1940

* March 12
13, 14.
* Oct. 30.

J. DONAT MARLEAU (PLAINTIFF).....APPELLANT;

AND

THE PEOPLE'S GAS SUPPLY COMPANY LIMITED (DEFENDANT) .....} RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Sale of Goods—Purchaser claiming damages for alleged breach of conditions implied by s. 15 of Sale of Goods Act, R.S.O., 1937, c. 180—"Goods supplied under a contract of sale"—Sale of acetylene gas supplied in tank—Explosion of tank in purchaser's garage—Cause of explosion—Evidence—Findings of trial judge—Pleadings—Allowance of amendment at trial—Effect and scope of pleadings as amended.

Defendant, a manufacturer and distributor of acetylene and other gases, had delivered to plaintiff two tanks (or "cylinders") containing acetylene gas which plaintiff required (to defendant's knowledge) to use in plaintiff's garage. Plaintiff had purchased from defendant the acetylene gas, but when it was used was to return to defendant the tanks (which defendant had purchased from the manufacturer

* PRESENT:—Rinfret, Crocket, Davis, Kerwin and Hudson JJ.

thereof) and (for retention after 30 days) pay a rental therefor. (A time limit was fixed for return but had not expired when the accident in question occurred). Some time after said delivery, one of said tanks, which tank had not been used since delivery, exploded (whether from defect therein or from some immediately prior volume explosion or other external cause in the garage, where plaintiff had been working at a welding operation, was a matter in dispute), and plaintiff was injured and his property damaged. He sued for damages. In his statement of claim he alleged that the explosion was caused by negligence of defendant "in storing under compression acetylene gas in a defective and unsafe tank, the bottom part of which, not being properly and securely welded and affixed to the remaining portion, suddenly and violently separated from it with the resulting explosion." There was no proof of any such improper or insecure welding. By amendment allowed at the trial, plaintiff added in his statement of claim a plea that he purchased the gas and hired the tank, having made known to defendant the purpose for which they were required and relying upon defendant's skill or judgment, the gas and tank being goods which it was in the course of defendant's business to supply; that the gas was purchased and the tank hired by description; that "the said gas and/or tank were not reasonably fit for the purpose for which they were sold and/or hired and were not of merchantable quality" and that plaintiff's damages were the direct and proximate result thereof. The trial judge found that the explosion "was due to some defect in the internal structure or set-up of the cylinder, using the words in their widest application" and "that the cylinder exploded by reason of extremely high internal pressure only, due to some internal structural defect," and gave judgment to plaintiff for damages. This judgment was reversed by the Court of Appeal for Ontario, ([1939] Ont. W.N. 367; [1939] 4 D.L.R. 199) which held, on their view as to the issue raised by the pleadings and the lack of proof to support plaintiff on that issue, it was not open to the trial judge to enter upon a consideration of all the possible causes of the explosion or "to find that the explosion was due to some unknown defect in the cylinder not alleged by the plaintiff, and the nature of which the evidence does not disclose." Plaintiff appealed.

Held (Rinfret and Kerwin JJ. dissenting): Plaintiff's appeal should be allowed and the judgment at trial restored.

Per curiam: Said amendment to plaintiff's pleadings at the trial was, having regard to the proceedings, discussions, and offering of terms to defendant, properly allowed, and plaintiff's pleadings, so amended, covered a claim founded in contract generally for breach of conditions implied under s. 15 of the *Sale of Goods Act,* R.S.O., 1937, c. 180.

Per Crocket, Davis and Hudson JJ.: Upon all the evidence there was warrant for the trial judge's finding as to the cause of the explosion and (though on the printed record a doubt as to such cause might exist in the minds of an appellate court) his finding should not be disturbed; and on that finding, and as the facts essential to give rise to the conditions implied by said s. 15 of the *Sale of Goods Act* were established, plaintiff was entitled to judgment for damages.

1940

MARLEAU v. PEOPLE'S GAS SUPPLY CO. LTD.

Though the tank was not actually sold but only the acetylene gas contained therein, yet both were "goods supplied under a contract of sale" within the meaning of said s. 15 of the *Sale of Goods Act*. *Geddling* v. *Marsh*, [1920] 1 K.B. 668, cited.

Per Rinfret and Kerwin JJ. (dissenting): Upon the evidence, the cause of the explosion of the tank in question was a prior volume explosion; and whether that was so or not, there was not sufficient in the evidence to warrant the inference that the tank (assuming, but not deciding, that said s. 15 of the *Sale of Goods Act* applied to it) and its contents were not reasonably fit for the purpose for which they were intended or that they were not of merchantable quality.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment of the trial judge, Chevrier J.) dismissed the action, which was brought to recover damages for personal injuries and damage to property caused by an explosion in the plaintiff's garage which the plaintiff alleged occurred by reason of defect in an acetylene gas tank delivered by the defendant to the plaintiff. The material facts of the case sufficiently appear in the reasons for judgment in this Court now reported. The appeal to this Court was allowed and the judgment at trial restored with costs throughout, Rinfret and Kerwin JJ. dissenting.

A. W. Beament K.C. for the appellant.

T. N. Phelan K.C. and *G. E. Edmonds K.C.* for the respondent.

The judgment of Rinfret and Kerwin JJ., dissenting, was delivered by

KERWIN J.—This is an appeal by J. Donat Marleau from a judgment of the Court of Appeal for Ontario dismissing an action brought by him against The People's Gas Supply Company Limited and thereby reversing the judgment of Mr. Justice Chevrier after a trial without a jury. The action should be dismissed, but as my reasons for that conclusion are different from those assigned by the Court of Appeal, it will be necessary to refer to the pleadings and the course of the trial and to state the facts in some detail.

The plaintiff was the owner of a building in the village of St. Isidore in the Province of Ontario, in which he conducted a garage business for the repair of motor cars, and

(1) [1939] Ont. W.N. 367; [1939] 4 D.L.R. 199.

he himself was a mechanic accustomed to doing acetylene welding. The defendant is a company engaged in the business of manufacturing and distributing acetylene and other gases. About the thirty-first day of March, 1937, the defendant delivered to the plaintiff, at his garage, two tanks of acetylene gas. There is no dispute as to the arrangement under which this delivery was made,—the plaintiff purchasing the quantity of acetylene in the tanks and agreeing to pay a rental for the containers. The smaller of the two tanks (Exhibit 8) was placed on the garage floor against the north wall and was never used in any way. From time to time, as occasion required, the larger tank (Exhibit 13) was used by the plaintiff in connection with his welding operations. On the night of May 28th, 1937, while Exhibit 13 was so in use, Exhibit 8 exploded, injuring the plaintiff and damaging the building and contents.

In his statement of claim, the plaintiff alleged that the explosion was caused through the negligence of the defendant by

> storing under compression acetylene gas in a defective and unsafe tank, the bottom part of which, not being properly and securely welded and affixed to the remaining portion, suddenly and violently separated from it with the resulting explosion.

The tank alleged to be "defective and unsafe" was Exhibit 8. The defendant denied negligence and it was on that basis that the action proceeded and the trial commenced. The trial continued for some days until the plaintiff's case was practically completed when counsel for the plaintiff applied to amend the statement of claim by adding the following:—

> The Plaintiff purchased the acetylene gas contained in the said tank from the Defendant and hired the said tank and the contents thereof (other than the said acetylene gas) from the Defendant having made known to the Defendant the purpose for which the said gas and tank were required and relying upon the skill or judgment of the Defendant, the said gas and tank being goods which it was in the course of the Defendant's business to supply. The said gas was purchased and the said tank was hired by description. The said gas and/or tank were not reasonably fit for the purpose for which they were sold and/or hired and were not of merchantable quality. The damages suffered by the Plaintiff as herein set out were the direct and proximate result of the said goods not being reasonably fit for the purpose for which they were sold and/or hired and not being of merchantable quality.

This application was opposed by the defendant but the trial judge allowed it. The question of terms was dis-

1940

MARLEAU v. PEOPLE'S GAS SUPPLY CO. LTD.

Kerwin J.

cussed, including one as to whether the trial should be adjourned for the purpose of giving the defendant an opportunity to prepare to meet the case put forward by the statement of claim as amended. Counsel for the plaintiff also offered to recall any or all of his witnesses so that they might be further cross-examined. After consideration, counsel for the defendant determined to proceed with the trial without asking for any adjournment.

Undoubtedly a trial judge has the right to grant an amendment during the trial of an action, and an appellate court may interfere with the judgment pronounced after such a trial, if the opposite party has suffered any injustice. In the present case the Court of Appeal considered that this had occurred but, in view of the facts that an adjournment was suggested and the privilege offered to counsel for the defendant to cross-examine again any, or all, of the plaintiff's witnesses, and that counsel then decided to continue with the trial, I am unable to agree. It is true that witnesses were present from a distance, including experts, but all these matters of expense could have been arranged. When counsel deliberately takes a stand under these circumstances, the party for whom he appears must abide by the consequences.

It was next argued that even with the amendment the defendant was only obliged to meet a claim of breach of contract confined to an allegation of negligence through a defective weld but the remarks of counsel for both parties on the motion to amend, and the amendment itself, are not, in my view, capable of that construction. As amended, the claim against the defendant is founded in contract, generally, as well as in tort.

From the amendment and the argument at bar, it appears that reliance is placed upon section 15 of *The Sale of Goods Act*, R.S.O., 1927, chapter 163, the relevant provisions of which are as follows:—

15. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(*a*) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied con-

dition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

(*b*) Where goods are bought by description from the seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

It is said that these provisions clearly apply to the sale of the acetylene gas and that so far as the container is concerned, the plaintiff and defendant, as bailee and bailor for hire, are, in relation to the implied conditions, in the same position as vendee and vendor, citing *Hyman* v. *Nye* (1); *Vogan* v. *Oulton* (2). It is also contended that the tank, although not actually sold, falls within the meaning of the expression "goods supplied under a contract of sale" as used in section 15 of the Act, citing a decision of a Divisional Court, *Geddling* v. *Marsh* (3), and a decision of the New York Court of Appeals, *Haller* v. *Rudmann* (4), where the *Geddling* case (3) is referred to. There appears to be a difference of judicial opinion as to whether the obligation of a bailor is the same as that of a vendor but, in the view I take of the matter, it is unnecessary to determine the point.

The method of constructing tanks such as the one in question was described, and in fact the history of Exhibit 8 was given. It was not manufactured by the defendant but by a company in the United States. Steel plate of a certain specification was used to form a disc which was cut to the required length and a forged steel boss to carry a valve and a protecting cap was welded at the top. Through the bottom, the cylinder was next filled, under pressure, with an approved porous filler consisting of asbestos plug discs,—this filler serving two purposes, (1) as a carrying or distributing agent for acetone, (2) to break up acetylene into small cells so that in the event of ignition taking place, propagation of the flame would be prevented. A convex bottom was next placed in position and welded. (It might here be interpolated that on the question of negligence the trial judge found no defect, as alleged, in

(1) (1881) L.R. 6 Q.B.D. 685.
(2) (1898) 79 L.T. 384, (1899) 81 L.T. 435.
(3) [1920] 1 K.B. 668.
(4) (1937) 249 N.Y. 83.

1940
MARLEAU
v.
PEOPLE'S GAS SUPPLY CO. LTD.
Kerwin J.

this welding, and in this I agree). Acetone was put in through the valve opening in the head of the tank. It was then subjected to an internal pressure of five hundred pounds of air and one out of the lot of two hundred, or less, that included Exhibit 8, was subjected to an internal hydro-static test of seven hundred and fifty pounds per square inch. A special ring was attached by shrinking around the bottom of the cylinder to protect the weld from abuse in service. Finally, in the convex bottom of the tank were inserted three fusible plugs each containing a core of some material having a low melting point, the purpose of these being to release internal pressure in the cylinder that might be built up due to external heat.

Exhibit 8 was sold by the manufacturer to the defendant in April, 1931. The history of the tank thereafter shows that from time to time the defendant charged the tank with acetylene gas and sent it to its customers. The method of charging was described and no fault has been found with it.

On the night of the explosion, May 28th, 1937, Marleau was welding a piece of metal and for that purpose was using Exhibit 13 in conjunction with an oxygen tank, the two being strapped together on a carrier or holder. Marleau was standing, facing north and seven to ten feet easterly from Exhibit 8, which still stood on the garage floor near the north wall and which had never been used. He completed the welding operation, changed the torch from his right to his left hand, turned off the supply of oxygen, and was about to turn off the acetylene when he heard an explosion, "felt a kind of forced air" on his left side, and became unconscious.

There was a pit in the garage that had been constructed in order to permit mechanics to work underneath motor cars. Marleau was found, after the explosion, in this pit,—about twenty feet from where he had been standing. He was taken outside where it was discovered he had been burned on the hands and face, and the front part of his trousers and underwear had been torn away half way to his hips. An employee who had been working in the pit heard an explosion, felt a rush of air from the direction of the north wall and "something" burned him. The roof was blown off the garage and part of the walls knocked

down. One of two men who were standing near a motor car on the floor of the garage was killed. A dent was discovered in the cement floor just where Exhibit 8 had been standing; the weld-protecting ring that had been on the tank was found on the garage floor as was also the bottom of the tank but, instead of the latter being convex to the inside of the tank as it was prior to the explosion, it was concave. Two of the plugs from the bottom of the tank were picked up in the garage, not fused, and from the evidence it seems clear that they were forced out of their position when the bottom of the tank was deformed. The rest of the tank was found partly buried in the earth at a distance of about three hundred feet from the position it had occupied in the garage. The plugs in the bottom of Exhibit 13 had fused. This tank, Exhibit 13, and the oxygen tank that had been in use with it, were found on the floor but, except for the gauge on the oxygen tank and the hose, undamaged.

The theory of the plaintiff was that Exhibit 8 had exploded from some internal cause, while the theory of the defendant was that there had been a prior external volume explosion in the garage, which caused Exhibit 8 to explode. It is common ground that an acetylene tank such as Exhibit 8 would explode only from one of these two causes, or from external heat, and it is also common ground that in view of the fact that the plugs on Exhibit 8 had not fused, the last alternative was excluded.

I agree with the trial judge that *res ipsa loquitur* does not apply. The tank was not under the control of the defendant at the time of the explosion as were the premises in question in *United Motors Service Inc.* v. *Hutson* (1). In *Donoghue* v. *Stevenson* (2), there was no doubt about the snail being in the bottle. In *Grant* v. *Australian Knitting Mills Ld.* (3), it was shown that the woollen garment, when purchased from the retailer, was in a defective condition owing to the presence of excess sulphites.

The question remains as to what caused Exhibit 8 to explode. The trial judge decided that there was no prior volume explosion and that, therefore, there remained only the plaintiff's theory to account for the explosion, and that there must have been some defect in the construction of

(1) [1937] S.C.R. 294. (2) [1932] A.C. 562.
(3) [1936] A.C. 85.

1940

MARLEAU v. PEOPLE'S GAS SUPPLY CO. LTD.

Kerwin J.

the tank or in the method of charging it with acetone or acetylene gas. The issue does not depend upon the credibility of witnesses but upon the inference to be drawn from undisputed facts. What the proper inference should be may give rise to a difference of opinion and, after anxious consideration of the evidence, I have concluded that there was a prior volume explosion.

We have not here a case of Exhibit 8 standing in the garage and with nothing else occurring in the building that could have no possible relevance to an explosion. The opinion of Mr. Hazen, an expert called by the defendant, that there was a flash-back in the hose stretching from the torch to Exhibit 13 is corroborated by other evidence. Even Stryker, a witness called for the plaintiff, admitted that there might have been a flash-back. Mr. Hazen was also definitely of opinion that following this flash-back, there was a volume explosion in the garage, although he could not say exactly what caused it. He pointed to the elliptical form of the sides of Exhibit 8 after the explosion, and I agree that it is impossible to believe that this deformation was caused when the shell hit the ground some distance away. In view of the condition of the top of Exhibit 8, I find it difficult to believe that that tank went through the roof of the garage before there had been a prior explosion causing the roof to be moved. There is also the evidence of the witness Dumas, who on the night in question was on the same street as the garage and about three hundred feet south of it, and who testified that he heard three detonations, the first two being not as loud as the last.

I have not overlooked that Mr. Pitts, the manager of the defendant company, testified that the presence in the tank of acetone was not a safety factor. In this he is quite wrong, as Mr. Hazen was clear that the absence of acetone, or a sufficient quantity of it, would have a tendency to make the tank more liable to explode. But, as a practical matter, Mr. Pitt's erroneous opinion has no application. The presence of acetone allows the tank to be charged with a greater quantity of acetylene than would otherwise be the case, and from the records it appears that the weight of Exhibit 8, without any acetone, was ninety-three pounds; the acetone put in by the manufac-

turer was twenty pounds; on each occasion that the tank was returned to the defendant, it was weighed in order to discover if it were deficient in acetone, and on three occasions acetone was added.

Assuming that section 15 of *The Sale of Goods Act* applies to the container as well as the acetylene gas, my view is that there was a prior volume explosion which caused Exhibit 8 to explode. Whether that be so or not, there is not sufficient in the evidence to warrant the inference that the tank and its contents were not reasonably fit for the purpose for which they were intended or that they were not of merchantable quality. I would dismiss the appeal with costs.

CROCKET J.—This action, as originally brought, claimed damages to the amount of $25,666.90, for the destruction of the plaintiff's garage and contents as well as other property and for personal injury suffered by the plaintiff in consequence of the explosion of an acetylene gas tank, through the alleged negligence of the defendant in storing acetylene gas in a defective and unsafe tank, the bottom part thereof "not being properly and securely welded and affixed to the remaining portion."

The respondent in its statement of defence admitted that it was the manufacturer and distributor of acetylene and other gases, but alleged that it did not manufacture tanks in which to distribute the gas but purchased them from a reliable manufacturer, and that if the tank in question was defective or unsafe it had no knowledge thereof. It also pleaded unavoidable accident and alternatively that the accident was due entirely to the negligence of the appellant.

The plaintiff joined issue on the statement of defence and gave notice that he desired the issues of fact to be tried by a jury, but when the case was called for trial at the L'Orignal sittings of the court in March, 1938, the presiding judge (Chevrier, J.) granted a motion of the defendant's counsel to strike out the jury notice on the ground that the pleadings involved the consideration of technical questions and expert testimony relating to the cause of the explosion, and the action was consequently one that could better be tried without a jury. The action, therefore, was tried as a non-jury case.

1940

MARLEAU
v.
PEOPLE'S GAS SUPPLY CO. LTD.

Crocket J.

After the trial had continued for several days and the plaintiff's expert witnesses had been examined, cross-examined and re-examined as to the possible causes of the explosion, Mr. Beament, who had then joined Mr. Marion as the plaintiff's counsel, made an application to amend the statement of claim by adding a claim for breach of the implied conditions of the contract of sale and hire, under which the acetylene gas had been delivered to the plaintiff in the said tank, in that the said gas and/or tank were not reasonably fit for the purpose for which they were sold and/or hired, and were not of merchantable quality. Although Mr. Phelan, the defendant's counsel, strenuously objected to the allowance of the amendment upon the ground that it would shift the whole basis of the plaintiff's case from one of tort to one of contract and seriously prejudice the defendant if the trial were proceeded with upon that basis, inasmuch as he had in the preparation of the defence naturally considered the case only from the point of view of negligence, he stressed on the other hand the great expense already incurred by the defendant in connection with the attendance of its expert witnesses, which could not be fully compensated for by any terms that could well be granted on the suggested order for adjournment. At the same time he admitted that the facts involved were the same, whether the question of the defendant's liability were considered from the viewpoint of negligence or that of breach of contract. After a long discussion between His Lordship and counsel, in which it appeared that the plaintiff did not intend to adduce any further evidence and offered to recall any witnesses already examined in order that the defendant's counsel might cross-examine them further if he desired and to submit to any terms that might be imposed, His Lordship intimated that he would allow the amendment, and granted a recess for two hours to afford Mr. Phelan an opportunity of considering whether he should prefer to have the trial adjourned to the next court or to proceed. When the court reconvened Mr. Phelan announced his decision to proceed with the trial and expressly stated that he did not desire to further examine any of the plaintiff's witnesses. The trial was accordingly proceeded with upon the pleadings as amended and con-

tinued for another two or three days, which were mostly occupied with the evidence of Mr. Coakley, factory manager of the Pressed Steel Tank Co., of Milwaukee, from whom the defendant had purchased the alleged faulty tank and many other similar tanks, and that of two other expert witnesses. Practically the whole of the testimony of these three witnesses was directed to the defendant's claim that the explosion of the alleged defective tank, described in the case as Exhibit No. 8, was caused by a so-called external volume explosion, which had occurred in the garage immediately before in connection with a welding job, on which the plaintiff was engaged at his bench from 7 to 10 feet distant from that tank, though he was making no use of it for that purpose, and it had not been used since its delivery to the garage some weeks before.

At the conclusion of the evidence the learned trial judge heard the arguments of opposing counsel and reserved judgment thereupon. This he delivered some weeks later. While stating in his reasons therefor that he could not find that the weld was defective, as alleged in the original statement of claim, he did expressly find that the tank exploded through no fault of the plaintiff and that its explosion was " due to some defect in the internal structure or set-up of the cylinder, using the words in their widest application", and further "that the cylinder exploded by reason of extremely high internal pressure only, due to some internal structural defect," and that it was not of merchantable quality. He allowed the plaintiff $13,565.95 for the damages sustained thereby.

The defendant thereupon appealed to the Court of Appeal, which allowed the appeal and dismissed the action with costs on the ground that it was not open to the trial judge to enter upon a consideration of all the possible causes of the explosion or "to find that the explosion was due to some unknown defect in the cylinder not alleged by the plaintiff, and the nature of which the evidence does not disclose."

It is quite apparent, I think, from the reasons given for the judgment on appeal that the court altogether ignored the amendment of the plaintiff's statement of claim, which the trial judge granted on the trial in the circumstances

1940

MARLEAU v. PEOPLE'S GAS SUPPLY CO. LTD.

Crocket J.

above stated, and treated the case as one which could only be determined upon the basis of the original claim for negligence in connection with the improper and insecure welding of the base to the remaining portion of the tank.

With all respect, I am of opinion that the Court of Appeal was not justified in so holding, in view of the course of the whole trial and particularly of the defendant's election in the circumstances above stated to proceed with its defence on the amended statement of claim rather than take the suggested adjournment on terms, and that the defendant was in no way prejudiced by the amendment. It was, to my mind, not only open to but the duty of the learned trial judge to determine the question of the liability of the defendant for breach of the implied conditions of the contract of sale and hire under the added claim, as well as that for the negligence first charged. Although founded on tort, the claim was one which manifestly arose out of the relationship of purchaser or lessee and vendor or lessor as between the plaintiff and the defendant, and necessarily involved proof of the existence of some fault in the tank in question, to which its explosion and the resulting damage was attributable. The defendant's own plea of unavoidable accident or, in the alternative, that the evplosion of the tank was entirely due to the negligence of the plaintiff, called for the full investigation of all possible causes of the tank's explosion, and it was indeed to that issue, as the record discloses, that practically the whole of the evidence, apart from that bearing on the assessment of damages, was directed from the beginning to the end of the trial. The Court of Appeal having erroneously, as we think, concluded that, notwithstanding the allowance of the amendment, the case could not be considered as involving any claim for breach of the implied conditions of the contract of sale and hire beyond that charged in the original statement of claim, the question remains as to whether upon that branch of the case the learned trial judge was warranted in holding the defendant responsible for the explosion as having been caused by some internal structural defect in the tank, and for the damages the plaintiff sustained as a direct consequence thereof. Although the amendment itself does not say so, it is clear that the claim thereunder is based upon the law

as declared in s. 15 of the Ontario *Sale of Goods Act*. This enactment is in its terms the same as that contained in s. 14 of the Imperial *Sale of Goods Act, 1893*, 56 & 57 Vict., ch. 71, and, like the latter, is a codification of principles long recognized by the common law of England. It cannot be questioned, I think, that the amendment sets up a good and valid cause of action. Whether there was a sale only of the acetylene and a mere bailment of the tank, there can be no doubt that the acetylene could only be supplied in a tank of a particular description nor that both the acetylene and the tank were supplied by the defendant under a contract of sale within the meaning of the law, as declared by s. 15 of the Ontario *Sale of Goods Act*. See *Geddling* v. *Marsh* (1).

Apart from the cause of the explosion, there was no serious dispute as to any of the factors essential to fix the defendant with responsibility as seller under the added claim. It was admitted that the defendant company was a manufacturer and distributor of acetylene and other gases, which could only be supplied to its customers in tanks specially designed and constructed in order to insure their safe transportation and storage when charged. The gas and tank, therefore, were clearly goods of a description, which it was in the course of the defendant's business to supply, and were in fact supplied to the plaintiff under its agreement of sale. That the defendant knew the particular purpose for which this and other similar tanks, charged with acetylene and oxygen, were required and, in the circumstances, that the plaintiff relied on the skill or judgment of the defendant, not only in relation to the manufacture of the gas, but the safety and security of the tanks in which the gases were delivered, can hardly be questioned upon the evidence as it appears in the record. The contract of sale, under which the defendant supplied these tanks and their contents to the plaintiff, must be taken, I think, to have carried with it an implied warranty that they were, not only of merchantable quality, but fit for the particular purpose for which they were supplied.

Both parties clearly recognized that the essential issue centred in the cause of the tank's explosion, and that the explosion could only have been brought about by one or

(1) [1920] 1 K.B. 668.

1940
MARLEAU
v.
PEOPLE'S GAS SUPPLY CO. LTD.
Crocket J.

other of three possible means. These were described as: 1st, the application of considerable external heat; 2nd, external violence or concussion such as a prior or contemporaneous volume explosion, and 3rd, internal defect in the tank itself. It was common ground that if the first two of these possible causes were negatived, the explosion was necessarily attributable to the third. Mr. Coakley, the factory manager of the Pressed Steel Tank Co., from whom the defendant purchased this and other acetylene gas tanks, was asked if it was fair to say that this cylinder, Exhibit No. 8, did not explode by reason of any locally applied heat. His answer was:

A. The examination of it does not reveal evidence of any locally applied heat.

Q. And, if it did explode by reason of any locally applied heat, it would not comply with the Canadian Railway Commission specification No. 8, would it? Isn't that correct? A. That is correct.

Q. So that you would not suggest that it could be locally applied heat that caused this cylinder to explode? A. I don't see how it could be.

Q. So that we have eliminated one possible cause? A. No, it could be in a fire and heat would explode it. Locally applied heat is heat applied at only one point.

Q. There is no evidence of anything like that, is there? That external fire caused this explosion? A. I can't honestly say there is.

Q. In point of actual fact, I notice from the base of the tank that it looks as though those fusible plugs had been forced out? A. That would happen due to the bottom being reversed, the holes becoming larger.

Q. Whereas, if the cylinder had been subjected to heat, the plugs would have fused? A. Yes.

Q. Rather than being forced out, as they appear to have been? A. Yes.

Q. So that, in your opinion, would negative the theory that this cylinder exploded by reason of extraneous heat? A. I can't see any reason for that.

Q. Now we are down to two possibilities, external shock or inherent vice in the cylinder itself? A. That is right.

Q. And if the evidence were to satisfy His Lordship that this explosion of the cylinder, Exhibit No. 8, were not caused by external shock, then we would be left with one thing only, inherent vice? A. Yes, sir.

The following questions and answers on the same subject appear in the cross-examination of Mr. Pitts, the President and General Manager of the defendant company:

Q. If a cylinder explodes without any abnormal external cause, would that be evidence that the cylinder was defective in some respect? A. I think so, yes.

Q. That is, either the cylinder or its contents? A. Yes.

Q. Should a proper cylinder of that kind, properly charged, explode? A. No.

Q. And if, without any other cause, it does explode, that is evidence that either the cylinder or its contents are defective? A. Without any other cause, yes.

* * *

Q. And a cylinder that will explode without external cause, you would hardly say it is fit for the purpose for which it is intended? A. If it exploded without any cause, I would say it was an unfit cylinder.

And from the cross-examination of Mr. Hazen, Vice-President of the Milton Hershey Co., Montreal—the defendant's principal independent expert witness:

Q. Now, talking of a cylinder in good condition and properly charged, you came to the conclusion that it can only be set off by one of two methods. I wrote them down as you gave them. The first one was violent concussion and the second one was the application of heat, and then you paraphrased "Violent concussion" by saying "violent shock." Is that right? A. Yes.

Q. So that, if this cylinder exploded, and assuming that, as you have sworn, that it was a cylinder in good condition, it must either have been the subject of the application of considerable heat or it must have been the subject of a violent concussion. Is that correct, Mr. Hazen? A. I would say so, yes.

Q. So that, if the evidence were to establish that, prior to the explosion of this cylinder, it had not been subjected to the application of considerable heat, nor had it been subjected to any violent concussion then we would be left with the only conclusion that it exploded by reason of some defect in the cylinder or in the contents themselves? A. That would be true, yes.

With external heat definitely eliminated as a possibility, as was conceded all around, there remained but one thing, other than inherent defect, to account for the explosion of the cylinder, Exhibit No. 8, viz.: that it had been subjected to concussion from a prior or contemporaneous volume explosion in the garage, whereby the internal pressure in this cylinder had been so increased as to cause it to blow up. Although Professor Jamieson of McGill University, another expert witness examined for the defence, testified that in his opinion an internal pressure must have developed of at least 1,350 pounds to the square inch before the cylinder blew up, and that a volume explosion such as Mr. Hazen had suggested could have increased the internal pressure in a cylinder to that extent, the defendant's whole case in support of the hypothesis of a prior volume explosion in the garage rested in the main on the suggestion of Mr. Hazen that a so-called flash-back had occurred in the oxygen tube of the welding apparatus the plaintiff was using at the time, from which flash-back a volume explosion might have developed in the garage by

1940
MARLEAU
v.
PEOPLE'S GAS SUPPLY CO. LTD.
Crocket J.

reason of its releasing gases, which subsequently became ignited. The oxygen tube, in which he suggested the flash-back occurred, led, of course, from the oxygen tank the plaintiff was using, and this naturally in conjunction with an acetylene tube leading from another tank containing acetylene, described as Exhibit No. 13, to the welding torch, in which the mixture of the two gases was controlled by valves. The oxygen and acetylene tanks were braced together on a rack situated a few feet east of the welding bench where the plaintiff was doing his welding job. Yet Mr. Hazen admitted that if gasolene fumes were the basis of the suggested volume explosion "they naturally did not come from the acetylene tank," and that, as far as gasolene fumes were concerned, the flash-back had nothing to do with it. It is somewhat difficult to follow his varying statements in this connection, and I therefore quote from his evidence precisely as it appears in the record of his cross-examination:

Q. Assuming for a minute that it was gasoline fumes that caused this volume explosion, that heat of the torch itself would have been sufficient to ignite those fumes, would it not? A. Yes.

Q. And, therefore, the flash-back would have nothing to do with the ignition of gasoline fumes, if it were gasoline fumes that caused that explosion? A. I think not.

Q. That is correct? A. I think so.

Q. So that, if the explosion was caused by gasoline fumes, the flash-back has no relevancy? A. Not at all.

* * *

By His Lordship: Q. Mr. Beament asked if your conclusion was that the only relevancy of the flash-back is if it was the cause of releasing from the acetylene tank in use sufficient acetylene to form an explosive mixture in the garage. A. It might have ignited them. I don't think it is likely, but it might have.

By Mr. Beament: Q. Would not the torch itself have ignited the gasoline fumes without any flash-back? A. The torch? It would probably be out when the flash-back occurred.

Q. Mr. Hazen, please. If there were gasoline fumes in that room, they didn't come there suddenly, like that (snapping fingers)? A. No.

Q. Then the torch was going, admittedly, or certainly up to the time when the flash-back occurred. Isn't that true? A. Yes.

Q. A flash-back could not occur unless the torch was going? Isn't that true? A. Certainly.

Q. Could a flash-back occur if the torch wasn't burning? A. Certainly not.

By His Lordship: You are going to leave me under the impression that there were gasoline fumes in the garage. I can assume for the sake of argument that there were. But I do not know whether there were or not.

By Mr. Beament: I am trying to eliminate gasoline fumes as a possibility, my Lord. I am trying to get the witness to say if there had been gasoline fumes in that garage, they would have been ignited long before by the torch.

By Witness: That is so.

By Mr. Beament: Q. So that the flash-back has no relevancy to the ignition of the gasoline fumes? They would have been ignited anyway? A. Yes, they would.

Q. And, when we finally get down to it, the only thing to give relevancy to the flash-back is that it might have caused the escape of acetylene from the cylinder, Exhibit No. 13. Is that the only relevancy of the flash-back, that it might have caused the escape of acetylene from Exhibit No. 13? A. Yes, the flash-back might have caused the release of gases from the cylinder in use, Exhibit No. 13.

Q. That is the only relevancy of the flash-back? A. As far as that cylinder is concerned.

Q. As far as anything is concerned? A. Yes, I think so.

Q. Then the only relevancy of the flash-back was that it might have caused the release of acetylene fumes from Exhibit No. 13 which, on ignition, might have exploded? A. I think so.

Q. You have examined the cylinder, Exhibit No. 13? A. Yes.

Q. And you tell me that, as far as your examination would disclose, there was nothing defective about it? A. That is true, except that the plugs were melted out.

Q. But that has no relevancy to our discussion at the present time? A. Not now.

Then he admitted that the valve equipment that was on Exhibit No. 13 had not in any way been affected by the explosion and that there was no apparent place from which anything could escape, so that if there was an escape of acetylene consequent on the flash-back, if there was a flash-back, it must have taken place after the acetylene had passed through the valve. I may say here that both the acetylene and oxygen tanks, which the plaintiff was using in his welding job when the explosion occurred, admittedly were found intact on the floor of the garage after the explosion and also numerous pieces of burning asbestos saturated with liquid acetone containing acetylene in solution, which could only have come from the cylinder Exhibit No. 8 when it exploded. There was also evidence of portions of rubber oxygen and gasolene tubes of the welding apparatus having been burned in varying degrees while a length of about 7 feet of the rubber hose was entirely missing, which Mr. Hazen admitted might have been burned by an external flame.

Whether the balance of probability lay on the side of the defendant's claim that Exhibit No. 8 blew up in consequence of a prior volume explosion caused by a flash-

1940
MARLEAU
v.
PEOPLE'S GAS SUPPLY CO. LTD.
Crocket J.

back in the welding apparatus or on the side of the plaintiff's claim that it exploded in consequence of its own internal defect was the problem which it was the special duty of the learned trial judge to determine. This involved a careful consideration, not only of the testimony of Mr. Hazen and the other expert witnesses for the defence, but of the whole evidence on both sides, which the record shews His Lordship followed with the closest possible attention throughout. Having concluded, as he did, "that the cylinder exploded by reason of extremely high internal pressure only, due to some internal structural defect," I am not, after anxious consideration of all the relevant testimony, prepared to say that that finding was wrong, or that there was not sufficient evidence to warrant it.

I would therefore allow the appeal and restore the trial judgment with costs throughout.

DAVIS J.—The action out of which this appeal arises was brought by the appellant, the owner and operator of a garage and motor car repair shop, against the respondent company, which is a manufacturer and distributor of acetylene and other gases, for damages for personal injuries and property loss sustained by him as the result of an explosion on his premises. The explosion was a very severe one, as is shown by the amount of the damages, and assessed by the trial judge at $13,565.95.

That a particular steel tank filled with acetylene gas which the respondent had sold and delivered under contract to the appellant had actually exploded on the appellant's premises at the time and in the place complained of, is not in dispute. The base of the tank or container (commonly called "the cylinder") was found after the explosion on the floor of the garage, while the body of the tank, which had been blown through the roof of the garage, was found with its nose embedded in a field some 200 feet away from the garage. The explosion, whatever was its cause, practically demolished the garage building, killed a customer who was standing in the garage near an open door and caused serious and permanent injuries to the appellant himself.

The appellant in the ordinary course of his business carried on welding operations by the use of a mixture of oxygen and acetylene gases. The respondent manufac-

tured and distributed both these gases and the appellant regularly purchased his supplies of these gases from the respondent. The respondent did not itself manufacture the tanks or containers into which it put the acetylene gas but it supplied and delivered the gas in tanks or containers which its customers were required to return when the contents had been used. The container was not to be retained for more than 90 days and a nominal charge per week was made for its retention after 30 days. When the explosion in question occurred the 90 days had not expired, though nothing really turns on that point.

There is no direct evidence as to how the explosion actually occurred and a mass of evidence was given, including much expert testimony, in an endeavour to indicate what really happened, but, as might well be expected under such circumstances, the real cause can only be inferred from the known facts.

Mr. Phelan, counsel for the respondent, in a very careful review of the evidence which extended to two large printed volumes, left me in a great deal of doubt as to what was the real cause of the explosion that did all the damage—in fact I think I should lean to the view that the explosion of the particular tank in question may have been caused by something that occurred at the moment in the welding apparatus which the appellant had been operating some 10 or 15 feet away from the corner of the building in which the particular tank had been resting for some two months, awaiting use when the contents of another tank then in use had been exhausted. This welding operation was being done on a table and the apparatus consisted of a torch and two rubber tubes leading from two separate tanks on the floor, one tank of oxygen and the other of acetylene. The appellant had finished his welding and had turned off the supply of oxygen to his welding torch and was preparing to turn off the acetylene when the explosion occurred. It is difficult for me to believe that the unopened tank in question resting on its weight in the corner exploded of itself. But on the other hand, if the initial explosion occurred in the welding operation it is strange that the two tanks being used in the welding operation remained intact where they were on the floor near the welding table. From each of these tanks rubber hoses had led to the welding torch and the flow of gas

1940

MARLEAU v. PEOPLE'S GAS SUPPLY CO. LTD.

Davis J.

was controlled by valves on the hoses. It is a question of fact, and the learned trial judge saw and heard a great many witnesses and, it is plain, very carefully followed the evidence. It requires more than a doubt or suspicion on my part, merely reading the printed evidence, to disturb the finding of fact of the trial judge. One thing is plain on the evidence and that is that the acetylene tank in the corner exploded and that it could not have exploded except from one of three causes: (1) external heat, or (2) external force, or (3) some inherent defect. No one suggested that there was any external fire or heat, and the trial judge has found definitely that the explosion was not caused by any external force, though the respondent's evidence was directed towards the theory that it was the force of an earlier explosion, called a "flash-back," in the hose of the oxygen tank which the appellant had been using in his welding operation that had caused the unused and unopened acetylene tank in the corner to explode. There seems to me to be much to support that theory and I was impressed with it; but the trial judge, after seeing the witnesses and hearing all the evidence, expressly excluded this as the cause. The trial judge was very definite on that point:

> I am also convinced that the explosion of the cylinder was not due to what has been described as outside concussion, due to external violence, as for instance from a volume explosion.

Further, the trial judge found as a fact that the cylinder did not explode through any fault of the plaintiff.

That left only some inherent defect in the tank or its contents as the cause of the explosion. The properties of acetylene gas and the complex process of handling and transporting the gas are, with detailed references to the evidence, set out in the respondent's factum as follows:

> The cylinders are made of steel plate, of a specified strength; drawn to produce a shell. Into the top of the shell is welded a boss which carries the valve and valve cap. Before the bottom is welded on, the cylinder is completely filled with an approved porous filler—asbestos, which is put in under pressure of 80 to 100 pounds. This filler serves to break up the mass of acetylene gas which later is compressed into the tank, so that in the event that ignition takes place, propagation of the flame is confined to the small spaces in the porous filling. In the base of the tank are inserted three fusible plugs; the metal of which fuses at 212 degrees Fahrenheit, and thereby the compressed gases are released without explosive force. The bottom is then welded on to the cylinder. The tanks are then subjected to pressure tests of 500 pounds. * * *

Into the porous filling of the tank so constructed is inserted a liquid known as acetone which dissolves the acetylene gas later forced into it under pressure. The acetone dissolves about twenty-five times its own volume of gas, thus increasing the economy of the container and furnishing at the same time a very definite safety factor because the acetone tends to prevent disintegration of the acetylene.

The learned trial judge in carefully considered written reasons gave judgment in favour of the appellant for the amount of the damages upon the finding that "the explosion was due to some defect in the internal structure or set-up of the cylinder, using the words in their widest application." The respondent appealed to the Court of Appeal for Ontario and its appeal was allowed and the action was dismissed with costs. From that judgment an appeal was taken to this Court.

The real difficulty in the appeal turns on the pleadings. The difference between the view of the case taken in the Court of Appeal and my own view of the case is a difference in what is to be taken as the proper interpretation of the pleadings. The appellant in the first place put his claim in tort, and solely in tort, in the statement of claim. I quote paragraphs 2, 3 and 4 of the statement of claim:

2. On or about the 31st day of March, 1937, the defendant delivered or caused to be delivered to the garage of the plaintiff two tanks of acetylene gas required by the plaintiff.

3. The plaintiff carefully put aside, for future use, one of those tanks in the exact condition in which it was received from the defendant and proceeded to use the other tank for welding operations and was still using it for that purpose in the evening of May 28th, 1937, when the unused tank, through no interference or fault whatsoever on the part of the plaintiff or anyone in or near the garage, suddenly exploded.

4. The plaintiff alleges that the explosion was caused or brought about by and through the sole negligence of the defendant, its servants and employees, in storing under compression acetylene gas in a defective and unsafe tank, the bottom part of which, not being properly and securely welded and affixed to the remaining portion, suddenly and violently separated from it with the resulting explosion.

At the trial, after the plaintiff had put in all his evidence over a period of some six days, his counsel moved the trial judge to grant an amendment to the statement of claim. The amendment asked for was in the following words:

5. (*a*) The plaintiff purchased the acetylene gas contained in the said tank from the defendant and hired the said tank and the contents thereof (other than the said acetylene gas) from the defendant having made known to the defendant the purpose for which the said gas and

1940

MARLEAU v. PEOPLE'S GAS SUPPLY CO. LTD.

Davis J.

tank were required and relying upon the skill or judgment of the defendant, the said gas and tank being goods which it was in the course of the defendant's business to supply. The said gas was purchased and the said tank was hired by description. The said gas and/or tank were not reasonably fit for the purpose for which they were sold and/or hired and were not of merchantable quality. The damages suffered by the plaintiff as herein set out were the direct and proximate result of the said goods not being reasonably fit for the purpose for which they were sold and/or hired and not being of merchantable quality.

The application for the amendment was opposed by counsel for the respondent and there was considerable argument by counsel for both parties as to the amendment sought to be made. The appellant's counsel made it plain that he did not desire to offer any further testimony in the case even if the amendment were granted but simply desired to set up on the facts that had been already proved a case against the respondent in contract upon the ground that the acetylene gas and tank which had been supplied under a contract of sale were not reasonably fit for the purpose for which they had been supplied and were not of merchantable quality, and that the damages suffered by the appellant as disclosed in the evidence were the direct result. During the discussion on the application for the amendment Mr. Phelan said very properly that

> the object of [the proposed amendment] is to shift the whole basis of the plaintiff's case from one of tort to one of contract. It is true that the facts are the same, as my friend says, but the application of those facts to the law is quite a different problem.

The trial judge expressed the view that, the trial having then gone on for so many days and the amount claimed being a large amount, he was inclined to allow the amendment. "I think a very great hardship would be occasioned if I limited the scope of the action." After a couple of hours' adjournment in which the respondent's counsel was given time to consider whether he would go on with the defence or take advantage of the trial judge's offer that the case could stand over till the next sittings of the Court (the case was being tried at L'Orignal without a jury), Mr. Phelan stated that the defence would go on rather than have the case stand over. The amendment was treated as duly made to the pleadings, and the trial proceeded.

There was no proof at the conclusion of the plaintiff's case when the amendment was asked for, nor any proof

on the whole of the evidence, of the act of negligence alleged in the original pleading that "the bottom part" of the tank had not been "properly and securely welded and affixed to the remaining portion." And it is not contended by counsel for the appellant that there was any such proof. Obviously that was apparent to counsel for the appellant at the close of the plaintiff's evidence and was the practical reason for the amendment to put the case on the contractual relationship that existed between the parties on the sale of the acetylene gas. But when the case got to the Court of Appeal that Court took the view that the amendment must be treated as limited to the particular cause of complaint set out in the original statement of claim, that is, that the bottom part of the tank had not been properly and securely welded and affixed to the remaining portion, and that that was the only issue which the Court could consider. There being no evidence to support a claim based on that narrow ground, and that feature of the case being really conceded by the present appellant, the Court of Appeal appear, as stated by counsel to us, to have taken the view that the whole evidence could not properly be reviewed and considered by the Court on the wider basis of a claim in contract for failure to supply the goods reasonably fit for the purpose for which they had been sold. When the case came before this Court, without deciding at the time whether the amendment should be treated as so limited or not, we heard argument upon the whole of the evidence as if the amendment were wide enough to found the action in contract on the ground of failure by the vendor to supply the goods under the contract to the purchaser in reasonably fit condition. I think we are all of the opinion that the amendment cannot properly be read as limited to a claim in contract based solely on the allegation that the bottom part of the tank had not been properly secured to the upper portion. It must be apparent that such an amendment would have served no practical purpose, because, if it could not be proved as a fact that the welding at the base of the container had been defective and that that caused the explosion, then it did not matter that proof of negligence in that respect might not be necessary in an action on a contract for the sale of goods though it would be necessary in an action in tort, or, to put it another way, if you proved

1940

MARLEAU v. PEOPLE'S GAS SUPPLY CO. LTD.

Davis J.

as a fact that the welding at the base of the container had been defective it would, in the case of a highly explosive liquid, be *per se* evidence of negligence and you would not need to fall back on a claim in contract. The practical view of the amendment, as it suggested itself to the trial judge as well as to counsel for the respondent was, in the words of Mr. Phelan during the discussion of the proposed amendment as above referred to, " to shift the whole basis of the plaintiff's case."

It is to be regretted that we have not had the advantage of a consideration of the case by the members of the Court of Appeal on the basis of the amendment being wide enough to cover a case of goods supplied under a contract of sale. The provisions of sec. 15 of the Ontario *Sale of Goods Act* (R.S.O., 1937, ch. 180) follow the Imperial Act, 56 and 57 Vict., ch. 71, sec. 14, in that where a buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose. And, further, when goods are bought by description from the seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality.

There can be no doubt on the evidence that the appellant as a motor car repair man was a regular customer of the respondent in the purchase of oxygen and acetylene gases for the purpose of his business, and that the respondent was a manufacturer and distributor of these gases and knew the particular purpose for which the gases were required and that the buyer relied on the seller's skill and judgment. That being so, and the facts in evidence being found by the trial judge to establish that the explosion of the acetylene tank in question was not caused by any external heat or by any external force or concussion but was caused by some inherent defect, the appellant was entitled to succeed in his action on the basis that the goods " supplied under a contract of sale," to adopt the exact words of sec. 15 of the *Sale of Goods Act,* were not

reasonably fit for the purpose for which they were sold and that the breach of the statutory condition was the direct cause of the appellant's damages.

Something was said during the argument that, the tank or container not being sold but only its contents, the *Sale of Goods Act* could not apply to the container. But both the container and its contents were "goods supplied under a contract of sale." *Geddling* v. *Marsh* (1).

Some of the items in the assessment of damages, particularly with reference to the wife's illness, may be doubtful, but no serious objection was taken before us to the amount of damages assessed by the trial judge, and I do not think, in any event, that we should be justified in considering any revision of the items upon which the learned trial judge reached his ultimate amount.

For the reasons above given, the appeal should, in my opinion, be allowed and the judgment at the trial restored with costs throughout.

HUDSON J.—I am in general agreement with the views expressed by my brothers Crocket and Davis. My chief difficulty was to ascertain, if I could, the immediate cause of the explosion of the cylinder supplied by the defendant. On this question, the learned judges of the Court of Appeal did not find it necessary to come to a conclusion.

Consideration of the evidence in the record leaves me in considerable doubt and, under these circumstances, I deem it my duty to accept the decision of the learned trial judge. See remarks of Lord Esher in *Colonial Securities* v. *Massey* (2); *Bigsby* v. *Dickinson* (3).

I would, therefore, allow the appeal and restore the judgment at the trial with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *L. P. Cecile.*

Solicitor for the respondent: *G. E. Edmonds.*

(1) [1920] 1 K.B. 668.
(2) [1896] 1 Q.B. 38.
(3) (1876) 4 Ch. D. 24.