CITY OF PRINCE ALBERT (*Plaintiff*) ....APPELLANT;

AND

UNDERWOOD McLELLAN & ASSOCIATES LIMITED (*Defendant*) .... } RESPONDENT.

1968

*May 8, 9, 10 Dec. 20

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Guarantee and suretyship—Subrogation—Respondent employed by appellant to prepare plans for and supervise construction of reservoir—Performance bond by surety company provided by contractors—Collapse of reservoir because of faulty method of backfilling—Failure of respondent to properly supervise operation—Payment made by contractors to surety and from surety to appellant—Whether action brought in name of appellant against respondent champertous—Whether appellant's right to recover from respondent extinguished.

Under a contract in writing the appellant city employed the respondent, a firm of engineers, to prepare plans for and to supervise the construction of a reservoir. A contract of construction prepared by the respondent was entered into between the city and a firm of contractors. Pursuant to a term of the construction contract requiring them to furnish a performance bond covering the faithful performance of the contract, the contractors provided such a bond by a surety company. Several months after work on the erection of the reservoir was begun the structure collapsed during the process of backfilling.

Following the collapse the contractors took the position that they would not rebuild or complete the contract except without prejudice to the rights of all concerned. The respondent was unwilling to let the matter proceed on this "without prejudice" basis. Later, upon receipt of a certificate from the respondent that sufficient cause existed to justify such action, the city sent a notice to the contractors terminating their employment and advising them that the city intended "to take immediate possession of the premises and finish the work by whatever method the City may deem expedient all in accordance with the provisions of the said contract". Following this the appellant employed another contractor to rebuild and finish the reservoir which was done in accordance with the original design and specifications at a cost of $149,191.88.

Subsequently, under written agreements between the appellant and the surety and between the contractors and the surety, the contractors paid to the surety the sum of $101,039.28, *i.e.*, the cost of rebuilding the reservoir less the amount owing by the appellant to the contractors under the original contract of construction, which amount the appellant held back. The sum of $101,039.28 was in turn paid by the surety to the city. It was provided, *inter alia,* that subrogated rights of the surety to sue in the name of the city should be exercised under the control of the contractors.

An action against the respondent brought in the name of the city was successful at trial, where it was held that the failure of the respondent to properly supervise the backfilling operation "was the prime factor

*PRESENT: Cartwright C.J. and Martland, Ritchie, Hall and Spence JJ.

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in the collapse of the reservoir". On appeal, the Court of Appeal by a majority allowed the appeal and dismissed the action. An appeal from the judgment of the Court of Appeal was then brought to this Court.

Held (Cartwright C.J. and Spence J. dissenting): The appeal should be allowed and the judgment at trial restored subject to a variation as to quantum.

Per Martland, Ritchie and Hall JJ.: The surety company became an assignee by way of subrogation and by virtue of its agreement with the appellant, to which the appellant had to give effect by allowing the action to be taken in its name. No element of champerty or maintenance arose here.

The contention that the action was champertous having failed, nothing stood in the way of the appellant being entitled to judgment against the respondent for breach of their contract as found by the trial judge unless the payment made by the surety under its agreement with the appellant extinguished the appellant's right to recover from the respondent.

The payment in question was not a "realization" out of the contractors as stated by Riddell J.A. in *Campbell Flour Mills Co. Ltd. v. Bowes; Campbell Flour Mills Co. Ltd. v. Ellis* (1914), 32 O.L.R. 270 at 280, or a recovery within *Imperial Bank of Canada v. Begley,* [1936] 2 All E.R. 367. Here the payment was conditional. If the appellant had not permitted the action to be brought in its name it would have had to refund the money it got under the agreement. In that agreement the appellant did not purport to release the respondent nor the contractors, but specifically provided that the surety company should be subrogated to all the rights and remedies of the appellant against the contractors as well as against the respondent or any other persons arising out of the failure of the reservoir structure.

Further defences, *viz.*, that the appellant was estopped and that the agreement between the appellant and the surety was *ultra vires,* were also rejected.

Per Cartwright C.J. and Spence J., *dissenting*: As held by the Court of Appeal no question of subrogation arose in this case and the appeal was to be decided on the basis of the rights of the appellant against the respondent. The bonding company was not paying pursuant to its bond; it paid an amount larger than the penalty in the bond and did so with money furnished by the contractor and as its agent. A principal debtor who pays his debt has no right of subrogation.

The action failed because the appellant was not able to prove that it suffered any loss; indeed it was proved that before the action was commenced the appellant's loss had been paid in full.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing an appeal from a judgment of Bence C.J.Q.B. Appeal allowed and trial judgment restored subject to a variation as to quantum, Cartwright C.J. and Spence J. dissenting.

[1] (1967), 61 W.W.R. 577, 65 D.L.R. (2d) 12.

Alan W. Embury, Q.C., and *John M. Embury*, for the plaintiff, appellant.

J. L. Robertson, Q.C., and *K. Barton*, for the defendant, respondent.

The judgment of Cartwright C.J. and Spence J. was delivered by

THE CHIEF JUSTICE (*dissenting*):—The relevant facts and material documents are set out in the reasons of my brother Hall. A brief summary will be sufficient to make plain the reasons for the conclusion at which I have arrived.

On the findings in the Courts below, which are fully supported by the evidence, the cause of the collapse of the reservoir was the faulty manner in which the backfill was applied by the contractor, Smith Bros. & Wilson Ltd., hereinafter referred to as "the contractor". I think it clear that there was a breach of contract by the contractor but this need not be decided as it has actually paid the whole of the loss suffered by the appellant.

There is no doubt that there was a breach of contract on the part of the engineer, the present respondent, in failing to supervise the application of the backfill by the contractor and that this breach was a cause of the collapse.

The contractor was not a party to the contract between the appellant and the respondent and the respondent was not a party to the contract between the appellant and the contractor. In my view when the reservoir collapsed the appellant had causes of action against both the contractor and the respondent but these were independent and distinct causes of action.

We are concerned only with the action between the appellant and the respondent. In my view this action fails on the ground that the loss which was undoubtedly sustained by the appellant has been fully paid to it by the contractor partly in cash and partly by the appellant retaining the sum of $48,152.60 held back by it which, but for its breach, would have been payable to the contractor. The matter is, in my view, covered by the following sentence

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in the judgment of Riddell J.A. in *Campbell Flour Mills Co. Ltd. v. Bowes; Campbell Flour Mills Co. Ltd. v. Ellis*[2]:

> It is true that, if the full amount of the damages were realised out of the contractors, no action (except perhaps for nominal damages) would lie against the architects, but that is on an entirely different principle, namely, that the plaintiffs have suffered no damage from the default of the architects.

The reasons given in the case just cited and in the passage from Mayne on Damages quoted in *Truth & Sportsman Ltd. v. Kethel*[3] for refusing to enquire into the existence of liability of a stranger to the contract for the loss caused by the breach by the defendant of its contract with the plaintiff have no application where that stranger is not merely said to be liable for but has actually paid the whole loss suffered by the plaintiff.

I agree with the unanimous conclusion of the Court of Appeal that no question of subrogation arises in this case and that the appeal is to be decided on the basis of the rights of the appellant against the respondent. If the bonding company had in fact paid the appellant under its bond questions might have arisen as to whether it could claim to be subrogated to the appellant's right of action against the respondent but the contracts recited in the reasons of my brother Hall make it plain that the bonding company was not paying pursuant to its bond; it paid an amount larger than the penalty in the bond and did so with money furnished by the contractor and as its agent. A principal debtor who pays his debt has no right of subrogation.

In my view the action fails because the appellant is not able to prove that it suffered any loss; indeed it is proved that before the action was commenced the appellant's loss had been paid in full.

The proposition that a person who has suffered a loss and who has separate causes of action against more than one person to recover the amount of that loss cannot recover more than the total amount thereof is treated as too plain for argument in *Imperial Bank of Canada v. Begley*[4], a judgment of the Privy Council affirming the

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[2] (1914), 32 O.L.R. 270 at 280.

[3] (1932), 32 N.S.W.S.R. 421 at 427.

[4] [1936] 2 All E.R. 367.

judgment of this Court in *Begley v. Imperial Bank of Canada*[5]. Lord Maugham giving the judgment of the Board says at p. 375:

> It is clear that in the circumstances the respondent was not put to her election to sue either McElroy or the appellants: she could sue both or either, subject of course to this that she could not recover more than the total sum due to her.

While it is clear that there was a breach of contract by the respondent and consequently the appellant may well have been entitled to a judgment against it for nominal damages, no claim for any such judgment was put forward either in the Courts below or before us and under the circumstances I think that the judgment of the Court of Appeal providing that the action be dismissed with costs ought not to be disturbed.

I would dismiss the appeal with costs.

The judgment of Martland, Ritchie and Hall JJ. was delivered by

HALL J.:—This is an appeal from a judgment of the Court of Appeal for Saskatchewan[6] (Woods J.A. dissenting) which allowed an appeal by the respondent from a judgment by Bence C.J.Q.B. in favour of the appellant for $160,784.53.

The litigation arises out of the collapse of a water reservoir being built for the appellant city. The city employed the respondent, a firm of engineers, to prepare detailed plans and specifications for the proposed reservoir under a contract in writing dated July 28, 1961. This contract contained the following clauses:

> Article 1 Branches of the Project:
>
> The Engineer will perform engineering services as outlined in Article II, for the following branches of the project:
>
> 1. New storage reservoir and pumphouse.
> 2. Other items directly related to the provision of the above as agreed.
>
> Article II Engineering Services:
>
> The Engineer will perform the following services under this contract:
>
> 1. Preliminary sketch plans and cost estimates. Attendances at any necessary meetings to discuss the project.
> 2. Design of structures and ancillary items, selection of equipment and materials. Preparation of detail plans and specifications, call, receive and tabulate tenders and make recommendations to council for tender award.

[5] [1935] S.C.R. 89.

[6] (1967), 61 W.W.R. 577, 65 D.L.R. (2d) 12.

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3. *Supervise construction of the project* including all office functions such as checking of shop drawings and changes in methods and materials, prepare and submit monthly progress estimates and *including resident supervision for continuous daily inspection and guidance of the contractor.* Final "as built" plans and operating manuals will be submitted for record purposes.

4. Arrange for soils investigation and materials testing as required.

(Emphasis added.)

The respondent recommended a cylindrical type of reservoir having a diameter of 131 feet and a height of 30 feet to be constructed in an excavation, the whole of which when completed and capped would be surrounded by and covered with earth. The reservoir was to be constructed of concrete and was designed to utilize a particular pre-load or pre-stressed process owned by a firm known as Canadian Gunite. This process permits the use of a thinner wall than that type of construction which is confined to reinforced steel. It includes reinforced steel but in addition involves the installation of a series of wires under tension around the outside of the cement wall and a special composition added to the outside surface. This method provided a lighter overall structure and strengthened the walls against the internal pressure exerted when filled with water. The filling in of the excavated area surrounding the concrete structure by the process known as backfilling was something which had to be done with great care. Earth had to be placed in layers all around the structure so that no undue pressure would be exerted at any particular area on the wall of the reservoir. This was of special importance because of the comparative lightness of the pre-stressed concrete and its susceptibility to being moved by uneven external pressure.

Tenders were called for in accordance with the terms of the contract between the parties. The tender of a firm known as Smith Bros. & Wilson Ltd. was accepted and a contract of construction prepared by the respondent was entered into between the appellant city and said contractors. That contract, including the specifications as a part thereof, contained *inter alia* the following:

10. Engineer and Contractor

The Engineer shall have general supervision and direction of the work, but the Contractor shall have complete control, subject to Clause 12, of his organization.

The Engineer is, in the first instance, the interpreter of the contract and the judge of its performance; he shall use his powers under the contract to enforce its faithful performance by both the parties hereto.

20. *Emergencies*

The Engineer has authority to stop the progress of the work whenever in his opinion such stoppage may be necessary to ensure its proper execution. In an emergency affecting or threatening the safety of life, or the structure, or of adjoining property, he has authority to make such changes and to order, assess and award the cost of such work extra to the contract or otherwise as may in his opinion be necessary.

In the specifications A under General Instructions:

(11)(*e*) All materials to be incorporated in the work shall be stored under suitable conditions to prevent damage, deterioration, contamination, etc. No materials to be incorporated in the work shall be temporarily used or installed as a facility for construction purposes except with the express approval of the Engineer.

B under General Trades:

(8) *Backfilling*:

(a) *All free water surrounding concrete structures in excavation prior to backfilling must be completely removed* and only dry unfrozen material may be used for backfill. Backfilling generally, unless otherwise particularly specified or noted, shall consist of gravel or of clean earth, particularly against concrete walls.

(b) *All backfill and embankment required around the structure shall be deposited in layers* and carefully consolidated to the lines and grades indicated on the drawings, *as indicated by the Engineer,* but not previous to 21 days after completion of placing the concrete for the walls. Where additional fill is required to comply with the drawings, it shall be furnished by the Contractor without additional remuneration.

(c) . . . . . .

(d) Backfilling shall not be done against walls that have been waterproofed, until the waterproofing has been inspected and approved by the Engineer; *then it shall be placed in layers,* and consolidated in such a manner as to not damage the waterproofing.

(e) Local pockets of materials which in the opinion of the Engineer are unsuitable for slab support shall be removed to such depth as the Engineer may require and replaced with compacted pit-run gravel.

(f) Backfill over the reservoir shall consist of 3″ of gravel and clean earth to the elevations noted. Consolidation of fill over the reservoir shall be done with light machinery to minimize the possibility of damage.

25. *Leakage Test*: After the covercoating has been applied but before waterproofing and backfilling the reservoir and pumpwell shall be water-tested.

The pumpwell shall be left empty while the reservoir is tested. This will indicate any leaks in walls of the pumpwell.

The chamber shall be filled to operating level with clear water and shall remain standing for 24 hours. *If no leaks develop and on approval of the Engineer, the Contractor may proceed with waterproofing and backfilling as further specified herein.*

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If leaks do develop, they shall be repaired to the satisfaction of the Engineer. After leaks have been repaired, the chambers shall be re-tested to ensure that the repairs are satisfactory. All visual leaks shall be repaired.

. . .

26. *Waterproofing*: The perimeter walls (interior and exterior) and reservoir roof shall receive two coats of asphalt waterproofing, Flintkote Static Asphalt Protective Coating Type I, or approved equal. The inside of the perimeter wall may be waterproofed prior to testing but the exterior surface shall not be waterproofed until after testing.

. . .

The Contractor shall obtain the approval of the Engineer on the first coat before proceeding with the second coat. *After approval has been received on the second coat, the Contractor shall proceed with backfilling as specified elsewhere herein.*

(Emphasis added.)

Clause 27 of the construction contract required the contractors to furnish a performance bond covering the faithful performance of the contract. Pursuant to this clause the contractors provided a bond by Western Surety Company in the sum of $93,500. That bond reads in part as follows:

KNOW ALL MEN BY THESE PRESENTS, that SMITH BROS. & WILSON LIMITED, a corporation organized under the laws of the Province of Saskatchewan, (hereinafter called the Principal) and WESTERN SURETY COMPANY, a corporation created and existing under the laws of the Dominion of Canada and whose principal office is located in Regina, Saskatchewan (hereinafter called the Surety), are held and firmly bound unto CITY OF PRINCE ALBERT (hereinafter called the Obligee), in the full and just sum of NINETY-THREE THOUSAND FIVE HUNDRED.....xx/100 Dollars, lawful money of the Dominion of Canada, to the payment of which sum, well and truly to be made, the said Principal binds itself, its successors and assigns, and the said Surety binds itself, its successors and assigns, jointly and severally, firmly by these presents. Signed, sealed and delivered this 15th day of June, A.D. 1962. WHEREAS, said Principal has entered into a certain written contract with the Obligee, dated April 25, 1962 for the construction of water storage reservoir, which by reference hereto is made part hereof as fully to all intents and purposes as though recited in full herein. *NOW,* therefore, the condition of the foregoing obligation is such that if the said Principal shall well and truly indemnify and save harmless the said Obligee from any pecuniary loss resulting from the breach of any terms, covenants and conditions of the said contract on the part of the said Principal to be performed, then this obligation shall be void; otherwise to remain in full force and effect in law;

Smith Bros. & Wilson Ltd. will hereinafter be referred to as the contractors.

The work on the erection of the reservoir was begun in the month of April 1962, with one Jenkins as superintendent in charge on behalf of the contractors and an engineer

representing the respondent by the name of Farley. Farley was replaced in mid-September 1962 by one Palichuk also employed by the respondent who had graduated in electrical engineering in the spring of 1962 and had worked for the respondent for one year prior to that time. He became a professional engineer in 1964. Both Jenkins and Palichuk continued in their respective positions until the reservoir collapsed. The collapse occurred on November 29, 1962, during the process of the backfilling operation.

The events preceding the collapse are set out in the judgment of Bence C.J.Q.B. as follows:

> When the reservoir was filled with water to test it for leaks prior to proceeding with the water-proofing of the exterior it was found that a portion consisting of approximately thirty per cent of the perimeter in the south-east section showed wet spots.
>
> According to Jenkins, Palichuk was on the job at the time the testing was done and instructed him to proceed to repeat the water-proofing on the inside of the thirty per cent. It was necessary for this purpose to drain the water out, which was done. While this was going on the construction company proceeded with the exterior water-proofing on the seventy per cent area which was free of leaks. Jenkins stated that he asked permission from Palichuk to proceed with the backfilling on the seventy per cent and that Palichuk gave him such permission subject to any water in the trench being removed. Palichuk confirmed this in his evidence.
>
> Backfilling operations commenced on Friday, November 23rd, which was the day after the said permission was given by Palichuk. It continued on Saturday and also on the Monday, Tuesday, Wednesday and Thursday of the following week. The collapse occurred at about five o'clock on the Thursday. At no time was there ever any backfilling on the said thirty per cent. Apparently the exterior water-proofing on the seventy per cent was going on at the same time as the backfilling. The exterior water-proofing was finished on Tuesday, November 26th.
>
> According to Palichuk, he left the job site Monday morning for Shellbrook to examine another construction job being undertaken at that point. He stated that before doing so he told Jenkins not to go beyond the limits of six to eight feet around the reservoir. This is denied by Jenkins, who said that the only warning that was ever given by Palichuk to him was not to use too large lumps in the backfill.
>
> Palichuk remained in Shellbrook that night and returned to Prince Albert around three o'clock the following afternoon and arrived on the job site at approximately 4:00 p.m. He stated that he found the backfill was up to the grade level, which is 20 to 24 feet from the bottom of the excavation. He said that when he observed this he talked to Jenkins and asked him why he had gone beyond the six to ten feet. Again, according to him, Jenkins replied that the reason he did so was that there would be enough counter action around the seventy per cent to prevent damage to the walls. Palichuk testified that his reply was merely: "I told him it is up to you Bill, you are doing the work." Nothing further was done and no warnings were given.

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Jenkins said that any instruction given to him by Palichuk were carried out. He insisted he received no advice or warnings from any one that the method of backfilling that he was doing was dangerous. He did state that the backfill which he did do was deposited in layers as these were the instructions in the specifications and also the instructions of the resident engineer Palichuk.

Bence C.J.Q.B. found and the finding is fully supported by the evidence that the reservoir collapsed because of the faulty method of backfilling in which about seventy per cent of the circumference was covered leaving the remaining thirty per cent without support. This was described as unsymmetrical loading and contrary to the specifications in the construction contract.

The care which had to be exercised in the back-filling operation was well known to Palichuk. One Davidson representing the Canadian Gunite Company visited the construction project on October 12, 1962, and testified that he had a discussion on the site with both Palichuk and Jenkins and that he described to them the proper procedure to be followed which was to go around the entire structure with the fill material in layers of about one foot in depth. Davidson followed up his concern about the backfilling operation by calling upon the respondent's officials in Saskatoon and discussing the procedure with them. He then returned to his company's office in Calgary where, being still apprehensive concerning the backfilling, he wrote a letter to the respondent dated October 16, 1962, as follows:

> Underwood McLellan & Associates Ltd.,
> Box 539,
> Saskatoon, Saskatchewan.
> Attention: Mr. K. Mountain, P. Eng.
> Reference: Prince Albert Reservoir
>
> Gentlemen:
>
> At this time we take the liberty of writing to you regarding the pending backfill work at the Prince Albert Reservoir. As is the case with any concrete reservoir the backfill must be properly placed to avoid damaging the walls and we mention the following points here in case you would wish to pass any or all of them along to the contractor or persons responsible for this work.
>
> —Care must be taken to avoid uneven loading to structure.
>
> —Backfill material must be soft earth, free from rock and stones.
>
> —No machines should be allowed close enough to increase side pressure on the wall.
>
> —Backfill material must be placed successively about the structure so as to avoid uneven loading.
>
> —If compaction is required this too should be done in a manner avoiding uneven loading and impact.

> Mr. Warder has enquired regarding the possibility of using a 'cutback' type asphalt as an exterior wall treatment material and we are now waiting for a reply from the suppliers of the rubber jointing materials in this regard. You will hear from us soon.
>
> Yours very truly,
> THE CANADA GUNITE COMPANY LIMITED,
> Sgd. "R. G. DAVIDSON"
> R. G. Davidson,
> Branch Manager.

This letter was entered as ex. P. 10. The contractors were not sent a copy nor any similar communication.

Palichuk testified that he received a copy of Davidson's letter (P.10) from his principals and that he showed the copy to Jenkins. Jenkins denied having been shown a copy prior to the collapse. Regarding this conflict in the evidence, the learned trial judge said: "I prefer to accept Jenkins' testimony in this regard."

The appellant city brought action against the respondent claiming:

(1) that the design was faulty.

(2) in the alternative that the defendant failed to use reasonable and proper skill in supervising the construction of the reservoir particularly during the backfilling operation and permitted and indicated through its resident engineer a backfill operation around part of the circumference of the reservoir leaving a gap in the backfill and causing the wall to collapse where it was unsupported by backfill in the area of such gap.

The claim based on faulty design was dismissed by Bence C.J.Q.B. and was not urged in this Court.

The learned trial judge made the following findings of fact:

(*a*) It was generally agreed by the witnesses, and I have no hesitation in finding, that the cause of the collapse was the faulty method used in backfilling by the completion of about seventy per cent of the circumference while leaving the balance of thirty per cent without any support. This is described as unsymmetrical loading.

(*b*) In the light of the knowledge which Palichuk says he had about the necessity of proper backfilling, his awareness of the information contained in the said letter, Exhibit P.10, and his familiarity with the specifications, I have come to the conclusion that he was negligent in not insisting at the time of his return from Shellbrook that no further work should be done on the backfilling. His attitude that it was up to Jenkins as he was doing the work is inexplicable. It is my view that it was his duty under the contract to have insisted that Jenkins stop and if there had been a refusal the matter should have been immediately reported both to the management of the contracting company and to the officials of the defendant.

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(c) Palichuk was further negligent by giving Jenkins permission in the first place to proceed with the backfilling when he knew that it could not be done around the thirty per cent. He did state that the thirty per cent could have been water-proofed up to the places where the water leak marks showed, these marks being above the grade level, but there is no evidence that he suggested that this be done.

(d) It seems to me also that Palichuk should not have left the job at this rather critical juncture for a period of over a day. He failed to give "continuous daily inspection and guidance".

(e) For the reasons I have indicated I find the defendant through its agent Palichuk was negligent in the discharge of his duties and responsibilities and that such negligence resulted in the collapse of the reservoir. If he had acted as he should have done and provided proper supervision the damage which incurred could have been avoided.

(f) I have found that the defendant's failure to discharge its responsibility under the contract was the reason for the collapse of the reservoir. Smith Bros. & Wilson Ltd. believed that this was so and in my opinion were justified in adopting the stand they did.

(g) I find that the defendant did have a responsibility with respect to supervising the proper carrying out of the operation, that it failed in its discharge thereof and that such failure was the prime factor in the collapse of the reservoir.

The Court of Appeal summarized the learned trial judge's findings of negligence under three headings:

(1) In his failure to stop continuance of backfilling operations on his return to the site after absence from a Monday morning to late Tuesday afternoon, when backfilling had then reached grade level;

(2) In granting permission to commence backfilling operations when it could not be done on the thirty per cent area;

(3) In absenting himself from the work for a period in excess of twenty-four hours, and this during what the trial judge termed a "critical juncture".

Maguire J.A. concurred in finding that there had been a breach of contract by the respondent. He said:

I think there is evidence upon which the learned trial judge could make his first finding of breach of contract by the engineer. The engineer company employee, Palichuk, when he returned to the site on the Tuesday late afternoon and observed that backfill on the seventy per cent of the circumference had proceeded almost to grade level and thus most substantially in excess of what he states he had authorized or approved, knew, or should have known, that this constituted a serious menace to the safety of the structure. Even though this situation may have arisen through default of the contractor, the engineer, in performing his duties to the City, failed to act and take what appears to be a rather obvious precaution for the safety of the structure, namely by ordering cessation of further backfill, until such fill could be brought up to level in the remaining thirty per cent circumference.

He did not deal with 2 and 3 holding it was not necessary to do so. In my view all the findings of negligence made

by the learned trial judge and so summarized by Maguire J.A. were fully supported by the evidence. The contractors were not parties to the action nor was any application made to join them as might have been done under the Saskatchewan Queen's Bench Rules of Court. The learned trial judge did not make any finding of negligence against the contractors. Regarding the cause of the collapse, he found specifically:

> That the defendant's failure to discharge its responsibility under the contract was the reason for the collapse of the reservoir. Smith Bros. & Wilson Limited believed that this was so and in my opinion were justified in adopting the stand they did.

and that the failure of the respondent to properly supervise the backfilling operation "was the prime factor in the collapse of the reservoir".

Maguire J.A., in dealing with this last finding, said:

> I do not interpret the trial judgment as absolving the contractor from negligence in the performance of its duties during construction. The learned trial judge directed his consideration to whether, as between the city and the engineer, and under the terms of the engineer's contract, it had committed a breach or breaches in the performance of its contractual duties. The findings that the negligence of the engineer was the "prime cause" of the failure of the structure goes no further than this.

While, as Maguire J.A. says, this does not absolve the contractors, it does not in any way constitute a finding of negligence against them but even if it did, the collateral liability, if any, of the contractors to the appellant under a separate and distinct contract cannot be used to defeat the appellant's right to judgment against the respondent, *Campbell Flour Mills Co. Ltd. v. Bowes; Campbell Flour Mills Co. Ltd. v. Ellis*[7]; *Truth & Sportsman Ltd. v. Kethel*[8], and *Mayne & McGregor on Damages*, 12th ed., p. 162, nor could the liability of the contractors be determined in the present action as constituted, they not being parties. *Mayne on Damages*, 10th ed. at p. 127.

The appellant was, therefore, entitled to succeed against the respondent unless under another aspect of the case which must now be examined, it has suffered no damage.

This second aspect has its foundation in certain agreements made between the appellant and Western Surety Co. on the one hand and between the contractors and Western

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[7] (1914), 32 O.L.R. 270.
[8] (1932), 32 N.S.W.S.R. 421 at 427.

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Surety Co. on the other after the collapse of the structure. Following the collapse the appellant made a demand on the surety company but that company denied liability under the bond by letter dated March 14, 1963, as follows:

The City Clerk,
City Hall,
PRINCE ALBERT, Saskatchewan.

Dear Sir:

Re: New Water Storage Reservoir
and Pump House

We have your registered letter of March 8th, 1963, with enclosures.

We understand from Smith Bros. & Wilson Ltd. that they take the position the City has wrongfully and without sufficient cause terminated their contract and that there has been no breach of contract or other default on their part.

This being the case, our Company contemplates taking no action at this time.

Yours very truly,
WESTERN SURETY COMPANY.
(sgd) "L. N. RAY"

Lionel N. Ray,
General Manager.

Following the collapse of the structure, the contractors took the position that they would not rebuild or complete the contract except without prejudice to the rights of all concerned. In a letter to the respondent dated January 3, 1963, they said in part:

Underwood, McLellan & Associates Ltd.,
Consulting Professional Engineers,
1721—8th Street East,
Saskatoon, Saskatchewan.

Dear Sirs:

Re: Prince Albert Reservoir

You have indicated to us that you do not intend to reply to our letter of December 11th, nor to acknowledge that any work of repair carried out by us is to be without prejudice to the rights of all concerned, and is not to be construed as an admission of liability on our part.

Without such an agreement and acknowledgment from you and the City of Prince Albert, we find it impossible to undertake the responsibility of making repairs.

We do not ask that you or the City abandon any rights that you may have in the matter, but we ask simply that the question of liability be kept open and unaffected, and that our undertaking to make repairs is without prejudice to our right to claim payment for the same in addition to the contract price.

However, if you and the City are unwilling to facilitate matters as requested we must decline to proceed with the repairs.

A copy of this letter was sent to the appellant. The appellant replied on January 21, 1963, through its solicitor as follows:

> I have been retained by the City of Prince Albert in connection with the difficulties which have arisen in the matter of the completion of the New Storage Reservoir and Pumphouse.
>
> I have before me and have perused your tender of April 19, 1962, for the construction of this work; the agreement made on the 25th day of April, 1962, between your Company as Contractor and the City of Prince Albert as Owner; General Conditions of the contract; instructions to bidders and specifications.
>
> In our opinion it is clear that your Company undertook and agreed to do and fulfill everything which is indicated by the above documents and the drawings and to complete the work within the time specified.
>
> The work has not been completed in terms of the agreement and is at present in a state requiring major repairs to the work which was done.
>
> In the above circumstances the City hereby gives you the Notice and makes the demands following:
>
> PLEASE TAKE NOTICE THAT THE CITY HEREBY requires you to complete the construction of the Water Storage Reservoir and Pump House referred to in the Agreement of April 25, 1962, in accordance to the terms of the said agreement, general conditions of the contract, the instructions to bidders, the specifications, the tender and the drawing above referred to:
>
> AND FURTHER TAKE NOTICE THAT UNLESS you agree to proceed with the completion of the work the City will have no alternative but to terminate the agreement and/or call upon the Bonding Company to complete the work.
>
> In giving this notice and in making this demand the City agrees that, while denying any liability or responsibility, you may proceed on the understanding that it is without prejudice to any legal right or claim you may have against it for payment for the repair work in addition to the Contract price and by the same token without prejudice to any legal right or claim the City may have against your Company to claim payment for expenses or damages incurred or suffered by it or to enforce any other right which it may have.

The respondent was, however, unwilling to let the matter proceed on this "without prejudice" basis. It stated its position in a letter to the solicitors for the contractors dated February 14, 1963, reading:

> Yesterday in our meeting with Mr. Cuelenaere, you asked Underwood McLellan & Associates Limited to agree that if your client Smith Brothers and Wilson completed the reservoir at Prince Albert according to its contract with the City, its so doing would be "without prejudice" to any right it might have against Underwood McLellan & Associates Limited.
>
> While we do not know of any right your client may have in this regard, we have discussed your request at some length with our principals and are instructed to say that they do not agree to it.

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On February 25, 1963, the respondent, purporting to act under the provisions of the construction contract, certified to the appellant as follows:

> IN THE MATTER OF A CONTRACT DATED THE 25TH DAY OF APRIL, 1962, BETWEEN THE CITY OF PRINCE ALBERT AND SMITH BROTHERS & WILSON LTD. FOR THE ERECTION OF A RESERVOIR:
>
> CERTIFICATE
>
> WHEREAS Smith Brothers & Wilson Ltd. is the Contractor named in a certain contract dated the 25th day of April, 1962, between it and the City of Prince Albert;
>
> AND WHEREAS Underwood McLellan & Associates Limited is the Engineer of the City named in said contract;
>
> AND WHEREAS the said Smith Brothers & Wilson Ltd., under the provisions of said contract contracted and agreed with the City of Prince Albert to perform and complete the work, including the erection of the reservoir, described and specified in said contract by not later than the 21st day of August, 1962;
>
> AND WHEREAS said Smith Brothers & Wilson Ltd. has not performed and completed the work, including the erection of said reservoir, which it was required to do under said contract, and the said Underwood McLellan & Associates Limited estimates that the said work cannot now be completed until about July 1st, 1963, at the earliest;
>
> AND WHEREAS the said Smith Brothers & Wilson Ltd. has done no work under said contract since about the 29th day of November, 1962, notwithstanding requests both verbal and in writing to proceed with and complete said work, including the erection of said reservoir;
>
> *NOW THEREFORE the said Underwood McLellan & Associates Limited does hereby certify that in its opinion, and because of the foregoing, the Contractor is in substantial violation of the provisions of said contract* and that, without prejudice to any other right or remedy, sufficient cause exists to justify the City of Prince Albert, by written notice to the said Smith Brothers and Wilson Ltd., terminating the employment, under said contract, of the said Smith Brothers & Wilson Ltd., taking possession of the premises on which said work was to have been executed and all materials, tools, structures and appliances thereon and finishing the work, without undue expense or delay by whatever method may be deemed expedient, all in accordance with the provisions of the said contract.

It will be noted that this certificate makes no reference to the collapse of the structure or to any allegation of negligence in respect thereto on the part of the contractors. The substantial violation asserted against the contractors was that:

> Smith Bros. & Wilson Ltd. has done no work under said contract since about the 29th day of November, 1962, notwithstanding requests both verbal and in writing to proceed with and complete said work, including the erection of said reservoir.

The appellant thereupon gave the contractors the following notice on March 5, 1963:

> IN THE MATTER OF A CONTRACT DATED THE 25TH DAY OF APRIL, 1962, BETWEEN SMITH BROTHERS & WILSON LTD., AS CONTRACTOR AND THE CITY OF PRINCE ALBERT, AS OWNER, FOR THE CONSTRUCTION OF A WATER STORAGE RESERVOIR AND PUMPHOUSE:
>
> NOTICE
>
> TAKE NOTICE that the City of Prince Albert having received the Certificate of the Engineer, Underwood McLellan & Associates Limited that sufficient cause exists to justify such action, a copy of which said certificate is attached hereto, does hereby give you Notice terminating your employment as Contractor and does hereby notify you that the City intends to take immediate possession of the premises and finish the work by whatever method the City may deem expedient all in accordance with the provisions of the said contract.

Following this the appellant employed another contractor to rebuild and finish the reservoir which was done in accordance with the original design and specifications at a cost of $149,191.88.

When the reservoir had been rebuilt and the cost of so doing ascertained the surety company on June 2, 1964, entered into an agreement with the appellant under which the appellant received $101,039.28. No doubt negotiations between the appellant and the surety company and the contractors must have taken place in the months preceding June 1964 although the record is silent in this respect. This agreement reads:

> WHEREAS by a contract in writing between Smith Bros. & Wilson Limited, a body corporate carrying on business in the Province of Saskatchewan, and the above named City of Prince Albert, the said Smith Bros. & Wilson Limited contracted to erect a certain reservoir for the said City of Prince Albert in the said City to certain designs and specifications outlined in the said contract.
>
> AND WHEREAS the said City of Prince Albert entered into a contract in writing with Underwood McLellan and Associates Limited, a body corporate carrying on business in the Province of Saskatchewan, to provide engineering services and supervision for the erection of the said reservoir.
>
> AND WHEREAS Western Surety Company entered into its Bond Number 01-1-4461 for the due performance of the said contractor, Smith Bros. & Wilson Limited, in the construction of the said reservoir.
>
> AND WHEREAS on the 29th day of November, A.D. 1962, the structure of the said reservoir failed before construction had been completed and expenses were incurred in reconstruction and completion resulting from the said failure.
>
> AND WHEREAS the City of Prince Albert has completed the said repairs and construction of the said reservoir at a cost of

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$149,191.88 and claims the said sum less $48,152.60 owing by it to Smith Bros. & Wilson under the original contract of construction, namely, $101,039.28 from the said Western Surety Company pursuant to the terms of the said bond.

NOW THEREFORE THIS AGREEMENT WITNESSETH:

1. That in consideration of the premises and the payment of the sum of $101,039.28 now paid by the said Western Surety Company unto the City of Prince Albert (the receipt whereof is hereby acknowledged), the City of Prince Albert does hereby release, remise and forever discharge the said Western Surety Company from all claims, demands, actions or causes of actions whatsoever which the said City of Prince Albert may have against Western Surety Company under and by virtue of the said bond.

2. By virtue of such payment, the said City of Prince Albert acknowledges and agrees that Western Surety Company is subrogated to all of the rights and remedies for recovery of the City, both in contract and in tort, in law and in equity, enjoyed at any time by the City of Prince Albert arising out of either its contract with Smith Bros. & Wilson Limited or Underwood McLellan and Associates Limited or any other persons whatsoever arising out of the failure of the said reservoir structure, with the right in Western Surety Company to sue in the name of the City of Prince Albert against any person or corporation as it may be advised for the full enforcement of such rights, remedies and recoveries, and the City of Prince Albert agrees it will deliver to Western Surety Company all original contract documents, correspondence or any other relevant documents, vouchers or accounts in its possession and will co-operate fully with the said Western Surety Company in the prosecution of any action for such recovery, subject always to the condition that such co-operation and subrogation shall be at the expense of the said Western Surety Company; provided further that the said Western Surety Company will save the City harmless from any legal costs incurred in any action taken in the name of the City of Prince Albert from any judgment on any claim or counterclaim for engineering services incurred in demolition and rebuilding; and the City of Prince Albert agrees that if in any such action the costs of demolition and rebuilding of the said reservoir shall be found by the court to be less than the sum paid by the City of Prince Albert for this purpose, then the City of Prince Albert will refund to Western Surety Company the sum in excess of such court finding, if any, now paid to the City of Prince Albert under and by virtue of the terms of this release and subrogation agreement; and further Western Surety Company agrees to clear the title of the works of claims for lien arising prior to the 29th day of November, A.D. 1962.

3. The City of Prince Albert agrees that it will not rescind or revoke this agreement to the prejudice of the Western Surety Company at any time hereafter.

On the same day the contractors and the surety company entered into the following agreement:

WHEREAS Smith Bros. & Wilson Limited are indemnitors to the bond of Western Surety Company numbered 01-1-4461 for the due performance by Smith Bros & Wilson Limited of a certain contract for the construction of a reservoir for the City of Prince Albert by the said Smith Bros. & Wilson Limited dated the 25th day of April,

A.D. 1962, and have requested Western Surety Company to secure the rights in subrogation of the City of Prince Albert as indicated in a certain release and subrogation agreement hereunto annexed and marked as Schedule "A" hereto.

AND WHEREAS Smith Bros. & Wilson Limited have paid unto Western Surety Company the sum of $101,039.28, who in turn are paying the same to the City of Prince Albert for the acquisition of the said rights in subrogation pursuant to the said release and subrogation agreement.

AND WHEREAS Smith Bros. & Wilson Limited desires that the said rights in subrogation of the City of Prince Albert be exercised under its control in the name of the City of Prince Albert and at its expense by the issue of a writ against the engineers referred to, namely, Underwood McLellan and Associates Limited, a body corporate carrying on business in the Province of Saskatchewan.

NOW THEREFORE THIS AGREEMENT WITNESSETH:

(1) Smith Bros. & Wilson Limited hereby agrees to save Western Surety Company harmless and fully indemnifies it from all claims, counterclaims, demands, costs or expenses whatsoever which may be incurred and arising out of the prosecution of the said action in the name of the City of Prince Albert under and by virtue of the said release and subrogation agreement hereunto annexed and marked as Schedule "A" hereto.

(2) Western Surety Company hereby agrees that Smith Bros. & Wilson Limited shall have control of the said action in subrogation to prosecute the same against the said Underwood McLellan and Associates Limited as it may be advised.

(3) Nothing in this agreement contained nor anything done in pursuance thereof shall, in any way, prejudice the rights of Western Surety Company under the agreement of indemnity given by Smith Bros. & Wilson Limited in respect to the bond given by Western Surety Company in this connection, or in any way operate as a waiver, release or postponement of the rights of Western Surety Company under the said agreement of indemnity by Smith Bros. & Wilson Limited and the said agreement of indemnity is hereby ratified and confirmed and Smith Bros. & Wilson Limited hereby authorizes and confirms the entering into of the agreement marked as Schedule hereto.

In the statement of defence as originally delivered the respondent's main defence was that the collapse of the structure had been caused by the default and negligence of the contractors and it specifically denied any negligence on its part or on the part of its employee, Palichuk. However, at the trial of the action the statement of defence was amended by order of the learned trial judge permitting the respondent to plead in the alternative that all damage alleged to have been suffered by the appellant had been paid to it in the following manner:

(a) By Western Surety Company, for and on behalf of Smith Bros. & Wilson Limited, paying the sum of $101,039.28 to the Plaintiff, the said Western Surety Company being the Surety named in a certain

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bond (numbered 01-1-4461 by Western Surety Company for the purposes of its own records) dated June 15, 1962, wherein the Plaintiff was named as Obligee and Smith Bros. & Wilson Limited as Principal, the condition of which was that if the said Smith Bros. & Wilson Limited should well and truly indemnify and save harmless the City of Prince Albert from any pecuniary loss resulting from the breach by it (that is by Smith Bros. & Wilson Limited) of any of the terms, covenants, and conditions of the said contract the obligation under the said Bond should be void otherwise to remain in full force and effect; and

(*b*) By holding back from payment to Smith Bros. & Wilson Limited under the provisions of said contract dated the 25th day of April, 1962, the sum of $48,152.60 or thereabouts and applying said sum plus said sum of $101,039.28 to the cost of completing the construction work required to be done by Smith Bros. & Wilson Limited under its said contract with the Plaintiff.

and there was filed in evidence an admission of facts by the appellant as follows:

1. That Smith Bros. & Wilson Limited, on or shortly before June 2nd, 1964, paid the sum of $101,039.28 to Western Surety Company.
2. That Western Surety Company paid said sum of $101,039.28 to the Plaintiff on June 2nd, 1964.
3. That on June 2nd, 1964 Western Surety Company entered into an Agreement with the Plaintiff, a true copy whereof is hereunto annexed and marked "A".
4. That on June 2nd, 1964 Western Surety Company entered into an Agreement with Smith Bros. & Wilson Limited a true copy whereof is hereunto annexed and marked "B".
5. That Western Surety Company has no interest in this action excepting only as may be evidenced by said Agreements marked "A" and "B".
6. That Smith Bros. & Wilson Limited procured and paid for the bond described in the Statement of Defence wherein the Plaintiff is named as "Obligee", Western Surety Company as "Surety" and Smith Bros. & Wilson Limited as "Principal".

The agreements referred to as "A" and "B" in the foregoing admission of facts are the agreements of June 2, 1964, previously referred to. In substance the defence thus put forward by the respondent on this branch of the case is that the surety company did not become subrogated to the rights of the appellant and the appellant having received the reservoir it contracted for at no extra cost to it, had no right of action.

The respondent contended also that the action was a champertous one and that the agreement between the appellant and the surety company of June 2, 1964, was *ultra vires* the powers of the appellant and it also contended that the appellant was estopped from asserting a

claim against the respondent because of having acted upon the respondent's certificate of February 25, 1963, previously referred to.

The contention based on the subrogation issue was fully gone into by the learned trial judge and I am in agreement with him that the surety company became an assignee by way of subrogation and by virtue of the agreement of June 2, 1964, to which the appellant had to give effect by allowing the action to be taken in its name. I agree with the learned trial judge and with Maguire J.A. that no element of champerty or maintenance arises here.

In any event it is significant to point out as was done by Woods J.A. in his dissenting judgment that the action is in the name of the appellant only; that neither the surety company nor the contractor claims any status in the action.

The contention that the action is champertous having failed, nothing stands in the way of the appellant being entitled to judgment against the respondent for the breach of their contract as found by the learned trial judge unless the payment made by the surety under the agreement of June 2, 1964, extinguished the appellant's right to recover from the respondent. The case of *Campbell* previously cited arose out of somewhat similar circumstances. The facts in *Campbell's* case were: the plaintiffs employed a firm of architects to draw plans and specifications for a building and to superintend the construction thereof; and entered into a contract with a firm of builders to erect the building. The plaintiffs brought an action against the builders for breach of the building contract by placing defective materials in the building, and another action against the architects for negligence in supervising the construction by reason of which the defective material was not condemned. The actions were begun on the same day. The trial judge, Latchford J., consolidated the two actions and found that both the architects and the builders were in breach of their separate and distinct contracts and gave judgment against both for the damages sustained by the owners. Both the architects and the builders appealed, the former as to liability and the latter on quantum only.

The architects argued that the owners were bound to elect which set of defendants they would sue and that the judgment against the builders was a bar against the owners

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being given judgment against the architects. The Court of Appeal held that as the Rules then read, the actions should not have been consolidated, but regardless of the error in procedure held that the judgment against the architects was proper. In the result the owners had judgment against both the architects and the builders.

It is in this context that Riddell J.A. said at p. 280:

> It is true that, if the full amount of the damages were realised out of the contractors, no action (except perhaps for nominal damages) would lie against the architects, but that is on an entirely different principle, namely, that the plaintiffs have suffered no damage from the default of the architects.

That sentence came after he had said:

> "Where there are joint and several contracts, or joint and several debts, or where the several parties are independently and collaterally bound by the same obligation, the recovery of judgment against one of such separate contractors or separate debtors is no bar to an action against the others, until the judgment has been satisfied:" Addison on Contracts, 11th ed., p. 193. This is as old as Queen Elizabeth's time (*Blumfield's Case* (38 & 39 Eliz.), 5 Co. R. 86 B), and cannot be doubted. See *per* Montague Smith J., giving the judgment of the Court in *Vestry of Bermondsey v. Ramsey* (1871), L.R. 6 C.P. 247, at p. 251; *per* Stirling J. in *Blyth v. Fladgate,* [1891] 1 Ch. 337, at p. 353. And it makes not the slightest difference that the amount secured by the independent contracts is the same and for the same debt.
>
> * * *
>
> In the present case, the plaintiffs had two separate and distinct contracts, the one with the contractors, which was in writing, the other with the architects, which was, as in *Jameson v. Simon,* (not in writing but) implied from the employment. The contractors broke their contract when they put bad material into the building; at the same moment the architects broke theirs because they allowed this to be done. Under the circumstances, the damages are the same under either contract; but that is wholly immaterial. The contracts are not the same; and, if judgment were to be obtained in the action against the contractors, it would destroy their contract *quoad hoc,* but it could not affect the contract of the architects—that *non transit in rem judicatum,* but remains a simple contract.

and following the sentence above quoted, he continued:

> The result is, that the plaintiffs are entitled to judgment against both the contractors and the architects, and that is what the judgment in appeal gives them.
>
> * * *
>
> The plaintiffs might have insisted on a judgment in both cases with costs, either set of defendants to be at liberty to move, in the nature of an *audita querela,* to stay their action on payment of costs if and when the amount was made out of the other set, and either set of defendants to be at liberty to bring an action to recover from the other any sum paid by them, etc. (I do not suggest that any such action will lie on the facts, but the defendants should not be precluded from litigating the question if so advised.)

The case of *Imperial Bank of Canada v. Begley*[9] is authority for the proposition that a person who has suffered a loss and who has separate causes of action against two or more persons to recover the amount of that loss, cannot recover more than the total amount of the loss. That situation does not arise here. The city will not recover more than its actual loss. Under the agreement of June 2, 1964, it must account to the surety for all moneys it may recover in this action.

The payment made by the surety to the appellant was not, in my opinion, a "realization" out of the contractors as stated by Riddell J.A., or a recovery within *Imperial Bank of Canada v. Begley*. Here the payment was conditional, the condition being as set out in para. 2 of the agreement of June 2, 1964, previously quoted. If the appellant had not permitted the action to be brought in its name it would have had to refund the money it got under that agreement. The surety was potentially liable to the appellant under the performance bond because, whatever the reason may have been, the reservoir was not constructed within the time provided, and if liable under the bond the surety had the right to be reimbursed by the contractors. The fact that it received reimbursement prior to or simultaneously with payment to the appellant is immaterial. That does not alter the conditional character of the payment, and it is important to note that in the agreement between the appellant and the surety the appellant did not purport to release the respondent nor the contractors, but specifically provided that the surety company should be subrogated to all the right and remedies of the appellant against the contractors as well as against the respondent or any other persons arising out of the failure of the reservoir structure. In this way litigation between the appellant and the surety was no doubt avoided and the rights of the surety preserved.

Under Saskatchewan Rule of Court 48, the contractors could have been brought into the action by the respondent as parties "...whose presence before the Court may be necessary, in order to enable the Court effectually and completely to adjudicate and settle all the questions involved in the cause or matter..." and the rights of these

[9] [1936] 2 All E.R. 367.

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parties *inter se* dealt with, but for reasons best known to the respondent this was not done. The action, accordingly, falls to be disposed of in the form in which it was dealt with at the trial, in the Court of Appeal and in this Court.

On the record before this Court the appellant is entitled to succeed. There has been no judicial determination of negligence against the contractors. The respondent sought to overcome this fact by contending that the payment by the contractors through the surety to the appellant was the equivalent of such a determination, or, alternatively, was an admission of the contractors' liability. However, in view of the position taken by the contractors and by the surety in their respective letters of January 3, 1963, and March 14, 1963, and the findings of the learned trial judge previously quoted, that contention is not tenable. There has not been a "realization" of the appellant's damages from the contractors nor a payment of those damages by the contractors in the procedure which was adopted in this instance. The contractors were not relieved of their liability by the payment but that liability, if any, was specifically continued by the agreement of June 2, 1964.

There remain the defences of estoppel and *ultra vires* to deal with. First, as regards estoppel, this contention cannot succeed. There were no representations of fact made by the appellant to the respondent which the respondent acted upon to its prejudice nor was any prejudice alleged.

As to the defence that the agreement of June 2, 1964, between the appellant and the surety company was *ultra vires* the appellant, it should first be noted that this defence was not raised in the pleadings nor was it referred to in the judgments below. In any event it cannot be said that the appellant had not the power to stipulate for the indemnity bond from the contractors. Having received the indemnity bond, the appellant had the right to assert a claim under it and it must follow that it necessarily had the right to receive payment, and having received payment it became by the process of subrogation answerable to the surety for any damages it might recover. Nor can it be contended that the appellant had not the right to sue for a breach of the contract. The mere existence of the in-

demnity bond could not extinguish the appellant's right to recover damages from the respondent if the contract with it was breached as found by the learned trial judge.

The learned trial judge allowed as part of the appellant's damages an item of $17,573.57 being the fee paid the respondent for services in respect of the construction in question including the plans and specifications used both before and after the collapse. Counsel for the appellant admitted here and in the Court of Appeal that not all such fees had been thrown away by reason of the collapse. This clearly follows from the dismissal of the claim for faulty design. The structure was actually completed according to the original plans and specifications. I am in agreement with Maguire J.A. that the onus was on the appellant to establish what portion, if any, of the $17,573.57 was so thrown away and in the absence of such evidence the Court cannot speculate on the amount. The award of this item cannot stand and the judgment should be varied accordingly.

The appeal will, therefore, be allowed subject to this variation with costs here and in the Court of Appeal.

Appeal allowed and judgment at trial restored subject to a variation as to quantum, with costs, CARTWRIGHT C.J. *and* SPENCE J. *dissenting.*

Solicitors for the plaintiff, appellant: Embury, Molisky, Gritzfeld & Embury, Regina.

Solicitors for the defendant, respondent: Schmitt, Robertson, Muzyka, Beaumont & Barton, Saskatoon.