Canadian Courts may now be at liberty to provide remedies in cases where actions in tort, contract, or trust would not be available. The **Deglman** case demonstrates a category of claims, the essential principle of which is that the defendant should not be unjustly enriched at the expense of the plaintiff. The test of the recovery is not the loss to the plaintiff, but the gain to the defendant, though in general the loss fixes a limit. The essence of the remedy in other words is not compensation to the plaintiff, but the restitution by the defendant of what would be, if not restored, an unjust enrichment. Since the obligation is one for the refund of enrichment as distinguished from damages, the obligation ceases where the enrichment ceases.

—Joseph Bérubé, I Law, U.N.B.

PROVINCIAL BANK OF CANADA V. WETMORE[1]

Capias Practice

This decision affords an opportunity to examine the practice on issuance of a writ of **capias** and more particularly the requirements of the affidavit in support of an application for an order to hold to bail. The judgment turns on the lack of validity of the affidavit and the main concern here shall be with that.

The facts of this case are simple. Application was made for an order to be at liberty to issue a **capias** against the defendant. The affidavit in support of the application was made by the assistant manager of the plaintiff bank. The order was granted and a **capias** issued. The defendant was arrested and later released on bail bond. The defendant then made application to have the proceedings set aside because of certain irregularities.

The statutory authorization for **capias** proceedings is found in s. 1 (2) of the Arrest and Examinations Act[2] as follows:

> Any person, not having privilege, may be arrested and held to bail, or committed to prison on *mesne* process, under the following circumstances:
>
> Where in an action brought or to be brought in any court having jurisdiction, a person by affidavit of himself or some other person shows to the satisfaction of the judge or other official hereinafter mentioned, that he has a cause of action against another person to an amount exceeding twenty dollars, and also shows such facts and circumstances as satisfy the judge, or other official, that there is good cause for believing that the person against whom the application is made is about to quit the province, the judge or other official may order that the person against whom the application is made shall be arrested, in which event a writ of *capias* may be issued to arrest such person in such manner as has heretofore been the practice.

The following objections were made to the affidavit:

(1) The affidavit did not state the amount of the alleged cause of action.

1. Saint John County Court, Keirstead, Co. Ct. J., [1954] 3 D.L.R. 70; 35 M.P.R. 107.
2. R.S.N.B. 1952, C. 10.

(2) The allegation that the defendant was about to quit the Province was not based on personal knowledge but on information and belief and as such failed to show sufficient grounds for such belief.

(3) There was no statement to the effect that the deponent believed that the defendant was about to quit the Province.

The subject matter of the suit apparently was a promissory note and as such contained both principal and interest. The affidavit here, it seems, failed to state the total amount but did set forth such facts—principal, interest rate, date from which interest to run—so that the total amount could be easily determined. **Id certum est quod certum reddi potest.** The first objection therefore failed.

When the information that the defendant is about to quit the Province is not based on personal knowledge but rather on hearsay evidence, sufficient particulars must be shown so that perjury can be assigned to the statement should it be false. The Rules of Court require that grounds of belief be given when hearsay evidence is permitted. "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted."[3] The reason for permitting hearsay has been given by Parke, B.:

> We think evidence of this nature is a sufficient foundation for orders like the present, and it is every day's practice to make them on such evidence. In many cases it might be difficult, if not impossible, to procure better, and if we were to establish such a rule with respect to these affidavits we should render the statute a dead letter. There is, however, this limitation to hearsay evidence, that no Judge ought to make an order of this description merely upon the plaintiff's swearing that he is informed and believes that the defendant is about to leave the country; the plaintiff should be required to state in his affidavit the name of the person giving him that information.[4]

Failure to name the informants in the affidavit thus permitted the learned trial Judge to allow the second objection.

The deponent after stating that to his information the defendant will quit the Province went on to say: "I do verily believe by reason of the premises that the said intended defendant will quit and leave this Province." The objection to this was sustained because the affidavit did not state the defendant "is about to quit the Province" but only that the defendant "will quit and leave the Province." Presumably there was a lack of immediacy in the form used. The defendant could leave in a week or ten years hence. Because of this the objection would appear to be well taken.

The affidavit being found wanting, the whole proceedings were set aside. An application was made to submit supplemental affidavits but this was denied on the ground that the proceedings having been completed their validity or invalidity must be judged as from the time

3. 0.38, r. 3.
4. **Gibbons v. Spalding** [1843] 11 M. & W. 173, pp. 174-5.

action was taken upon them. This holding can be founded on the statement in The Practice of the Court of King's Bench and Common Pleas, in Personal Actions and Ejectment, 8th ed. by William Tidd, that:

> . . . . [W]here the affidavit is a mere nullity, as being made by a person convicted of felony, or does not contain any positive oath, or cause of action, the court will not receive a *supplemental* affidavit . . .[5]

A number of other objections were made to both the order to hold to bail and the writ. However they did not enter into the judgment.

The judgment points up that failure to adhere strictly to the requirements of practice may—and indeed in this case, does—defeat the immediate object of the proceedings. The function of the writ of **capias** is to take security from a defendant about to quit the Province. Such a defendant is placed in a disadvantageous position as compared to the ordinary defendant with his ability to delay and frustrate the plaintiff contingent upon the giving of security. A plaintiff who by want of form has a **capias** proceeding set aside stands to be put to great inconvenience and may well lose the amount in issue.

—J. W. McManus, II Law, U.N.B.

5. Pp. 191-2. See also **Whitehead v. Bennett** [1846] 6 L.T.O.S. 313, where the defect in the original affidavit could not be remedied by a supplemental affidavit.

SAVAGE v. WILBY AND WILBY AND DELONG[1]

Landlord and Tenant — Master and Servant — Negligence — Vicarious Liability of Tenant for Negligence of Independent Contractor — Common Means Employed by Contractor — Tenant Without Knowledge of Risk Involved.

In this case the Supreme Court of Canada was again confronted with the exceptions to the general, and well established, rule of law that a principal is never liable for the negligence of an independent contractor. These exceptions, briefly summarized, fall into two broad classes: first, where the principal is under an absolute or strict liability; and second, where the undertaking instigated by the principal is, in itself, inherently dangerous; and in these instances a stringent duty to take care, or to see that due and proper care is taken, is placed upon the principal, and if, under these conditions, injury should occur to another through the negligence of an independent contractor, then the principal becomes vicariously liable.

With regard to this non-delegatable liability Salmond has stated[2] that:

1. [1953] 4 D.L.R. 326.
2. Salmond on Torts (11th ed.) p. 133.