GENERAL SECURITY INSURANCE COMPANY OF CANADA *(Defendant)* — APPELLANT;

AND

HOWARD SAND & GRAVEL COMPANY LIMITED *(Plaintiff)* ..... — RESPONDENT.

1954

*June 3, 4, 7

*Oct. 18

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Pleadings—Insurance—Public Commercial Vehicles Act (Ont.)—Form of action to recover money paid 3rd party induced by misrepresentation by insurer to insured—Applicability of The Public Commercial Vehicles Act R.S.O. 1950, c. 304 to commercial vehicle used by real owner solely for purposes of registered owner.

The respondent sued the appellant to recover money which it alleged it had paid under a mistake of fact by reason of misrepresentation by the appellant. The latter had issued a public liability policy covering a motor truck registered in the respondent's name and had undertaken the defence of an action for damages caused by the truck. Just before trial it advised the respondent that it had assumed the defence on the assumption that the respondent was the owner but, having now learned that one P was the real owner, the policy was invalid and it might be forced to withdraw from the action. It had however arranged a settlement for $25,000 plus costs and was prepared to pay $15,000 if the respondent paid the balance. The respondent did so and thereafter the present action was brought.

For some time P had been employed to haul exclusively for the respondent. In the belief that to continue to do so he would have to be licensed under *The Public Commercial Vehicles Act,* R.S.O. 1950, c. 304, an arrangement was entered into whereby P sold the truck to the respondent for one dollar subject to resale on the same terms at any time P desired, P to register and insure the truck in the respondent's name. The agent of the insurer was advised of the arrangement at the time the truck was insured, some nine months prior to the accident.

Held: 1. That the arrangement entered into between the respondent and P. did not infringe the provisions of *The Public Commercial Vehicles Act,* R.S.O. 1950, c. 304.

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2. That the appellant knew of the arrangement and by its misrepresentation induced the respondent to make a payment which the latter was entitled to recover as money paid by the respondent to the use of the appellant.

Per Locke J.: The appellant was estopped by its conduct from asserting that the right to indemnity had been lost by reason of misrepresentations. In consequence of the provisions of ss. 211 and 214 of the *Insurance Act*, R.S.O. 1950, c. 173, in the circumstances disclosed by the evidence the principle in *Moule* v. *Garrett* L.R. 7 Ex. 101 applied, and the moneys paid could be recovered as moneys paid to the appellant's use.

Decision of the Court of Appeal for Ontario [1954] 1 D.L.R. 99, affirmed.

APPEAL by defendant from the judgment of the Court of Appeal for Ontario (1) allowing an appeal from the judgment of Barlow J. (2) dismissing plaintiff's action for the recovery of money paid under mistake.

J. F. McGarry, Q.C. and *A. J. Campbell, Q.C.* for appellant.

T. N. Phelan, Q.C. for respondent.

The CHIEF JUSTICE:—The appellant mis-stated a fact when it stated through its solicitor's letter of October 10, 1951, that "it has been conducting the defence of this action on the assumption that Howard Sand & Gravel Company, Limited, was the owner of the truck involved in the accident". The appellant had not been conducting the defence of the Atkinson action on any such assumption and the appellant knew it. That being so, the payment made by the respondent which, no matter what the form, was in substance a payment to the appellant, was made under a mistake of fact and may be recovered from the appellant as money paid to its use, unless the trial judge was right in the view he took of the case.

Mr. Justice Barlow held that the action failed because, in his opinion, the appellant had entered into an illegal scheme in contravention of the *Public Commercial Vehicles Act*, R.S.O. 1950, c. 304. As to this, I agree with the Court of Appeal that the respondent was the owner of the truck for all relevant purposes; but, even if it be assumed that Patterson remained the owner, I also agree that he was not

(1) [1954] 1 D.L.R. 99. (2) [1953] 3 D.L.R. 633.

conducting upon a highway by means of a public commercial vehicle *the business* of transportation of goods and, therefore, there could be no effort to circumvent the provisions of the statute.

The appeal should be dismissed with costs.

RAND J.:—I agree that the license under the *Public Commercial Vehicles Act* is not necessary where the truck is used solely for the purposes of its registered owner. The title transferred to the respondent entailed the entire control of its use and in this aspect it becomes, for the purposes of the Act, a private vehicle. I desire to guard myself, however, against suggesting that it is only for trucks in common carrier service for which licenses are required; a truck owner may carry on trucking or carrier services short of holding himself out to carry for the public generally.

I agree also that the accord to share the loss with the insurance company was induced by the misrepresentation of a fact within the knowledge of the company. The company, through its authorized agents, knew the circumstances of the transfer of title to the respondent a few days after the insurance was effected. Although the letter containing this misrepresentation was written by the solicitor of the insurance company, it is clear that he is merely communicating the representations of his principals.

These were the two issues on which the case was fought out. The respondent is entitled therefore to have the accord rescinded: as the money was paid to the claimant at the request of the insurance company, it became, in the circumstances, paid to its use and can be recovered under that count.

The appeal must be dismissed with costs.

The judgment of Kellock and Estey JJ. was delivered by:—

KELLOCK J.:—The business of the respondent, carried on at two plants, one at Hamilton and the other at nearby Aldershot, is, *inter alia,* the production of ready-mixed concrete for which annually some 10,000 tons of Portland cement is required.

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For these operations the respondent maintains a number of its own trucks, and prior to April, 1948, it had begun to employ also, one Patterson to haul cement with his truck. Howard, the president of the respondent, testified that at that time the police had begun to enforce the *Public Commercial Vehicles Act* and had warned Patterson, who did not have what is known as a P.C.V. licence, to discontinue hauling cement. The respondent and Patterson thereupon entered into an arrangement, set out in an exchange of letters dated the 12th of April, 1948, under which Patterson "sold" to the respondent company his truck, composed of a tractor and trailer, for $1.00 each, on terms that the respondent would "resell" the vehicles to him at any time on the same terms. It was agreed that Patterson would insure the truck against public liability and property damage, but the insurance was to be in the name of the respondent. Registration of the truck under the *Highway Traffic Act* was obtained in the name of the respondent.

While the respondent company placed its name upon the truck, it remained at all times in the possession of Patterson who used it exclusively, as arranged, in hauling cement for the respondent. Patterson was paid therefor "freight and haulage" in exactly the same way as the respondent paid other truckers who held P.C.V. licences and hauled for the respondent. Patterson was at no time paid wages by the respondent company and all expenses of operating the truck, including gas, oil and repairs, were paid by him. The learned trial judge, on this evidence, found that in reality Patterson remained the owner, and that the arrangement between him and the respondent was entered into in the belief that Patterson would otherwise have required a P.C.V. licence.

The agent for the then insurer of the truck was informed of these facts at the time, and the existing insurance was, through him, transferred into the name of the registered owner. Subsequently, a new tractor was purchased and paid for by Patterson in replacement of the former one and it was agreed between him and the respondent that the arrangement would continue to apply to it. The original insurance was not issued by the appellant but on June 15, 1950, the appellant became the insurer.

The policy was executed on behalf of the appellant by Anglo Canadian Underwriters Limited "authorized for the purpose" by the appellant. On the 28th of June following, Anglo Canadian Underwriters wrote the agent, one Edworthy, stating:

> We have recently ordered our usual investigation of this risk, and we have been advised to the effect that the Howard Sand & Gravel Company do not own the vehicle described under this policy. It has been suggested that a private owner who is doing some hauling for this Company may be insuring this truck.
>
> In view of this we would ask you to kindly let us have your further advice in this connection.

To this letter Edworthy replied as follows:

> Lynden, June 29/50
>
> Dear Sirs,—
>
> You are right, the actual owner of truck is B. Patterson, Rockton, whom we have had insured for years. The truck is licensed, & in the name of Howard Sand & Gravell for business reasons. I believe the above Co. has a Contract for cement, and Assured does all his work for the Co. & its customery for owners of trucks to have Co's name on truck, there is nothing underhand in the setup.
>
> (sgd.) S. Edworthy

This letter was produced at the trial from the custody of the appellant. It is therefore apparent that the "usual investigation of this risk" to which the letter refers, was carried out by Anglo Canadian Underwriters Limited on behalf of the appellant company, and the information it elicited from the agent was duly transmitted to the appellant.

Subsequently and following the accident of the 6th of March, 1951, out of which the present litigation has arisen, the appellant, with the knowledge of the situation above disclosed, paid to the respondent under the policy the amount of the damage sustained by the truck itself in the accident, as well as the amount of a fire loss to the truck in September, 1950. When, therefore, it was stated by the solicitors for the appellant in the letter of the 10th of October, 1951, to the solicitors for the respondent, that

> The insurer instructs us that it has been conducting the defence of this action on the assumption that Howard Sand & Gravel Company Limited was the owner of the truck involved in the accident.

this statement was not true and the "insurer" knew that.

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The learned trial judge held that although the appellant was, in fact, aware of the real situation, nevertheless the *Public Commercial Vehicles Act* prohibited Patterson from operating his truck, as he did, without a P.C.V. licence and that the respondent, by accepting registration of the truck in its name, was a party to the breach of the statute with the result that the insurance was void. The action was accordingly dismissed.

This judgment was set aside on appeal. In the opinion of the Court of Appeal the transaction of April, 1948, between Patterson and the respondent was effective to constitute the respondent the owner of the vehicle, it being held that the statute had no application to "a vehicle used exclusively for the transportation of an owner's own goods", and did not affect the respondent as owner. The court allowed recovery on the footing of the appellant's misrepresentation.

In my opinion, the transaction of April, 1948, was, as the learned trial judge held, admittedly for the purpose of evading what was believed to be the operation of the statute, and I am content to assume that, as between the parties to this action, the proper view is that Patterson remained the owner of the vehicle. The first question to be determined is as to whether the statute was in fact infringed.

The statute is the *Public Commercial Vehicles Act*, R.S.O., 1950, c. 304. S. 2 provides as follows:

> 2. (1) No person shall conduct upon a highway by means of a *public* commercial vehicle the *business* of transportation of goods except under an operating licence.
>
> (2) No person shall operate a public commercial vehicle unless the vehicle is licensed as a public commercial vehicle under this Act.

"Public commercial vehicle" is defined by s. 1(*i*) as

> A *commercial* motor vehicle or trailer as defined in *The Highway Traffic Act*, operated on a highway by, for, or on behalf of any person for the transportation for compensation of goods . . .

The italics are mine.

The definition in the *Highway Traffic Act* referred to, deals only with the structure of vehicles.

Patterson, before the transaction of April, 1948, and afterwards, in the view that he remained the owner, was, of course, carrying goods for compensation by means of his

truck. In so doing, however, was his truck "a public commercial vehicle", and was he conducting upon a highway the "business" of transportation of goods by means of "a public commercial vehicle" within the meaning of the statute?

Other provisions of the statute are relevant to this inquiry. It is provided by s. 4, s-s. (1) that no operating licence (i.e., a "public commercial vehicle operating licence issued under this Act", (s. 1(*h*))), is to be issued without the approval of the Ontario Municipal Board, such approval being evidenced by a certificate of the Board of "public necessity and convenience". The Board is required by s-s. (1)(*a*) to take into consideration the construction, width and nature of the highway, as well as the volume and nature of the traffic "on the proposed route", the type, weight, nature and number and the proposed use of the vehicles for which the P.C.V. licence is required, and the effect upon traffic conditions of the issue of the licence, as well as "the public necessity and desirability" of furnishing the proposed services upon the highways in question.

It has not been shown in the first place, that Patterson, in hauling cement to one or other of the two plants of the respondent, was confined in his operations to any one route. Moreover, I do not think the statute contemplates prohibiting the owner of a single truck from carrying the goods of one person exclusively without the Ontario Municipal Board first having considered whether or not there were not already available sufficient trucks owned by others for the carriage of such goods, and so certifying. It would seem that what is contemplated by the words "public necessity and desirability", and the other provisions of the statute to which I have referred, is the operation over defined routes of common carriers holding themselves out to the public as such. This view is strengthened by the provisions of s. 15, which authorizes the Lieutenant-Governor in Council to make regulations covering such matters as

> (*d*) fixing the form, amount, nature, class, terms and conditions of insurance or bond that shall be provided and carried by persons licensed under this Act;
>
> (*g*) respecting the publication, filing and posting of tariffs of tolls, and the payment of tolls;

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(*l*) prescribing the method of bookkeeping or accounting to be used and the returns or statements to be filed, and providing for the examination by officers of the Department of all books, records and documents;

(*m*) prescribing the method of handling cash on delivery shipments and the collection and remittance of cash on delivery funds;

(*n*) prescribing the form of bill of lading to be used;

There would appear to be no object which the legislature could have had in mind in connection with an operation such as is here in question in requiring the "publication", "filing" and "posting" of "tariffs". Such provisions would, however, be apt in the case of a carrier holding itself out as willing to carry for the public generally, although in practice it might confine its operations to the goods of one person. Under the arrangement between Patterson and the respondent company, the former had no right, so long as the arrangement lasted, to carry goods for anyone else.

Accordingly, although the parties considered that in the arrangement which they made, they were avoiding the effect of the statute, I do not think that aspect of the matter relevant. In my opinion, the statute did not, in fact, apply. There was, consequently, no illegality attaching to the policy of insurance.

The respondent was induced to make the payment to the Atkinson Estate upon the representation of the solicitors instructed by the appellant, that "the insurer" had "been conducting the defence" of the action "on the assumption that Howard Sand & Gravel Company Limited was the owner of the truck", and had discovered, only on October 3, 1951, that that was not so but that Patterson was the owner. As already pointed out, this was an untrue statement to the knowledge of the insurer.

The respondent rested its case in argument upon the principle of *Kelly* v. *Solari* (1), for the recovery of money paid under a mistake of fact. In my view, however, that principle does not apply. When the settlement was made with the Atkinson Estate, the respondent issued its cheque payable to the solicitors for the estate for the agreed portion to be paid by the respondent and the balance of the settlement was paid by the appellant. The settlement was, of course, a settlement of the claim of the estate against the

(1) (1841) 9 M. & W. 53.

respondent. The appellant company did not receive these moneys from the respondent and accordingly, it is not liable in this form of action.

It may be that the action might have been framed in damages for deceit, but on the argument, Mr. Phelan expressly disclaimed that basis of claim. While he rested his claim as above, it is apparent that the "mistake" which the respondent at all times had in mind was mistake in accepting as true the misrepresentation put forward by the appellant as to its lack of knowledge. There was no other mistake. Misrepresentation accordingly has been throughout the real basis of the respondent's claim although it has been put forward as "mistake", and the only dispute between the parties on this branch of the case was as to whether or not misrepresentation on the part of the appellant had been in fact established. As put by the appellant in its factum:

> The burden is upon the respondent to show any misrepresentation in the letter of October 10th, 1951.

The issue according to the respondent's factum is:

> (*a*) that the Respondent was entitled to recover the monies paid to the Insurer because the monies were paid under a mistake and because the Respondent was induced to make the payments by the material misrepresentations in the letter;
>
> (*d*) that the Insurer was at all times well aware of the said transaction and of the ownership of the automobile, and with such knowledge paid and satisfied claims of the Respondent under the insurance policy.

The learned trial judge's express finding is that the appellant

> Must be found to have known and been well aware of the situation.

And this finding was affirmed by the Court of Appeal.

This being the situation, the respondent, in my opinion, is entitled to recover on the footing of an action for moneys paid by the respondent to the use of the appellant. The moneys which the respondent paid to the Atkinson Estate, it was induced to pay by reason of the misrepresentation. The representation being untrue, the respondent has paid moneys which the appellant had taken on itself to pay under the policy of insurance it had issued to the respondent. This is sufficient to establish the cause of action; 7 Halsbury, 2nd ed. p. 265, par. 367.

I would dismiss the appeal with costs.

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LOCKE J.:—I have had the advantage of reading the judgment to be delivered by my brother Kellock in this matter and, for the reasons given by him, I am of the opinion that the arrangement made between Patterson and the respondent company and the operation of the truck pursuant to that arrangement did not infringe the provisions of the *Public Commercial Vehicles Act* (c. 304, R.S.O. 1950 as amended).

I agree with the learned trial Judge that the respondent was not the owner of the insured vehicle at the time the insurance was effected. The arrangement made between Patterson and the respondent, as explained by the witness Howard, was simply for the purpose of enabling the company to obtain a licence for the truck in its name and to avoid what was thought by both parties to be the necessity of obtaining a licence under the *Public Commercial Vehicles Act*. As the evidence shows, the vehicle was not carried on the books of the respondent as one of its assets, for the sufficient reason that it was common ground that it was the property of Patterson. The bearing of this upon the claim under the policy raises a question quite distinct from that sought to be raised under the *Public Commercial Vehicles Act*.

The earlier policies issued in the name of another company upon the application of the respondent were not put in evidence. In the application for the insurance which was reproduced on the face of the policy, the respondent represented that the tractor which formed part of the insured vehicle had been purchased by it in January 1950, new, for $3,500 and declared that it was the registered owner of the vehicle. The tractor had not been purchased by the applicant at the time stated nor had the applicant paid the sum of $3,500 for it; rather it had been purchased by Patterson to replace the tractor which had been insured by another company at the commencement of the arrangement between the parties. While the effect of this misrepresentation was not argued before us, the appellant has contended on the authority of a decision of the Court of Appeal of Ontario in *Sleigh* v. *Stevenson* (1), that the representation that the respondent was the registered owner was untrue. Since the same considerations determine, in my

(1) [1943] O.W.N. 465.

opinion, the legal consequences of these statements, they may be properly treated as if both points had been taken before us.

By s. 200 of *The Insurance Act* it is provided that where an applicant knowingly misrepresents any fact required to be stated in the application, any claim by the insured shall be rendered invalid and the right of the insured to recover indemnity shall be forfeited. This section of the statute is reproduced as Item 8 in the application for the insurance signed by the respondent. If it be accepted that the representation that the respondent was the registered owner of the vehicle should be construed as meaning that the respondent was not merely registered as owner but was in truth the owner of the machine, the right to indemnity would be lost unless the right to set up this defence to a claim was waived by the appellant or if, for other reasons, the appellant was estopped from relying upon it.

The appellant pleaded in the Statement of Defence that the respondent had no insurable interest in the vehicle and that it was owned by Patterson. In the reply, these allegations were put in issue and it was alleged that the appellant had knowledge of the arrangement between the respondent and Patterson when the policy was issued and when the appellant had paid a collision loss under the policy in March of 1951. At the trial, the respondent was permitted to amend the reply by alleging that the appellant was estopped from denying the validity of the policy since the facts upon which the defence was based were known before or immediately after the issue of the policy on June 15, 1950, and by the defendant's silence until October 10, 1951, the respondent had been induced to believe that the policy was valid.

The policy issued by the appellant bore the printed signature of the appellant and that of Anglo-Canadian Underwriters Limited, under which appeared the words "authorized for the purpose". Other evidence as to the status of Anglo-Canadian Underwriters Limited is very slight. The application for the policy was taken by one Edworthy, an insurance agent who had for some ten years prior thereto submitted applications for insurance to the Anglo-Canadian Company. In cross-examination, he referred to that company as a broker but he really had no first hand information

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as to the nature of whatever arrangement existed between it and the appellant company. At the trial, the policy signed as above stated was put in evidence without objection and the appellant did not contend that it was not properly executed so as to be binding upon it. The appellant was aware that the respondent contended that notice to Anglo-Canadian Underwriters Limited of the facts as to the arrangements between it and Patterson was notice to it but elected to call no evidence. It is my opinion that in these circumstances there was prima facie evidence that Anglo-Canadian Underwriters Limited was the agent of the appellant in the negotiations which resulted in the issuance of the policy and at the time the enquiries were made of the agent Edworthy on June 28, 1950, shortly after the policy was issued which disclosed the nature of the arrangement between Patterson and the respondent and at the time of the occurrence of the accident in March, 1951.

It was shown that on August 9, 1950, the insured vehicle was damaged by fire and a claim for the loss was filed with the appellant. The risk of fire was by the policy insured by the Phoenix Fire Insurance Company of Paris, the portion of the risk assumed by the appellant excluding fire losses, and while the claim was made upon the appellant and Howard said that the loss was paid the amount was presumably paid by the Phoenix Company. The appellant, however, was manifestly made aware of the claim and no suggestion was made at that time that the policy was not in effect.

On March 6, 1951, the accident took place which gave rise to the action brought by the Atkinson Estate against the respondent and a claim for the loss caused to the insured vehicle by collision was made upon both of the insurance companies and paid. It was not until the following October that the appellant first raised the question as to the validity of the policy or of the respondent's right to indemnity.

It is my opinion that under these circumstances the appellant should be held to be estopped by its conduct from asserting that the right to indemnity had been lost by reason of the misrepresentations made in the application.

The claim of the respondent, as pleaded, was to recover the moneys paid by it to the solicitors for the Atkinson Estate as its contribution to the settlement, which amount

was said to have been paid in the belief that it was legally liable to contribute to the settlement, a belief induced by representations made by the defendant which were untrue in fact. As to one of these, the evidence adduced might support a claim that its falsity was known to the defendant and so justify an action for damages for deceit. Counsel for the respondent, however, disclaimed before us any such claim and rested the respondent's right to recovery upon the claim that the appellant was liable on the ground that the moneys had been paid by a mistake of fact.

Subject to certain exceptions which are pointed out in the 20th Edition of Chitty on Contracts, at p. 95, within none of which the present matter falls, it is of the gist of an action for the recovery of moneys paid by a mistake of fact that the moneys were received by the defendant to the use of the plaintiff. The customary form of pleading in actions for the recovery of moneys so paid may be found in the last Edition of Bullen and Leake at p. 228 where, in a note, the cases relating to this type of action are collected. These include *Kelly* v. *Solari* (1), *Jones* v. *Waring* (2), and other authorities upon which the respondent relied in the argument before us. These might support a claim for the recovery of the money from the Atkinson Estate but not from the appellant as, in them, the action was brought against the actual recipient of the money. It is, in my opinion, a sufficient answer to a claim to recover these moneys as moneys paid under a mistake of fact that the appellant did not receive them.

I have, however, come to the conclusion that this is a case where the moneys paid may be recovered as moneys paid by the respondent to the use of the appellant, upon the principle stated by Cockburn C.J. in *Moule* v. *Garrett* (3).

The position is affected, in my opinion, by the provisions of the *Insurance Act* (c. 183, R.S.O. 1950). While it was the respondent which was in the first instance liable to the Atkinson Estate, by reason of the provisions of that Act the appellant was liable to pay the amount of any judgment recovered against the respondent up to the sum of $5,000 in any event by virtue of s. 211 of the Act and to

(1) (1841) 9 M. & W. 53. (2) [1926] A.C. 670.
(3) (1872) L.R. 7 Ex. 101.

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the full extent of the policy limits under the provisions of s. 214, unless the insurer was not, for some reason, liable to indemnify the insured. By the latter section a person having a claim against an insured for which indemnity is provided shall, notwithstanding that such person is not a party to the contract, be entitled upon recovering a judgment against the insured to have the insurance moneys payable under the policy, to the extent above mentioned, applied in satisfaction of his judgment. At the time the solicitors for the insurance company approached the respondent, early in October 1951, the liability of the respondent to the Atkinson Estate had not been determined but, if liability existed, both the appellant and the respondent would become liable when judgment was recovered, the respondent to the full extent and the appellant to the extent limited by the policy and the provisions of the Act.

As I have indicated, I think there was no defence to the claim of the respondent to indemnity upon any of the grounds asserted and as between these parties liability to satisfy the claim to the extent of the insurance rested upon the appellant.

In *Moule* v. *Garrett,* Cockburn C.J., with whose judgment Willes, Blackburn, Mellor, Brett and Grove, JJ. agreed, quoted with approval a statement in the then current edition of Leake on Contracts which reads (p. 104):—

> Where the plaintiff has been compelled by law to pay, or being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount.

Cockburn C.J. further said that whether the liability was put on the ground of an implied contract, or of an obligation imposed by law, is a matter of indifference and that it was such a duty as the law would enforce. This statement from the earlier edition of Leake referred to in *Moule* v. *Garrett* is repeated in the last edition of that work at p. 46 and a statement to the same effect appears in the last edition of Chitty on Contracts at p. 1023.

This principle is, in my opinion, applicable in the circumstances of this case and, while the claim was not thus expressed in the pleadings, it appears to me that all of the

evidence which would be relevant to the consideration of such a cause of action is before us. I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. F. McGarry.*

Solicitors for the respondent: *Phelan, O'Brien, Phelan & FitzPatrick.*