

THE NEW BRUNSWICK UNSATISFIED JUDGMENT FUND.*

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The time allotted for this talk precludes a full discussion of the Unsatisfied Judgment Fund of this province;¹ however, I propose setting out briefly some of its major provisions.

The Unsatisfied Judgment Fund was first established in New Brunswick by legislation in 1951,² but it was not proclaimed until February, 1953. It is now provided for in sections 286-303 of The Motor Vehicle Act 1955.³

Under section 286, a fee, not exceeding one dollar, is paid by every person to whom a licence or renewal is issued. These fees, called unsatisfied judgment fees, constitute a fund known as the Unsatisfied Judgment Fund. The payment of the fees may be suspended from time to time by the Lieutenant-Governor in Council having regard to the amount of the Fund.

Scope and Purpose of the Fund.

Recourse may be had to the Unsatisfied Judgment Fund where a person obtains in any court in New Brunswick a judgment

(a) against an owner of a motor vehicle or a driver of a motor vehicle other than a motor vehicle owned by or under the care or control of the person, for damages for injuries to or the death of any person or damage to property, arising out of the operation, care or control of the motor vehicle in the Province;
or

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1. Little, for example, will be said of actions against persons unknown.
2. (1951) 15 Geo. VI, c. 22, s. 17.
3. (1955) 4 Eliz. II, c. 13, Part VIII.

(b) against a Party Unknown, as contemplated by section 293, for damages for injury to or the death of any person arising out of the operation, care or control of a motor vehicle in the Province.⁴

By section 1(29) of the Motor Vehicle Act 1955, "motor vehicle" is defined as "every vehicle which is self propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, and not operated upon rails, but does not include a farm tractor"; however, for the purposes of the Unsatisfied Judgment provisions, "motor vehicle" includes farm tractor.⁵

Judicial exposition of the purpose of an Unsatisfied Judgment Fund is to be found in several reported cases. For example, when considering the Ontario legislation in *Re MacBeth v. Curran*,⁶ Gale, J. of the Ontario High Court said:

Its language shows that it was passed to establish a government-sponsored benefit fund for the protection of certain unfortunate individuals who have suffered as the result of the operation of the motor vehicles in Ontario. The first requisite is that the person who sustains the loss is to obtain a judgment, and surely it is not the right of this Court or its duty to go behind the judgment on an application of this kind. This is beneficial legislation passed for the protection of the public and the court should take care to see that the rights thereby created are not frittered away by narrow judicial interpretation. When the object of a statute is plainly for the advantage of the public the Court must strive to interpret the words in such a way as to accomplish the desired result.

In *Telfer v. Kerr*⁷ McRuer, C.J.H.C. enlarged upon the principles expounded by Gale, J. saying:

With the principles there outlined I entirely agree, but there are other principles of a converse nature that I would add. While this legislation is beneficial in character and "the rights created are not to be frittered away by narrow judicial interpretation", it is at the same time to be remembered that the object of the legislation is to relieve against hardship and not to provide a fund in the nature of a free reinsurance scheme for insurers of those who have suffered damage as the result of the operation of motor vehicles, or any means by which insured persons may be twice compensated for injuries sustained. As I indicated on the argument, this is a public fund set up by means of a levy on all licensed operators of automobiles, and is to be regarded as a *sort of last resort*.⁸

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4. The Motor Vehicle Act 1955, s. 287, as enacted by (1958) 7 Eliz. II, c. 19, s. 16.
 5. The Motor Vehicle Act 1955, s. 285 (c), as enacted by (1958) 7 Eliz. II, c. 19, s. 15.
 6. [1948] 3 D.L.R. 85, at pp. 87-8.
 7. [1949] 2 D.L.R. 627.
 8. *Ibid.*, at p. 629 (Italics mine).

How broadly should the words "for damages for injuries to or the death of any person", which appear in section 287, be interpreted? The Ontario Court of Appeal, in *Klebanoff v. Price*,⁹ held that similar words included damages recovered by a company for the loss of services of its president occasioned by injuries suffered by him in an automobile collision, since such damages were "on account of injury to" the company officer. Similarly, in *Re Brady v. Ferrill*,¹⁰ it was held by Ferguson, J. of the Ontario High Court that recourse could be had to the Fund by a husband who had recovered damages for loss of *consortium* in an action arising from an automobile accident in which his wife was injured.

Procedure on Application

The procedure on application for payment out of the Fund underwent important changes by amendments to The Motor Vehicle Act in 1958. Formerly, once a judgment was obtained and certain requirements met, the person applied in the first instance by way of motion to a Judge of the Supreme Court for an order for payment out of the Fund upon giving notice to the Provincial Secretary-Treasurer.¹¹ By the former section 288,¹² the Judge could make an order directed to the Provincial Secretary-Treasurer for payment out of the Fund, provided the requirements therein set out were satisfied. From the applicant's point of view, this procedure was not particularly cumbersome or impractical, but some of the requisites for the application could unnecessarily delay eventual payment from the Fund.

Under the 1958 amendments, the new procedure is briefly as follows. Upon the determination of all proceedings, including appeals, application is made to the Provincial Secretary-Treasurer (who is referred to as "the Minister") for payment out of the Fund of the amounts in respect of the judgment to which the applicant is entitled.¹³

A new section 287A sets out the prerequisites for payment out of the Fund by the Minister. It provides that the person applying must make an affidavit setting out

- (1) the amount he has recovered or is entitled to recover, from any source, for or in respect of any injury, death or damage to person or property arising out of the operation, care or control

9. [1949] 2 D.L.R. 575.

10. [1954] 2 D.L.R. 253.

11. The Motor Vehicle Act 1955, 4 Eliz. II, c. 13, s. 287.

12. *Ibid.*, s. 288.

13. The Motor Vehicle Act 1955, s. 287, as enacted by (1958) 7 Eliz. II, c. 19, s. 16.

of the motor vehicle by the owner or driver thereof against whom the judgment was obtained, whether or not in the action damages were claimed for or in respect of the injury, death or damage, and also any compensation or services or benefits with a pecuniary value he has recovered or received or is entitled to recover or receive for or in respect of the injury, death or damage;

(2) that the application is not made by or on behalf of an insurer, or in lieu of a claim against an insurer, and no amount will be paid to reimburse an insurer.¹⁴

The solicitor for the person must make an affidavit

(1) that the judgment is a judgment as described in section 287;

(2) giving particulars of the amount of damages for or in respect of injury or death, damage to property and the costs included in the judgment;

(3) that in so far as he was advised by any person and learned of any facts during the litigation,

(a) he has commenced action against all persons against whom the person might reasonably be considered as having a cause of action for or in respect of the injury, death or damage to person or property as described in clause (1) above of the applicant's affidavit,

(b) the application is not made by or on behalf of an insurer, or in lieu of a claim against an insurer and no amount will be paid to reimburse an insurer, and

(c) except as disclosed in the applicant's affidavit, the person is not entitled to recover from any source, nor to receive compensation or services or benefits with a pecuniary value, for or in respect of any injury, death or damage to person or property as described in clause (1) above of the applicant's affidavit;

(4) that he has filed with the Registrar of Motor Vehicles a certificate of judgment and affidavit of non-satisfaction pursuant to section 259;

(5) that the action was defended throughout to judgment or that there was a default or a consent or agreement by or on behalf of the defendant and that he complied with section 289.¹⁵

14. The Motor Vehicle Act 1955, s. 287A(1), (2), as enacted by (1958) 7 Eliz. II, c. 19, s. 17. This requirement is almost identical with the former s. 288(1)(c).

15. The Motor Vehicle Act 1955, s. 287A(1)(b), as enacted by (1958) 7 Eliz. II, c. 19, s. 17.

Under section 289, written notice must be given to the Minister if the defendant fails to file an appearance or a statement of defence, fails to appear in person or by counsel at the trial, or consents or agrees to the entering of judgment.

The two affidavits, together with a copy of the statement of claim, a certified copy of the judgment docket and the assignment of judgment, are forwarded to the Solicitor for the Unsatisfied Judgment Fund. If the amount of the judgment and costs is then paid by the Minister, he may also pay to the person for costs of the application the sum of twenty-five dollars.¹⁶

For any of the reasons enumerated in the new section 287B, the Minister may delay payment and forthwith advise the person of his objections. Then if such objections are not remedied to his satisfaction, the Minister may advise the person that he must obtain an order of a Judge of the Supreme Court to obtain payment out of the Fund. If the person is so advised, he may, on notifying the Minister, apply to a judge by way of summons for an order directing payment out of the Fund.¹⁷

It will be noted that when applying to the Minister for payment out of the Fund, it is not a requisite for payment that the applicant show that "he has taken all reasonable steps available to him to recover upon every judgment so obtained, stating the specific steps so taken" as was formerly the case.¹⁸ Since this provision has been repealed, it would appear that it is no longer necessary for the judgment creditor to avail himself of the various means by which he might attempt to realize upon his judgment, including issuing execution, examining the defendant as a judgment debtor and making exhaustive inquiries to determine whether the defendant has any exigible assets. The necessity for taking all reasonable steps to recover on the judgment has been the source of considerable litigation reflected in reported decisions in other provinces. In view of this amendment, it might well be questioned whether the New Brunswick Unsatisfied Judgment Fund remains "a sort of last resort" in the sense in which this phrase was used by McRuer, C.J.H.C. in the *Telfer* case,¹⁹ bearing in mind that a judgment debtor can have his driver's licence or owner's permit reinstated by making satisfactory instalment payments on the judgment and interest to the Minister.²⁰

16. The Motor Vehicle Act 1955, s. 287A(1)(c), as enacted by (1958) 7 Eliz. II, c. 19, s. 17.

17. The Motor Vehicle Act 1955, ss. 287B, 287C, as enacted by (1958) 7 Eliz. II, c. 19, s. 17.

18. The Motor Vehicle Act 1955, 4 Eliz. II, c. 13, s. 288(1)(b)(iii), repealed by (1958) 7 Eliz. II, c. 19, s. 18.

19. [1949] 2 D.L.R. 627.

20. The Motor Vehicle Act 1955, s. 303A, as enacted by (1957) 6 Eliz. II, c. 21, s. 31.

In this regard much, of course, will depend upon the attitude and policy of those charged with the administration of the Fund—more so than ever before. It would certainly appear that any determination of the defendant's ability to satisfy a judgment against him has become primarily the responsibility of the Minister, although the statute is silent on the scope of his responsibility in this regard.

If application is required to be made to a Judge of the Supreme Court to obtain payment out of the Fund, the applicant must satisfy the judge that he has met the requirements set out in section 288, as amended in 1958. The Minister may appear and be heard on the application and may show cause why the order should not be made.²¹

Limits to Payment out of the Fund.

There are certain limits, monetary and otherwise, to payment out of the Fund. For example, section 299(1)(a) provides that no amount for interest on a judgment or interest on costs may be paid out of the Fund. Section 299(1) (b) states that there may not be paid out of the Fund

any amount in respect of a judgment in favour of a person who ordinarily resides outside of New Brunswick, unless such person resides in a jurisdiction which provides substantially the same benefits to persons who ordinarily reside in New Brunswick;

The meaning of "ordinarily resides" has been considered in two Ontario decisions. In *Service Fire Insurance Co. of New York v. Eggens*²² it was argued that the plaintiff was precluded from recovering from the Ontario Unsatisfied Judgment Fund because it ordinarily resided outside of Ontario, the plaintiff being a company with its head office in the State of New York. Gale, J. in an oral judgment, held that the plaintiff did not "ordinarily reside out of Ontario" as that expression is used in section 98(5b) of the Highway Traffic Act.²³ In the course of his judgment the learned judge said:

... my main task is to ascertain, if I can, the purpose and scope of the subsection in question. That being so, I am persuaded that it was intended to exclude from the benefits bestowed by Part XIV of the Act only those persons who have in no way contributed to the creation and maintenance of the Fund from which those benefits are obtained. For example,

21. The Motor Vehicle Act 1955, s. 288, as amended by (1958) 7 Eliz. II, c. 19, s. 18.

22. [1955] 4 D.L.R. 388.

23. R.S.O., 1950, c. 16, s. 98(5b), as enacted by (1953) 1 Eliz. II, c. 46, s. 20(4).

the Act would not be available to a person who simply comes to this Province temporarily on holidays, or to a company which does not carry on business in this Province but merely has vehicles within its confines on occasions, even for business purposes.

On the other hand, I am of the opinion the new subsection was not meant to exclude from the advantages of the Act companies such as the applicant and other similar organizations which regularly carry on business in Ontario and contribute to the welfare of this Province.²⁴

In a recent case, *Mester v. Kumm*,²⁵ the plaintiff at the time of the accident giving rise to the proceedings was living in Sudbury. He was at the time a student at McGill University and during his attendance there he resided with his parents in Montreal. During his vacation he was engaged in summer employment in Sudbury, Ontario. Counsel for the Minister referred to the above-quoted statement of Gale, J. in the *Service Fire Insurance* case that ". . . it was intended to exclude from the benefits bestowed by Part XIV of the Act only those persons who have in no way contributed to the creation and maintenance of the Fund from which those benefits are obtained". Wells, J. was of opinion that this statement did not truly reflect the judgment of Gale, J. but that "the persons meant to be excluded were those whose ordinary residence was outside of Ontario in the sense that they were not in Ontario for any permanent period but were as it were, transients or casual visitors".²⁶ He therefore held that the plaintiff had an ordinary residence in Ontario as well as in Quebec and thus was not ordinarily resident outside Ontario at the pertinent time.

In both the *Service Fire Insurance* case and the *Mester* case the plaintiff had a residence in a jurisdiction which did not provide a recourse of a substantially similar character to that provided by the Ontario Unsatisfied Judgment Fund. In each case, therefore, the Minister attempted to show that the plaintiff was ordinarily resident outside Ontario.

The necessary degree of similarity of legislation to enable a person resident in another jurisdiction to recover has been considered by the courts on several occasions, but a clear picture cannot be drawn from the reported decisions. A resident of Massachusetts cannot obtain payment out of the Ontario or Nova Scotia Unsatisfied Judgment Funds since it was shown in *Beane v. Hil*²⁷ and *Sampson et al v. MacKenzie*,²⁸ respectively, that the

24. [1955] 4 D.L.R. 388, at pp. 389-390.

25. (1958) 11 D.L.R. (2d) 217.

26. *Ibid.*, at p. 223.

27. (1957) 7 D.L.R. (2d) 135.

28. (1957) 7 D.L.R. (2d) 461.

scheme of compulsory insurance existing in that state does not provide a recourse of a substantially similar character. It would appear that the same would hold true in this province, although our statute differs slightly from those of Ontario and Nova Scotia. The New Brunswick statute speaks of other jurisdictions providing "substantially the same benefits" to New Brunswick residents, while the phrase "recourse of a substantially similar character" is used in Ontario and Nova Scotia.²⁹

An application by a Prince Edward Island resident for payment out of the Nova Scotia Unsatisfied Judgment Fund was granted in *MacKinnon v. White*,³⁰ even though the P.E.I. statute did not adopt the test of reciprocal treatment. The P.E.I. statute³¹ does permit recovery by a non-resident creditor against a P.E.I. judgment debtor but not, for example, recovery by a Nova Scotia judgment creditor against a New Brunswick judgment debtor for damages sustained in P.E.I. Nevertheless Doull, J. held, with the rest of the Court concurring, that the P.E.I. legislation "is of a substantially similar character. It is of the same kind and for the same purpose and in the main, it is administered on like principles".³²

Section 299(1) further states that there may not be paid out of the Fund

(c) (i) more than Five Thousand Dollars, exclusive of costs, for injury to or the death of one person, and, subject to such limit for any one person so injured or killed, more than Ten Thousand Dollars, exclusive of costs, for injury to or the death of two or more persons in any one accident; or

(ii) more than One Thousand Dollars, exclusive of costs, for damage to property resulting from any one accident;

The words "any one accident" have been judicially interpreted in several cases. In *Hopkins v. White*,³³ a car struck three small children one after the other while being driven recklessly along a street. Urquhart J. of the Ontario High Court held that there was only one accident and hence the maximum recovery out of the Fund (exclusive of costs) was \$10,000.00. It was immaterial that three separate actions had been brought and separately pursued to judgment. The word "accident" does not refer to an individual injury but rather to an occurrence, incident or event that

29. Cf. The Motor Vehicle Act, 4 Eliz. II, c. 13, s. 299(1)(b) with R.S.O., 1950, c. 167, s. 98 (5b), as enacted by (1953) 1 Eliz. II, c. 46, s. 20(1) and R.S.N.B., 1954, c. 184, s. 179(11).

30. (1956) 5 D.L.R. (2d) 766.

31. R.S.P.E.I., 1951, c. 73, s. 115(1).

32. (1956) 5 D.L.R. (2d) 766, at p. 769.

33. [1950] 4 D.L.R. 679.

may result in injury to several individuals. In the words of Urquhart, J.:

I have no doubt that the Legislature had in its mind's eye any accident (so called) in which a number of persons might be killed or injured by one act of negligence. In fact the concluding words of section 93b(5)(a) in themselves show that intention: "on account of injury to or the death of two or more persons in any one accident". If each individual injury constituted an accident, the words preceding the word "accident" would have little meaning; about the only occasion when one accident would cover two or more persons injured would be when they were in the motor car itself and practically every form of street accident would be excluded.³⁴

Hopkins v. White was distinguished by Dunfield, J. of the Newfoundland Supreme Court in *Re Carroll and Furlong*,³⁵ where three cars were struck in quick succession by a drunken driver, the collisions being spread over about 250 yards of street. The learned judge held that there were three distinct accidents, although it is difficult to see an adequate distinction between these facts and those in the *Hopkins* case.

A broad interpretation was again placed on the phrase "one accident" by the Newfoundland Supreme Court in *United Towns Electric Co. Ltd. v. Bishop*³⁶ where Walsh, C. J. held that there were two accidents in the following circumstances. While driving on the wrong side of the highway the defendant collided with a car driven by B who was proceeding in the opposite direction. After the impact with B's car, the defendant's car swung to its right and into its proper lane and then back again onto the wrong side of the highway where it collided with the plaintiff's car which was following behind B. B recovered judgment for \$780.00 and was paid that amount out of the Unsatisfied Judgment Fund. The plaintiff also recovered judgment and applied for an order for payment of \$905.00 out of the Fund. Walsh, C. J. was of opinion that "after the first collision, there was separate and distinct negligence on the part of the defendant in the operation and management of the car and that a new act of negligence caused the damage to the property of the plaintiff".³⁷ These three cases are especially interesting in that one would have expected the personal injuries in the *Hopkins* case to have prompted a decision favourable to the plaintiff rather than the property damage in the two Newfoundland decisions.

34. *Ibid.*, at pp. 683-4.

35. [1955] 3 D.L.R. 279.

36. [1955] 5 D.L.R. 782.

37. *Ibid.*, at p. 785.

By section 299(1)(c)(i) recovery is limited to \$5,000.00 for injury to or the death of one person. In *Klebanoff v. Price*³⁸ the company plaintiff recovered \$2,000.00 for loss of services of its president, who, also a plaintiff in the action, was awarded damages in the sum of \$3,581.26, making a total of \$5,581.26 awarded to both plaintiffs. The Court directed an apportionment, holding that only \$5,000.00 was available from the Fund. In *Re Brady v. Ferrill*³⁹ a woman received injuries in an automobile accident and recovered judgment for \$5,392.60. Her husband was awarded damages in the sum of \$1,231.00 for loss of *consortium* and other damages. Since his wife's damages exceeded the \$5,000.00 limit, the husband argued that not only were the wife's injuries occasioned by a motor vehicle but the damages he suffered, including loss of *consortium*, were also occasioned by a motor vehicle, and therefore there was injury to two persons and that part of the award to him for loss of *consortium* should not form part of the amount paid out on account of the wife's injuries. The court, in rejecting the argument, followed *Klebanoff v. Price*, and held that "injury" was used in the sense of physical injury.

Section 299(1) was amended in 1958 by striking out the proviso thereto and substituting another⁴⁰ which, I must admit, I find difficult to follow. The intention of the new proviso is fairly apparent, but a close reading of it discloses certain omissions and faults in draftsmanship. For example, it reads in part as follows:

... where he receives or is entitled to receive, from any source, compensation or services or benefits with a pecuniary value for or in respect of the injury, death or damage . . . the pecuniary value of any services or benefits received or which he is entitled to receive . . .

shall be taken into consideration as therein set out in computing the amount payable from the Fund. It will be observed in this excerpt that in one place mention is made of "compensation, or services or benefits" but further on only the words "services or benefits" are used. Under the present wording it could be argued that *compensation* with a pecuniary value need not be taken into consideration, since the operative part of the section states that "the pecuniary value of any services or benefits" are to be considered, with the word "compensation" omitted at this point.

New Brunswick Decisions

A few comments should be made on the reported decisions on our Unsatisfied Judgment legislation. I have found only three

38. [1949] 2 D.L.R. 575.

39. [1954] 2 D.L.R. 253.

40. The Motor Vehicle Act 1955, 4 Eliz. II, c. 13, s. 299(1), as amended by (1958) 7 Eliz. II, c. 19, s. 19.

such cases. In *Saunders v. Smith*⁴¹ it was held that the plaintiff debtor under the Arrests and Examinations Act, since, under the Unsatisfied Judgment Fund, the costs allowable are those taxed as between party and party and payable by the judgment debtor to the judgment creditor.

The two other cases involved the construction of the statute from the point of view of retroactivity. In *Re Trites*,⁴² the Court of Appeal decided that a judgment creditor whose cause of action arose before February 1, 1953, the date of proclamation of the Unsatisfied Judgment Fund provisions, has no right of recourse to the Fund, since the legislation is not retrospective; it is not sufficient that the judgment is obtained after that date. Similarly, in *Provincial Secretary-Treasurer v. Hastie et al.*,⁴³ the Court of Appeal held that an amendment to the provisions of the Fund should not be given a retroactive effect.

Conclusion

In common with most legislative schemes, by usage the Fund has been found wanting. It is hoped that the latest amendments will facilitate payment in deserving cases, while the Fund will not, at the same time, become accessible to a judgment creditor when reasonably thorough investigation would reveal that the judgment debtor has ample ability to pay. In other words, the Fund should not become simply a convenient means of instalment payment for solvent judgment debtors.

Perhaps consideration should be given to raising the maximum amounts payable out of the Fund. My only comment here is this. In 1957 the maximum amounts payable under the Ontario Unsatisfied Judgment Fund were raised (in the case of accidents occurring on or after January 1, 1958) to \$10,000.00, exclusive of costs, on account of injury to or the death of one person, and subject to such limit for any one person so injured or killed, to \$20,000.00, exclusive of costs, on account of injury to or the death of two or more persons in any one accident, and \$2,000.00, exclusive of costs, for damage to property resulting from any one accident.⁴⁴ The provisions for proof of financial responsibility were also amended by raising the minimum limits to \$10,000.00,

41. (1954) 34 M.P.R. 138.

42. (1954) 34 M.P.R. 197.

43. (1955) 37 M.P.R. 211.

44. (1957) 5 & 6 Eliz. II, c. 44, s. 20 (2), (3), amending R.S.O., 1905, c. 167, s. 98 (5) (a), (b).

\$20,000.00 and \$5,000.00, respectively.⁴⁵ It might well be asked whether, in view of this amendment to the Ontario statute, a New Brunswick resident suffering damage in Ontario could obtain payment out of the Ontario Fund. Does the New Brunswick Unsatisfied Judgment Fund still provide a "recourse of a substantially similar character" despite the fact that an Ontario resident suffering damages in New Brunswick would be faced with limits of one-half the amount existing in his own province? It was pointed out earlier that the reported cases do not reveal the precise degree of similarity of legislation that must exist to permit recovery by a non-resident. But surely, one of the most important provisions in an Unsatisfied Judgment Fund is that setting the maximum amounts recoverable. It would therefore appear questionable whether a New Brunswick resident suffering injury or damage in Ontario could successfully recoup his loss from the Ontario Fund, at least to the extent to which the Ontario maximum limits now exceed those existing in New Brunswick.

Problems of this nature will continue to arise when provinces attempt to insert reciprocal provisions in their statutes without any apparent regard for the provisions in other jurisdictions. Since we are to a great extent a "generation on wheels", closer co-operation between the provinces with a view to secure uniform legislation would remove much of the doubt surrounding payment from an Unsatisfied Judgment Fund to a plaintiff who lives outside the jurisdiction where his cause of action arises.

45. (1957) 5 & 6 Eliz. II, c. 44, s. 16 (1), (2), amending R.S.O., 1950, c. 167, s. 86.