CASE NOTES

COMMISSIONER FOR RAILWAYS (N.S.W.) v. CARDY[1]

Occupier's Liability—Latent Danger on Land—Absence of Warning—Whether person entering is Trespasser or Licensee

In this case, the High Court of Australia reviewed the question of an occupier's duty to persons entering on his land. A majority of the judges held that when the occupier himself creates a specific danger he owes a duty of care to all persons likely to be injured by it, whether they are invitees, licensees, or trespassers.

The appellant occupied a large area of land, part of which was used by him as a rubbish dump. Hot ashes had been dumped there and a crust had formed on the surface, but the ashes continued to smoulder underneath. Skirting the edge of this dump was a roadway leading to a workers' camp.

The respondent, a boy of 14 years, entered the land and, having followed the roadway for some distance, strayed on to the dump. His bare feet broke through the surface crust and were badly burnt.

Members of the public frequently passed across the land, although trespassers had from time to time been warned off by a watchman and a foreman.

The respondent sued the appellant for negligence and, at first instance, the learned trial judge directed the jury that they should first decide whether the plaintiff was a trespasser or a licensee and, if they found he was a licensee, they should consider whether the dump constituted a hidden danger. The jury found for the plaintiff and awarded £2,000 damages. An appeal to the Full Court of the Supreme Court of New South Wales was dismissed, and the Commissioner for Railways (N.S.W.) then appealed to the High Court.

The appeal was heard by Dixon C.J. and McTiernan, Fullagar, Menzies and Windeyer JJ. The Court by a majority (Dixon C.J., McTiernan, Fullagar and Windeyer JJ., Menzies J. dissenting) dismissed the appeal.

The dissenting judge, Menzies J., based his decision on the ground that, on the evidence, it was open to the jury to find that the respondent was a licensee on the roadway but not on the dump itself.

Dixon C.J. and Fullagar J. pointed out that, in many cases of this kind, the finding that the plaintiff was a licensee could only be called a

[1] (1961) A.L.R. 16.

legal fiction. A licence is 'a voluntary or gratuitous grant of an advantage to another consisting in the use of or entry upon premises'.[2] In the present case, not only was there no intentional grant, but, had the appellant been asked to consent to the respondent's presence on his land, he would have refused. Moreover, it is not easy to see how an occupier who objects to the presence of strangers on his land can avoid becoming a 'constructive' licensor by his conduct. In pointing out this difficulty, Fullagar J. said: 'The erection of a fence will not be enough, for the people who crossed the land in *Lowery* v. *Walker*[3] got over a fence in order to enter the land. Warning people off the land every now and then will clearly not be enough. Nor will the taking of legal proceedings against a selected few. In such a case as the present, where the land in question is of an area of some hundreds of acres, the difficulties of the Commissioner in guarding against the possibility of a jury's being allowed to find him to be the grantor of a licence are indeed formidable.' [4]

Dixon C.J. and Fullagar J. preferred to consider the appellant a trespasser, and to base the Commissioner's liability on a duty towards the respondent independently of their relationship as occupier and trespasser. This relationship is relevant when the trespasser suffers injury through some inherent condition of the premises, and in that case the maxim that a trespasser enters at his own risk will apply. The Commissioner, however, according to their Honours, was liable in the present case because 'a duty exists where to the knowledge of the occupier premises are frequented by strangers or are openly used by other people and the occupier actively creates a specific peril seriously menacing their safety or continues it in existence'.[5]

McTiernan and Windeyer JJ. both based their decisions on the narrower ground that there was evidence to support the jury's finding that the respondent was a licensee and that the dump constituted a hidden peril. Windeyer J., however, indicated that in his view the Commissioner would have been liable even had the respondent been a trespasser. His Honour stated that, in the first place, a trespasser can complain of 'any acts done by the occupier that are fraught with danger to anyone, whether lawfully on the land or not, whom the occupier knows is, or very probably may be, within the area of danger'[6]; and that, secondly, an occupier who has made his premises dangerous is under a duty to warn people who might enter upon the premises of this danger, even if in entering they would be trespassers.

It would seem that the view of Dixon C.J. and Fullagar and Windeyer JJ. is in accordance with the recent trend of imposing a duty on an occupier who himself creates a danger on his premises irrespective

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2 *Id.* at 21, *per* Dixon C.J.

3 [1909] 2 K.B. 433; [1911] A.C. 10.

4 *Supra* n. 1 at 27.

5 *Id.* at 21, *per* Dixon C.J.

6 *Id.* at 45, *per* Windeyer J.

of whether persons affected by it are trespassers or not. In *Morton* v. *Poulter*[7] it was held that a person about to do a dangerous act, such as felling a tree, is under a duty to warn persons in the vicinity, even if they are trespassers. In *Rich* v. *Commissioner for Railways* (N.S.W.)[8] the High Court of Australia held that in performing such an act on his land, a person must exercise reasonable care in all the circumstances, and that he owes a duty to persons likely to be injured by his act. Such persons include trespassers, if their presence on the land is reasonably foreseeable.

Following the view of the majority in the present case, this principle will apply also to an occupier creating a dangerous condition on his premises. He is under a duty to take reasonable care towards persons likely to be injured, even in the case of trespassers if their presence is foreseeable.

It is respectfully suggested that such a principle would avoid much of the present confusion in the law of occupier's liability. A person creating a dangerous situation would owe a duty of reasonable care to all persons likely to be affected by it, and this duty would be independent of the question whether or not he was the occupier of the land on which he creates this danger. Apart from this general duty of care, an occupier *qua* occupier would still be liable for dangers on his premises which he himself has not created; and in that situation the old categories of invitee, licensee and trespasser would continue to be relevant in determining what duty, if any, is owed by the occupier to persons entering his premises.

R. Plehwe

DANZIGER v. THE HYDRO-ELECTRIC COMMISSION[1]

Workers' Compensation—Increased Wages since time of accident—Variation at time of application for compensation

A recent decision of the Supreme Court of Tasmania (*per* Crisp J.) sheds light on the interesting question of increases in weekly payments to workmen receiving compensation under the Workers Compensation Act 1927[2] in cases where wages have also increased since the time of the accident. It decides, in effect, that weekly payments may be varied in accordance with wages ruling at the time of the application to vary them rather than at the time of the accident. Section 23 of the Act provides in sub-section (1):

> 'Upon the hearing of an application to review the same, a weekly payment may be terminated, diminished, or, *subject to the limitations set forth in the schedule,* increased.'

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7 [1930] 2 K.B. 183.

8 (1958) 101 C.L.R. 135.

1 Supreme Court of Tasmania, 1961 (unreported).

2 18 Geo. V, No. 82.

And then in sub-section (4):

> 'If the application for review is made more than six months after the accident and it is claimed and proved that for the twelve months immediately preceding the application the average wage in respect of the same class of employment as the worker was engaged in at the time of the accident and in the same locality has increased . . . by more than one fifth of the average wage for the twelve months immediately preceding the accident (or immediately preceding the last review if the payments have been previously varied on review), the weekly payments shall be varied accordingly . . .'

In the present case, the applicant had suffered injury in 1953 causing recurrent temporary total incapacity. At that time his actual wage was £15/5/6, the average weekly wage for the twelve months preceding the accident being £14/19/3. With a wife and three dependent children he was then entitled to £9/15/- per week during such incapacity. It was at this figure that compensation payments remained, in effect, pegged, although wages were rising steadily until the average wage applicable to him had reached £19/19/6 per week in January 1961. An application was, accordingly, made to the Court under section 23 (4) which precisely covered the situation.

Had the accident occurred in January 1961, he would have been entitled to payment of £10 per week in respect of himself plus £2/10/- for his wife and £1/4/6 in respect of each child under the age of sixteen wholly or mainly dependent on the worker. As he still had one dependent child, his payments would have amounted to £13/14/6, subject to the limitations in paragraph 1 (1) of subrule (2) of rule 2 which reads:

> '1A. No weekly payment under paragraph I of this subrule shall exceed—
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> (a) Where the amount of the average weekly earnings of the worker before the date when the injury was sustained did not exceed fifteen pounds, eighty-five per centum of that amount: and
>
> (b) In any other case—
>
> (i) Seventy-five per centum of the amount of the average weekly earnings of the worker before the date on which injury was sustained, or
>
> (ii) Twelve pounds fifteen shillings whichever of those sums is the greater.'

Since £13/14/6 is within seventy-five per cent. of £19/19/6, the average weekly wage, that is the figure which he would have actually received.

However, on the face of it, the limitations in the schedule refer expressly to the pre-accident wage as the governing criterion. On that basis, £13/14/6 would have been in excess of the permitted percentage. Since section 23 (1) was expressed to be subject to the limitations set forth in the schedule, the respondent objected that the applicant was therefore precluded from recovering £13/14/6 and was limited to £12/15/-.

On the other hand, it was contended for the applicant that the meaning of the word 'accordingly' in section 23 (4) must refer back to the circumstances contemplated within that sub-section, that is to say, an increase by more than one fifth of the average wage, and that it was

therefore intended that payments should be increased accordingly, that is, in accordance with the change which had taken place in the wage. Regard should therefore be had to the twelve months preceding the application instead of the twelve months preceding the accident.

His Honour said in passing that if the respondent's argument were correct 'then in the absence of legislative intervention, no matter to what astronomical heights the wage of a worker of the same class might soar, an applicant could always be pegged to the same figure determined by reference to his pre-accident earnings, not to what a worker of the same class in the same locality is currently earning'.

The real indication of the intention of the Act may be gained from a comparison with the relevant section of the Imperial Act of 1925.[3] There, a similar provision to the Tasmanian section 23 (4) exists, but, instead of the word 'accordingly' the Imperial Act goes on to say as follows:

> '. . . so as to make it such as it would have been if the rates of remuneration obtaining during the twelve months previous to the review had obtained during the twelve months previous to the accident . . .'[4]

It seems that the Tasmanian draftsman in copying the Imperial provisions has sought to abbreviate this somewhat complex phrase by substituting for it the word 'accordingly'. This departure from precedent was argued by the respondent to be an indication that a different meaning was intended and thus there was here no specific provision negativing the limitations *prima facie* imposed by the opening sentence of section 23 (1).

This contention was rejected by the learned judge, who said that a breach of the draftsman's golden rule did not necessarily imply that a departure in drafting indicated a different intention from the precedent. In the recent case, despite the formal differences, the Tasmanian provision was intended concisely, though with dangerous gravity, to achieve the same result as the Imperial sub-section. The claim for £13/14/6 was accordingly allowed.

Although the point involved is a short one, the case may be of some importance and indeed was treated by the Judge as being so because of its possible effect as a precedent. It elucidates an ambiguous piece of draftsmanship which might otherwise have continued to mislead and cause injustice to workmen receiving payments under the Act. It illustrates the danger of departing from precedent in drafting legislation of similar intent to that on which it is modelled for no better reason, apparently, than to improve on a somewhat clumsy phrase. The Victorian

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[3] 15 and 16 Geo. V, c. 84.

[4] A similar provision in Victoria is more simply and better expressed to the same intent 'Where the review takes place more than three months after the injury the amount of weekly payment may be increased to such an amount as would have been awarded if the average weekly earnings of the worker before the injury had been the same as the average weekly earnings which he would probably have been earning at the date of the review if he had remained uninjured.'

'Workers Compensation Act 1958, s. 9 (2) 6 (2), Act No. 6419.

section quoted above would have achieved this object more aptly. The decision is of interest further because the departure from the Imperial legislation seems peculiar to the Tasmanian jurisdiction and no assistance on this precise point might therefore be expected from digests and text-books based on other jurisdictions.

H. A. Finlay

HALL v. RICHARDS[1]

Supreme Court of Tasmania exercising Federal Jurisdiction in Bankruptcy — Position of caveator as secured creditor in a bankruptcy — Commonwealth Bankruptcy Act 1924-1960 — *Tasmanian Real Property Acts*

This case arose out of an application for directions by the trustee in bankruptcy of a bankrupt's estate. On August 15, 1958, a Sequestration Order was made against a person who at the time was the registered proprietor of land held under the provisions of the Tasmanian Real Property Acts (Torrens System). The Certificate of Title was subject to memoranda in respect of first and second mortgages, both of which were registered in 1956. Between February, 1957, and July, 1958, pursuant to section 22 of the Real Property Act 1886,[2] thirty judgment creditors entered caveats in respect of divers sums of money against the Certificate of Title. The caveats did not arise out of any claim for an estate or interest in the land.

Under section 82 of the Real Property Act 1862, any settlor of land under the provisions of the Act, transferring such land to be held by the transferee as trustee, or any beneficiary, or other person, claiming estate or interest in any such land may, by caveat in the prescribed form, forbid the registration of any instrument affecting such land either absolutely or until after notice of an intended dealing. Such caveat must sufficiently identify the land and the estate or interest therein claimed by the caveator. Section 84 provides that no entry affecting the land is to be made in the register book so long as the caveat remains in force.

In this case, after the Sequestration Order had been made, the second mortgagee exercised his power of sale and out of the proceeds of sale he discharged the debt due to the first mortgagee, his own debt, and then handed the surplus moneys to the trustee in bankruptcy. The purchaser of the land obtained a clear title free from the caveats registered

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1 18 A.B.C. 128. The judgment of the High Court of Australia has not yet been reported.

2 Section 22 provides:

(1) It shall be lawful for the judgment creditor of any person registered as the proprietor of land under the Principal Act to enter a caveat in the manner prescribed by section eighty-two thereof.

(2) The practice, procedure, and mode of dealing with such caveat shall in all respects be the same as if such judgment creditor claimed an estate or interest in such person's land within the meaning of that section.

(3) The court or judge, in deciding on the validity or otherwise of such caveat, shall be guided by the ordinary rules of law and equity as to the upholding or setting aside a judgment.

against the Certificate of Title. The trustee in bankruptcy now raised the question whether or not a judgment creditor, who had entered a caveat on the registered title of a bankrupt, was to be regarded as a secured creditor. By section 4 of the Bankruptcy Act 1924-1960, the latter is defined as 'a person holding a mortgage, charge, or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor'.

Pursuant to a representative order made by Burbury C.J., several caveators were represented at the hearing of the application for directions made by the trustee in bankruptcy. They contended that the caveats gave them a security in the bankruptcy and entitled them to priority in the distribution of the surplus proceeds of sale at present held by the trustee in bankruptcy.

The learned Chief Justice held, with great respect, that the judgment of Nicholls C.J. in *Re Price*[3] was wrong and should not be followed. In that case it had been decided that a judgment creditor who enters a caveat under section 22 of the Real Property Act 1886 against the debtor's Certificate of Title is a secured creditor within the meaning of section 4 of the Bankruptcy Act. Sir Stanley Burbury cited Lord Goddard C.J. to the effect that a judge at first instance will as a matter of judicial comity usually follow the decision of another judge at first instance unless he is convinced that it is wrong.[4] He also referred to the *dictum* of Isaacs J. and said that if the judge is convinced that the prior decision is wrong he should in accordance with his judicial duty of giving effect to the law as he finds it express his real opinion and not maintain an incorrect interpretation.[5] His Honour came to the conclusion that the right of a judgment creditor to levy execution against the debtor's property, and to sell it under the provisions of section 94 of the Real Property Act 1862, and section 17 of the Real Property Act 1893, does not amount to a charge or lien upon the property within the meaning of section 4 of the Bankruptcy Act. The learned Chief Justice said that the *ratio decidendi* in *Re Price* was that a judgment creditor's right to issue execution against the land and his power, by virtue of his caveat, to prevent dealings with the land, thereby keeping it available for his levy, together amounted to a statutory charge or lien. But this *ratio* was inconsistent with the view adopted by Griffiths C.J. in *Butler* v. *Fairclough*,[6] that the purpose of a caveat is not to enlarge or add to the existing proprietary rights of the caveator, but merely to protect those rights.

His Honour concluded that if a judgment creditor does not hold a charge or lien over the debtor's property by virtue of his judgment, then

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3 26 Tas. L.R. 158.

4 *Huddersfield Police Authority* v. *Watson* (1947) K.B. 842 at 848.

5 *Australian Agricultural Co.* v. *Federated Engine Drivers' and Firemen's Association of Australasia* (1913) 17 C.L.R. 261 at 278-279.

6 (1917) 23 C.L.R. 78, at 91 and 97.

the entry of a caveat—which is nothing more than a statutory injunction —cannot give him that security. The judgments of Isaacs J. in *Barry* v. *Heider*,[7] and of Owen J. in *Re Hitchcock*,[8] were cited in support. His Honour pointed out that the Supreme Courts of the other Australian States had consistently held the lodging of a caveat to be nothing more than a protection of existing rights, and he adopted as correctly expressing the law on this subject the judgment of Henchman J. in *Lynch* v. *O'Keefe*.[9]

Nicholls C.J. in *Re Price*[10] had maintained that 'if the caveating judgment creditor has not secured to himself a lien or charge on the land, the Real Property Act 1886 and the whole proceeding of entering a caveat are futile as having no practical effect.' But, in the present case, Burbury C.J. pointed out that 'the entering of a caveat prohibits dealings with the land pending a judgment creditor perfecting a sale after making a levy. That the operation of his caveat may be defeated upon bankruptcy does not mean it is of no practical effect'.

The caveators appealed from the decision of Burbury C.J. to the High Court of Australia. The latter (Dixon C.J., Kitto, Taylor, Menzies, and Windeyer JJ) held unanimously that the caveators were unsecured creditors in the bankruptcy and the appeal was therefore dismissed. Kitto J. decided that section 22 of the Real Property Act 1886 enabled a judgment creditor, who lodged a caveat against the debtor's title, to forbid any disposition by the debtor which would remove the debtor's estate or interest in the land from the reach of an execution in enforcing a judgment pursuant to section 94 of the Real Property Act 1862. In the words of Kitto J.: 'In this sense the caveat may be said to *bind* the land to answer a future execution'.[11] His Honour then examined the cases distinguishing the meaning of the words 'bind', 'lien', and 'charge', and held that the caveators did not have a lien or charge upon the bankrupt's land within the meaning of section 4 of the Bankruptcy Act. Even had the land still been available at the date of the Sequestration Order, he was of the opinion that section 92 of the Bankruptcy Act would have prevented the caveators from retaining the benefit of any execution levied upon the bankrupt's estate or interest in the land. Taylor J. also considered that section 92 of the Bankruptcy Act was particularly fatal to the appellants' claim, for the power to levy against the judgment debtor's land was lost upon the latter being made bankrupt. Menzies J. stated that upon the transfer of the land by the second mortgagee the caveats ceased to have any operation and thus any interest depending upon their existence would disappear with them. Consequently, the judgment creditors could not attain any priority over unsecured creditors who were not caveators in the distribution of the surplus proceeds of

7 (1914) 19 C.L.R. 197, at 221.

8 (1900) 17 N.S.W.W.N. 62, at 63.

9 (1930) St. R. Qd. (Full Court), 74, at 110.

10 26 Tas. L.R. 158.

11 See *Colonial Bank of Australia* v. *Riddel* (1893) 19 V.L.R. 280, and *Re Anderson Mitchell & Co. Pty. Ltd.* (1928) 23 Tas. L.R. 35.

sale held by the trustee in bankruptcy. Both Dixon C.J. and Windeyer J. agreed with the reasons given by Kitto J.

It is of interest to compare the position which now exists in Tasmania in the matter of land held under the General Law with that of land held under the Real Property Acts. Section II of the Registration of Deeds Act 1935, which according to the High Court in the present case does not apply to land under the Real Property Acts, provides that, subject to that section, 'every judgment whereby any sum of money is made payable . . . shall, when registered, be a charge upon the lands of the judgment debtor'. The inclusion of the word 'charge' in this section has been construed to mean that a registered judgment creditor has a security in the estate of a judgment debtor upon the latter's bankruptcy, and it has been the practice in Tasmania, probably following the judgment of McIntyre J. in *Ex parte Armstrong, In re Fahey*,[12] for the charge to attach to the proceeds of sale of a bankrupt's land carried out under the General Law. It is thought, although there does not appear to be any direct Australian case on the point, that if a registered judgment creditor in respect of the land of a bankrupt held under the General Law applied to the court for an order of sale, such an application would be granted. The reason for this view is that if the registered judgment creditor were left to realise his security by levying execution or by the appointment of a receiver, then the provisions of section 92 of the Bankruptcy Act would prevent him from retaining the benefit of the execution against the trustee in bankruptcy. However, the position is not altogether clear, and Taylor J. in the present case, in comparing section 22 of the Real Property Act 1886, with section II of the Registration of Deeds Act 1935, said 'It is clear that the provisions of the Real Property Act to which we have referred do not contain any counterpart of the operative words of the Registration of Deeds Act which purport to create a "charge"—whatever that expression may mean in the context in which it is used (*c.f.* the discussion in 12 and 13 *A.L.J.*).'

Thus, the present position in Tasmania of a judgment creditor in the circumstances we have been considering, and which Nicholls C.J. said in *Re Price*[13] would be anomalous, is determined by the particular land-holding system under which the bankrupt's property is held. If he lodges a caveat against the bankrupt's title to land held under the Real Property Acts he will have no security, whereas the registration of his judgment against the bankrupt's land held under the General Law will enable him to be treated as a secured creditor. As a secured creditor he will be in a most favoured position, for it was decided in *Re Kent*[14] that, unlike the case of a mortgagee, his security cannot be attacked as a preference under section 95 of the Bankruptcy Act. This seems to offend against a cardinal principle of bankruptcy law that there should be an

12 (1902) 2 N. & S. 104.
13 26 Tas. L.R. 158.
14 (1956) Tas. L.R. 139.

equitable distribution of the debtor's property among the creditors. It remains to be seen whether legislative action will be taken to harmonize the relevant sections of the Tasmanian land law statutes in connection with the bankruptcy of a judgment debtor. It is noted that section 195 of the English Law of Property Act 1925 is more explicit than section 11 of the Tasmanian Registration of Deeds Act and, in the matter of preferences, avoids this conflict with the bankruptcy legislation.

R. C. Southee

INGRAM v. LITTLE[1]

Contract — Offer and Acceptance — Mistake of Identity

In this case the difficult question is raised of unilateral mistake as to the identity of a party in relation to the validity of a contract. It deals with the situation where one person who is conducting negotiations prior to concluding a contract is mistaken as to the other party's identity, and where that other party has or ought to have knowledge of that mistake. It is the effect of this type of mistake upon the formation and validity of a contract which is considered in the instant case.

Three plaintiffs, joint owners of a car, advertised it for sale at £725. A rogue, introducing himself as Hutchinson, offered to buy it. He first suggested a price of £700 but this was refused. Then he offered £717. The plaintiffs were prepared to accept this in cash. At that moment the rogue pulled out a cheque book and the first plaintiff, who was conducting the negotiations, realised that he was proposing to pay £717 by cheque. The first plaintiff told him that they expected cash and that they were not prepared to accept payment by cheque, and that the proposed sale was cancelled.

The rogue thereupon said that he was P. G. M. Hutchinson, a reputable businessman living at an address in Caterham, and having business interests in Guildford. The second plaintiff forthwith went to a nearby post office and ascertained from the telephone directory that there was such a person as P. G. M. Hutchinson living at the address given by the rogue. The second plaintiff communicated this information to the first plaintiff who, believing the rogue to be in fact P. G. M. Hutchinson, decided to let him have the car in exchange for the cheque.

The rogue had no connection with the real P. G. M. Hutchinson and his cheque was dishonoured on presentation. Meanwhile, the rogue had sold the car to the defendant, who bought it in good faith.

The plaintiffs now claimed the return of the car or, alternatively, damages in respect of its conversion.

Judgments were delivered in the Court of Appeal by Sellers, Pearce, and Devlin, L.JJ.

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1 [1960] 3 W.L.R. 504.

Sellers L.J. gave judgment for the plaintiffs. He said that the decision to be made turned solely on whether Hutchinson entered into a contract giving him a title to the car which would subsist until the contract was avoided. He regarded the correct approach, where the formation of a contract was in dispute, to be expressed in the question 'How ought the promisee to have interpreted the promise?'[2] That is to say, a rogue cannot accept an offer if he knows, or ought to know, that it is not addressed to him but to some other identifiable person whom he has represented himself to be. In this case there was, for example, no doubt that the rogue knew that the offer was addressed *at* him, but the question is, should he as a 'reasonable man' have known it was not addressed *to* him?

Pearce L.J. agreed with the decision of Sellers L.J. although he tended to approach the question from the offeror's point of view. His Lordship went on to say in part: 'An apparent contract made orally *inter praesentes* raises particular difficulties. The offer is apparently addressed to the physical person present. *Prima facie* he, by whatever name he is called, is the person to whom the offer is made. His physical presence identified by sight and hearing preponderates over vagaries of nomenclature'.[3] The gravamen of his remarks appears to be that the court must decide in cases of mistaken identity whether what may perhaps be called the 'constructive' presence of the person impersonated is of greater importance to the offeror than the physical presence of the rogue. By the term 'constructive' presence is meant the cumulative effect of the misrepresentations of the rogue, and Pearce L.J. gave examples to show that a rogue who has deliberately passed himself off, either by disguise or merely by 'verbal cosmetics' as someone else, both could and could not accept an offer which is physically addressed to him.[4]

The test is reduced to the query whether the plaintiffs offered to contract with the physical person to whom the offer was spoken or with an individual whom (to the other party's knowledge) they believed to be the physical person present. This he said is a question of fact.

Devlin L.J. dissented from his brother judges. He did not, however, dissent from the presumption formulated by the majority that an oral offer is made to the person to whom it is spoken. His dissent was based on the question whether this presumption had in fact been rebutted in the case before him.

In his dissenting judgment he distinguished mistake preventing any true interchange of offer and acceptance from mistake which, once the contract is in form valid, vitiates its substance. Dealing with the first limb of this distinction he agreed with the majority that there is a presumption that a person intends to contract with the person to whom he addressed the words of a contract, and agreed that this presumption

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2 At 515.
3 At 517.
4 At 517.

may be rebutted, though obviously to a far lesser extent than his brethren were prepared to admit. He said, however, that it had not been rebutted in the case before him.

Having held, therefore, that there was a true interchange of offer and acceptance he next considered whether the resulting contract had been vitiated by a fundamental mistake and held that it had not been so vitiated. He said that it was credit-worthiness and not identity which was the material matter in this case and that 'credit-worthiness in relation to a contract is not a basic fact; it is only a way of expressing the belief that each party holds that the other will honour his promise'.[5]

The question for the courts to decide in all cases of fraudulent misrepresentation as to a contracting party's identity is whether the innocent party intended to contract with the rogue or not. The answers given by the courts to this question, before the instant decision was given, may be summarised as follows:

1. When a rogue concludes an apparent contract, other than by personal communication, with an innocent party who is led to believe that he is dealing with some other specific existing legal person the courts will be slow to hold that there is a valid contract between the innocent party and the rogue.[6]
2. When a rogue holds himself out as an agent of a non-existent principal the courts will readily infer that the innocent party intended to contract only with such principal and that therefore there can be no valid contract between the innocent party and the rogue.[7]
3. When a rogue fraudulently assumes the name of a person of credit and stability and contracts in person and obtains delivery of the goods from the innocent party the courts will treat the innocent party as if he intended to sell to, or buy from, the person present and identified by sight and hearing.[8]

It is the third of those propositions which requires re-examination in the light of *Ingram* v. *Little*. In *Phillips* v. *Brooks*, Horridge J., referring to *Edmunds* v. *Merchants' Despatch Transportation Co.*,[9] said: 'The headnote in that case contained two propositions which I think adequately express my view of the law. They are as follows: "(1) If A, fraudulently assuming the name of a reputable merchant in a certain town, buys, in person, goods of another, the property in the goods passes to A. (2) If A representing himself to be a brother of a reputable merchant in a certain town, buying for him, buys in person, goods of another, the property in the goods does not pass to A".'

The judgment of Horridge J. in *Phillips* v. *Brooks*[10] has stood for over forty years, and in fact Sellers L.J. said of it: 'As *Phillips* v. *Brooks Ltd.* has stood for so long and is, I think, a decision within an area of fact I would not feel justified in saying that it was wrong'.[11] However,

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5 At 527.

6 *Cundy* v. *Lindsay* (1878) 3 App. Cas. 459.

7 *Hardman* v. *Booth*, 32 L.J. (Ex.) 105.

8 *Phillips* v. *Brooks Ltd.* [1919] 2 K.B. 243.

9 135 Mass. 283, 284.

10 [1919] 2 K.B. 243.

11 At 512.

the first proposition referred to by Horridge J. in *Phillips* v. *Brooks* is very difficult to reconcile with the decision in the instant case. That which Horridge J. regarded as a proposition of law Sellers L.J. called a question of fact.

It appears that what has been treated as an irrebuttable presumption, namely, that an offer is made to a person to whom it is addressed is now regarded by the Court of Appeal as a rebuttable presumption. In fact, Sellers L.J. said of *Phillips* v. *Brooks*: 'It is not an authority to establish that where an offer or acceptance is addressed to a person (although under a mistake as to his identity) who is present in person, then it must in all circumstances be treated as if addressed to him'.[12] That is, however, the very proposition which Horridge L.J. purported to apply in *Phillips* v. *Brooks*.

It should, however, be noted that the courts have consistently applied the one general test to cases of this type. Namely, as stated above and in the judgments in this case, was the offer or the acceptance, as the case may be, intended for the other party physically present at the time of the alleged formation of the contract?

The only divergence in the instant case is as to the question of proof of this intention. It is the writer's submission that although the formulation by their Lordships of the rebuttable presumption, above referred to, is inconsistent with *Phillips* v. *Brooks* and does not appear to be warranted by any express judicial pronouncement, it is nonetheless fully consistent with the aforementioned test.

Neither in law nor in logic can the writer see any justification for the distinction between the fact situation where the rogue is physically present and where he is not, though no doubt such a distinction is technically arguable. However, the considerations which gave rise to this unwarranted distinction afford grounds for a court requiring strong evidence to satisfy it that the *prima facie* presumption that an offer is made to a person to whom it is addressed has in fact been rebutted.

The necessity for an intention to contract remains unaltered. A person cannot accept an offer which he knows is not intended for him but for some third person, and conversely he cannot hold another to an acceptance when he knows that that party was intending to accept an offer made by some third person and not by him.

The effect of the decision in *Ingram* v. *Little* is simply to substitute a rebuttable presumption in place of the former irrebuttable presumption. This will permit the courts to have a true regard for the realities of the case before them more than has hitherto been possible since the decision in *Phillips* v. *Brooks*.

It should be noted, however, that leave was given to appeal to the House of Lords.

A. G. Ogilvie

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12 At 512.

THE WINDING-UP OF A COMPANY BY THE COURT

The considerations to be taken into account by the court on the presentation of a petition by a creditor for the winding-up of a company under section 161 (1) (e) and (f) of the Tasmanian Companies Act 1959,[1] were recently considered by the Court of Appeal in England in two cases, namely, *In re Vuma Ltd.*[2] and *In re P. & J. Macrae Ltd.*,[3] and by Pennycuick J. sitting in the Chancery Division in *In re A.B.C. Coupler and Engineering Co. Ltd.*[4] Section 161 of the Act provides (*inter alia*) that 'a company may be wound-up by the court if . . . (e) it is unable to pay its debts; (f) the court is of opinion that it is just and equitable that it be wound-up.' The other relevant section of the Act considered in those cases was section 248[5] which provides (1) 'The court may as to all matters relating to the winding-up of a company have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence. . . . (2) In the case of creditors, regard shall be had to the value of each creditor's debt.' *Prima facie* then it is submitted that on any such petition it would be sufficient to show that if a petition was opposed by creditors the amount of whose debts exceeded that of the petitioning creditor then the court would be bound to disallow the petition. That this is not so will be seen from an examination of the three cases mentioned above. In the case of *In re Vuma* the facts were that the company which had a total paid-up capital of £100 was carrying on the business of general merchants. A judgment had been obtained by a creditor for the total sum of £603/9/-. On execution being issued by the judgment creditor the effects of the company were claimed by one F. C. Hopkinson (who, in fact, bore the same name as one of the two signatories of the memorandum of association of the company). Subsequently, the judgment creditor presented a petition to have the company wound-up by the court, but at the hearing two creditors whose total debts amounted to £3,118/7/2, and who had previously given notice to the petitioner that they would support the petition opposed it.

Buckley J. dismissed the petition and the petitioner thereupon appealed to the Court of Appeal, where the appeal was heard by Lord Evershed M.R. and Harman L.J. Counsel for the opposing creditors argued that if the majority of the creditors oppose the making of an order, that is the end of the matter save in special circumstances, for example, when the opposing creditors are acting for some irrelevant or improper motive or where fraud is established in the conduct of the company's business.

That proposition, which is perhaps a literal interpretation of the Act, was rejected by the Court, although it must have found favour with

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1 Corresponding to s. 222 (e) and (f) of the U.K. Companies Act 1948.

2 [1960] 1 W.L.R. 1283.

3 [1961] 1 W.L.R. 229.

4 [1961] 1 W.L.R. 243.

5 See s. 346 of the U.K. Companies Act 1948.

Buckley J. It appears from the judgments in the Court of Appeal that the true principle is that the opposing creditors (even though a majority in value) must also come before the court and show good reason why the company ought not to be wound-up. In this case no evidence was adduced as to the grounds of opposition. Lord Evershed M.R. said:[6] 'It appears from the evidence before us that the company has no assets whatever, and no attempt has been made on the respondents' side to show that it has any assets or any prospects of successful business.' He went on to say:[7] 'With great respect to Buckley J., I do not think it was right simply to treat the fact of the majority opposition as conclusive. I am persuaded on the material in this case that the court in the exercise of its discretion ought to order a winding-up.' Harman L.J. put it on much the same basis when he said:[8] 'I agree. In the circumstances disclosed in the petition it was incumbent upon those who opposed it to say why they opposed it . . . they did not do that, but they persuaded the judge that all he had to do was to count heads.'

The judgment of the Court of Appeal in *re Vuma* had not been reported when *In re P. & J. Macrae Ltd.* came on for hearing. The facts of the latter were similar in essence to those of the former case. The total paid-up capital of P. & J. Macrae Ltd. was £1,000. The petitioning creditor had obtained a judgment for the total sum of £685/9/1 in respect of goods supplied. At the hearing it appeared that there were eleven supporting creditors to the extent of £2,136, six of whom were for under £100, and two for under £50. There were forty-two opposing creditors to the extent of £19,101 of which one creditor was secured by debenture in the sum of £7,000 and unsecured in the sum of £10,000. The other forty-one opposing creditors represented some £9,000, twenty-nine of them being creditors for under £100, and eighteen for under £50. The County Court judge allowed the petition and the opposing creditors appealed, first, on the basis that in the circumstances of the case the judge was bound to dismiss the petition having regard to the number and value of the creditors opposing the same — in the absence of evidence showing special circumstances why the wishes of such creditors should not be given effect to, and secondly, that in so far as the judge had a discretion to make the order he exercised the same under a mistake of law concerning the regard which ought to have been paid to wishes of the creditors appearing in opposition to the petition and in disregard of the principles upon which such regard should have been paid.

The first argument somewhat resembles that put forward by counsel for the opposing creditors in *re Vuma* and the short answer given by Willmer L.J., delivering the judgment of himself and Ormerod L.J., was this:[9]

> 'To say that the court is bound to dismiss the petition is to deprive the court of the discretion which Parliament has conferred by the clear terms of section

6 [1960] 1 W.L.R. 1283, at 1285.
7 At 1286.
8 *Ibid.*
9 [1961] 1 W.L.R. at 231.

346 (1) of the Act.[10] If such were the case the court would be left, as I see it, with no judicial function to perform. The argument involves that in all cases the decision would have to be arrived at by a mere counting of heads.'

In connection with the second argument the court referred to the following passage in *Palmer's Company Law*:[11] 'This right to a winding-up order is, however, qualified by another rule, *viz.*, that the court will regard the wishes of the majority in value of the creditors, and if for some good reason they object to a winding-up order, the court in its discretion may refuse the order.' The majority of the court regarded that statement as not only well supported by authority including decisions of the Court of Appeal, but also to be in accordance with the plain meaning of section 346 of the Act. In the case before them the judge in the County Court had stated that in his view 'it is for the court to weigh up all relevant matters and decide whether the *prima facie* right of the petitioning creditors to an order should give way to the wishes of a majority of creditors expressed by the bare fact of opposition coupled with the nature of their debts.' The court was of opinion that this was the correct view to take in the present case. In the words of Willmer L.J.:[12] 'In the state of ignorance in which he was left I cannot see that he was guilty of any misdirection in putting the matter in that way. The answer to the question which the judge put to himself was a matter for his discretion. The fact that in the event he did not give effect to the wishes of the majority does not mean that in exercising his discretion he did not have regard to them.'

In both these cases minority creditors obtained a winding-up order against the opposition of the majority. In *re A.B.C. Coupler and Engineering Co. Ltd.*[13] the opposition of the majority prevailed over the minority. The company had a nominal capital of £200,000 paid up to £194,000. A statement of its financial position, about four months before the petition, showed an excess of assets over liabilities amounting to £689,687. The petitioning creditor had obtained a judgment against the company under which there was a balance owing of £17,542/19/3. The petition was opposed by a number of creditors whose debts amounted to £18,328. Pennycuick J. disallowed the petition. The learned judge discussed *In re Vuma* at length in the course of his judgment. The distinction, however, between this case and *In re Vuma* is obvious. As Pennycuick J. pointed out:[14] 'In the Vuma case it was decided that the company had no assets and no prospects of successful business and on those particular facts the Court of Appeal considered it was right to wind-up the company.' The learned judge went on to point out, however, that 'it must still be right having regard to the terms of section 346, to

10 He said later at 235 that 'the appellant's argument virtually involves construing the words "may have argued" as though they were "shall give effect to" and also that the argument ignored the important words "as proved to it by any sufficient evidence".'

11 20th ed., at 701.

12 [1961] 1 W.L.R. at 236.

13 [1961] 1 W.L.R. 243.

14 At 246.

have regard to the wishes of the majority of the creditors'; and that although those wishes may not be conclusive, in his opinion they still possessed great weight. 'And it seems to me that where the wishes of the majority are on the face of them reasonable, the court ought to follow those wishes in the absence of any special circumstances.' He proceeded to explain that in the present case the financial status of the company, and the fact that the company had prospects of continuing to carry on in the future were sufficient grounds for showing that the wishes of the majority of creditors of the company that it should not be wound-up, were indeed reasonable. Accordingly, he dismissed the petition.

It is submitted that in each of the foregoing three cases the courts took into consideration the company's position in the trading community. In *re Vuma*, as Harman L.J. pointed out, the opposing creditors must furnish good reasons to the court why it should leave 'this hopelessly insolvent and assetless company encumbering the ground.'[15] It is not sufficient for two people simply to walk into court and say that 'we now oppose' the petition. Although the question of law involved is really a matter of interpretation, it is submitted that it will assume greater importance having regard to the steady increase at the present time in the number of small family companies and the like. This is perhaps borne out by the fact of the three cases in question all having been heard within the space of three months.

A. E. Bailey

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15 [1960] 1 W.L.R. at 1286.