Fullager, J. thought that the debtor's petition and a creditor's petition were placed on the same footing by virtue of ss.54 and 57. His Honour remarked: "I can see no reason for drawing any distinction between an order made on a creditor's petition and an order made on a debtor's petition. A creditor's application is more likely to be controversial than a debtor's application, but the nature and effect of the application and of the order are precisely the same in both cases, and the Court is exercising precisely the same function in both cases."

Webb, J., in his dissenting judgment, treated the observations of Griffith, C.J. in *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead*[16] as containing the definition and not merely the broad features of judicial power. In His Honour's view the absence of *controversy* prevented the power from being a judicial one.

On the whole, the effect of the decision is that sequestration orders, made by the Registrar or Deputy Registrar on the debtor's own petition, are void, and the Official Receiver was not entitled to any property of the debtors in such cases. Consequently he could not confer a good title on anyone. The problem becomes acute in the case of old system land,[17] and also where sums of money were paid to the Official Receiver under s.95 of the Act[18] relating to preferences. It would not, therefore, be surprising if the Commonwealth Parliament found it necessary to pass an Indemnity Act barring all actions against the Official Receiver. As creditors of such debtors could now sue them in respect of their old debts it is also interesting to speculate whether an Act of the Commonwealth Parliament can retrospectively declare that such sequestration orders are to be deemed validly made. After *Le Mesurier* v. *Connor*[19] held that such orders made on *creditors'* petitions were void, the invalidated sequestration orders were listed before the judge who pronounced them again. This course may also be followed in this instance. As to the future, it seems that sequestration orders on the debtor's own petition will be made by the judge. Alternatively, however, the Act may be so amended that upon a request by the debtor that his estate should be administered in bankruptcy, the Registrar will merely certify that the debtor's request is in order.

T. R. BERNFIELD, Case Editor — Third Year Student.

INVITOR'S LIABILITY FOR DEFAULT OF INDEPENDENT CONTRACTOR *THOMSON* v. *CREMIN AND OTHERS.*

The decision of the House of Lords in *Thomson* v. *Cremin*[1] raises again the question of the extent of the invitor's liability for the default of his independent contractors, especially in those cases where the work done by contractors is of an involved and highly technical nature, such as would not usually be done by an occupier for himself. The case is the more remarkable in that, though originally decided in 1941, it escaped all notice till 1952, when Mr. R. F. V. Heuston discovered it in the Lords Journals, "by good fortune alone", as he modestly affirmed in his preface to the 15th edition of Salmond's *Law of Torts*.

In that case the first Respondent was employed by the second Respondent, a stevedoring firm, as a stevedore's labourer. He was injured while engaged in discharging bulk grain from the Appellant's ship, the *S.S. Sithonia*, by a shore falling on his head. This shore had been fixed by Australian shipwrights at Fremantle, W.A., in accordance with regulations made under the Navigation Act 1912-1926 (Cwlth.)[2], and a Government Certificate had been issued to the

[16] (1908) 8 C.L.R. 330, 357.
[17] That is, land not yet brought under the Torrens system of registered titles. Indefeasibility of title would, under this system, ordinarily be assured after registration of a transfer from the Official Receiver.
[18] *Id.*
[19] (1929) 42 C.L.R. 481.
[1] (1953) 2 All E.R. 1185.
[2] No. 4 of 1913.

effect that the regulations had been complied with. It was argued on behalf of the Appellant that his compliance with the regulations was the full extent of his duty.[3] The important point, however, was whether the shipowners were liable to the labourer for the default of their independent contractors.

Counsel for the Appellant had not argued that point, he being seemingly convinced that an invitor was liable for the default of his contractors, or at least entertaining no hopes of winning their Lordships over to the contrary view. As a result their Lordships did not devote much space in their judgments to that question. Lords Thankerton and Porter did not even deem the point worthy of discussion and Lord Simon confined himself to an approving reference to *Wilkinson* v. *Rea Ltd.*[4] Only Lord Wright can be said to have considered the problem at some length.

His Lordship commenced[5] by associating himself with the Lord Chancellor's approval of *Wilkinson* v. *Rea Ltd.*[6] He then continued:[7]

> The duty of the invitor towards the invitee is in my opinion a duty personal to the former, in the sense that he does not get rid of the obligation by entrusting its performance to independent contractors. It is true that the invitor is not an insurer; he warrants, however, that due care and skill to make the premises reasonably safe have been exercised whether by himself, his servants, or his independent contractors whom he employs to perform his duty.

His Lordship saw this only as an instance of the general rule that an employer cannot escape from a personal obligation by having it performed by an independent contractor. After stating that this always involved a question of the extent of the duty incurred, he held that in the present case the invitee was not concerned with the course adopted by the invitor to discharge the duty, but that the invitee was entitled to rely on the warranty.

Their Lordships were supported in their decisions by *dicta* to a similar effect in earlier cases such as *Wilkinson* v. *Rea Ltd.*[8] and *Pickard* v. *Smith,*[9] both cases dealing with the loading of coal by independent contractors into an open hatch, and mishaps resulting from their failure to give proper warning. *Thomson* v. *Cremin*[10] and these earlier cases might appear to establish a quite general rule that an occupier is liable to an invitee for the default of his independent contractor. There is, however, a group of cases which are irreconcilable with such a general principle. This latter group now demands consideration in order to determine whether they can be reconciled with *Thomson* v. *Cremin*[11] or whether they must now be regarded as overruled.

The first of this group is the decision of the Court of Appeal in *Hazeldine* v. *C. A. Daw and Son Ltd.*[12], which preceded *Thomson* v. *Cremin*[13] by a few months, but was not mentioned at all in the later case.

In the former case it was held that the landlord of a tenanted flat was not

---

[3] As regards the Certificate, it was pointed out by Viscount Simon, L.C. (1953) 2 All E.R. 1185 at 1188) that the regulations under the Navigation Act served merely to secure that ship and cargo could safely face the dangers of the voyage. Thus it did not alter the shipowner's duty to see to it that his ship was in fact safe.

[4] (1941) 1 K.B. 688. This was a case where it was said by Luxmoore L.J., to whose judgment Lord Simon in *Thomson* v. *Cremin* particularly referred, that there was no reason for thinking that the duty of an occupier to an invitee could be escaped by delegating performance of the work to an independent contractor.

[5] (1953) 2 All E.R. 1185, at 1190.

[6] (1941) 1 K.B. 688.

[7] (1953) 2 All E.R. at 1191.

[8] (1941) 1 K.B. 688.

[9] (1861) 10 C.B.N.S. 470.

[10] (1953) 2 All E.R. 1185.

[11] *Ibid.*

[12] (1941) 2 K.B. 343.

[13] (1953) 2 All E.R. 1185.

liable to an invitee[14] for the default of engineers he had employed to check and repair a defective lift. The ground of the decision was that the task involved highly technical knowledge and a layman would not be expected to supervise it. *Hazeldine* v. *Daw*[15] may therefore represent an exception to the general rule that an occupier cannot escape liability to an invitee for the default of an independent contractor. Such an exception could be stated in the form that an occupier will not be liable to an invitee for injuries arising from defective work where the work, by reason of its special nature, could not be performed by the occupier or any persons for whose acts he would normally be liable as his servants, and for which the occupier was therefore compelled to employ an independent contractor. This is but another way of saying that the personal duty of an occupier in such circumstances extends not to the careful doing of the task, but to the careful selection of a contractor. There is always, as Lord Wright said in *Thomson* v. *Cremin*[16], a question of the extent of the duty incurred which must be answered before it can be determined how far the rule stated in *Thomson* v. *Cremin*[17] applies.

Such an exceptional rule would be supported by the later decisions in *The Jersey*[18] and *Woodward* v. *Hastings*.[19] In the former case it was decided that the Port of London Authority was not liable for the default of Naval Control in buoy marking in waters normally under the control of the Authority, but from which the Authority was then excluded owing to war circumstances, Naval Control, an Armiralty Department, having assumed the duty of buoy marking. In the latter case it was held that school authorities were liable for the default of a charwoman engaged in sweeping snow off steps, a function obviously quite easy to supervise.

The cases decided before *Hazeldine* v. *Daw*[20] are not inconsistent on their facts with the rule as stated in that case. Thus, the house owner in *Pickard* v. *Smith*[21] and the shipowner in *Wilkinson* v. *Rea Ltd.*[22] could have had the coal loaded by their servants, just as the school authorities in *Woodward* v. *Hastings*[23] could have swept the steps themselves. They chose to but were not constrained to employ independent contractors. The landlord in *Hazeldine* v. *Daw*,[24] however, being unable to repair the lift, was forced to hire the engineers.

Returning now to *Thomson* v. *Cremin*,[25] it may be observed that the shipowners could have used members of the crew to nail the shore securely with 5 inch nails instead of the 2½ inch nails used by the shipwrights. It was only for convenience's sake that they left it to the shipwrights. The fact was immaterial that such shoring was part of the shipwright's normal job, and that a shipping company would not be expected to interfere. It is also part of a charwoman's job to sweep snow, and part of a coal merchant's to load coal.[26]

---

[14] It was held by a majority of the judges that the plaintiff was an invitee, Goddard L.J. dissenting feeling himself bound by the decision of the House of Lords in *Fairman* v. *Perpetual Investment Building Society* ((1923) A.C. 74) where the visitor of a tenant was held to be mere licensee. This view of Goddard L.J. was confirmed by the decision of the House of Lords in *Jacobs* v. *London County Council* ((1950) A.C. 361) expressly overruling the majority holding in *Hazeldine* v. *Daw* ((1941) 2 K.B. 343). One cannot then regard the *dicta* in *Hazeldine* v. *Daw* as *ratio decidendi*, but that does not necessarily mean that they are to be disregarded.

[15] (1941) 2 K.B. 343.

[16] (1953) 2 All E.R. 1185.

[17] *Ibid.*

[18] (1942) P. 119.

[19] (1945) 1 K.B. 174.

[20] (1941) 2 K.B. 343.

[21] (1861) 10 C.B.N.S. 470.

[22] (1953) 2 All E.R. at 1190.

[23] (1945) 1 K.B. 174.

[24] (1941) 2 K.B. 343.

[25] (1953) 2 All E.R. 1185.

[26] In *Duncan* v. *Camell Laird Co.* ((1943) 2 All E.R. 621, 628) *Hazeldine* v. *Daw*

Thus *Thomson* v. *Cremin*[27] will seem to fall, together with *Woodward* v. *Hastings*,[28] *Wilkinson* v. *Rea. Ltd.*[29] and *Pickard* v. *Smith*,[30] into that category of cases where it is generally recognised that the occupier is liable for the default of his independent contractor to an invitee. As such it does not displace the rule in *Hazeldine* v. *Daw*.[31] Nor is the reasoning any more than the decision in *Thomson* v. *Cremin*[32] necessarily inconsistent with the rule we have suggested. The rule in *Hazeldine* v. *Daw*[33] merely lays down that the mere finding and employment of a competent independent contractor may, under certain circumstances, amount to "due care and skill to make the premises reasonably safe." The warranty to which Lord Wright refers in *Thomson* v. *Cremin*[34] only states that the occupier cannot escape liability by delegating the performance of his duty; it does not say what that duty consists of. *Hazeldine* v. *Daw*,[35] however, formulates the extent of the duty in certain kinds of circumstances without excusing him from any responsibility for the performance of it.

In the upshot, *Thomson* v. *Cremin*[36] does not seem to affect the rule in *Hazeldine* v. *Daw*.[37] It is submitted that on their facts the two cases fall within different categories, *Hazeldine* v. *Daw*[38] being rather supplementary to the general principle stated in *Thomson* v. *Cremin*.[39] Strictly it does not even establish an exception to it, but merely an application of the general rule to particular kinds of facts, after the scope of the occupier's duty on those facts has been defined.

The conclusion is that the occupier is only liable to an invitee for the default of an independent contractor if it was reasonably possible for the work to be done by himself or by persons under his control or supervision.

P. E. NYGH, Case Editor — Third Year Student.

PERSONAL REPRESENTATIVES: SUCCESSION TO DECEASED'S CONTRACTUAL RIGHTS.

OTTER v. *CHURCH*

It has long been recognised that the rule "*actio personalis moritur cum persona*" does not apply to causes of action for breach of contract, and that a personal representative may, in general, sue on all contracts with the deceased broken in his lifetime.[1] The personal representative has also been permitted to recover damages where the breach of contract occurred after the death of the deceased, but would have occurred in his lifetime had he lived longer.[2] But in *Otter* v. *Church*[3] the Court was faced with a novel problem. There had been a

((1941) 2 K.B. 343) was held not to apply there as the former related to submarines. This decision was not, however irreconcilable with *Hazeldine* v. *Daw*, since it could be argued that the Admiralty with its large technical staff could have supervised the work if it had so chosen.

27 (1953) 2 All E.R. 1185.
28 (1945) 1 K.B. 174.
29 (1953) 2 All E.R. at 1190.
30 (1861) 10 C.B.N.S. 470.
31 (1941) 2 K.B. 343.
32 (1953) 2 All E.R. 1185.
33 (1941) 2 K.B. 343.
34 (1953) 2 All E.R. 1185.
35 (1941) 2 K.B. 343.
36 (1953) 2 All E.R. 1185.
37 (1941) 2 K.B. 343.
38 *Ibid.*
39 (1953) 2 All E.R. 1185.

1 *Raymond* v. *Fitch* (1835) 2 C.M. & R. 588; *Crotty* v. *Woolworths* (1942) 66 C.L.R. 603, 613. 1 Williams, *Executors and Administrators* (13 ed. 1953) 347-349. Law Reform (Miscellaneous Provisions) Act, 1934 (Eng.) 24 & 25 Geo. 5, c.41, s.l. Law Reform (Miscellaneous Provisions) Act, 1944 (N.S.W.) Act No. 28, 1944, s.2(1).

2 Cases cited *infra* n.12.

3 (1953) I Ch. 280.