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.

> the tendency of legal development is in the direction of extending rather than restricting this liability

and Friedmann has advanced this idea further with his proposition[3] that:

> the traditional distinction between an employer's liability for the acts of his servants and for those of his independent contractor, has no longer any real meaning.

From the reasons given for the decision in the case under discussion it may well be concluded that the Supreme Court of Canada is adhering to this modern legal trend.

The appellant Savage was lessee of a ground floor in the City of Fredericton owned by the respondent Wilby. The premises were to be used as a restaurant, and in the course of redecorating the appellant hired the respondent DeLong, a painter contractor. DeLong, in undertaking the removal of paint, at first used a remover of brand name CCO-10 which was noninflammable, but, when the odour from this remover was found to be nauseating to his employees, he later changed to a highly inflammable liquid remover known as Taxite. During the use of the Taxite a fire occurred causing serious damage to the premises, and resulting in an action by Wilby against both DeLong and Savage. At the original hearing in the New Brunswick Supreme Court, Queens Bench Division, Bridges J. found the contractor guilty of negligence, and, the actual cause of the fire being undetermined, applied the doctrine of **res ipsa loquitur;** but he excluded the appellant Savage from liability on the ground that it was beyond his knowledge to realize the danger involved. On appeal, before the New Brunswick Court of Appeal, the liability of the respondent DeLong for negligence was affirmed, and the appellant Savage was also held liable on the finding that there was a dangerous undertaking which a reasonable man might expect to cause damage to others if due and proper care was not taken. Hughes J., in his dissenting judgment as to the liability of Savage, held that the dangerous nature of Taxite paint remover was not of common knowledge and therefore should not have been ordinarily known to a reasonable man, and also that the substitution of the highly inflammable Taxite liquid, for the noninflammable CCO-10, was done without the knowledge of the appellant Savage. On appeal to the Supreme Court of Canada it was held, affirming the Appeal Court of New Brunswick, that the appellant's actual knowledge of the probable danger was immaterial, as the dangerous nature of Taxite was such as should have been known by him as a reasonable man, and that he was therefore under a duty to see that due precautions were taken, and that the damage resulted from the lack of such precautions.

In coming to this decision it was necessary for the Supreme Court to recognize and to answer three questions: viz.— What is a dangerous or hazardous undertaking? What are the boundaries confining what a

3. 1 Modern Law Review, p. 54.

reasonable man must be expected to foresee? What is required to discharge the taking of "due and reasonable precautions"?

In relation to the first question the Court made reference to the cases of **Grote v. Chester Holyhead Railway**[4], and **St. John v. Donald**[5], and, on the basis of the two cases held, in the words of Rand J.[6]:

> . . . difficulties may arise in determining when the circumstances present the degree of danger attracting the rule, but . . . here . . . the excess of risk was present.

In the **Grote** case the undertaking was the building of a railway bridge, which must be properly done or be a hazard to the public as passengers; in the **St. John** case the undertaking was the handling of explosives; in both, the dangerous and hazardous aspects of the undertaking were clearly within the conception of what was intended to be an undertaking inherently dangerous in itself. In his decision in the **St. John** case, Anglin J., in discussing hazardous undertakings, said in part[7]:

> . . . of a nature likely to involve injurious consequences to others . . .

Is paint remover capable of being so classed? In its highly inflammable nature there is the possibility of accident and injury, but its common and every day use would seem to remove any expected possibility into the realm of remote probability. Indeed, a number of painting contractors called as witnesses testified to the fact that they had used Taxite, or removers akin to it, on many hundreds of occasions without mishap, and further, that the probability of such, or any, mishap had never primarily occupied their concern. Considering that, in the case of **Fosbroke-Hobbes v. Airwork Limited,** in 1936[8], the courts were reluctant to place air travel within the scope of a hazardous undertaking, it can only be concluded that by placing paint remover within this scope the Supreme Court has taken a step in the direction of widening the limits intended a dangerous undertaking, to include, not only such as are inherently dangerous in themselves, but those to which even the improbable aspect of injurious consequences attach.

Turning to the second question the Court's answer is found in the words of Cartwright J.[9]:

> In my opinion a reasonable man in the position of the appellant ought to have forseen the danger which the work would create.

Here the Court relied on the decision in **Dalton v. Angus**[10], which concerned the lateral support of an adjoining building. On the same point the New Brunswick Court of Appeal considered the decision in the case of **Brooke v. Bool**[11], where a joint tortfeasor had searched for a gas leak with the aid of a match. In both cases the possible danger

4. [1848] 2 Ex. 251; 154 E.R. 485.
5. [1926] 2 D.L.R. 185.
6. [1954] 3 D.L.R. 206.
7. [1926] 2 D.L.R. 191.
8. [1936] 53 T.L.R. 254.
9. [1954] 3 D.L.R. 210.
10. [1881] 6 A.C. 740.
11. [1928] 2 K.B. 578.

from the act done was clearly of the type which a reasonable man might be expected to recognize. Were the circumstances in the instant case similar?

Undoubtedly, the appellant Savage should have known of the highly inflammable nature of the substance in use, in view of the fact that nearly all such removing or cleaning products are of that nature. Hughes J., however, in his dissenting judgment in the New Brunswick Court of Appeal, was of the opinion that, in the absence of knowledge that the highly inflammable Taxite had been substituted in the course of the undertaking for a noninflammable remover, no danger existed which should have been foreseen by the appellant. But, it is submitted, the true question for determination was whether the appellant, as a reasonable man, could have been expected to foresee that the acts of the contractor would be performed in such a manner as to invoke the known possibility of danger. Should he, having hired an experienced contractor, been expected to foresee that the contractor would act in a manner encouraging mishap? Even with the knowledge of the possibility of danger, would it not be unreasonable to hold him foreseeable of such acts, in a legal sense, unless he also possessed the competency to understand the intricacies of the work itself, and to recognize that it was being performed in an undesirable and danger provoking manner? In the result this decision would appear to have widened the duty of the principal to inquire and, correspondingly, to have extended the range of foreseeability in law.

To the third question, whether Savage had exercised due and reasonable care in the presence of the foreseeable danger, the Court answered in the negative, as there was nothing in the record to suggest that he gave any directions to the contractor, or took any steps whatsoever, in regard to the performance of the undertaking. But the question remains basic: What precautions would have relieved Savage of liability? The idea that there really is any such relief has often been questioned, but it would appear from the statement of Cockburn J. that:[12]

> When work is likely to cause damage to another . . . [There is] a duty to take all reasonable precautions against such danger.

that such relief is in fact possible; to the same effect are the observations of Winfield:[13]

> The defendent is answerable not only for his own wrongdoing . . . but also for the fault of an independent contractor. The duty is thus pitched higher than in negligence, but lower than that in *Rylands v. Fletcher,* for he is not liable if he has taken reasonable care.

Accepting that the appellant could thus have escaped liability, it becomes necessary to consider the acts on his part sufficient to afford him this relief. It is apparent that a mere warning to the workers to take every reasonable precaution and to accomplish the undertaking in the safest possible manner remains far from adequate, because, for all such

12. **Bower v. Peate** -- [876] 1 Q.B. 326.
13. Winfield on Torts, (5th ed.) p. 598.

pleadings, he has no guarantee that they will proceed accordingly. Once again the matter of knowledge becomes important: the principal's must equal that of the contractor, if he is competently to determine when the undertaking is in fact being carried out in the proper and most desirable manner. The possession and application of such knowledge, it is submitted, elevates the principal to a position where he is affecting, if not in fact directing, the actual mode of work; thereby is erased the sole distinguishing factor essential to the principal-independent contractor relationship.

G. W. N. Cockburn,
III Law, U.N.B.

REFORM OF THE STATUTE OF FRAUDS IN ENGLAND.

Last June seventh the Law Reform (Enforcement of Contracts) Act, 1954, came into force in England and Wales; and in the following month judgment was delivered[1] in what may prove to be the last of a countless number of cases in which the Statute of Frauds has been pleaded as a defence.

The legislation, which amended section 4 of the Statute of Frauds[2] and repealed section 4 of the Sale of Goods Act,[3] has met with almost universal approval—most people considering it long overdue. It has been suggested that no one is sorry to see the end of the Statute of Frauds except perhaps a few law teachers, who have lost a perennially fertile field for lecture and examination! The Act, in the form of a private bill, gave effect to the First Report of the Law Reform Committee[4] presented to Parliament in April, 1953. This committee in effect agreed substantially with the recommendations of the Law Revision Committee[5] with regard to these matters, and endorsed the reasoning of that earlier group.

The Act repealed the whole of section 4 of the Statute of Frauds except the clause relating to guarantees ("any special promise to answer for the debt, default or miscarriage of another person"). The clause relating to land and interests therein had been repealed before and replaced by section 40 of the Law of Property Act, 1925.

The Law Revision Committee, after careful consideration, had recommended the reform

1. **Craxfords (Ramsgate) Ltd. v. Williams and Steer Manufacturing Co., Ltd.**, [1954], 1 W.L.R. 1130.
2. In New Brunswick, the corresponding sections to those repealed are subsections (a), (c) and (e) of section 1, Chapter 218, R.S.N.B., 1952.
3. In New Brunswick, section 5, Chapter 199, R.S.N.B., 1952.
4. Law Reform Committee, First Report, 1953, Cmd. 8809.
5. Law Revision Committee, Sixth Interim Report, 1937, Cmd. 5449.