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JULIUS MAJORCSAK and AUDRY MAJORCSAK (*Plaintiffs*) ..... APPELLANTS;

*Mar. 13, 14, 15 May 13

AND

NA-CHURS PLANT FOOD COMPANY (CANADA) LTD. (*Defendant*) ..... RESPONDENT;

AND

SAMUEL LAMMENS (*Defendant*).

SAMUEL LAMMENS (*Defendant*) ..... APPELLANT;

AND

JULIUS MAJORCSAK and AUDRY MAJORCSAK (*Plaintiffs*) ..... RESPONDENTS;

AND

NA-CHURS PLANT FOOD COMPANY (CANADA) LTD. (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Liquid fertilizer purchased under contract whereby manufacturer was to arrange for application of product to purchaser's crop—Purchaser subsequently arranging with sprayer to add pesticide to fertilizer—Herbicide added instead of pesticide—Crop destroyed—Sprayer liable in negligence—No liability on part of manufacturer.

The plaintiffs, husband and wife, were the owners of a tobacco farm. Under a written contract the male plaintiff ordered, *inter alia,* 45 gallons of a liquid fertilizer from the defendant manufacturer. It was provided in the contract that the manufacturer would make arrangements to apply the fertilizer to the plaintiffs' crop at local rates, and payment for spraying was to be made by the grower direct to the spraying service company. The chemical was to be applied at the rate of 2 gallons per acre.

The co-defendant, a custom sprayer, was instructed by a representative of the manufacturer that the crop was ready for spraying and he thereupon sent two of his employees to the plaintiffs' farm to carry out the operation. Having learned from these employees that, in accordance with their instructions, the chemical was to be applied at the rate of 1½ rather than 2 gallons per acre, the plaintiff determined that with an additional 5 gallons of the product his entire crop could be sprayed instead of only part of it as he had originally intended. He asked the men if they could obtain from their employer additional fertilizer and upon being assured that they could do so asked if they would also spray endrin (a pesticide) at the same time as the

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

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fertilizer. One of the men departed for the sprayer's warehouse and, according to his evidence and that of the sprayer, he there picked up a 5-gallon can of the fertilizer and a 5-gallon can of endrin. On his return the spraying commenced and on the completion thereof the men presented their account to the plaintiff and he paid them.

A few days later the tobacco plants, following an abnormal increase in their rate of growth, became wilted. The evidence established that the crop was destroyed by a hormone herbicide of the 2-4-D type. At trial, judgment was given against both defendants, and, on appeal, the Court of Appeal allowed the appeal of the defendant manufacturer but dismissed the appeal of the defendant sprayer. Appeals from the judgments of the Court of Appeal were then brought to this Court.

Held: The appeals should be dismissed.

From an examination of all the evidence it was concluded that the only possible source of the 2-4-D type of chemical which destroyed the plaintiffs' tobacco crop was the contents of the 5-gallon can which was supposed to have contained endrin. This can always was within the sole control of the sprayer and his employees. Having found, on the balance of probabilities, that the sprayer and his employees had sprayed the crop with such a deleterious substance they were liable in negligence.

It was unnecessary to decide the question as to whether or not the sprayer was the agent of the manufacturer for the purpose of applying the fertilizer to the crop. The arrangements made between the male plaintiff and the sprayer's employees were materially different from those that had been undertaken by the manufacturer, and were such as to absolve the manufacturer from responsibility for what later occurred. It was in the performance of the subsequent contract, to which the manufacturer was not a party, that the sprayer was negligent. That negligence could not be attributable to the manufacturer.

Landels v. Christie, [1923] S.C.R. 39; *British & Beningtons, Ltd. v. North Western Cachar Tea Co., Ltd.,* [1923] A.C. 48, referred to.

APPEALS from judgments of the Court of Appeal for Ontario[1], allowing an appeal by the defendant company and dismissing an appeal by the co-defendant from a judgment of Ferguson J. in favour of the plaintiffs in an action for damages for negligence. Appeals dismissed.

P. B. C. Pepper, Q.C., B. A. R. Taylor, and *P. S. A. Lamek,* for Julius and Audry Majorcsak.

C. A. Keith, for Na-Churs Plant Food Co. (Canada) Ltd.

I. W. Outerbridge, for Samuel Lammens.

The judgment of the Court was delivered by

[1] [1966] 2 O.R. 397, 57 D.L.R. (2d) 39.

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SPENCE J.:—These are appeals from the judgments of the Court of Appeal for Ontario[1] pronounced on April 15, 1966. In those judgments, the said Court allowed an appeal by the defendant Na-Churs Plant Food Company (Canada) Ltd. from the judgment of Ferguson J. after trial which said judgment was pronounced on January 29 but dismissed the appeal from the judgment against the co-defendant Samuel Lammens. The plaintiffs appeal from the dismissal of the action against the defendant Na-Churs and the defendant Lammens appeals from the confirming of the trial Court judgment against him.

It is necessary to state the facts in some detail. The plaintiffs Julius and Audry Majorcsak, husband and wife, are the owners of a tobacco farm in the Township of Middleton and County of Norfolk.

In March 1962, two representatives of the defendant Na-Churs Plant Food Company Limited, which will be referred to hereafter as "Na-Churs", called on Majorcsak and after conferring with them Majorcsak placed an order as follows. This order was on a printed form supplied by the said representatives of Na-Churs and I repeat it completely:

NA-CHURS PLANT FOOD CO., LTD.
London Canada

CROP SERVICE ORDER

Date March 13th

Name Julius Majorcsak
P.O. Address R.R. 2, Delhi
Lot 48 Concession?
Township Middleton County Norfolk
Shipping Date April

Quantity	Size	Price	Total
45 Gls.	5-20-5		$ 438.75
45 "	10-20-10		2%
45 "	2-18-18		$ 429.98

It is understood that the 'Na-Churs' Plant Food Company will make arrangements to apply 'Na-Churs' Liquid Fertilizer to the crop at local rates.

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Payment for spraying is to be made by the grower direct to the spraying service company at the time of spraying.

TERMS: Cash

Crops and Acres to be sprayed.

30 Acrs. Tob.

Method of applications To be applied at the Rate of 2 gals/A

Aircraft _____

Own Equipment _____

Custom Spray V

This Order is not subject to cancellation—

No verbal agreements other than herein stated will be recognized.

'D. E. Gaddes'
Representative

'Julius Majorcsak'
Signed:

(Give Detailed Shipping Directions on Reverse Side).

Majorcsak had ordered the same type of spray on the previous year and the crop had been sprayed by a John Jakobi. In this action, we are concerned only with the second chemical in the list of three set out on the said order, *i.e.*, 45 gals. of 10-20-10. Majorcsak testified that he suggested to Na-Churs' representative that Mr. Jakobi, whose services had been satisfactory in the year 1961, should again be used to spray the said 10-20-10. On or about April 3, 1962, an employee of Na-Churs delivered to the premises of Majorcsak the three 45-gallon drums of chemicals and one Steve Vonga signed for their receipt. According to Majorcsak's evidence, those drums were then placed in what he described as his steam room, being one room in the pack barn on the tobacco farm. The building was not locked but, again according to Majorcsak's evidence, the drums were undisturbed until they were used. The first drum, *i.e.*, that of 5-20-5, was used at the time Majorcsak planted his tobacco crop and we are not further concerned with it. Some time about a week before July 17, 1962, a representative from Na-Churs came onto Majorcsak's farm and inspected it. He then went to one Samuel Lammens, who is a defendant in the action, and instructed him that Majorcsak's crop was ready for spraying with the 10-20-10. Majorcsak testified that no one told him when that spraying was to take place. On July 17, 1962, at about 5:30 p.m., two men arrived on Majorcsak's farm towing behind a truck an implement called a "hi-boy". This is a large, three-wheeled piece of equipment the drive being upon the large front wheel with the two wheels one at each side of the rear. It

contains, in addition to the motor which drives the machine, a pump, a large tank said to be of 200 gallon capacity, and three booms each of which held three nozzles. The full width of the vehicle when the booms were opened and the nozzles ready to operate was thirty feet. Majorcsak recognized the purpose for which the equipment was there and asked these men if they came from Jakobi. They replied that they had been sent there by Mr. Lammens and were there for the purpose of spraying the Na-Churs plant fertilizer.

In further conversation, Majorcsak ascertained that their instructions were to spray the fertilizer at the rate of only one and a half gallons per acre. An inspection of the order which I have set out above, shows that the chemical was to be spread at the rate of two gallons per acre. Majorcsak realized that at the rate of only one and a half gallons per acre, his 45-gallon drum would not be used up in spraying the 24 acres which he had intended originally to cover and determined that with only five gallons more of 10-20-10 he could spray his whole crop which he believed to be about 33¼ acres but which turned out at a later measurement to be very little less than 35 acres. Majorcsak asked these two men who were Fish and Lauwerier if they could obtain from their employer additional 10-20-10 and upon being assured that they could do so asked if they would also spray endrin at the same time as the 10-20-10. The latter chemical is one for the destruction of worms which Majorcsak had noticed appeared in his crop and in the previous year he had Jakobi spray a mixture of 10-20-10 and endrin. Again Fish and Lauwerier agreed that they could spray the two chemicals at the same time and stated that Mr. Lammens had in his warehouse a supply of endrin. Thereupon, Lammens' employee drove the hi-boy inside the pack barn, the three men rolled out the 45-gallon drum of 10-20-10 and the employee Lauwerier removed the bung which had sealed that drum. There is direct contradiction in the evidence as to what occurred when this bung was removed. According to Majorcsak, it could only be removed when the Lammens' employees obtained a larger wrench and when it did come free the movement was accompanied by a gushing or popping sound. On the other hand, according to Lammens' employees, the bung was so easily removed that Lauwerier who was operating the wrench fell backwards as it turned too freely.

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For reasons to which I shall refer hereafter, neither the learned judge nor I regard such contradiction as important.

Upon the bung being removed, Majorcsak left for the fields intending to assist his men in removing the sprinkler heads of an irrigation system which were protruding above ground and which would have been in the way of the hi-boy as it proceeded down the rows of tobacco. Lammens' employee Lauwerier departed in the pick-up truck for Lammens' warehouse. According to the evidence given by that employee and by Lammens, he there picked up and put in the truck a five-gallon can of 10-20-10 and a five-gallon can of endrin and again, according to that evidence, both cans were sealed and the seal was removed by Lammens at his own warehouse. These employees of Lammens testified that in accordance with their usual practice, on the first occasion, they put into the tank on the hi-boy enough to do about one-half of the crop. This they did by inserting in the hole in the top of the drum of 10-20-10 a hose which ran from the pump on the hi-boy and then pumping from the drum into the tank in the machine, sufficient of the 10-20-10. They then took the hi-boy alongside the Majorcsak water tank and in the same fashion pumped from there sufficient water to make the mixture with the 10-20-10 the proper one for the purpose.

Lauwerier returned from Lammens' warehouse with the five-gallon can of endrin and the additional five-gallon can of 10-20-10. Although it is not definitely stated in the evidence, it appears to me a necessary conclusion that no spraying was done until Lauwerier had returned to the Majorcsak farm. Both men testified that they only filled the tank on the hi-boy twice; both testified that the chemical endrin was used in the mixture which covered the whole crop. Fish testified that for the first driving of the machine, he operated it while Lauwerier rode on the machine and watched the booms. Fish testified that they used the spray on the field close to the barn and south and east of it, and described in detail his course of operation up and down the rows of tobacco, including the folding of the three booms to permit the spraying of what he thought were the last two short rows close to the fence.

The spraying continued long after dark and was only completed about 1:00 a.m. At that time, the two men pre-

sented their account to Majorcsak and he paid them. The receipt for the payment was produced at trial and reads:

One five-gallon can 10-20-10	$ 19.75
Spraying 33 acres at $1.75	57.75
Endrin at $2.00	64.00
Julius Majorcsak	$141.50

Paid
Larry and Roger

During the two days which followed, Majorcsak observed what he believed to be a very abnormal increase in the growth of his tobacco plants, with the exception of the two rows close to the fence near the barn. By the 21st, the plants were definitely wilted and he went to Lammens warehouse to confer with Lammens. On the previous Thursday, July 19, in the forenoon, Majorcsak swore he telephoned to one Lelenko and asked Lelenko to get in touch with Mr. Geddes; Mr. Geddes was Na-Churs' representative who had attended Majorcsak and sold him the 10-20-10 chemical and his name appears on the order as a witness to Majorcsak's signature. Majorcsak swore that he knew Lelenko was also a representative of Na-Churs. He swore that he did not know Lammens and did not know how to contact the man who had done the spraying. Majorcsak's ability to read English is very limited.

On the 21st, Majorcsak complained to Lammens as to the state of his crop and asked Lammens to come to his farm and inspect it. When Lammens did so, a man named Wiggars, also an employee of Na-Churs, was present and together they went through the crop inspecting the damage. The condition of the crop is graphically illustrated in a photograph produced at trial as ex. 34 which, however, was not copied into the Appeal Case. The photograph, according to the evidence of the photographer, was taken on July 24 and it shows the two rows of tobacco plants in the foreground as appearing perfectly normal while all those from there to the far side of the field appear to be completely wilted. The damage to the crop need not be described in detail as I shall refer to the scientific evidence as to such damage and the cause thereof hereafter.

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Lammens' employees had departed from Majorcsak's premises in the early morning of July 18. They left the 45-gallon drum of 10-20-10 which had an unused residue of one gallon or a little more therein. They also left an empty five-gallon can of 10-20-10. They took with them, however, the tin of endrin which had in it some residue of the chemical which it had contained. According to the evidence of Lammens and of his employee Fish, that residue was used in the same hi-boy the very next morning, *i.e.*, the morning of July 18, to spray about eight acres of Lammens' own crop with the pure endrin, *i.e.*, not mixed with 10-20-10, and Lammens' crop was utterly unaffected. The learned trial judge made a finding of fact in reference to this evidence to which I shall refer hereafter. It will also be necessary to refer to certain other evidence from time to time but it would be more convenient to do so when considering the actual point as to which such evidence has any relation.

At trial, the only scientific evidence was called on behalf of the plaintiff. Professor Clayton M. Switzer, the professor of botany and plant physiology at the Agricultural College, Guelph, Ontario, and the chairman of the Ontario Weed Committee, gave evidence as an expert. The trial judge described him in these words:

> He is perhaps, if not certainly, the person best qualified in this province to identify 2-4-D damage.

His opinion was corroborated by Norman Skeidow, B.Sc., a graduate of Macdonald College, McGill University, and then an employee of the Ontario Department of Agriculture at Delhi. That evidence was that the crop had been killed by a hormone herbicide of the 2-4-D type and that nothing else did so. The experts were in agreement that neither 10-20-10 nor endrin, no matter how inexpertly applied, would cause the type of damage which had occurred in the Majorcsaks' crop and which they refer to as systemic, *i.e.*, it was through the whole plant as distinguished from any spotting or curling of leaves. Hereafter my reference to 2-4-D should be understood as referring to any hormone herbicide of that general chemical nature.

After the trial, which lasted seven days, Ferguson J., the learned trial judge, reserved judgment, and subsequently, in very carefully detailed reasons, gave judgment against both the defendant Na-Churs and the defendant Lammens,

being of the opinion that by the contract which I have quoted above, Na-Churs not only agreed to sell and deliver the chemical 10-20-10 to Majorcsak but to spray it on the crop and that there was an implied term of the agreement that it should be done without negligence. He found that, as agent of Na-Churs, Lammens did spray the crop and due to negligence, either in his spraying or in the supplying of the chemical in the first place, the crop was ruined.

McGillivray J.A., giving reasons for the Court of Appeal, was of the opinion that Na-Churs' contract with Majorcsak was to supply him with chemical and to arrange that the fertilizer 10-20-10 be sprayed by some person who was chosen by them but who would be solely the agent of Majorcsak in carrying out his task. McGillivray J.A. therefore concluded:

> Upon these facts, with all deference to the learned trial judge who reached a contrary result, I must conclude that Na-Churs in its contract, did no more than agree to find for the plaintiff a custom sprayer to do the work and that neither in contract nor in tort had it any vicarious responsibility for the tortious act of Lammens.

McGillivray J.A. continued in his reasons to examine the case against the defendant Lammens and concluded that Lammens' liability in tort had been established and confirmed the judgment against this defendant.

I think we may well start with the proposition that from wherever it came, the chemical which ruined the plaintiffs' tobacco crop was a hormone herbicide such as 2-4-D. That is the uncontradicted evidence of the experts and all of the other evidence confirms their opinion. It, therefore, becomes necessary to determine what was the source of that 2-4-D type of chemical and whether its application to the plaintiffs' crop of tobacco results in any liability on either one of the defendants. Seven different possible sources of the hormone chemical have been suggested, as follows:

1. The creek from which the irrigation water was taken for Majorcsak's farm might have been contaminated with 2-4-D.

2. The water in Majorcsak's water tank standing in their barnyard might have been contaminated with 2-4-D.

3. There might have been minerals in the soil containing 2-4-D.

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4. The tank on Lammens' hi-boy might have been contaminated through its previous use in application of 2-4-D to other crops.

5. The 45-gallon drum of 10-20-10 might have been so contaminated.

6. The five-gallon can of 10-20-10 which came from Lammens might have been so contaminated.

7. The five-gallon can of what was said to be endrin obtained from Lammens might have been contaminated, or it might have been a five-gallon can of 2-4-D.

The first three of these possibilities need only be mentioned. The complete answer to the possibility that the creek had been contaminated and that, therefore, the irrigation which had been done some three or four days before the plants were sprayed might have resulted in the destruction is the evidence that the whole crop was damaged well-nigh evenly while on Majorcsak's evidence his irrigation equipment only covered six of the roughly 34 to 35 acres of planting. As to the second possible source, the water used to mix with the chemical in the tank in the hi-boy came from Majorcsak's water storage tank standing in his barnyard. That water had been pumped there from a well in Majorcsak's cellar. The family all drank water from that well and the stock was watered from that tank. Moreover, the tank stood high—one witness, I think, said twenty feet above the ground, and it would simply be fantastic to consider that anyone had climbed to that height in order to contaminate the water tank with what would have been a very considerable dose of a noxious chemical such as 2-4-D. I might add here that there was not the slightest evidence throughout the trial of any person having enmity for Majorcsak. As to the third possible source, there was no evidence whatsoever that there was any mineralization of the soil such as could possibly cause the damage which occurred to Majorcsak's crop. As to the fourth possible source of 2-4-D, *i.e.*, the tank on the hi-boy being contaminated, a great deal of evidence was adduced in reference to this possibility. Lammens had owned and operated two different hi-boys—one, an older smaller model, and a second, what he called the big hi-boy, which was a larger model with a 4-cylinder motor and with a 200-gallon tank. He swore, and so did his employees that he had not

used the larger hi-boy in the whole of that season for the spraying of 2-4-D although he had used the smaller hi-boy for such purpose as late as July 12.

Of course, Majorcsak did not know whether the outfit which was used to spray his crop was the large hi-boy or the small, older piece of equipment. Although the evidence relied upon by Lammens to prove that the larger equipment alone has been used on Majorcsak's farm was somewhat confused and unconvincing, and although the fact that Lammens did not spray at all after the completion of the Majorcsak job at about 1:00 a.m. on the 18th until the 24th, while he had been busy using the same large hi-boy in spraying on the 12th, 13th, 14th, 15th and 17th, would seem to be rather suspicious, I am unable to come to the conclusion that there is any convincing evidence that the tank on the outfit used by Lammens' men when they arrived at Majorcsak's farm was contaminated with a 2-4-D like chemical before it arrived upon the premises. It is true that Mr. Shedow, upon being asked what was the power of 2-4-D as a herbicide, replied that it takes very minute quantities to cause injury, adding "I can't say in parts per million but it is very light". Dr. Switzer, on cross-examination, however, agreed that the particular damage to Majorcsak's crop as illustrated in the photographs would require 2-4-D in the proportions of a herbicidal weed spray and that it probably did represent about one pint per acre use.

Much more difficult is the consideration of the 5th, 6th and 7th possible sources of the 2-4-D contamination. The fifth dealt with a possibility that the 45-gallon drum of 10-20-10 purchased from the defendant Na-Churs was contaminated when it arrived at the farm of Majorcsaks or that it was contaminated by 2-4-D thereafter and prior to it being pumped into the tank of the hi-boy. It is significant that the defendant Na-Churs did not manufacture 2-4-D and had no 2-4-D around its plant. There seems not the slightest ground to even suspect that when the 45-gallon drum of 10-20-10 was delivered to Majorcsak it was anything but that same chemical and nothing else. As I have said, when the spraying work had been completed, there was still a small amount of chemical in that drum. A sample was taken from that residue by Klaus Mueller, an employee of

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S. R. Bennett Limited, chemical analysts, with Majorcsak assisting him. At the time the sample was removed the drum smelled very strongly of ammonia which is the typical smell of the chemical 10-20-10 and not of the chemical 2-4-D. Mueller took that sample to his laboratory and analyzed it. He testified that it contained 10.17 per cent of nitrogen, no nitrate nitrogen, 19.15 per cent of phosphoric acid, and 9.92 per cent of water soluble potash, in other words, it was 10-20-10 for commercial purposes. There was on the label of the drum a statement that there were traces of certain other chemicals. Mueller did not attempt to separate out in his analysis these traces, nor did he test the sample for 2-4-D

I agree with McGillivray J.A. when he said:

> It is difficult to believe that an analyst close to it as he would be failed to recognize the presence of 2-4-D.

Of course, this evidence of analysis would rule out the presence of that 2-4-D contamination not only when the drum left Na-Churs plant but up to the time when the contents thereof had been used to fill the tank on the hi-boy. If the 45-gallon drum of 10-20-10 had been contaminated by a 2-4-D type of chemical after it left Na-Churs plant and before the contents were used to fill the tank on the hi-boy it would have had to have been done by either the plaintiff Majorcsak himself, by some of his hired men or by some stranger who had nefariously entered the plaintiffs' premises, probably by night, in order to contaminate the can. With deference, I agree with the learned trial judge when he said:

> No one suggested or said that any 2-4-D was found in it. It is incredible that the plaintiff would deliberately contaminate the barrel. It is improbable that his hired men did so, as there was no suggestion that there was any 2-4-D on the premises or that any had been used by the plaintiff, or if there were any why they would dispose of it by pouring it into a full drum of 10-20-10.

I add that it is equally incredible to picture some stranger with enmity toward the plaintiffs, and none was suggested, coming probably by night upon the plaintiffs' premises to put into a full barrel of 10-20-10 enough 2-4-D to cause the damage which was exhibited by the plaintiffs' crop. Therefore, in my view, whether the bung was removed on the 45-gallon drum with a pop or easily there is no evidence

whatever to suggest that the contents of that drum contained anything except the 10-20-10 which it was supposed to contain.

The remaining two possible sources of contamination were the two five-gallon cans which were brought upon the plaintiffs' premises from Lammens' warehouse by Lauwerier on the evening of July 17. One of those cans it was said contained 10-20-10 and the other it was said was a can of endrin. Lammens testified that he took both of these cans from his warehouse to give them to his employee Lauwerier and that before Lauwerier left the warehouse he, Lammens, broke the seal on the can which was said to contain endrin. There was no evidence as to when the seal on the can which was said to contain 10-20-10 was broken. The reasons given by Lauwerier for the breaking of the seal on the can of endrin at Lammens' warehouse were that it was realized that the whole of the can would not be used and therefore the balance would have to be returned and it was necessary to take care in breaking the seal so as not to damage the spout which was inside the seal, and that Lammens had a knife handy. It is rather unusual that a five-gallon can of a rather valuable liquid should be opened at Lammens' warehouse and then carried by truck in that condition six miles to the plaintiffs' farm. The evidence as to the use of the 45-gallon drum of 10-20-10, the five-gallon can of 10-20-10, and the five-gallon can which was said to contain endrin was given by the defendant Lammens' witnesses only as the plaintiff was not present when the contents of those cans were pumped or poured into the tank on the hi-boy. It was the evidence of these witnesses that the five-gallon can of 10-20-10 was used only for the second filling of that tank on the hi-boy. When the employees left the plaintiffs' premises that night, they left on the premises the 45-gallon drum and the five-gallon can of 10-20-10. As I have said, there was a residue in the 45-gallon drum but the five-gallon can was, on their evidence and on the evidence of both the plaintiff and the chemist Mueller, quite empty. On the other hand, the endrin had not been used up since it required only one pint per acre and since there were, at the most, nearly thirty-five acres to be sprayed, there would be not less than five pints of the chemical left in the five-gallon can. Therefore, the five-gallon can labelled

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"endrin" with its small residue of contents was returned by Lammens employees to his warehouse. Lammens and his employee Fish swore that it was used on the very next morning to spray eight acres of tobacco on Lammens' own farm and that the tobacco suffered no ill effects whatsoever from the spraying.

As McGillivray J.A. pointed out in his reasons for judgment, the learned trial judge misunderstood the evidence which I have restated above, as he said:

> The empty can of 10-20-10 brought to the plaintiffs' farm by Lauwerier on his return trip from Lammens' warehouse, was taken back to Lammens. Why the empty 10-20-10 was not left on the plaintiffs' farm, if all of its contents had been used, was not explained. It is, of course, possible that the supposed five gallons of 10-20-10 was in fact 2-4-D and indeed this would seem to me to be the only reasonable explanation of the damage. The circumstances are such that they are, in my view, consistent only with that conclusion.

After referring to other evidence, the learned trial judge continued:

> There is some element of speculation in this, but it seems to me to be the only possible explanation of the two healthy rows and such a theory is consistent with the fresh can of supposed 10-20-10 being used after Lauwerier's return, and that it was not 10-20-10 but 2-4-D. It is also consistent with the fact that some 10-20-10 remained in the 45 gallon drum and, it is consistent with the two healthy rows being left unsprayed at one side of the field.

The learned trial judge then made this specific finding of fact based on credibility:

> By all the standards of tests for credibility I reject the evidence of Lammens and his witness (I observed them carefully) that they did not spray 2-4-D on the plaintiffs' crop. I also reject their evidence that they sprayed Lammens' own crop without damage. If they did so, it must have been after the Hi-Boy was decontaminated.

It is evident that the learned trial judge made this finding of fact believing that the can which was purported to contain 10-20-10 had been returned by Lammens' employees to the Lammens' warehouse and believing that it was the evidence of Lammens and his employee that the balance of the contents of that can had been used to spray Lammens' own field the next day. Such belief was, of course, in error. It was the five-gallon can which was said to have contained endrin which was returned partly used to Lammens' warehouse, while the five-gallon can which was said to contain

10-20-10 had been completely used and the empty can had been left on the plaintiffs' farm. In my view, the error does not destroy or render of any less importance the direct finding of fact by the learned trial judge based on his assessment of the credibility of the witnesses. He was of the opinion that it was the partly-used five-gallon can which had been returned by Lammens' employees to Lammens' warehouse, and which they said they had used on Lammens' own field the next morning, which had contained the deleterious substance, and on their evidence he was ready to reject their claim that they did not spray 2-4-D on the plaintiffs' crop and that they sprayed Lammens' own crop without damage. It is realized that to find that that five-gallon can contained not endrin, as it was supposed to contain, and as Lammens and his witness first swore that it did contain, but rather a 2-4-D type of chemical is to reject the evidence of Lammens and his witness Fish but, in my view, the trial judge has made an unassailable finding of fact based upon credibility on that topic.

There are, moreover, several most important factors tending to corroborate that view. The plaintiff had full title to both the 45-gallon drum of 10-20-10 which he had purchased from Na-Churs, and the five-gallon can of 10-20-10 which he had purchased from Lammens. It was, therefore, perfectly proper that both of those containers with any contents remaining in them should be left with the plaintiff on the plaintiffs' property. On the other hand, the plaintiff had no title to any endrin. According to the contract made between the plaintiff and Lammens' employees on the evening of July 17, these employees were to spray endrin on the plaintiffs' crop at the rate of one pint per acre and were to charge by the acre. The account rendered and paid so demonstrates. Lammens would, therefore, be entitled to have taken back to his own warehouse any unused part of the five-gallon can said to have been endrin. It is significant that Lammens ordinarily sprayed 2-4-D under exactly the same arrangement. Page 21 of ex. 53 is a book of Lammens' invoices which Lammens produced and to which he referred in his testimony. It is a copy of an invoice to a farmer August Verhegghe dated July 12, 1962, just five days before the plaintiffs' crop was sprayed and it reads: "19½ acres 2-4-D sprayed at $2.25 — $43.87". It would be inevitable

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that with spraying sometimes endrin and sometimes 2-4-D in this fashion on fields of varying sizes there would be some small amounts left in the containers, and it matters not whether Lammens only received 2-4-D in the original containers of one-gallon size. The remains of both chemicals might well have been stored in odd empty five-gallon cans. In fact, the plaintiff testified that some two weeks after his crop was sprayed, he went to Lammens' warehouse and asked Lammens for a small quantity of endrin. Lammens took an empty five-gallon can and poured endrin from another open five-gallon can, which he had taken from amongst five in the back of his truck, in order to give to the plaintiff the small quantity of endrin required.

As I have said, the damage occurred over the whole crop with the exception of the two short rows in one corner where it would be most difficult to spray with such a large piece of equipment as the hi-boy. The five-gallon can of 10-20-10 was used only in the second spraying, and therefore if it had contained the deleterious substance it would not have covered the whole field. The so-called endrin, on the other hand, was used to spray the whole crop. Therefore, I have concluded from all of the evidence that the only possible source of the 2-4-D type of chemical which destroyed the plaintiffs' tobacco crop was the contents of the five-gallon can which was supposed to have contained endrin. This five-gallon can always was within the sole control of Lammens and his employees. The plaintiff never had possession of it or any property in it. One need not have recourse to the rule of evidence known as *res ipsa loquitur* to find that if Lammens and his employees sprayed the plaintiffs' crop with such a deleterious substance they are liable in negligence. That is a finding of fact based on the balance of probabilities. The balance of probabilities is the only standard which need be applied. To use the words of Duff J., as he then was, in *Landels v. Christie*[2], at p. 41:

> Other explanations were suggested but there was nothing in the facts pointing to any of them as an agency actually or probably operative and my conclusion is that there is sufficient preponderance of probability

[2] [1923] S.C.R. 39.

in the circumstances proved in favour of the trial judge's conclusion to cast the burden of explanation upon the appellants—a burden of which the trial judge held they have not acquitted themselves.

I would, therefore, dismiss Lammens' appeal with costs.

I turn next to consider Majorcsaks' appeal from the dismissal of the action as against the defendant Na-Churs.

The learned trial judge in his reasons for judgment found that Na-Churs were liable for the damages on the ground that Lammens was an agent of Na-Churs for the purpose of applying the 10-20-10 contained in the 45-gallon drum which had been purchased directly from Na-Churs and delivered by that defendant directly to the plaintiffs. In his reasons, the learned trial judge said:

> It is my view that the words of this contract amounted to an agreement by Na-Churs to do the spraying... The defendant company undertook to provide the spraying services, including the equipment and must accept whatever liability such an arrangement entails. I do not agree with counsel for the defendant company that their obligation ended with their nomination of Lammens as the person to do the spraying. The relationship turns on the proper interpretation to be given to the contract between the plaintiff and the defendant company. The defendant company agreed to supply the spraying service.

McGillivray J.A., giving judgment for the Court of Appeal for Ontario, said:

> The key words in this contract are "Company will make arrangements to apply 'Na-Churs' Liquid Fertilizer to the crop at local rates". An initial observation is that, if the agreement is, as submitted, one whereby the company undertakes to apply the fertilizer, the words "make arrangements for" are redundant.

McGillivray J.A. also said:

> ...I must conclude that Na-Churs in its contract, did no more than agree to find for the plaintiff a custom sprayer to do the work and that neither in contract nor in tort had it any vicarious responsibility for the tortious act of Lammens.

In this Court, counsel for both Majorcsaks and Na-Churs presented detailed and able argument on this question of the status of Lammens as an agent of Na-Churs. In my opinion, the appellants Majorcsaks' appeal may be disposed of without deciding that question. Although I am far from convinced that Lammens could be held to be, when his men arrived on Majorcsaks' farm on July 17, the agent not of Na-Churs with whom alone he had dealt but rather of Majorcsak who had never heard of him and who

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had not arranged when or how his crop was to be sprayed. I find myself in agreement with McGillivray J.A. when he concluded his reasons by saying:

> Even had I reached a contrary conclusion to the above, I am of the opinion that the subsequent arrangements made between the male plaintiff and Lammens' employees on July 17th, were materially different from those found by the trial judge to have been undertaken by Na-Churs in its contract, and were such as to absolve Na-Churs from responsibility for what later occurred.
>
> Whatever obligation arose under the contract of March 13th, it was effectively terminated on July 17th when the male plaintiff authorized what was, in effect, another contract, namely, to spray a different acreage at a different rate per acre and with some additional different materials. Na-Churs can well assert that, had the original contract terms been observed, the contents of the 45-gallon drum having been declared free of contamination, no damage would have resulted to the crop.

For the reasons which I have already outlined, there seems to be no other possible conclusion than that the 2-4-D like chemical which caused the damage came from the five-gallon can which was labelled "endrin". This can was the property of the defendant Lammens and it was used by Lammens to spray the plaintiffs' crop of tobacco. It was no part of the contract between the plaintiffs and Na-Churs that endrin should be supplied. Endrin was not a product produced by the Na-Churs company. The chemical endrin is a product produced by the Chipman company. There is no way of determining whether if the Na-Churs representatives had had an opportunity they would have even agreed to the mixture of the chemical 10-20-10, which they supplied, with the chemical endrin. It is true that minor variations of a contract when made by an authorized agent, if Lammens might be considered an authorized agent, will result in a variation and not a rescission of the original contract: *British & Beningtons, Ltd. v. North Western Cachar Tea Co., Ltd.*[3], and many other cases may be cited in support of the same principle. In so far as the variation of the rate of application of the 10-20-10 from two gallons per acre, as set out in the original contract, to one and a half gallons per acre, such authority would apply to prevent the rescission of the contract. If Lammens were Na-Churs' agent, that variation was made by its agent on its instructions. The other variation, however, was not of any such inconsequential nature but was, in fact, a complete change

[3] [1923] A.C. 48.

in the contract and in the parties thereto. The original contract had been to spray the chemical sold by the Na-Churs company on, according to the contract, thirty acres of the plaintiffs' crop at the rate of two gallons per acre. It is difficult to understand how, under such circumstances, only 45 gallons of 10-20-10 were purchased, as that would permit spraying at the rate of only one and a half gallons per acre, the rate finally used. The contract as made between Lammens' agents and Majorcsak was for the spraying of about 35 acres of tobacco crop with a mixture of the 10-20-10, sold by the Na-Churs company, and endrin, which Lammens supplied and which had come from a different source. It was in the performance of the latter contract, to which Na-Churs was not a party, that Lammens was negligent. I cannot understand how that negligence can be attributable to the defendant Na-Churs. I would, therefore, affirm the judgment of the Court of Appeal in the dismissal of the action against the latter defendant.

In the result, I would dismiss both appeals. The respondent Na-Churs is entitled to its costs against the appellants Majorcsaks, and the respondents Majorcsaks are entitled to costs as against the appellant Lammens.

Appeals dismissed with costs.

Solicitor for Julius and Audry Majorcsak: Arnold Taylor, Delhi.

Solicitors for Na-Churs Plant Food Co. (Canada) Ltd.: Keith, Ganong, Mahoney & Keith, Toronto.

Solicitors for Samuel Lammens: Gibson & Linton, Tillsonburg.