INDEMNITY INSURANCE COMPANY OF NORTH AMERICA (*Defendant*) ..... APPELLANT;

AND

EXCEL CLEANING SERVICE (*Plaintiff*) ..... RESPONDENT.

1953
*Oct. 15
1954
*April 12

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Contractors Liability Policy issued "on location" cleaning service—Property in care, custody and control of insured excluded from risk—Whether damage to rug fastened to floor within exclusion.

The appellant by a "Contractors Liability Policy" agreed by "Coverage B" to indemnify the respondent in respect of all sums it should be obligated to pay because of injury to property arising out of the respondent's work caused by accident. Exclusion clause (*g*) provided that the policy did not apply "to damage to or destruction of property owned, rented, occupied or used by or in the care, custody or control of the insured." The respondent operated an "on location" cleaning service and due to a defective cleaning machine, caused damage to a rug it was cleaning in the home of its owner. The rug, which extended from wall to wall, was tacked down all the way round the edges by a quarter round. The rug's owner obtained judgment against the respondent and the latter sought to recover under its policy. The appellant contended that it was relieved of liability under the exclusion clause (*g*).

Held: (Kerwin and Cartwright JJ. dissenting) that the exclusion clause (*g*) did not apply to relieve the appellant of its liability.

Per: Rand J. The rug, attached as it was to the floor, was for the purposes of the service in the same relation to "care, custody or control" of the respondent as the surface of the floor itself. The obligation to do the work upon the property was in contemplation of law to do it while the property remained within the exclusive care and control of the owner. Clearly custody was not transferred; the only care called for was in the execution of the service, not toward the property as such; and no control, in a proprietory sense was intended.

Per: Estey J. The exclusion clauses were general in character and not directed to any special undertaking such as that of the respondent. In this context the words "care, custody and control" as cited in clause (*g*) might be variously construed and therefore should be construed in a manner favourable to the insured. *Cornish* v. *The Accident Ins. Co.* 23 Q.B.D. 453 at 456; *Woolfall & Rimmer Ltd.* v. *Moyle* [1942] 1 K.B. 66 at 73.

Locke J. would dismiss the appeal for the reasons stated by Laidlaw J. in delivering the unanimous judgment of the Court of Appeal, [1953] O.R. 9.

Per: Kerwin J. (dissenting).—Exclusion (*g*) must be read with coverage B as the agreement of the appellant to pay was made subject to the exclusions. "Property" included real and personal property and the clause must be read disjunctively. The rug was in the respondent's

*PRESENT: Kerwin, Rand, Estey, Locke and Cartwright JJ.

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safekeeping in the sense that the respondent was not to damage it and, to that extent at least, it had "authority" over the rug. With the consent of the owner the respondent had taken such possession as was possible. *Hardware Mut. Cas. Co.* v. *Mason-Moore-Tracey Inc.* 194 F. 2d. 173 referred to.

Per: Cartwright J. (dissenting)—It is not necessary to determine whether there was technically a bailment of the rug. The words "care", "custody" and "control" are used disjunctively in clause (*g*) and interpreting them in their plain, ordinary and popular sense the respondent, at the time the damage was done, had both the care and control of the rug and had the owner taken it out of his control before the work was finished he would thereby have committed a breach of the contract.

Judgment of the Court for Ontario [1953] O.R. 9, affirmed, Kerwin and Cartwright JJ. dissenting.

APPEAL by the defendant by special leave of the Court of Appeal for Ontario from a judgment of that Court (1) affirming a decision of the County Court of the County of York in favour of the plaintiff.

G. N. Shaver, Q.C. for the appellant.

J. H. Osler for the respondent.

KERWIN J. (dissenting):—By special leave of the Court of Appeal for Ontario, Indemnity Insurance Company of North America appeals from a judgment of that Court (1) affirming a decision of the County Court of the County of York. The question is whether under a contractors' liability policy of insurance issued by the appellant to the respondent, Excel Cleaning Service, the former is liable to indemnify the latter against a judgment by which the respondent became obligated to pay John H. King the sum of $500 for damages and costs. Counsel for the appellant contended that, assuming it would be so liable by virtue of the provisions of "Coverage B" of the insuring agreements in the policy, Exclusion (*g*) in the policy relieved it of that liability. This is the sole point to be determined.

As stated in the Declarations in the policy, the respondent carried on, in Toronto and the surrounding territory, the business of "General Household Cleaning Service (including cleaning of walls, floors, furniture, etc.)." According to the evidence it was an "on location cleaning service", that is, the cleaning at a house of everything therein, such as walls, windows, floors, rugs, upholstery and

(1) [1953] O.R. 9.

furniture, but excepting drapes and lamp shades, the cleaning of which the respondent sublet to others who did the necessary work at their own premises, or at any rate away from those of the owner. By the policy the appellant "AGREES WITH THE INSURED, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

* * *

Coverage B—Property Damage Liability

To pay on behalf of the insured, provided premium is charged under Coverage B in the declarations, all sums which the insured shall become obligated to pay by reason of the liability imposed upon the insured by law for damages because of injury to or destruction of property, including the loss of use thereof, arising out of the work of the insured and during the prosecution thereof, caused by accident, including accidents occurring after completion or abandonment of the operations and arising out of pick-up or delivery operations or the existence of tools, uninstalled equipment and abandoned or unused materials, or occurring elsewhere if caused by an employee of the insured while engaged in the performance of his duties for the insured in connection with the work at such locations.

Under the heading "Exclusions" appears the following:—

This policy does not apply:

* * *

(*g*) to damage to or destruction of property owned, rented, occupied or used by or in the care, custody or control of the insured.

During the currency of the policy the respondent agreed with John H. King to clean in his home some furniture and a broadloom rug. The necessary cleaning fluid and equipment were taken there by one of the members of the respondent partnership and one of its employees. At the trial an other partner agreed that the respondent's advertising circulars correctly put the position in stating:— "You (the customers) are free to stay at home and just watch, or take the day off and return to a shining clean house." On this particular occasion Mr. King was not at home and, while his wife was, the witness could not say if she was in the room containing the rug when an accident occurred. Mr. King had had the rug tacked to the floor all the way around the edges by a quarter-round. The two workmen were cleaning it with a second-hand cleaning machine

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which, as it transpired, was defective inasmuch as the detergent tank had become rusted and a trip on the tank was also faulty. During the process of cleaning and while the machine was stopped so that the tank might be refilled some of the detergent leaked out and formed a spot on the rug although the damage was not evident for some hours. It was for this damage that Mr. King sued the respondent and recovered judgment.

It appears from the evidence; (*a*) the tacks had not been removed; (*b*) Mrs. King did not touch the rug while the workmen were cleaning it; (*c*) if she had made any suggestions as to the method to be employed, they would have considered they knew more about the matter than she but, of course, if she had told them to stop, they would have done so.

Exclusion (*g*) must be read with Coverage B as the agreement on the part of the appellant to pay is made subject to the exclusions. I am unable to agree with the trial judge's conclusion that temporary care, custody or control by the respondent arising out of its work or during its duration is not covered by (*g*) as that would be inserting a limitation upon the words that is not justified. The reasons for judgment of the Court of Appeal were delivered by Laidlaw J.A. He decided that the words involved actual possession of the property that was damaged, and then proceeded:—

> Care in the sense in which it is used in the paragraph is synonymous with "safe-keeping"; "custody" imports some authority over the property; "control" supposes physical possession of property over which control may be exercised. The respondent did not assume the care, custody or control of the property or the responsibilities incidental thereto and the owner did not transfer or surrender such care, custody or control to the respondent. Indeed I think the respondent had no right, without special permission or authority from the owner, to remove any of the quarter-round strip or any nails holding the rug to the floor or to alter the position of the rug in any way or otherwise exercise control in respect of it in the course of cleaning. The respondent and its employees were simply "on location" in the house of the owner of the rug for the purpose of doing certain specific work. The mere fact that they were engaged there in the performance of that work did not give them the care, custody or control of the property on which the work was being done.

As to this it is important to note that "property" includes real and personal property and that the clause must be read disjunctively. If Mrs. King had left her home upon the arrival of the workmen, the rug would surely have been

in the care, custody or control of the respondent, and the mere fact that she was in the house does not alter the position, even though the rug was held to the floor by tacks and the quarter-round. There is nothing to indicate that the respondent's contract with Mr. King involved the removal of the rug from the floor and in fact it was being cleaned in the position it occupied; but it was in the respondent's safekeeping in the sense that the respondent was not to damage it and, to that extent at least, it had "authority" over the rug. With the consent of the owner the respondent had taken such possession of it as was possible.

None of the decisions referred to are precisely in point but some assistance is to be gained from a perusal of the judgment of the United States Court of Appeals, Second Circuit, in *Hardware Mut. Cas. Co.* v. *Mason-Moore-Tracey Inc.* (1). The Court consisted of Chief Judge Swan, Judge Learned Hand and Judge Agustus N. Hand, the judgment being delivered by the latter. The action was upon an insurance policy and the exclusion to the coverage of property damage liability was the same as Exclusion (*g*) except that the word "injury" was substituted for the word "damage". The actual decision was upon the word "used" and it was held that an insured had been using an elevator in a building not owned or rented by it and over which building it had no "control", notwithstanding that the insured's use of the elevator might have been in conjunction with others.

The appeal should be allowed, the judgments below set aside and the action dismissed. In accordance with the undertaking of the appellant to the Court of Appeal when leave was given to come to this Court, the dismissal is without costs and there will be no costs in the Court of Appeal but the appellant will pay the respondent $350 for its costs in this Court in addition to the costs of printing its factum.

RAND J.:—The respondents conduct what is known as an "on location" cleaning service of walls, floors, ceilings, furniture and rugs, on the premises of its customers, including such articles as drapes and lamp shades done by out-

(1) (1952) 194 F. 2d. 173.

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Rand J.

side specialists in cleaning them. In the course of servicing a rug held down by tacks and a half-round border strip, a destructive fluid escaped from the cleaning machine and the rug was ruined. Action was brought and damages recovered.

The respondents were insured by the appellants under what is called a "Contractor's Liability Policy" and a claim to be indemnified against the judgment is the matter of this appeal. The applicable obligation is in these words:—

COVERAGE B—PROPERTY DAMAGE LIABILITY

To pay on behalf of the insured, provided premium is charged under Coverage B in the declarations, all sums which the insured shall become obligated to pay by reason of the liability imposed upon the insured by law for damages because of injury to or destruction of property, including the loss of use thereof, arising out of the work of the insured and during the prosecution thereof, caused by accident, including accidents occurring after completion or abandonment of the operations and arising out of pick-up or delivery operations or the existence of tools, uninstalled equipment and abandoned or unused materials, or occurring elsewhere if caused by an employee of the insured while engaged in the performance of his duties for the insured in connection with the work at such locations.

From the scope of this there are certain exclusions, and that with which we are here concerned is:—

This policy does not apply:

* * * .

(*g*) To damage to or destruction of property owned, rented, occupied or used by or in the care, custody or control of the insured.

The sole ground taken is that no claim arises because the rug at the time of being damaged was "in the care, custody or control of the insured"; and it is not contended that in the absence of the exclusion, liability would not have arisen.

I am unable to accept Mr. Shaver's argument that the case is within the exclusion. The rug, attached as it was, to the floor, was, for the purposes of the service, in the same relation to "care, custody or control" of the respondents as the surface of the floor itself. The owner, continuing in the ordinary relation to his property, engages for work to be done to or upon it as it is *in situ*. Obviously while the respondents are in the process of cleaning any article, a *de facto* impact on the dominion over it is involved; but it is only of the nature of something imposed upon that dominion, not derogating from it; or, to put it in another form, the obligation to do work upon the property is in

contemplation of law to do it while the property remains within the exclusive care and control of the owner. Clearly custody was not transferred; the only care called for was in the execution of the service, not toward the property as such; and no control, in a proprietary sense, was intended. Either care or control would have involved some degree of responsibility towards the property, apart from and in addition to that relating to the application to it of the cleaning process. The situation was one in which all proprietary relations remained in the owner and only an operating responsibility towards the property arose.

The appeal should be dismissed with costs.

ESTEY J.:—The respondent's business is cleaning the interior of homes, including furniture and rugs. On November 5, 1951, two of the respondent's employees attended at the home of J. H. King and, while in the course of cleaning a rug, damaged it, for which J. H. King obtained judgment against respondent in the sum of $450 and costs.

The respondent was, at all times material hereto, insured by appellant under a policy of insurance styled "Contractors Liability Policy" and in this action sought to be indemnified for the said amounts under the terms of that policy.

The relevant provisions of the policy read:

> Coverage B—Property Damage Liability
>
> To pay on behalf of the insured, provided premium is charged under Coverage B in the declarations, all sums which the insured shall become obligated to pay by reason of the liability imposed upon the insured by law for damages because of injury to or destruction of property, including the loss of use thereof, arising out of the work of the insured and during the prosecution thereof, caused by accident, including accidents occurring after completion or abandonment of the operations and arising out of pick-up or delivery operations or the existence of tools, uninstalled equipment and abandoned or unused materials, or occurring elsewhere if caused by an employee of the insured while engaged in the performance of his duties for the insured in connection with the work at such locations.

The rug here in question was damaged by the presence of rust in the equipment used by the insured in the process of cleaning it. There would appear to be no doubt that if the foregoing provision was alone relevant the respondent should recover. The appellant, however, contends that its liability thereunder is excluded by the last of a number of

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exclusion clauses lettered (*a*) to (*g*), and particularly because of the words "care, custody or control" in the latter. The clause reads:

> (*g*) to damage to or destruction of property owned, rented, occupied or used by or in the care, custody or control of the insured.

In support of its contention that the rug, while being cleaned, was in the care, custody or control of respondent, reliance was placed upon the evidence that respondent, while following its usual practice at King's home, was in "complete charge or control of the furniture and rug in order to clean them" and that upon this occasion, though Mrs. King was at home, she did not in any way interfere with the work. In the course of the evidence the following questions and answers appear:

> Q. And you and your associate took complete charge of the front room and did the furniture and the rug in the room?—A. That is correct.
>
> Q. And of course Mrs. King was the lady of the house, and, if she told you that she did not want you there any more—"Go out about your business", you would have stopped and gone away?—A. Absolutely.

It was a wall-to-wall rug "tacked down all around by the quarter-round." Neither of the parties to the cleaning contract contemplated that it would be, nor was the rug, in fact, moved throughout the process of cleaning it, which was effected by the operation of a machine thereon. It was the first time respondent had used the machine and the unknown presence of rust caused the damage, which was not discovered until the rug had dried.

The appellant relied upon a number of cases decided in the United States under exclusion clauses containing somewhat similar provisions. *Hardware Mutual Casualty Co.* v. *Mason-Moore-Tracey, Inc.*, (1) though dealing with an exclusion clause identical in language, is quite distinguishable upon its facts. There the insured, in the course of its business of moving machinery and equipment, was moving a heavy piece of machinery out of a building and, at the material time, was using the elevator to effect that end. The elevator was damaged and because it was being "used by" the insured in moving the machinery it was within the exclusion clause. It is, therefore, quite distinguishable, as there the insured was not employed in respect to the elevator which, however, he used to carry out his contract to move the heavy machinery.

(1) 194 F. 2d. 173.

In *State Automobile Mutual Insurance Co.* v. *Connable Joest* (1), the insured operated a garage. A customer left his automobile with the insured to have it greased and the oil changed some time during the day and when the work was finished he was to be notified. While the employees, in the course of their work, had the automobile elevated on a hoist it crashed to the floor. The insured carried a public garage liability insurance policy which contained an exclusion clause reading as follows:

> For damages to or destruction of property owned, rented, leased, in charge of, or transported by the assured.

The insured, while the automobile was at its own garage for the specified purpose, was held to be "in charge" thereof.

In *Guidici* v. *Pacific Automobile Insurance Co.* (2), an automobile, while at the insured's garage for repair, was destroyed by fire. It was held that while at his garage it was "in charge" of the insured.

In *Monroe County Motor Co.* v. *Tennessee Odin Ins. Co.*, (3), one driving an automobile upon a public highway was held to be "in charge" thereof, although its owner was seated beside him. It is the driver who is in actual physical control of an automobile.

The phrase "in charge," as construed in the last three mentioned cases, means that one who can be properly so described must have either physical possession or control of the chattel.

The respondent described its business as an "on location cleaning service." The cleaning equipment is taken to the home or premises of the customer and the work of cleaning completed on his premises. If the above-quoted evidence to the effect that the respondent took complete charge of the front room and did the furniture and rug therein is construed as the appellant contends it should be, then in its submission the respondent had in this case "care, custody or control" of everything in the room and, therefore, so far as this and, one would gather, the great majority of its cleaning jobs are concerned the respondent would have no coverage, notwithstanding the comprehensive character of the language used in Coverage B, and particularly the phrase "arising out of the work of the insured." Such a

(1) 125 S.W. 2d. 490. (2) (1947) 179 P. 2d. 337.
(3) (1950) 231 S.W. 2d. 386.

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construction would largely, if not completely, nullify the purpose for which the insurance was sold—a circumstance to be avoided, so far as the language used will permit. *Cornish* v. *The Accident Insurance Co.* (1), where at p. 456 Lindley L.J. stated:

> The object of the contract is to insure against accidental death and injuries, and the contract must not be construed so as to defeat that object, nor so as to render it practically illusory.

While in the construction of each exclusion clause effect must be given to the language thereof, it is of some assistance to observe the general nature of the provisions of these clauses as set out in the policy under the heading "Exclusions." Apart from those dealing with liability assumed by the insured, bodily injuries to employees and claims under the Workmen's Compensation Act, they contain certain provisions with respect to property damage. Clause (*d*) excludes liability in respect to "property damage caused by any escalator, elevator, hoist, or the appliances thereof . . . at premises owned, rented, or controlled in whole or in part by the insured . . ."; then in (*e*) "property damage caused by the ownership, maintenance or use of: (1) aircraft . . . (2) boats or dogs . . . (3) draft or saddle animals . . ." In (*f*) it is provided that "property damage resulting from work performed for the insured by any independent contractor or independent sub-contractor" shall be excluded.

These clauses are directed to damage caused by factors that are quite separate and distinct from those which would usually arise out of a contract for cleaning furniture and rugs upon the premises of their owner. In fact they emphasize what is apparent from a perusal of the policy as a whole that it was prepared as a general policy and not directed to any specific undertaking such as that of the respondent, a feature which often creates difficulties in construing the language as applied to a particular coverage.

Whether, in such a context, the parties to the contract, in the words " care, custody or control" of clause (*g*), have excluded the respondent's recovery for damages resulting

(1) (1889) 23 Q.B.D. 453.

from the cleaning of the rug here in question must be determined by construing the words upon a reading of the contract as a whole and with particular reference to the coverage purchased by the insured.

If clause (*g*), as suggested, be divided into three parts, first, "property owned, rented, occupied," second, property "used by," third, property "in the care, custody or control of the insured," support is found for the view that the clause here in question, under the third heading, will only apply where the insured has at least had the chattel in his possession.

Reference to the Oxford Dictionary discloses that these words, as commonly used, possess a variety of meanings. A study thereof does indicate that as here used "care" would include a measure of protection and preservation, "custody" of safekeeping and protection and "control" of direction or domination. Respondent and his customer King contemplated that the rug, in the process of cleaning, would not be moved. In the circumstances respondent had but a permission to go upon the rug, to move the furniture and to place thereon such equipment as might be necessary for the cleaning thereof. In the course of his work respondent would have a duty to use due care, much as any other person who might have permission to walk thereon. It does not appear that here the respondent has assumed any responsibility in respect to preservation, safekeeping, protection, direction or domination, as contemplated in the phrase "care, custody or control" as used in clause (*g*).

When regard is had to the possible meanings of the words "care," "custody" and "control" as they are here used as part of general provisions prepared without reference to the particular coverage purchased by the respondent, together with what is perhaps the more important consideration that, if construed as the appellant submits, these words would largely, if not entirely, nullify the usefulness of the insurance purchased, it is difficult to determine the precise meaning that ought to be attributed to these words.

It is, in such a case, a general rule to construe the language used in a manner favourable to the insured. The basis for such being that the insurer, by such clauses, seeks to impose exceptions and limitations to the coverage he

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has already described and, therefore, should use language that clearly expresses the extent and scope of these exceptions and limitations and, in so far as he fails to do so, the language of the coverage should obtain. Lord Justice Lindley stated:

> In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. *Cornish* v. *The Accident Insurance Co., supra,* at p. 456.

See also *Blackett* v. *Royal Exchange Assurance Co.* (1); *Hawthorne and Boulter* v. *Canadian Casualty and Boiler Insurance Co.* (2). Furthermore, the language of Lord Greene in *Woolfall & Rimmer, Ltd.* v. *Moyle* (3), is appropriate. He there states:

> I cannot help thinking that, if underwriters wish to limit by some qualification a risk which, prima facie, they are undertaking in plain terms, they should make it perfectly clear what that qualification is.

In my view the respondent did not have in its care, custody or control the rug here in question within the meaning of clause (*g*) and the appellant is liable to the respondent under Coverage B.

The appeal should be dismissed with costs.

LOCKE J.:—I would dismiss this appeal with costs for the reasons stated by Mr. Justice Laidlaw in delivering the unanimous judgment of the Court of Appeal (4), with which I respectfully agree.

CARTWRIGHT J. (dissenting):—The facts and the terms of the policy of insurance so far as they are relevant to the question before us are stated in the reasons of my brother Kerwin.

The facts being undisputed, the question which we have to decide depends on the construction of the policy. We are particularly concerned with the words of "Exclusion" (*g*), as the appeal was argued on the assumption that the appellant was liable unless relieved by this clause.

No authority is required for the propositions, that the policy must be construed as a whole, and, that the words used are to be understood in their plain, ordinary and popular sense. It is stated in the policy that the trade,

(1) (1832) 2 C. & J. 244 at 250.
(2) (1907) 14 O.L.R. 166 at 174.
(3) [1942] 1 K.B. 66 at 73.
(4) [1953] O.R. 9.

business or work covered by the policy is "General Household Cleaning Service (including cleaning of walls, floors, furniture, etc)." The work being done by the respondent at the time the rug was damaged was the sort of work described in the policy and was being carried on in the usual way, that is to say, the owner, having agreed with the respondent as to the articles which it was to clean, left it to the respondent to carry out the work of cleaning in its own way. The contract between the owner of the rug and the respondent appears to fall within the description of *"locatio operis faciendi"* contained in the text books; see, for example, Halsbury, 2nd Edition, Vol. 1 at page 766:—

> "Hire of Work and Labour." This class of bailment (locatio operis faciendi) is a contract in which one of the two contracting parties undertakes to do something to a chattel, e.g., to carry it or repair it, in consideration of a price to be paid to him. It is essential to constitute a valid contract of this description that there should be some work to be performed in connection with a specified chattel, and that money should be agreed to be paid as the price of the labour.

However, I do not find it necessary to determine whether there was technically a bailment of the rug. I do not read the words of clause (*g*) as covering only cases in which the owner of the property damaged has, in contemplation of law, transferred the possession of such property to the respondent. In my opinion, in the circumstances of this case a person in the situation of the parties would have regarded the rug and the other articles of furniture which the respondent had agreed to clean as being in the care or control of the respondent so long as the cleaning operation was in progress. The words "care", "custody" and "control" are used disjunctively in clause (*g*) and it seems to me that interpreting the words in their plain, ordinary and popular sense the respondent, at the time the damage was done, had both the care and control of the rug and that had the owner taken it out of the respondent's control before the work of cleaning was finished he would have thereby committed a breach of contract.

I agree with Mr. Shaver's submission that resort can properly be had to the maxim *"Verba chartarum fortius accipiuntur contra proferentem"* only if the Court is unable

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to determine the meaning of the words it is called upon to construe after calling in aid all relevant rules of construction.

I would dispose of the appeal as proposed by my brother Kerwin.

Appeal dismissed with costs.

Solicitors for the appellant: *Shaver, Paulin & Branscombe.*

Solicitors for the respondent: *Joliffe, Lewis & Osler.*

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*PRESENT: Kerwin, Taschereau, Rand, Kellock, Estey, Locke and Cartwright JJ.