THE CANADIAN BAR REVIEW

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☞ Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 2, Ontario.

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CASE AND COMMENT

VANDEPITTE'S CASE DISSECTED

A Note on Third-Party Insurance.

One of the most important decisions of recent years regarding automobile insurance is that of the Privy Council in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York*, [1933] A.C. 70, which has been repeatedly cited both in England and Canada as authority for the proposition that what are known as "omnibus" clauses[1] in insurance policies are of no effect at common law. The decision has been adversely criticised,[2] and an analysis of the judgment of the Court, which was delivered by Lord Wright, to discover exactly what was decided, and upon what grounds, may be informative.

The facts were as follows. The appellant obtained judgment against R.E.B's daughter in the Supreme Court of British Columbia as a result of a motor accident which was caused by

[1] In the instant case the clause ran as follows: "The foregoing indemnity provided by sections D and/or E shall be available in the same manner and under the same conditions as it is available to the insured to any person or persons while riding in or legally operating the automobile for private or pleasure purposes, with the permission of the insured, or of an adult member of the insured's household other than a chauffeur or domestic servant. . . ."

[2] See 1933 Annual Survey of English Law, p. 120; 49 L.Q.R. pp. 474-476; 33 Col. L.R. p. 749, vol. XXXIII, p. 749.

her negligent driving of R.E.B's car. R.E.B. had insured his car with the respondents, who contracted to indemnify him against third party risks, and to make the indemnity available to any person driving the car with R.E.B's permission. The appellant sued the respondent in respect of her unsatisfied judgment, claiming that R.E.B's daughter came within the scope of the policy, and that under sec. 24 of the Insurance Act of British Columbia[3] her right of action was transferred to the appellant. It was held (to quote from the headnote) "that the Act applies only where the person liable under the judgment is insured by an actual contract in law, and that the action failed, as there was no evidence that B had contracted on behalf of anybody but himself; even if the section had a wider application the action failed, because there was no evidence that B intended to create a beneficial interest for his daughter, nor did the fact that the respondent conducted the defence of the action raise an estoppel available to the defendant".

Apart from the question of estoppel, a matter of practice with which we are not concerned here, it may be said that the appellant sought to fix the respondent with liability upon two grounds:—

1 That Jean B. (R.E.B.'s daughter) was an actual party to the contract of insurance.

This could be done only by considering R.E.B. to have been the agent,[4] either express or implied, of his daughter at the time when he made the contract; and in respect of this contention the following points should be noted:—

(a) The Judicial Committee held that the wide terms of the contract would cover only such persons as were in the contemplation of R.E.B. at the time of making the contract, and intended by him to be covered by it; and they further held that there was no evidence that R.E.B. intended to insure anyone but himself.

This, with all respect, seems to deny the obvious facts. The mere presence of this clause, which is quite a common one in such policies, and is in fact normally honoured by insurance companies, both in England and Canada, is evidence that he meant the policy to cover others than himself. Why mention others at all if he intended to insure himself only?

[3] Chapter 20, of 1925.

[4] In point of actual fact, of course, it is absurd to say that a motorist, and particularly an owner-driver, effects a third party insurance, not for his own benefit, but solely in order to protect members of his family and such other as he allows to use the car.

(b) It was held as fact that R.E.B. had no authority to contract on behalf of Jean B., and that at no time did she purport to adopt or ratify any insurance, even if it was made on her behalf.

It is undeniable that a person in possession of goods can effect an insurance on them without the consent of the owner, who may later ratify the policy and sue on it as a party,[5] but that is not exactly parallel with the present case, and as it is true that there was no evidence of ratification by Jean B. there is some substance in this objection.

(c) It was also said that Jean B. furnished no consideration.

But assuming for the moment that Jean B. *had* adopted her father's act or in any other way constituted him an agent for her, is this necessary? If A, in consideration of money paid by him alone, obtains a promise from X that X will do something for the benefit of A *and* B, surely B can sue on this. Lord Atkin in *McEvoy* v. *Belfast Banking Company*, [1935] A.C. 24, at p. 43, said:—

> The suggestion is that where A deposits a sum of money with his bank in the names of A and B, payable to A or B, if B comes to the bank with the deposit receipt, he has no right to demand the money from the bank, or sue them if his demand is refused. The bank is entitled to demand proof that the money was in fact partly B's, or possibly that A acted with B's actual authority. For the contract, it is said, is between the bank and A alone. My Lords, to say this is to ignore the vital difference between a contract purporting to be made by A with the bank to pay A or B, and a contract purporting to be made by A and B with the bank to pay A or B. In both cases payment to B would discharge the bank, whether the bank contracted with A alone or with A and B. But the question is whether, in the case put, B has any rights against the bank if payment to him is refused. I myself have no doubt that in such a case B can sue the bank. The contract on the face of it purports to be made with A and B, and I think with them jointly and severally. A purports to make the contract on behalf of B as well as himself, and the consideration supports such a contract *ab initio*. If he has not actual authority, then subject to the ordinary principles of ratification, B can ratify the contract purporting to have been made on his behalf, and his ratification relates back to the original formation of the contract.

So here, on the supposition that R.E.B. *was* acting as agent for himself and the other people described in the policy, including

[5] See *Waters* v. *Monarch Life Assurance Co.* (1856), 5 E. & B. 870, especially *per* Lord Campbell C.J. at p. 881.

Jean B., it should be no objection to say that Jean B. furnished no consideration.

(d) The most insuperable objection to regarding Jean B. as an actual party to the contract was that she showed no *animus contrahendi*, either at the time it was concluded or by subsequently adopting it.

"There is here," the Court said, "no evidence that Jean B. ever had any conception that she had entered into any contract of insurance." Incidentally, it is pointed out in 49 *Law Quarterly Review* at p. 475 that "it is difficult to see how evidence of ratification could ever be obtained in a case where the driver did not wish to enforce the policy."

It is obvious, then, that in spite of the fact that some of the arguments advanced against it were specious and superficial, the appellant could not have succeeded in showing that Jean B., through the agency of her father, became an actual party to the contract of insurance.

(2) *Alternatively, it was sought to base the liability of the respondent on the proposition that Jean B. was "a party in equity".* In other words, that R.E.B. had constituted himself a trustee for her, and had contracted or had at least included this term in the contract for her benefit.

The judgment notes some of the cases in which a third person for whose benefit a contract has been made has been allowed to sue on the contract[6] and admits that this is not a novel suggestion. It goes on to say that where such a right is proved the action should be in the name of the contracting party who constituted himself a trustee, or if he refuses to sue, he should be joined as a defendant. But seemingly this was regarded as a minor objection, there being no strong expression of opinion on the point, and it is probable that had the Judicial Committee found that the facts justified the application of this principle, they would not have dismissed the suit because of the non-joinder of R.E.B., either as a plaintiff or a defendant.

(a) The first criticism the judgment makes regarding the application of this principle is that the intention to create the trust must be affirmatively proved.

Though they do not say as much, it is clear that their Lordships were not satisfied that this had been done, and they

[6] *Robertson* v. *Wait* (1853) 8 Ex. 299: *Lloyd's* v. *Harper* (1880), 16 Ch.D. 290: *Affréteurs Réunis S.A.* v. *Walford*, [1919] A.C. 801.

refer to *Irving* v. *Richardson* (1831), 2 B & Ad. 193, "where a mortgagee effected in the usual form an insurance on the full value of his ship. He claimed to recover the full amount, which was in excess of his mortgage debt, on the general principle. . . that a mortgagee may insure on behalf of, and for the benefit of, other persons interested as well as for his own benefit. . . . It was held that the plaintiff was not entitled beyond the extent of his mortgage debt, because he did not satisfy the jury of his actual intention in effecting the insurance to cover more than that."[7]

This is rather misleading. That case concerned, as Lord Wright said, "a usual form of insurance", (though in fact the report does not say anything about the form of the policy) with nothing to show on the face of it what or how much the interest of the insured was. On a claim under the policy he alleged that it was to cover both his interest as mortgagee and that of the mortgagor. The determination of this question was left to the jury, and on a motion for a new trial, this was approved; and rightly so. But the language used in the policy which gave rise to Vandepitte's action distinctly mentioned other people interested. Is that not *prima facie* evidence, and in the absence of anything else, sufficient to "prove affirmatively the intention to constitute a trust"?

Further, in the cases mentioned in the judgment,[8] it is submitted that the language used shows that it is sufficient if the contract is in fact for the benefit of the third party, and that the intention of the promisee is often immaterial.[9] In two of these cases the third party was what is commonly called in the United States of America a creditor-beneficiary, *i.e.*, he was a person to whom the promisee was under an obligation, and the promisee's prime motive in such cases, so far as that can be ascertained, is to rid himself of the obligation by throwing it on to the promisor. The fact that that action is beneficial to the third party, for whom he is considered to be a trustee is often, indeed normally, of no consequence to him at all

Vandepitte's Case, on the other hand (like *Lloyd's* v. *Harper*), is an example of the donee-beneficiary type of case, *i.e.*, where the

[7] At p. 80.

[8] See *supra*, note 6.

[9] So long, of course, as the advantage to the beneficiary is not completely incidental and casual, as in the following case: A Railway Company contracts with A, a manufacturer in town M to extend its line to M, which would enhance the value of land held by X, a large property owner in that district. If, for any reason, the deal falls through, X would have no right of action against either party, for such benefit as would result to him would be purely incidental to the purposes of the contract.

sole object of one of the contracting parties in entering into the contract, or at least in including some particular provision, is to confer a benefit upon the third person. R.E.B. was not, at the time of insuring, or at any time thereafter, under any obligation to Jean B. in respect of the car, and he could not have effected that insurance to rid himself of any such liability. Consequently the only possible object in naming her, by implication, as one of a class, in the policy, must have been to benefit her if the event insured against came to pass.

(b) It was said that R.E.B. did not intend to create a beneficial interest for Jean B.

This point is dealt with in the last paragraph, and it is also open to the objections that are advanced under 1 (a) above. In 1924 Roche J. (as he then was) in *Williams* v. *Baltic Insurance Company*, [1924] 2 K.B. 282 had held that such a clause was intended to create a beneficial interest, but the Judicial Committee, without criticising or distinguishing the decision, merely reported that they "had not been able to derive from that case any principles helpful to the issue now before the Board".

(c) A further objection to the application of the trust conception in this case was that this doctrine relates to benefits under a contract, "whereas in an insurance such as that contended for, serious duties and obligations rest on any person claiming to be insured, which necessarily involve consent and privity of contract".[10]

It is difficult to advance any argument against such a vague statement as this, but it is obvious that where there is a *cestui que trust* there must be a trustee who will satisfy the precious privity, and that there can be no complaint if his "serious duties" are performed by the *cestui que trust*, and that the fulfilment of the equally "serious obligations" will be a condition precedent to any relief granted to him or to the *cestui que trust*. And there can be no objection if the beneficiary brings the action in the promisee's name, as in *Waters* v. *Monarch Life Assurance Company* (1856), 5 E. & B. 870, where a warehouseman carried a floating policy on goods held in trust and on commission in his warehouse, unknown to the owners of the goods; and on their being damaged by fire he was permitted to recover their full value as trustee for the owners.

[10] At p. 81.

(d) The last objection was that R.E.B. had no insurable interest in the personal liablity of Jean B, and so, under sec. 10 of the British Columbian Statute, the policy was void as regards that particular risk, even if trusteeship could have been proved to the satisfaction of the Board.

This point also arose in *Williams* v. *Baltic Insurance Company*, [1924] 2 K.B. 282, where Roche J. held that a similar policy was primarily an insurance on goods, and that it only incidentally covered third party risks. Consequently it enjoyed the exemption conferred by sec. 4 of the Life Insurance Act, 1774,[11] on *bona fide* insurances on goods, from the provisions of secs. 1 and 2 of the same Act, requiring the names of beneficiaries to be inserted in a life policy and invalidating an insurance on the life of any person in whom the insurer has no interest.

The British Columbian Statute, however, contained no such exception as this, so *Williams' Case* was not analogous here, and the decision that under that Act the policy was void insofar it purported to cover Jean B. was undoubtedly correct (Though as Roche J. pointed out in *Williams' Case*, and this is just as applicable in British Columbia as in England, it would surprise the many holders of such policies to learn that they had taken out gaming policies.)

Enough has been said to show the unsatisfactory nature of this decision, and it would be much better for the development of the law and for the protection of persons who insure property if it were treated as a decision interpreting a particular statute and nothing more. Nevertheless the Saskatchewan Court of Appeal in *Crown Bakery* v. *Preferred Accident Corporation of New York*, [1933] 4 D.L.R. 117, unanimously decided that though there was no Saskatchewan statute comparable to sec. 10 of the Insurance Act of British Columbia, *Vandepitte's Case* should be followed, and in the main judgment (delivered by Martin J.A.) it is clearly stated that the Privy Council's decision is of general application.[12]

In *Hornbrook* v. *Toronto Casualty and Marine Insurance Company*, [1934] 1 D.L.R. 350, where the insured himself sued as trustee for the driver, *Vandepitte's Case* was followed by the British Columbia Court of Appeal, though with reluctance by McPhillips J.A., who though that the case exhibited "sub-

[11] 14 Geo. III, c. 48.

[12] In *Halle* v. *Canadian Indemnity Company*, [1937] 3 D.L.R. 320, the Supreme Court of Canada decided that *Vandepitte's Case* was not binding in Quebec, and did not affect the right of persons indicated by an "omnibus" clause to sue the insurer there.

stantial differences which would have. . . . modified the opinion of their Lordships". These differences seem to be (1) that the insurer and the driver, who had been condemned to pay damages, were co-plaintiffs, and (2) that the driver here had an insurable interest. As far as (1) is concerned, that fact can make no difference if, as the Judicial Committee says, an "omnibus" clause in a motor insurance policy is "merely a promissory representation or statement of intention on the part of the insurers, not binding in law or equity". In support of (2) McPhillips J.A. said, ". . . the moment (the driver) took the car out with the possibility of an accident he had an insurable interest, and he was insured under the policy." But this does not differ from *Vandepitte's Case*, where it was never denied that Jean B. had an insurable interest in this sense. What the Board did say was that *her father* had no insurable interest in *her possible liability*.

Most of the provinces have now sought to overcome the difficulties disclosed by the Vandepitte decision by legislation which creates a statutory contract between the insurer and every person who drives the car with the insured's consent. Such an amendment[13] in British Columbia was discussed in *Bennett* v. *General Accident Assurance Co.* (1935), 50 B.C.R. 316 where the only question before the County Court was whether the driver did actually have the insured's consent, and it was admitted that if this could be proved the insurer would be liable to indemnify him.

It should be pointed out, in conclusion, that in view of the provisions of the English Road Traffic Act, 1930,[14] the facts of *Vandepitte's Case* would almost certainly have led to a different decision in England. Sec. 36 (4) of that Act (the drafting of which has hardly commended itself to the Bench) provides that:—

> Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section *i.e.*, a policy of insurance against third party risks] shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.

Shortly after the passing of this Act there was some discussion as to how far this section extended; whether it was of general

[13] Insurance Act Amendment Act, 1932 (c. 20), 159. The events which gave rise to *Hornbrook's Case* (heard by the B.C. Court of Appeal in 1932 and reported in 1934) occurred in 1929.

[14] 20 & 21 Geo. V. c. 43.

[15] See *per* Scrutton L.J. in *Jones* v. *Birch Bros. Ltd.*, [1933] 2 K.B. 597 at p. 608.

application, reversing the rule said to be established by *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393,[16] so far as this type of insurance was concerned, or whether the five opening words were a denial that the Act was intended to effect any changes in the common law, as opposed to statute.[17] However, Greer L.J. in *McCormick* v. *National Motor Union* (1934), 40 Com. Cas. 76 at p. 90, made the following remarks *obiter*:

> I think it is quite clear that the section was intended to meet the difficulty that was patent; first that nobody who was not a party to a contract could bring an action on the contract; and secondly by reason of the statutory and well known law that a person who has no interest in the subject matter of an insurance cannot claim the benefit of that insurance.

And in *Tattersall* v. *Drysdale*, [1935] 2 K.B. 174, the point came up for actual decision by Goddard J. This was an action on a policy which declared that "this insurance shall extend to indemnify any person who is driving on the assured's order or with his permission", by a person who, when driving with the assured's permission, had been involved in an accident, and was subsequently ordered to pay heavy damages in respect thereof. He claimed an indemnity from the insurance company, and the learned judge explained the section as follows:—

> In *Williams* v. *Baltic Insurance Company* it had been held by a Court of first instance that this Act (the Life Assurance Act, 1774) did not apply to a policy of motor insurance, and it seems therefore that this provision is inserted to preserve the decision to that extent, and to guard against the possibility of a higher Court taking a different view.[18]

He referred to the remark in *Vandepitte's Case* that "this clause confers no right on such a (third) person, either at common law or in equity unless there was an intention on the part of the assured to create a trust for such person, or unless the assured was acting with the privity and consent of such person so as to be contracting on his behalf", but he held that the Road Traffic Act had conferred a right of action, and thereby abrogated the rule as far as its scope extended.

Although the actual decision in this case is enlightened and liberal, and one of the all too few that can be said to be in accord with the spirit of the third party provisions of the Road Traffic

[16] That only persons liable to be sued under a contract could bring action upon it.
[17] See (1933), 75 Law Journal, pp. 236, 252, 314, 330 and 351.
[18] At p. 180.

Act, it must be admitted that by implication it suggests that the wide generalisations that were made in *Vandepitte's Case* are now part of the common law, and that in the absence of statutory provision the protection afforded by an insurance policy is, in general, available only to those who are parties to the contract.

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NEGLIGENCE—LIABILITY TO TRESPASSERS.—The judgment of McDonald J. in the British Columbia case of *Hiatt* v. *Zien and Acme Towel & Linen Supply Ltd.*[1] marks a more liberal approach to the question of liability for damage caused to trespassers, licensees, invitees, etc. This department of law, which is usually dealt with under the heading of the liability of an occupier of premises for harm done to persons on the premises, while in reality but one specialized branch of the general law of negligence, has become so cluttered with classifications of the character in which persons enter on the premises that the main problem of negligence often bids fair to be lost in the very endeavour to characterize or describe the class in which the plaintiff should be placed.[2]

It is commonly said that the occupier of premises owes no duty to a trespasser, whether such trespasser be an adult or an infant, other than to refrain from wilful acts calculated to injure such trespasser.[3] Examination of the long and confusing line of cases dealing with this problem shows that such a broad generalization cannot be relied upon. In particular the decision of the House of Lords in *Excelsior Wire Rope Company* v. *Callan*,[4] as explained by the Court of Appeal in *Mourton* v. *Poulter*,[5] is extremely difficult to reconcile with the leading modern English case on the subject, *Addie & Sons (Collieries) Ltd.* v. *Dumbreck*,[6] while in Canada the decision of the Supreme Court of Canada in *C.P.R.* v. *Anderson*[7] raises additional difficulties and seems to

[1] [1939] 2 D.L.R. 530.

[2] See the series of articles by A. L. MacDonald, in 7 Can. Bar Rev. 665, 8 Can. Bar Rev. 8, 184, 344.

[3] *Addie & Sons (Collieries) Ltd.* v. *Dumbreck*, [1929] A.C. 358. See also *Grand Trunk Railway of Canada* v. *Barnett*, [1911] A.C. 361; *Canadian Pacific Railway* v. *Anderson*, [1936] S.C.R. 200.

[4] [1930] A.C. 404.

[5] [1930] 2 K.B. 183. See 46 L.Q.R. 393.

[6] [1929] A.C. 358.

[7] [1936] S.C.R. 200.

reaffirm to a considerable extent the wide doctrine of no liability to trespassers.

In *Hiatt* v. *Zien and Acme Towel & Linen Supply Ltd.*, McDonald J. used language which indicated that in his view it followed from the *Excelsior Wire Rope Case* that an occupier of premises owed a duty of care to persons who *might be expected* to be on his property but of whose actual presence the occupier was unaware. Stated in this bald manner it seems unlikely that such a general proposition would find support in the English or Canadian cases,[8] although from the standpoint of the general doctrine of negligence it has much in its favour, particularly when viewed in the light of the particular facts presented to the Court.

One of the difficulties in cases involving liability to trespassers, is the failure to make a distinction between different types of fact situations, which results in treating several dissimilar things under a general rubric. In connection with trespassers the cases seem to illustrate four situations which require different solutions and a difference in legal rule. Thus, (1) the presence of a trespasser may be unknown and unexpected; (2) the presence of a trespasser may be either known or reasonably to be expected; (3) damage to a trespasser may be caused by an existing static condition of the premises; or (4) damages to a trespasser may be caused by a positive act of misfeasance.

It seems reasonably clear that as a general rule an occupier of premises should not as a reasonable man have to expect the presence of trespassers on his property and consequently there can be no reasonable foreseeability of harm, the basis of any duty in a negligence action. On the other hand if an occupier of premises can reasonably foresee that certain persons are likely to be present on property which contains a risk of harm towards those in the immediate vicinity, a different situation arises. To meet this case courts have frequently used the fiction of tacit licensee[9] and have treated persons who were clearly trespassers as in the category of persons permitted to use the premises.[10] Thus, even in the *Hiatt Case*, McDonald J. was willing to consider the plaintiff, who was undoubtedly a trespasser, as a licensee if it were necessary to hold in his favour. This judicial legerdemain does not seem helpful from the point

[8] *Cf. Addie* v. *Dumbreck* and *C.P.R.* v. *Anderson, supra.*

[9] *Cf. Lowery* v. *Walker*, [1911] A.C. 10, and the manner in which *Cooke* v. *Midland Gt. West Ry.*, [1909] A.C. 229 has been treated in the subsequent case law in England.

[10] When warnings to "Keep out" have been repeatedly given it seems a plain untruth to treat persons who still persist on entering the presmises as "licensees", yet their are several instances of this in the reports.

of view of clarification of thought, and if a person's presence can reasonably be foreseen, whether he be a trespasser or not, it would seem that the cases impose *some* duty of care. To find such duty a further distinction, not always clearly expressed, must be made. Thus, for example, towards a trespasser, even though his presence might be expected, the cases seem clear to the effect that there is no affirmative obligation on the occupier to render those premises safe for such a person.[11] On the other hand, if an occupier is conducting certain activities on his land, it seems only proper that he should act with reasonable regard to those persons whose presence might be expected.[12]

The cases are reasonably clear to the effect that if a trespasser's presence is actually known to the person conducting activities fraught with an unreasonable risk of harm, liability should follow.[13] It is much more doubtful in view of cases like *C.P.R.* v. *Anderson* and *Addie* v. *Dumbreck*[14] whether this liability extends to persons of whose presence the occupier *ought reasonably to know*. It is submitted that there is sufficient in the case law to justify such an extension, and as such an extension is in keeping with the general doctrine of negligence it is preferable to classifying, contrary to common sense, trespassers as licensees.

In *Hiatt* v. *Zien* the plaintiff had made use of a vacant lot of the defendant company in order to turn his truck. Other persons had used the lot for this purpose for some time. A servant of the defendant company ran his truck into the plaintiff. As the presence of such persons as the plaintiff ought reasonably to have been expected the Act of the defendant's servant was negligence in law since he failed to keep a proper look-out for persons likely to be in his path.

An effort was made in the British Columbia Court of Appeal recently (in *Power* v. *Hughes*[15] by the dissenting judge O'Halloran J.) to bring the confused law regarding liability for defective premises into accord with broad principles of tortious liability.

[11] Even a licensee takes the premises as he finds them provided there is nothing that savours of fraud, i.e., a failure to disclose known defects.

[12] This, in reality, is not a liability of an occupier at all. For example, a person driving on a highway owes a duty of care to persons who may be unlawfully on the highway, e.g., without a driving permit. *Godfrey* v. *Cooper* (1920), 46 O.L.R. 565.

[13] See *Excelsior Wire Rope Company* v. *Callan*, [1930] A.C. 404; *Mourton* v. *Poulter*, [1930] 2 K.B. 183.

[14] *Supra*.

[15] [1938] 4 D.L.R. 136; [1938] 2 D.L.R. 534. In this case the difficulty centred upon finding a classification for the wife of a tenant who was injured by reason of a defect of a common balcony in the control of the landlord. She was by the majority of the court classified as a licensee.

While the effort failed in that case, the present judgment is a further indication that British Columbia at least is making an attempt to simplify a branch of law which has become over-refined and out of touch with the modern advance of negligence.

C. A. W.

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APPLICATION OF DONOGHUE V. STEVENSON TO REALTY—NEGLIGENCE IN INSTALLING FIXTURE—LIABILITY OF CONTRACTOR—INTERMEDIATE INSPECTION—PROOF.—In *Johnson* v. *Summers*,[1] Adamson J. of the Court of King's Bench, Manitoba, applied the doctrine of *Donoghue* v. *Stevenson*[2] to the case of an alleged negligent erection of a fixture in a house, apparently accepting the submission of *Charlesworth* in *The Law of Negligence*, that "the principle of that case is not restricted to the negligent manufacture of chattels but includes the negligent manufacture or building of houses, stands and other things attached to the land".[3] In so doing, the learned Judge gave the *Donoghue Case*, and *Grant* v. *Australian Knitting Mills*,[4] by which he held himself bound, an extension not yet achieved in England,[5] but which has some support in the United States.[6]

The facts in *Johnson* v. *Summers* were these: S. installed a radiator in a house, which was supported on brackets attached to the wall some distance from the floor and was held in at the top by two four-inch screws which passed through sections of the radiator into the wall. J., an employee of the occupant of the house, was injured when the radiator fell upon her foot while she was engaged in doing housework. The Court found as a fact that the radiator fell because it became loose or unfastened at the top. It was common ground that the screws to be effective had to go into a joist. S. testified that he had inspected the radiator and had tested it by pulling and shaking, and that he had found it solid. There was insufficient evidence, however,

[1] [1939] 1 W.W.R. 362.
[2] [1932] A.C. 562, 101 L.J.P.C. 119.
[3] P. 191. The author also says at p. 192 : "It is submitted that in the case of a house, a negligent builder is liable for his negligent act of building and is not relieved from liability because he happens to sell the house as well as to build it."
[4] [1936] A.C. 85, 105 L.J.P.C. 6.
[5] See *Otto* v. *Bolton & Norris*, [1936] 2 K.B. 46, 105 L.J.K.B. 602.
[6] Liability of lessors and vendors of real property for damage caused by the defective condition of the premises is still narrowly confined in the United States but there are extensions which as yet have not appeared in England. See RESTATEMENT OF TORTS secs. 351 - 372; HARPER, TORTS, secs. 101, 103.

as to whether the screws had struck the joist and, if so, how far in they went. The Court assumed that there was negligence, but dismissed J.'s action on the ground that there was no evidence that the radiator had not been interfered with. The case raises three problems: (1) Did S. owe a duty to J. to take care that she should not be injured by reason of his negligent installation of the radiator? (2) Was there any question of S. being insulated from liability on the ground of intermediate inspection? (3) Was the Court's ruling correct on the question of proof?

(1) On principle, this question presents little difficulty, but the effect of *Johnson* v. *Summers* requires a consideration of the doctrine of the *Donoghue Case* in connection with what Scrutton L.J. said was "well-established English law," namely, "that, in the absence of express contract, a landlord of an unfurnished house is not liable to his tenant, or a vendor of real estate to his purchaser, for defects in the house or land rendering it dangerous or unfit for occupation, even if he has constructed the defects himself or is aware of their existence."[7] *Cavalier* v. *Pope*,[8] *Robbins* v. *Jones*[9] and *Lane* v. *Cox*[10] show that this immunity of a landlord or vendor applied in respect of third persons rightfully upon the premises. Shortly before the decision of the House of Lords in *Donoghue* v. *Stevenson*, the Court of Appeal in England decided *Bottomley* v. *Bannister*.[11] The facts were that deceased took an unfurnished house from defendant who had installed a gas boiler with a special gas burner which if properly regulated required no flue. Deceased and his wife were killed by fumes. The case was determined in favour of the defendant on the ground, as stated by Lord Atkin in the *Donoghue Case*, that the apparatus was part of the realty and the landlord did not know of the danger.[12] It was dealt with also on the supposition that the gas apparatus was a chattel. As to this Lord Atkin made the following comment in the *Donoghue Case* :[13]

> Greer L.J. [in *Bottomley* v. *Bannister*] states with truth that it is not easy to reconcile all the authorities, and that there is no authority binding on the Court of Appeal that a person selling an article which he did not know to be dangerous can be held liable to a person with

[7] *Bottomley* v. *Bannister*, [1932] 1 K.B. 458, 468.
[8] [1906] A.C. 428.
[9] 15 C.B. N.S. 221.
[10] [1897] 1 Q.B. 415.
[11] [1932] 1 K.B. 458.
[12] [1932] A.C. 562, 582.
[13] *Ibid.*, 598.

> whom he has made no contract by reason of the fact that reasonable inquiries might have enabled him to discover that the article was in fact dangerous. When the danger is in fact occasioned by his own lack of care, then in cases of a proximate relationship the present case will, I trust, supply the deficiency.

Johnson v. *Summers* is clearly within the rule of *Donoghue* v. *Stevenson* if the radiator be considered a chattel. But it is of surpassing interest only in regarding the radiator as part of the realty.

One of the main arguments for the liability of the defendant in *Bottomley* v. *Bannister* was based upon cases dealing with the liability of a contractor, doing work negligently on another person's premises, to persons with whom he had no contractual relationship who were damaged by reason of his defective work.[14] As to this, Greer L.J. stated :[15]

> After *Cavalier* v. *Pope*, [1906] A.C. 248 in the House of Lords, and *Lane* v. *Cox*, [1897] 1 Q.B. 415, I cannot hold that these decisions apply to cases between the landlord and persons using the premises by license of the tenant. The result is unsatisfactory, because in the present case, if the landlord instead of doing the work himself before he sold the house, had done it afterwards as a contractor to Mr. Bottomley, he would have been liable if there was negligence on his part to have installed the . . . . . boiler without a flue.

Plainly *Johnson* v. *Summers* is distinguishable from *Bottomley* v. *Bannister* because in the former case S. who installed the radiator was a contractor who was not also the landlord.

That the principle of the *Donoghue Case* applies to contractors as well as to manufacturers is apparent from cases like *Stennett* v. *Hancock and Peters*,[16] in which liability was imposed upon a repairer for the negligent repair of a car belonging to another as the result of which a person on the street was injured; and *Malfroot* v. *Noxal, Ltd.*,[17] in which the male plaintiff recovered damages in contract and tort and the female damages in tort because of injuries sustained by them when a sidecar negligently fitted to the male plaintiff's motor cycle became detached while the plaintiffs were driving along a public road. Reference may be made also to *Brown* v. *Cotterill*,[18] where a mason who negligently erected a tombstone in a churchyard was held liable for injury caused to a passerby through a fall of the tombstone,

[14] *Parry* v. *Smith*, 4 C.P.D. 325; *Dom. Natural Gas Co.* v. *Collins*, [1909] A.C. 640; *Heaven* v. *Pender*, 11 Q.B.D. 503.
[15] [1932] 1 K.B. 458, 477.
[16] [1939] 2 A11 E.R. 578.
[17] (1935), 51 T.L.R. 551.
[18] (1934), 51 T.L.R. 21.

on the ground that the owner could not reasonably have been expected to examine the tombstone to see whether it was properly erected. Adamson J. in *Johnson* v. *Summers* alludes to the want of reason for reaching different conclusions as to liability in the case of negligent erection of a fixture in a house and in the case of negligent erection of a similar fixture in a railway coach or motor bus. The question that remains, however, is whether the application of *Donoghue* v. *Stevenson* should be denied in cases where the negligent contractor is also the landlord of the premises. In a situation like that in *Cavalier* v. *Pope*, it may perhaps be fair to confine the tenant to whatever rights he reserves against his landlord by contract, though even this may be illusory protection if landlords can refuse to warrant the fitness of a house and its freedom from defects. At all events, the tenant's licensees can claim no rights under his contract with the landlord and their claim to relief against the landlord can sound in tort only. Since the House of Lords exploded the "privity" fallacy in the *Donoghue Case*, the decision in *Cavalier* v. *Pope* would appear to invite reconsideration, unless landlords and vendors can reasonably lay claim to special treatment.

It is merely specious reasoning, of which the Court in *Bottomley* v. *Bannister* was plainly aware, to account for a difference in result because a negligent contractor is also the landlord of the premises on which he does work. While authorities can apparently be cited for the position, there is no logical reason why a defendant who enjoys the dual role of contractor and landlord should have applied to him a rule of law which exonerates rather than one which renders liable.

Atkinson J. had an opportunity to deal with the question raised by *Bottomley* v. *Bannister* in the light of the *Donoghue Case*. But in *Otto* v. *Bolton and Norris*,[19] he denied recovery to Mrs. O., who was injured by reason of the defective construction of the ceilings in a house built by defendants who sold it to Miss O. He held that there was nothing in the *Donoghue Case* to indicate that it applied to realty, and accordingly followed *Bottomley* v. *Bannister*. Winfield[20] comments on this decision as follows :

> It is difficult to see how the learned Judge could have reached any other conclusion; but the law is not satisfactory on this point, and it is quite likely that if no one had ever sued in tort for injury

[19] [1936] 2 K.B. 46.
[20] TEXT-BOOK OF THE LAW OF TORT, 589.

> arising from a ruinous house until after Lord Atkin's definition of legal duty in *Donoghue's Case*, the defendant in *Otto* v. *Bolton* would have been held liable, for he would have been the "neighbour" of the plaintiff within the terms of that definition. What conceivable difference is there between carelessly putting into circulation a dead snail in a bottle of ginger-beer and putting on the market a house so carelessly built as to be likely to cause death or grave injury? The exception which denies a remedy in the latter case had a very questionable historical origin and it gave such a charter of immunity to the jerry-builder that the Housing Act, 1925, made a partial qualification of it in favour of the tenant; but nothing except further legislation will confer any similar remedy on a third person injured in this way.

Clerk and Lindsell on *Torts*[21] also support the view that on the facts of *Otto* v. *Bolton and Norris* liability should have been imposed on the principle of the *Donoghue Case*.

While the views mentioned support the ruling as to duty of care in *Johnson* v. *Summers*, the case can be supported consistently with the *Otto Case* and with *Cavalier* v. *Pope* on the ground already mentioned, namely, that S. was a contractor only. It is true that Adamson J. states that "there is nothing in either the *Donoghue* or *Grant Cases* which would indicate that the principle of these cases was not of general application with proper safeguards."[22] But it is more probable that he was speaking generally of the application of the *Donoghue Case* to realty than that he had in mind as well the problem of the contractor-landlord. In any event, he takes a wider view than did Atkinson J. in the *Otto Case* who hesitated to extend the principle of the *Donoghue Case* to realty.

This wider view is also illustrated by the decision of Donovan J. in *Hammond and Hammond* v. *Davidson and Gibson Bros.*,[23] likewise a Manitoba case. The wife of a tenant who had been allowed in occupation prior to the beginning of his term under a lease was injured during the period of such occupation when she stepped into an opening in the floor of a clothes closet. The landlord hired contractors to replace a part of the flooring and to make incidental repairs. The contractors took the grating from an air vent in the floor of the clothes closet and neglected to replace it or to guard the opening at the end of their afternoon's work. Both landlord and contractor were held liable. "On the whole case," said Donovan J., "especially if from any doubt in law on a view of the facts of the wife's occupation

[21] 9th ed., 541.
[22] [1939] 1 W.W.R. 362, 366.
[23] [1939] 2 W.W.R. 97 (Man.).

negativing contractual relationship, I think the principle laid down in the *McAlister (Donoghue) Case* . . . . may be applied.[24]"

(2) The English authorities appear to favour the view that the probability of an intermediate examination will prevent liability from being imposed upon a negligent manufacturer.[25] Dr. Wright questions whether this should go to duty rather than to causation,[26] and points to the different results which would flow from a failure by a plaintiff to exercise a reasonable opportunity for inspection under a statute which permits apportionment of the degree in which the negligence of a plaintiff and defendant contributed to the injury.

Adamson J.'s discussion of this matter in *Johnson* v. *Summers* is very short. After distinguishing the *Otto Case* on the ground that there the Court held that there was some opportunity for discovery of the defect,[27] he remarks: "In this case the plaintiff, in entering this house for her day's work, could not be expected to, nor did anybody ever intend, that she should, test all the heavy fixtures for defects, nor does anyone suppose that she was qualified or could possibly discover any defects that existed."[28] In short, he negatives the "probability of examination", but gives no indication whether it goes to the defendant's duty to plaintiff or bears on the question of contributory negligence other than what is afforded by his distinguishing the *Otto Case* from the *Johnson Case* on the ground that in the former there was some opportunity for discovery of the defect. Since it was stated in the *Otto Case* that there was

[24] Ibid. 103 - 104.

[25] Goodhart, *Dransfield* v. *British Insulated Cables, Ltd.* (1938), 54 L.Q. Rev. 59; Wright, Case Note (1939), 17 Can. Bar Rev. 210. Cf. Branson J., in *Stennett* v. *Hancock and Peters*, [1939] 2 All E.R. 578, 583: "I think it right to say that, if upon the facts of the case, it had appeared that H. should reasonably have examined the wheel before putting it into use, and had failed to do so, then there would be a *novus actus interveniens* which would break the continuity necessary to make P. liable to the female plaintiff. I cannot think, however, that it would be right to say that a person who employs a skilled and competent repairer to repair his vehicle is omitting any duty which he owes to himself or to anybody else if he trusts to that man having done his work properly, and, in reliance upon that, takes the vehicle upon the road."

[26] *Ibid.*, 213.

[27] On this question Arkinson J. said in *Otto* v. *Bolton & Norris*, [1936] 2 K.B. 46, 58: "Now even if this principle [of the *Donoghue Case*] does apply to buildings which are sold by the man who has built them, it seems to me that it would still be impossible to hold that there was the necessary proximity between defendants and Mrs. O. There was nothing to prevent examination of the house on the intermediate purchase. Indeed, the well known absence of any duty in respect of the sale of a house makes examination usual and likely. The defect was not hidden or latent; the blobs were there plainly to be seen and would have put anybody, making a proper inspection, on his guard."

[28] [1939] 1 W.W.R. 362, 366.

no duty except a contractual one, there is ground for argument that Adamson J. considered the question of probability of inspection as going to duty. In this, he would be in accord with the English authorities. In *Hammond* v. *Davidson and Gibson Bros.*, a defence of contributory negligence was urged, as to which the Court said that the failure of the wife to take the precaution of lighting the dining-room fixture before stepping into the clothes closet was not unusual or negligent. There is no discussion in the case addressed specifically to the question of probability of inspection so that it would be unwise to conclude that Donovan J. in the *Hammond Case* considered that probability of inspection generally goes to causation. Undoubtedly the landlord and contractors were negligent in the *Hammond Case* and it was merely urged in the ordinary way that the female plaintiff had also contributed to her own injury.[29] Nevertheless it seems to be a sound argument that a person who creates a dangerous situation should not be relieved of liability simply because another person (who might be the plaintiff) had failed to act, as he should have, in a manner which would have avoided the danger.[30]

(3) The question of proof in *Johnson* v. *Summers* can be shortly disposed of on the ground that the facts proved left it doubtful whether there was negligence or not in installing the radiator so that plaintiff had to fail. Certainly the happening of the accident afforded no justification for the application of *res ipsa loquitur*,[31] especially in view of the fact that there was an interval of about four months between the installation of the radiator and occupation of the house by plaintiff's employer. No evidence was given as to the radiator during this period. Adamson J. held that proof had to be given that the radiator had not been interefered with and his conclusion was that, assum-

[29] *Cf.* Underhay, *Manufacturers' Liability; Recent Developments of Donoghue* v. *Stevenson* (1936), 14 Can. Bar Rev. 283, 296. See note in (1927), 40 Harv. L. Rev. 888, Tort Liability of Manufacturers and Contractors : Some Recent Developments, at p. 889 : "Ordinarily, to be sure, a contractor's work, unlike that of a manufacturer, is accepted by the buyer only after inspection. And it may be that where an article is installed on the buyer's premises instead of being merely delivered to his hands, the contractor is entitled to expect a great degree of care on the part of the buyer towards those who come in contact with it. But while the greater probability of intervening inspection in these cases may go to determine what is due care on the part of the contractor, this should not limit his liability to cases where there has been actual or constructive knowledge."

[30] *Cf.* Bohlen, *Liability of Manufacturers to Persons Other Than Their Immediate Vendees* (1929), 45 L.Q. Rev. 343.

[31] *Grant* v. *Australian Knitting Mills*, [1936] A.C. 85.

ing there was negligence, there was no evidence to find that it caused the accident. If he meant by this that the plaintiff had not shown that there was no probability of inspection or no intervening cause it would indicate that the burden of proving proximity lies on the plaintiff in the *Donoghue* v. *Stevenson* type of case as well as in the ordinary action for negligence.[32]

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WILLS—LOST WILLS—EVIDENCE—PROOF.—Ordinarily, in the language of Duff J. in *Clark* v. *The King*,[1]

> In civil proceedings the burden of proof being upon a party to establish a given allegation of fact, the party on whom the burden lies is not called upon to establish his allegation in a fashion so rigorous as to leave no room for doubt in the mind of the tribunal with whom the decision rests. It is, generally speaking, sufficient if he has produced such a preponderance of evidence as to shew that the conclusion he seeks to establish is substantially the most probable of the possible views of the facts. This proposition is referred to by Mr. Justice Willes in *Cooper* v. *Slade*, in these words : "The elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for the verdict."[2]

The learned judge was there making the distinction between the onus in civil proceedings and that which rests upon the Crown in criminal proceedings and which is usually referred to as proof of guilt beyond a reasonable doubt, or as it is sometimes put, proof which excludes "to a moral certainty all hypotheses inconsistent with guilt". The distinction between "proof" and "proof beyond a reasonable doubt" is one which is difficult to describe with accuracy, but its effect is well known in criminal cases and is apparently appreciated by a jury. In criminal proceedings

[32] *Cf.* CLERK AND LINDSELL, TORTS, 9th ed., 540 : "A person who does work on premises and leaves it negligently is liable for damage caused only within such a time as it might reasonably be expected the occupier or some other person would discover the defect and be able to have it guarded or remedied."

[1] (1921), 61 Can. S.C.R. 608 at p. 616.

[2] Compare the language of Lord Loreburn in *Richards Evans & Co.* v. *Astley*, [1911] A.C. 678; "It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise but courts, like individuals, habitually act upon a balance of probabilities."

the more onerous burden on the Crown is usually spoken of as founded on a strong policy of the law which finds expression in the presumption of innocence of an accused person.

The judgment of the Ontario Court of Appeal in *Re Craig*,[3] is an instance of a civil proceeding in which the Court stated that it would not act on a balance of probabilities but would require proof beyond a reasonable doubt, similar in effect to proof in criminal proceedings. The point in issue was whether the contents of a lost will had been sufficiently proved to be admitted to probate. There was no doubt that a will had been executed, and before the will was executed by the deceased, she had written out instructions which were to be given to the draftsman of the will. While the will was lost the instructions were retained by the deceased for a number of years and were found on her death. There was no evidence of the actual drawing of the will which would indicate with certainty that these in-instructions had been used by the draftsman. Other evidence which was given, however, pointed to the probability that the instructions embodied in this piece of paper had actually been used in drafting the will which was lost. Middleton J.A., dissenting from the majority of the Court, would have admitted such instructions to probate, apparently acting on the balance of probabilities. Robertson C.J.O. stated quite definitely, however, that "the question is not one of. . . the mere balance of probabilities. The question is whether the evidence is sufficiently cogent to establish beyond any reasonable doubt the contents of the will".[4] The majority of the Court of Appeal held that the evidence did not prove beyond a reasonable doubt that these instructions comprised the terms of the will. Therefore there was nothing which could be admitted to probate.

That there are civil cases in which this more stringent burden of proof is required is undoubted.[5] In the present case the majority of the Court proceeded on the ground that the "policy" of the Wills Act required something more than proof based on the ordinary accepted rule of a balance of probabilities.

Time and space does not permit in this place an examination of the curious treatment which English and Canadian courts have given to the "policy" of the Wills Act. At times rigid and technical proof of due execution of wills has been required,

[3] [1939] O.R. 175.
[4] At p. 182.
[5] See some of these discussed by the Court in *Clark* v. *The King*, *supra*, and see MacRae, Evidence, 4 C.E.D. (Ont.) at p. 764.

as is shown by such cases as *Hindmarsh* v. *Charlton*,[6] which insist on strict compliance with the literal interpretation of the Act. At other times by invoking the maxim *omnia praesumuntur rite esse acta* courts have admitted documents to probate where there was no proof at all of due execution.[7] The cases indicate throughout a conflict of two opposing policies, one, a desire to support the testamentary intention of a testator, the other a desire to give effect to rules regarding due execution.

If it be true that the normal method of succession on death is intestate succession, then one would expect to find rigorous proof demanded of the exceptional, that is, a will. In a manner of speaking the law does, theoretically, demand this in placing the burden of proof of capacity and execution on the proponent of the will. But, as the present writer has pointed out elsewhere,[8] Canadian decisions in particular seem in this instance anxious to support wills, and when capacity or undue influence is brought in issue, the cases frequently seem to place the burden of attack on those who resist admitting a document to probate. Such cases seem inconsistent with the rigorous attitude manifested in *Re Craig*. Furthermore, what is the "policy" of the Wills Act with regard to striking words out of a will for mistake? While it seems clear that the early cases refused to tamper with wills that had been duly executed on the ground that it was a "dangerous jurisdiction" to admit parol evidence for the purpose of rectifying, in a sense, wills of deceased persons, the modern practice of allowing great freedom in striking words out of a will for mistake seems to have become settled.[9] Similarly the whole doctrine of secret trusts raised by courts of equity on the theory of binding the conscience of a donee, seems, despite protestations of the courts, directly contrary to the provisions of the Wills Act and can only be explained by the desire of courts to support testamentary intentions of deceased presons provided they can find a suitable form of words in which to hide the fact

[6] (1861), 8 H.L.C. 160, and see *Chesline* v. *Hermiston* (1928), 62 O.L.R. 575 criticized by Shirley Denison, K.C. in 7 Can. Bar Rev. 199. Compare with these cases the conflict between strictness and good-natured laxity in the cases involving "presence" as a requisite to valid execution. *Casson* v. *Dade* (1781), 1 Bro. C.C. 99; *Goods of Piercy* (1845), 1 Rob. Eccl. 278; *Norton* v. *Bazett* (1856), Dea. & Sw. 259. See also 10 Can. Bar Rev. 55.

[7] See *Wright* v. *Sanderson* (1884), 9 P.D. 149; *Neal* v. *Denston* (1932), 48 T. L.R. 637; *Re Musgrove*, [1927] p. 264.

[8] (1938), 16 Can. Bar Rev. 405.

[9] *Cf. Stanley* v. *Stanley* (1862), 2 J. & H. 491 with *Morrell* v. *Morrell* (1882), 7 P.D. 68 and see Gray, *Sticking Words Out of a Will* (1912), 26 Harv. L. Rev. 212; Warren, *Fraud, Undue Influence and Mistake in Wills* (1928), 41 Harv. L. Rev. 309.

that they are violating a statutory provision.[10] The oft-repeated statement that the courts in construing a will "lean against an intestacy",[11] taken together with some of the illustrations given above, might indicate that English law manifested the *favor testamenti* of the Roman law.[12] Other cases such as *Re Craig* and those cases in Canada, such as *Re MacInnes*,[13] which hold invalid as being testamentary, transactions which might well have been supported as valid *inter vivos* gifts by choosing another form of language, indicate the contrary. Other illustrations might be given which indicate the inconsistency of English law on broad grounds of policy concerning the treatment of wills. Modern legislation which permits courts to interfere with the provisions of wills, depriving dependents of adequate provision, seems a partial statutory inroad against any *favor testamenti.*

While there still remain persons who refuse to admit that legal decisions depend on "policy", expressed or unexpressed, the instances given above with regard to wills seem to the writer to indicate clearly the part which policy has played in this branch of the law. Unfortunately the policies have frequently been obscured, with the result that divergent tendencies have been frequent. When such divergencies are pointed out, the lawyer's answer is usually that law is not necessarily logical. No one will gainsay this, but at the same time unless our law is to remain a series of disjointed incidents, it would seem that one of the fundamental problems of present legal scholarship should be directed towards an examination not merely of what our cases say, but of the forces or policies which have, consciously or unconsciously, dictated the course of decision. Our case law supplies a sufficiently wide range of word concepts to reach any one of several decisions. Which one is reached depends on something external to those word concepts themselves. The decision in *Re Craig* seems to have been dictated by the fear, which Masten J.A. expressed, of "making a dangerous inroad on the security which sec. 11 of our Wills Act affords". Decisions in the secret trust cases, to take but one instance, were not influenced by this fear, but were undoubtedly actuated by the

[10] Similarly the doctrine of incorporation by reference is difficult to reconcile with the provisions of the Wills Act concerning "signing at the foot or end thereof". Compare also the recent cases admitting to probate provisions of a will which physically follow the signature. *Goods of Smith*, [1931] p. 225; *In the Estate of Long*, [1936], 1 All E.R. 435.

[11] See *In re Harrison, Turner* v. *Hellard*, 30 Ch. D. at p. 393.

[12] For a short account of the *favor testamente* with some comparisons with English law, see BUCKLAND AND MCNAIR, ROMAN LAW AND COMMON LAW (Cambridge, 1936) pp. 125 *ff.*

[13] [1935] S.C.R. 200. And see the present writer in 13 Can. Bar Rev. 324.

desire to give effect to a deceased's intention. The really vital question would seem to be whether the danger is greater or less in one case than the other. We doubt very much whether the "policy" of the Wills Act which has voided many *inter vivos* transactions which had a testamentary operation, involved any more "danger" than the cases which have permitted striking words out of a will for mistake, or which have permitted the creation of testamentary trusts not expressed in the will itself.

C. A. W.

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[The following contribution also deals with the question considered by the Ontario courts in *Re Craig*.]

The law as to the admissibility to probate of a copy or the substance of a lost will is possibly of greater practical interest in Canda than in England. With the greater tendency in this country to home-made or form wills there is a lesser tendency towards safe-keeping of the executed document. There are, however, few reported cases on the subject in our Canadian law reports.

In *Sugden* v. *Lord St. Leonards*[1] the House of Lords, having great faith in the veracity and mental abilities of the testator's daughter and overruling or distinguishing previous authorities, admitted to probate the substance of Lord St. Leonard's will, as recollected and written down by his daughter. She was familiar with the document and the Court was satisfied that there was sufficient evidence to rebut the presumption of the testator's having destroyed the will *animo revocandi*. This case, and numerous subsequent authorities, establish two main principles on the subject, viz; (a) that the evidence adduced must be sufficient to rebut the presumption of destruction *animo revocandi*, to prove due execution and to establish satisfactory proof of the will's contents, and (b) that statements of the testator after making the will with reference to its contents are admissible. Proof of due execution is of main importance in those jurisdictions where a will is recognized as valid only when in writing and signed or acknowledged by the testator in the simultaneous presence of two or more subscribing witnesses. It is not proposed in this article to deal with the exceptions covering soldiers' and mariners' wills.

[1] (1876), 1 P.D. 154; 45 L.J. p. 49.

The presumption of destruction by the testator *animo revocandi* or *animo cancellendi* always arises when the will is traced to his possession or is within his control at the time of his death and is not forthcoming afterwards. In *Lord St. Leonards' Case*, the Court was satisfied that the presumption had been rebutted from the fact that the testator was a methodical man of business with a deep sense of the importance of testamentary dispositions, that several members of the household had access to his will, that he always exhibited great anxiety to make adequate provision for various persons and that he was quite aware of the consequences of destroying one will without having another one made. The presumption was said to be "presumptio juris, but not de jure, more or less strong" according to circumstances such as the character of the testator and his relation to the beneficiaries, the contents of the instrument, and the possibility of its loss being accounted for otherwise than by intentional destruction on the part of the testator.

In the Supreme Court of Canada the question was considered in the case of *Lefebvre* v. *Major*.[2] Here the testator was a simple man but it was shown that he regarded his will as a highly important document. He had, shortly before his death, taken it from a safety deposit box and it was not shown that he had placed it elsewhere for safe keeping. After his death certain of his clothing and bedding were burned without a search having been made for the will. He had named as beneficiary his only sister, for whom he had very affectionate feelings, not changing up to the time of his death. In the circumstances it was held that the presumption of revocation was rebutted.

The case of *Stewart* v. *Walker*[3] is also in point and was referred to with approval in *Lefebvre* v. *Major*. The testator therein had been an illegitimate child and died without issue. He was an experienced business man possessed of a large estate and must have been aware that unless he left a will his property would go to the Crown. He had, after the will was made, several times spoken of its existence and had mentioned some of its provisions. During his last illness, of several days duration, he had expressed no desire to make a will. Certain facts strongly pointed to the will having been stolen. These circumstances were held sufficient to rebut the presumption.

The Appellate Division of the Ontario Supreme Court in *Boddy* v. *Carpenter*[4] held that the presumption had been rebutted

[2] [1930] S.C.R. 252; 2 D.L.R. 532.
[3] 6 O.L.R. 495.
[4] [1931] 4 D.L.R. 927; O.R. 694.

by evidence of ante mortem statements made by the deceased and of the fact that some person had access to the deceased's premises and opportunity to remove the will after his death and that thereafter money was stolen from the premises.

In order to admit to probate the copy or substance of a lost will, due execution of the original must be proved. Little difficulty is encountered when the subscribing witnesses can be found and are able to swear to the formal acts. The Court will however presume due execution if the witnesses remember the occasion only imperfectly, provided the circumstances are in favour of the transaction having been regularly accomplished. (See *Lefebvre* v. *Major*, where the will was prepared by a competent solicitor and executed in his office, although there was no evidence to show that the formalities had been observed.) Although *Blake* v. *Knight*[5] does not concern a lost will but an attempt to impeach a will on the ground of defective execution, it is interesting to note that in spite of evidence by the subscribing witnesses tending to show that execution had been imperfect, the learned Judge held that positive affirmative evidence of the subscribing witnesses was not essential, and that in all the circumstances he would presume due execution.

One of the strongest cases on the subject is *Harris* v. *Knight*.[6] Neither the will nor a copy or draft of it could be found. It was not proved that it bore any date or contained any attestation clause, and both the attesting witnesses were dead. The signature of the testator and one only of the attesting witnesses was proved by an interested witness, and the signature of the testator and other vital facts were strongly attacked by the defendant. Lindley and Lopes L.JJ. (Cotton L.J. dissenting) held that the Judge below was justified on the evidence in presuming that the will was duly executed. The learned Judge applied the maxim *omnia praesumuntur rita esse acta*, pointing out that it was not necessary to remove all possible, but simply all reasonable doubts as to due execution and attestation. It was held that the Court might infer actual observance of all due formalities as a matter of probability if an intention on the part of the testator to do some formal act was established, and the evidence was consistent with that intention having been carried into effect in a proper way.

In the Goods of Phibbs[7] is also in point. Two witnesses swore to having seen the will. Both were disinterested witnesses

[5] (1843), 3 Curt. 547; 163 E.R. 821.
[6] (1890), 15 P.D. 170; 62 L.T. 507.
[7] [1917] P. 93; 86 L.J.P. 81.

and one of them had served for 15 years in a solicitor's office. Both swore that the will bore the testator's signature, that there was an attestation clause and signatures of two witnesses but neither could remember the names or addresses of the witnesses. Advertising failed to locate them. Shortly after the loss of the will, presumably as a result of a fire, the witnesses prepared an epitome of its contents. It was held that due execution should be presumed and that the epitome be admitted to probate.

In recollecting the contents of a lost will it is only to be expected that all the provisions may not be remembered. This however will not in itself render the recollected portion inadmissible to probate, provided the Court is satisfied that it is carrying into effect substantially, and as far as may be possible, the wishes of the testator. (*Sugden* v. *Lord St. Leonards.*)

It is a question on the facts of each case as to whether the evidence of a single witness as to the contents of a lost will requires corroboration. It is to be noted that Cockburn C.J. stated *obiter* in *Lord St. Leonard's Case* that although there existed some confirmation of Miss Sugden's statements it was not, in the special circumstances, essential. She was an interested witness in that a substantial portion of the estate passed to her, but her veracity and competency were unimpeachable. Actually there was no direct corroboration of the residuary bequest to her. It would seem a safe proposition to state that the contents of a lost will may be proved by a single, though interested, witness whose honesty of purpose, character and ability are unimpeached.

The case of *Gould* v. *Lakes*[8] follows *Lord St. Leonards' Case* in holding that declarations of a testator, written or oral, whether before or after the execution of a will, are admissible as secondary evidence of its contents. The case goes somewhat farther in extending the rule not only to the contents of the will, but also to its constituent parts. Here the question was whether or not a certain sheet of paper, attached to the will but not separately executed, had been written at the time of execution, and so made a part of the will. In effect, the question was whether or not the sheet of paper had been duly executed so as to operate as a will. It was agreed that statements of the testator were inadmissible to prove due execution but the learned Judge held them admissible to prove that the sheet of paper was part of the will at the time of its execution.

In summing up the above authorities it may be stated that the presumption of intentional destruction can be displaced by

[8] (1880), 6 P.D. 1; 49 L.J.P. 59; 43 L.T. 382.

any sufficient evidence, including ante mortem statements of the testator as related by an interested witness; the presumption is in favour of due execution of the will if it can be shown that the testator intended to do the necessary acts in a formal way; and that statements of the testator are inadmissible to prove due execution but may be admitted to show what papers he intended to constitute his will and what were the contents thereof.

J. T. HARVEY.

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