PARTIES.—When two motor cars come into collision after one has been "primarily" negligent only and the other has been "ultimately" negligent, and by reason of the collision an innocent and unconnected third person is injured, has the third person a right of action against the persons responsible for the driving of the motor car whose driver was guilty only of "primary" negligence? It is surprising, with the number of motor vehicle cases, that the answer to this question should have remained unsettled, but now that Acts recognizing degrees of contribution are being generally adopted it is to be hoped and expected that the question will be logically answered, *i.e.*, the person ultimately negligent and that person only will be held liable to the third person. In England the question has received surprisingly little attention with no direct decisions apparently available. In Canada the direct decisions seem contrary to the view expressed, and the dicta are opposed to logic. The only reasonable principle of liability so far developed is found in the causation theory under which the "desert or lack of it" has nothing to do with the right to damages.[1] Where two vehicles collide and a passenger is injured the logical application of the principle would indicate that the passenger has been injured only by the negligence which was ultimate. Juries (and judges) in attempting to do justice to passengers have applied the causation theory as between the drivers but adopted some more loose and vague ground in favour of the passengers. It is difficult to understand how negligence can contribute to the accident for one purpose and not for another.

In the earlier cases the plaintiff was denied the right to claim damages not because of his "contributory negligence", for that idea was undeveloped, but because he had himself done the act which caused the injury. In those cases the defendant's negligence was substantially earlier in time than, or otherwise severable from, that of the plaintiff. When cases arose in which, because of the shortening of the time or for other reasons, the negligence of the defendant was less easily severed, trouble arose. In *Raisin* v. *Mitchell*[2] the Court accepted a jury's verdict for one-half damages because the jury said "there were faults on both sides", but the practical view of this jury was lost,[3] and similar later attempts failed.[4]

[1] See *Loach's Case*, [1916] A.C. 719 at p. 727. *Cf.* Vincent C. MacDonald, 13 Can. Bar Rev. p. 535, and Cecil A. Wright, 16 Can. Bar Rev. p. 137.
[2] (1839), 9 C. & P. 613.
[3] *Cf. Smith* v. *Dobson* (1841), 3 M. & G. 59.
[4] *Ayers* v. *Bull* (1889), 5 T.L.R. 202.

The inability of the Court to do justice where the plaintiff's negligence has in any degree contributed has resulted in the "hard cases" which so frequently make "bad law". In the "donkey case",[5] cited, according to Mr. Beven,[6] "probably more often for the peculiarity of the facts than for any additional clearness in the exposition of the law therein", the driver, had he been in control of his horses, had no reason to find the donkey even an added hazard. The earlier case of *Butterfield* v. *Forrester*[7] is nearer to the real problem because the rider came upon the barricade at dusk. Even then he could have seen it from horseback for 100 yards. He had just come from a public house but as usual there was no evidence of intoxication. The application of the principles enunciated to later cases, such as *B.C. Electric* v. *Loach*,[8] and *McLean* v. *Bell*,[9] and to the average motor vehicle collision case, is more difficult and the most recent decisions of the highest Court have not solved the problem. For example, if the statement of law most frequently cited as a guide in ultimate negligence — "If, although the plaintiff was negligent, the defendant could have avoided the collision by the exercise of reasonable care, then it is the defendant's failure to take that reasonable care to which the resulting damage is due and the plaintiff is entitled to recover."[10]—is applied literally to cross actions where the parties were both guilty of continuing or concurrent negligence, will the plaintiff not succeed on his claim and yet the defendant (as plaintiff) succeed on his counterclaim? For the practical result of this principle see *B.C. Electric* v. *Key*[11] and *Godfrey* v. *Gilbert*,[12] from which it appears that statements of the principles of ultimate negligence so far developed in the highest Court do not furnish an intelligible guide to a court or jury.

It is questioned whether the element of time is so important,[13] but whether or not ultimate negligence is a failure to take the "last chance", it is over-worked, as becomes apparent when you consider the rights of an innocent third party arising out of such negligence. In *McDonald* v. *Thomas*[14] it was held that a

[5] *Davies* v. *Mann* (1842), 10 M. & W. 546.
[6] BEVEN, NEGLIGENCE, 3rd ed. at p. 151; retained 4th ed. p. 167.
[7] (1809), 11 East 60.
[8] [1916] A.C. 719.
[9] (1932), 48 T.L.R. 467.
[10] *Swadling* v. *Cooper*, [1931] A.C. 1 at p. 8: also quoted in *McLean* v. *Bell*, *supra*.
[11] [1932] S.C.R. 106.
[12] [1936] N.Z.L.R. 699.
[13] 4 F.L.J. 102; *cf.* SALMOND, TORTS, 9th ed., pp. 480 *ff.*
[14] (1933), 41 M.R. 657.

passenger in an automobile could succeed in an action against the driver of the other automobile although the driver of the automobile in which the passenger was riding was guilty of ultimate negligence (*i.e.*, as between the drivers) and there is considerable support for this view.[15] It is difficult to see how acts which contribute to the collision for one purpose do not also contribute for another and the explanations are not entirely logical.[16] This difficulty will disappear in time if the courts in applying the contributory negligence provisions will develop the principles of *Admiralty Commissioners* v. *S. S. Volute*[17] and *Corstar* v. *Eurymedon*,[18] and regard the common law decisions in the light of the new power in the courts. The difficulty is that many of the acts or omissions at present treated as "ultimate" are not sufficiently severable to relieve the earlier or primary ones entirely from liability.

Consider the cases on collisions with vehicles standing on the highway. Where this occurs in the *daytime* it would certainly require unusual circumstances to involve the parked vehicle, even assuming some breach of duty or statute.[19] When the collision occurs *at night* very special circumstances should be necessary to relieve completely an unlighted or inadequately lighted parked vehicle. In *Shust* v. *Harris*[20] the plaintiff's stationary waggon was only slightly on the pavement but it was unlighted. There being no Contributory Negligence Act, the motorist was held to have been ultimately negligent and liable to the plaintiff for his full damages. Could a passenger in the moving car have succeeded against the plaintiff or person in control of the waggon? *Billings* v. *Mooers*[21] was not a true case of ultimate negligence and should have come under the Act. The unlighted reaper met the motorist on the wrong side of the road. The views in the Ontario Court of Appeal in *Irvine* v. *Metropolitan*[22] seem preferable where, in addition, it was snowing and the parked truck was assessed 75% of the negligence. In *Brockie* v. *McKay*[23]

[15] See Riddell J.A. in *Falsetto* v. *Brown*, [1933] 3 D.L.R. at p. 547; *Wandeleer* v. *Dawson*, [1936] 3 W.W.R. 478; *Carter* v. *Van Camp*, [1930] S.C.R. 156, and the cases collected in 9 Can. Bar Rev. 470 at p. 481, including *Winnipeg Electric* v. *C.N.R.*, 59 S.C.R. 352 at p. 372. To the contrary see *Dent* v. *Usher*, 64 O.L.R. 327, and Smith J. in *Carter* v. *Van Camp*, *supra*, at p. 173.

[16] *Cf.* WINFIELD, TORT (1937) p. 442.

[17] [1922] A.C. 129.

[18] [1938] 1 All E.R. 122.

[19] See *Rogers* v. *Lewis*, [1934] O.W.N. 441.

[20] (1936), 44 M.R. 121.

[21] (1937), 11 Mar. P.R. 553.

[22] [1933] O.R. 823.

[23] [1934] 1 W.W.R. 725.

and *Hall* v. *West Coast*,[24] there were special circumstances as the moving vehicles were probably meeting other car lights, and in *Wandeleer* v. *Dawson*[25] the successful plaintiff was a passenger in the moving automobile.

To date the courts have not completely grasped their opportunities under the contributory negligence provisions but these provisions have been adopted in all but two of the common law Provinces of Canada and are receiving favourable comment in legal publications in England. Further, the trend of judicial decisions is towards limiting the scope of the principle of ultimate negligence under the Admiralty Rule and under the Canadian Acts. It is not too late to establish the logical principle that third persons have rights only against the person who is ultimately negligent and therefore responsible for the damage to all persons.

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TORTS—LANDLORD AND TENANT—OVERHANGING TREE.—The recent decision of the English Court of Appeal in *Shirvell* v. *Hackwood Estates Company Limited*,[1] cannot be said to assist in the elucidation of the difficulties which abound in that field of law relating to the liability of occupiers of premises for damage caused by the dangerous condition of those premises. A somewhat related and equally difficult field of law concerned with the liability of the landlord for damage caused to his tenant or his tenant's invitees by the dangerous condition of the demised premises when confused with the liability of an occupier, does not assist in the clarification of either branch of the law. Such seems to be the situation in the *Shirvell Case*.

The defendant's predecessor in title leased part of an estate to the plaintiff in January 1936. At that time near the boundary of the demised land stood a beech tree which was then in a dying condition and a branch of which projected above the plaintiff's land at a height of forty feet. In February 1936 the defendant purchased the entire estate of his predecessor in title, subject to the lease of the plaintiff and thus became the occupier of the land on which the beech tree stood. In May 1936 the branch of the tree fell upon and killed a servant

[24] [1935] 2 W.W.R. 134.
[25] [1936] 3 W.W.R. 478.
[1] [1938] 2 K.B. 577.

of the plaintiff who was working on the plaintiff's land. The plaintiff, having paid compensation to the widow of the deceased servant under the Workman's Compensation Act, brought an action against the defendant under the provisions of that act for an indemnity. As the plaintiff was suing, in effect, in right of the deceased man, two questions arose for decision: (1) Did the defendant owe a duty of care towards the deceased person? and (2) Did the defendant fail to fulfil its duty of care, that is, was the defendant negligent?

The Court of Appeal held that the action did not lie, Greer L.J. and Bennett J. holding that there was no duty of care owing either to the plaintiff as tenant of the defendant or to the plaintiff's servant. MacKinnon L.J. found it unnecessary to discuss this question because in any event he found the defendant had used due care, a conclusion from which Bennett J. differed. The importance of the case, therefore, lies in the question of duty or no duty.

The duty of an occupier of premises not to allow his premises to remain in a condition likely to cause damage to persons in the exercise of an independent right, such as passers-by on the highway or occupiers of adjoining property, seems clearly established. Whether one approaches such duty from the standpoint of negligence or nuisance seems for present purposes immaterial. Certainly if an occupier of premises knows, or as a reasonable man should know, that the condition of property in his occupation is likely to cause harm to adjoining owners or to persons on the highway, he is liable for failure to use due care to avoid such harm.[2] Does the fact that the person threatened with harm happens to be a tenant of the occupier of the potentially dangerous premises affect the result? The decision of the Court of Appeal in the *Shirvell Case* would indicate that it did. This seems open to doubt.

It is true that the English cases have established that

> a landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any.[3]

This view has been followed in many instances and has the support of the House of Lords in *Cavalier* v. *Pope*[4] which

[2] This is stating the liability at its lowest. In many cases proof of negligence is unnecessary either under the "nuisance" theory or the doctrine of *Rylands* v. *Fletcher*. For a case involving a branch of a tree falling on persons on the highway, see *Noble* v. *Harrison*, [1926] 2 K.B. 332.

[3] *Robbins* v. *Jones* (1863), 15 C.B.N.S. 221.

[4] [1906] A.C. 428.

denied any remedy either to the tenant or persons invited on the premises by the tenant against the landlord for dangerous conditions of the property transferred to the control of the tenant. In cases like *Cavalier* v. *Pope* and *Robbins* v. *Jones* the principle seems to be that as the tenant takes the premises as they are on the doctrine of *caveat emptor*, the lessor can expect that the lessee will not permit persons to come on the property until the latter has put the premises in fit condition for their use.[5] In other words, as the lessee has possession and control of the premises he becomes liable as an occupier for the dangerous condition existing on those premises. There is no suggestion in the present case that the plaintiff knew or should have known of the dangerous condition of the tree, and there are grave doubts whether he could, in any event, have removed the branch in question as against his landlord.

It is true that the tenant accepted the premises with the overhanging branch, but did he accept the risk of that branch falling and injuring either himself or persons lawfully on his property? The Court of Appeal took the view that because he had leased premises which carried with them an element of danger from the overhanging branch, he was barred on the principle of *Cavalier* v. *Pope*, and the landlord owed no duty of care in respect to dangerous premises which he had leased to another. The question arises, however, whether the principle of those cases applies to a situation where the thing threatening danger is within the control of the landlord himself. In cases of that kind it would seem that ordinary principles of negligence applicable to adjoining owners might apply. For example, in *Cunard* v. *Antifyre*,[6] the defendant landlord leased certain flats to a tenant, retaining in his possession an overhanging roof. The plaintiff was the wife of a subtenant of the original tenant and could therefore be considered as a licensee of the tenant. She was injured by reason of the overhanging roof falling on her. The landlord was held liable on ordinary principles of negligence, the Court merely saying that "anyone in occupation and control of something hung over a place, in which people may be expected lawfully to be, is bound to take reasonable care that it does not fall and injure them". Greer L.J. distinguished this case on the ground that it did not appear that the roof was in a dangerous condition at the time the lease was granted to the original tenant, and he seemed to

[5] See the exhaustive analysis by BOBLEN, STUDIES IN THE LAW OF TORTS (Indianapolis, 1926) at pp. 67 *ff.*, 202 *ff.*

[6] [1933] 1 K.B. 551.

indicate that the decision might be wrong if it were inconsistent with decisions like *Cavalier* v. *Pope*.

It is submitted that there is nothing inconsistent in the decisions once it is borne in mind that the dangerous condition threatening harm was entirely in the control of the landlord. There is, it is true, an apparent difficulty in a case like *Cheator* v. *Cater*,[7] which was relied on by Bennett J. In that case the defendant landlord had leased part of the farm to the plaintiff, and on the part retained in his own possession stood yew trees, branches of which overhung the boundary between his own and the tenant's land. A mare of the plaintiff's ate some of the leaves and died. The defendant landlord was held not liable on the ground that the plaintiff had leased the premises as they were. The difference between such a case and the situations presented in *Cunard* v. *Antifyre* and *Shirvell* v. *Hackwood Estates*, is that the state of things as they actually existed at the time of the lease in *Cheater* v. *Cater* caused damage, whereas in the *Cunard* and *Shirvell Cases* no damage was caused until the conditions were changed and the branch was no longer merely an overhanging branch but a falling one.

Even though it be possible to argue as the Court of Appeal did that the tenant had accepted the risk of a dangerous situation which existed at the time of the lease, did the servant of the tenant accept this risk or is he not in exactly the same position as a passer-by on a highway who is in the exercise of an independent right as against a person who has it in his power to prevent a dangerous condition from injuring him? While *Cavalier* v. *Pope* did decide that if a tenant in the absence of a covenant to repair had no cause of action, persons on the tenant's property had no higher rights, it is doubtful whether the reasoning is strictly appropriate to cases similar to *Shirvell* v. *Hackwodd Estates*. In *Cavalier* v. *Pope*, as has been indicated, the thing causing damage was in the exclusive possession and control of the tenant and it is impossible to make that statement concerning the present situation. To say that the tenant assumes a risk from adjoining property of his landlord is an altogether different proposition than saying persons on the tenant's property take a similar risk. In raising doubts as to the validity of *Cunard* v. *Antifyre*, and in failing to distinguish between dangerous conditions in the sole control of the tenant and dangerous conditions in the

[7] [1918] 1 K.B. 247.

control of the landlord, it is the writer's opinion that the decision of the English Court of Appeal is bound to raise difficulties in future litigation.

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Since writing the foregoing an extremely valuable comment by Professor A. L. Goodhart on *Shirvell* v. *Hackwood Estates* has appeared in the October issue of *The Law Quarterly Review*.[8] Professor Goodhart in discussing the defence of the landlord based on *Cavalier* v. *Pope* and *Robbins* v. *Jones* comments as follows :

> It is for the lessee to examine the character of the house and land he is taking: unless the lease contains a special clause he assumes the risk of all defects which are not in the nature of traps. But as in the present case the tree with the overhanging branch remained in the possession of the lessor, a different set of circumstances must be considered, and it is necessary to determine what are the defects which a lessee impliedly accepts under such a situation. In the case of an overhanging branch, the lessee, when he takes the land, knows that the shade which it throws may prevent his crop from growing underneath it, and he cannot thereafter complain of this result. Whether he is entitled to cut off such a branch is doubtful: certainly if the overhanging thing were part of the roof of the adjoining house instead of a branch he probably would not be entitled to have it removed. But although the lessee takes his land subject to the inconvenience and detriment of such an overhanging branch, does it therefore follow, as the Court of Appeal has held in the present case, that he also accepts the risk that the branch may fall on his land? Or, to put the problem in another way, is it not correct to say that the tenant takes the land as it is with the branch in its overhanging position, but that he does not agree that the branch may fall on his land?

As a practical matter the observation of Professor Goodhart that a prospective lessee in view of this decision should "now send engineers to inspect his neighbour's adjoining house to determine whether the overhanging roof is safe" is one that should come as a considerable shock to prospective tenants. It is difficult enough to be forced to accept the incongruity of decisions like *Otto* v. *Bolton*[9] (reaffirming as it did the non-liability of vendors of land for dangerous conditions) with the principles laid down in *Donoghue* v. *Stevenson*.[10] It is even more difficult to realize than an occupier of land may not be under any duty of care to persons outside his premises simply because they happen to be on property demised to a tenant.

C. A. W.

[8] (1938), 54 L.Q.R. pp. 459 - 462.
[9] (1936), 52 T.L.R. 438.
[10] [1932] A.C. 562.

STARE DECISIS.—In *Stuart* v. *Bank of Montreal*,[1] Anglin J. after a review of numerous English cases stated that "it is fairly well established, therefore, that the English Court of Appeal now holds itself bound by itself on previous decisions in matters of law. Since the express decision of that Court in *Pledge* v. *Carr*, [1895] 1 Ch. 51, it is quite improbable that any of its members will in the future hold that the Court is at liberty, even for grave reasons, to disregard such decisions." There have been other recent decisions in England in which the English Court of Appeal has felt itself bound by its own decisions.[2]

In view of these decisions recent statements of the English Court of Appeal in the *In re Shoesmith*[3] are worth noting. In that case Greer L.J. stated :

> I wish to repeat what I said in the course of the argument, that the Court has more than once, sitting as a Court with all its six members, decided that it can overrule a decision of the Court of Appeal which has held the field for a number of years. If the Court of Appeal, sitting with its six members, can do so, equally a Court sitting with a quorum of members can do the same thing. Although, as a matter of courtesy and of usual practice, this Court deems it right to follow its own decisions in earlier cases, there is no rule of law which compels it to do so.[4]

With this view Slesser L.J. agreed.[5]

The point in issue in *In re Shoesmith* was a very narrow one dealing with the question whether obtaining leave of the High Court for the institution of an action was a matter of practice and procedure. The importance of the point lay in the fact that if it were, an appeal would lie to the Court of Appeal, whereas if it were not, an appeal would lie to the Divisional Court. The Court of Appeal could not agree on this problem. It is this type of question that causes so much distress to the layman as he observes the mounting costs in litigation.[6] The following language of MacKinnon L.J. affords a striking contrast to the language of judges in the days when technicalities and points of practice could be debated for pages by His Majesty's Counsel and His Majesty's Judges.

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[1] (1904), 41 Can. S.C.R. 516 at p. 547.

[2] See, for example, *Produce Brokers Co.* v. *Olympia Oil and Cake Co.*, [1916] 1 A.C. 314 at pp. 318, 331-2; *Newsholme Bros.* v. *Road Etc. Insurance Co.*, [1929] 2 K.B. 356 at p. 375.

[3] [1938] 2 K.B. 637.

[4] At p. 644.

[5] At p. 645.

[6] See the article by Webber, *The Reform of Legal Procedure* (1938), 16 Can. Bar Rev. 622.

Conceiving, as I do, that the purpose of this, or any other Court, is to do justice between the parties who appear before it, it does seem to me to be monstrous that our time has been taken up in trying to decide whether, on the obscure words of an Act of Parliament, parties have rightly come to this Court or ought to have gone to another room down the corridor in which three other judges are, or may be, sitting as a Divisional Court. This obscure problem puts the parties and their advisers in the extremely difficult and potentially expensive position of having to know to which Court they ought to go. In this case the present appellants came here and it is objected that they ought to have gone there. If they had gone there, so nice is the question involved that I think it highly likely that there they would have been met with the objection that they ought to have come here.