(*p*) any other legal right of the dependent to support other than out of public money.

[Emphasis added.]

By the finding of the learned trial Judge, the source of income, if any, of Mrs. Letourneau was welfare or Mother's Allowance and a possibility of her earning, if allowed, an additional $100 a month. However, in suggesting that she could get additional moneys from Mother's Allowance or welfare to support Scott, the learned trial Judge did not direct his mind to s. 16, s-s. (5)(*p*) because that $10 a week would be coming out of public money, that is, the welfare or Mother's Allowance payments. The learned trial Judge was basing his decision on her ability to pay on the supposition that public moneys would inure to the benefit of Scott through his mother. In other words, a standard envisaged under s. 16(5)(*p*) is not to subrogate the rights of the dependant through his parent or parents by making an order for support so the welfare or Mother's Allowance payments, that is, the public moneys are increased (if they can be) and paid over to the dependant.

Accordingly, this Court finds that the learned trial Judge erred in finding that the appellant had the capacity to provide support at the time of trial for the above reasons given, although she had the obligation, if she could provide support, to do so.

Accordingly, the appeal will be allowed as to support and as to costs. Due to the novelty of this point, there will be no order as to costs of the appeal.

Appeal allowed.

RE CADILLAC FAIRVIEW CORPORATION LTD. AND ALLIN et al.

Ontario High Court of Justice, DuPont, J. July 3, 1979.

Real property — Condominium — Interim possession charges — Statute restricting amount chargeable — Whether applicable to prior agreement under which possession has already passed — Condominium Act, 1978 (Ont.), c. 84, s. 51(6).

Statutes — Interpretation — Retroactivity — Condominium — Interim possession charges — Statute restricting amount chargeable — Whether applicable to prior agreement under which possession has already passed — Condominium Act, 1978 (Ont.), c. 84, s. 51(6).

Section 51(6) of the *Condominium Act*, 1978 (Ont.), c. 84, limiting interim possession charges to taxes, common expenses, and the amount of interest under any mortgage to be given back by the purchaser, is not retroactive in effect and does not affect an agreement made before the subsection came into force. To hold otherwise would upset the agreement of the parties and so place a windfall in the hands

of the purchaser, especially in a case where no mortgage is to be given back and so, by the terms of s. 51(6) no charge at all is allowable in respect of interest.

[*Pitcher v. Shoebottom et al.*, [1971] 1 O.R. 106, 14 D.L.R. (3d) 522; *Upper Canada College v. Smith* (1921), 61 S.C.R. 413, 57 D.L.R. 648, [1921] 1 W.W.R. 1154; *Re Teperman & Sons Ltd. v. City of Toronto et al.* (1975), 7 O.R. (2d) 533, 55 D.L.R. (3d) 653; *West v. Gwynne*, [1911] 2 Ch. 1; *Main et al. v. Stark* (1890), 15 App. Cas. 384, refd to]

APPLICATION to determine the rights of parties to an agreement for the sale of a condominium.

Clifford C. Lax, for plaintiff.
T. R. Lederer, for Attorney-General of Ontario.

DUPONT, J. (orally):—This is an application by way of originating notice under Rule 612 for a declaration and determination of the rights of the parties under an agreement of purchase and sale of a condominium unit dated December 19, 1978, made between Cadillac Fairview Corp. Ltd. as vendor and David Ellis Allin and Mildred Amelia Allin as purchasers. The Allins did not appear, choosing to rely upon representations of counsel appearing on behalf of the Attorney-General for the Province of Ontario.

The said agreement provides for payment of a deposit of $3,000 upon execution of the document, and the balance of $108,500, subject to adjustments, upon the transfer of title. It is also provided that the purchasers are entitled to and did in fact take possession on April 30, 1979, in consideration for which they agreed to pay the vendor, after possession, the monthly sum of $836.25 as an occupation charge pending closing of the deal, during which time the vendor undertook to pay the realty taxes, insurance, repairs and maintenance to the common elements.

I find that during such interim possession period, the vendor expended the monthly sum of $140 for municipal taxes and $55 for monthly common expenses attributable to the unit in question. I find further that the monthly mortgage charges paid by the vendor attributable to the unit during such period of interim possession probably exceeded the monthly sum equal to the difference between $836.25 and $195.

The *Condominium Act*, being previously c. 77 of R.S.O. 1970, was repealed by "An Act to Revise the Condominium Act", 1978 (Ont.), c. 84, s. 61, and proclaimed June 1, 1979. Section 51(6) of the Act provides as follows:

> 51(6) Where an agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes permits or requires the purchaser to take possession of or occupy the unit before a deed or transfer of the unit acceptable for registration is delivered to him, the money paid in re-

spect of such right or obligation to the proposed declarant shall not be greater, on a monthly basis, than the total of the following amounts:

1. The amount of interest that the purchaser would have paid, monthly, in respect of any mortgage or mortgages he is obligated to assume or give under the agreement of purchase and sale on delivery of a deed or transfer of the unit.
2. An amount reasonably estimated on a monthly basis for municipal taxes attributable to the proposed unit.
3. The projected monthly common expense contribution for that unit.

It is clear that interim possession charges are restricted to the three items above described. Thus, in agreements providing for cash payment upon closing, that is, free of mortgage assumptions, as in the present case, the charge for such interim possession is limited to the remaining two items, relating to municipal taxes and common expense contribution.

The question for determination in this application is whether s. 51(6) of the *Condominium Act, 1978*, has a retroactive effect so as to apply to the agreement of purchase and sale between the parties herein.

If the question is answered in the affirmative, the monthly occupation charges would be reduced from $836.25 to $195, effective either from the date of possession, namely, April 30, 1979, or, as argued by counsel for the Attorney-General, from the date that the Act was proclaimed in force, namely, June 1, 1979. In either case, the purchasers would receive windfall benefits by having possession pending the transfer of title, at a monthly charge considerably lower than they had agreed to pay initially, and the vendor would suffer substantial financial loss by being prevented from passing on to the purchaser the cost of mortgage required during the interim possession period pending the closing of the transaction.

It is trite law to say that the "golden rule" of statutory interpretation requires that the words of an enactment be given their ordinary and natural meaning: see, for example, *Maxwell on the Interpretation of Statutes*, 12th ed. (1969), at p. 28. Section 51(6) of the Act refers to "an agreement" without specifying whether it applies to those agreements already in existence at the time the Act came into effect or only those coming into existence after that date. It is thus necessary to clarify the meaning of the subsection with regard to the question of retrospective effect.

An enactment is said to be retrospective when it affects a vested interest already in existence at the time it comes into effect, and affects it in such a way as to alter the rights of the persons connected with that interest. It is a long-standing presump-

tion in the interpretation of statutes that, unless otherwise indicated in the enactment itself, there is a presumption against retrospective operation. An indication of the venerability of this principle can be seen in the case of *Gilmore v. Shuter* (1678), 2 Lev. 227, 83 E.R. 531, where it was presumed that Parliament, in enacting the *Statute of Frauds*, did not intend to invalidate all agreements made before the date of its enactment. In Ontario, to quote the words of Mr. Justice Lieff in *Pitcher v. Shoebottom et al.*, [1971] 1 O.R. 106 at p. 113, 14 D.L.R. (3d) 522 at p. 529:

> It is a well-established principle of our law that a statute affecting substantive rights shall not be given retrospective construction.

and he quotes the decision of the Supreme Court of Canada in *Upper Canada College v. Smith* (1921), 61 S.C.R. 413 at p. 416, 57 D.L.R. 648 at pp. 649-50, [1921] 1 W.W.R. 1154, as authority. As Duff, J. (as he then was), stated in that case, a Court will not ascribe force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the Legislature.

In this application, the parties entered into an agreement in December of 1978. It is fair to presume that the purchasers were fully aware of the requirement to pay $836.25 per month to the vendors until title passed. Thus the agreement had the effect of "crystallizing" the relationship between the parties as it existed on the date that it was entered into. The essential question here is whether the crystallized rights survived the enactment of the Act, as it was the issue in *Re Teperman & Sons Ltd. v. City of Toronto et al.* (1975), 7 O.R. (2d) 533 at p. 535, 55 D.L.R. (3d) 653 at p. 655 (C.A.).

Section 51(6) of the Act was presumably enacted in light of a tendency on the part of some unscrupulous developers to charge occupation rent to purchasers before title had passed in excess of the actual costs associated with the condominium unit being sold. In the former Act, amended by 1974 (Ont.), c. 133, s. 14, which added s. 24*a* to the Act, s-s. (6) of s. 24*a* read as follows:

> 24*a*(6) Where an agreement of purchase and sale entered into by a proposed declarant for a proposed unit for residential purposes permits or requires the purchaser to take possession of or occupy the unit before a deed or transfer of the unit acceptable for registration is delivered to him the money paid in respect of such right or obligation to the proposed declarant shall be credited as payments of the purchase price unless the agreement states that the money or any part of it will not be so credited.

Thus the former s. 24*a*(6) did not place any limit upon the amount of, or specify the manner of calculation of the occupation charge. The present s. 51(6) is remedial in the sense that it re-

stricts the occupation charge to the total of three particular amounts, as set out above. However, through possible oversight on the part of the Legislature, para. 1 of s. 51(6) speaks of: "The amount of interest that the purchaser would have paid, monthly, *in respect of any mortgage or mortgages he is obligated to assume or give . . .*" (emphasis added) and makes no mention of sales where *no* mortgage is to be assumed. In such a case, the purchaser cannot obtain title to the premises until registration of the declaration is made, and the developer-vendor must go on paying mortgage interest in respect of the borrowed funds associated with the subject unit. The end result in such a case is a windfall gain to the cash purchaser if he is allowed to take possession prior to closing, and a serious and unexpected loss to the developer.

This conclusion is highlighted to an even greater degree by the present case. The parties entered into the agreement when the former Act was in effect. Although no mortgage was to be taken back, the parties agreed to an occupation charge which clearly recognizes the presence of an interest element at least equal to the difference between $836.25 and $195. To say now that the new Act applied so as to unsettle this agreement and make the purchasers liable for only $195 per month would be to give them a windfall and to deprive the vendor of a sizeable amount of money, all in conflict with the previously existing agreement. This would in effect rewrite the contract between the parties.

Counsel for the Attorney-General argued that a line of cases established that, while legislation is presumed to have a non-retrospective intent, legislation cannot take place in a vacuum. Every enactment will, to some extent, have an effect upon an already existing situation. The respondent relied upon several cases, but one, *West v. Gwynne*, [1911] 2 Ch. 1, can, I think, fairly summarize his submissions. At pp. 11-2, Buckley, L.J., says:

> Retrospective operation [of a statute] is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to be that which it was not, that Act I understand to be retrospective. That is not this case [here]. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the new Act, is to be taken to have been the law.

He then looks to the section in question and finds that it speaks of "all leases" not merely those executed after that date upon which the Act came into force. He further looks to another section of the Act which does address a certain matter and is expressed to be applicable only to leases entered into after the commencement of

the Act. He finds that the implication of retrospective effect in the passage first referred to is reinforced by the presence of express words negativing such implication in the latter section considered. In a similar vein, the respondent herein asks the Court to consider s. 52(1) of the Act which makes express reference to a certain situation arising "after this Act comes into force".

West v. Gwynne, however, is distinguishable from the matter at hand, in that the agreement between the parties was, at the time the new Act came into effect, an existing right which would be (as has been demonstrated) affected prejudicially by an application of s. 51(6). In *West*, Buckley, L.J., says at p. 12:

> Suppose that by contract between A. and B. there is in an event to arise a debt from B. to A., and suppose that an Act is passed which provides that in respect of such a contract no debt shall arise. As an illustration take the case of a contract to pay money upon the event of a wager, or the case of an insurance against a risk which an Act subsequently declares to be one in respect of which the assured shall not have an insurable interest. In such a case, if the event has happened before the Act is passed, so that at the moment when the Act comes into operation a debt exists, an investigation whether the transaction is struck at by the Act involves an investigation whether the Act is retrospective. . . . But if at the date of passing of the Act the event has not happened, then the operation of the Act in forbidding the subsequent coming into existence of a debt is not a retrospective operation, but is an interference with existing rights in that it destroys A.'s right in an event to become a creditor of B. As matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights.

Seen in the light of this passage, the agreement of purchase and sale is one in which "an event has happened" and one which should not be disturbed by the Court through a retrospective or retroactive application of the Act. As Duff, J., as he then was, stated in *Upper Canada College v. Smith*, *supra*, at p. 418 S.C.R., p. 651 D.L.R.:

> . . . the plaintiff's right at the time of the passing of the Act was a valuable right, a right capable of being appraised in money; after the passing of the Act it became, if the defendant's construction is the right one, deprived of all value.

He also quotes with approval Lord Selborne in *Main et al. v. Stark* (1890), 15 App. Cas. 384 at p. 388, to the effect that: ". . . words not requiring a retrospective operation, so as to affect an existing status prejudicially, ought not to be so construed." In response to this, and particularly, the passage from *West*, quoted above, the respondent says that the monthly payments by the respondent of $836.25 to the applicant is not made in response to an

"event" or an obligation, which "has already happened", but is an existing right of payment. Presumably, such existing right of payment would arise completely anew each month until title passed.

I cannot agree with this. Surely the primary obligation created by the execution of the agreement of purchase and sale in December of 1978 is the only "event" in question which gave rise to an obligation. To accept the respondent's position would mean that a new contract comes into effect with each payment when, in fact, the agreement creates a single obligation to make a series of payments, which series will terminate upon the passing of title.

In summary, s. 51(6) of the Act does not have a retroactive or a retrospective effect. To hold that it does would be to place a windfall in the hands of the purchaser and rewrite the agreement between the parties. In these circumstances I must observe the presumption against retrospectivity. To do otherwise would be to allow an enactment wholly uncontemplated by the parties at the time the agreement was entered into to radically alter the terms upon which the agreement was predicated and cause financial disadvantage to one of them.

There will be no costs.

Judgment accordingly.

306793 ONTARIO LTD. IN TRUST v. RIMES

Ontario Court of Appeal, MacKinnon, A.C.J.O., Dubin and Thorson, JJ.A.
June 28, 1979.

Sale of land — Breach of contract — Measure of damages — Considerations.

Contracts — Breach — Sale of land — Measure of damages — Considerations.

Where a vendor defaults under an agreement for purchase and sale of land, the purchaser is entitled to have his damages calculated as of the date of trial when he claims damages in lieu of specific performance. His damages are to be calculated on the basis of the value of the land under the original agreed-upon purchase price and the value of the land as of the date of trial. Moreover, it is not proper to deduct from the damages awarded the carrying charges that the purchaser would have had to have paid from the date of breach to the date of trial. To do so would be to place the defaulting vendor in precisely the same position as if the transaction had been closed on the date fixing the agreement but at the same time give the defaulting vendor the land for the extra period from the date of closing to the date of trial.

[*Johnson et al. v. Agnew*, [1979] 2 W.L.R. 487; *McKenna v. Richey*, [1950] V.L.R. 360; *Wroth et al. v. Tyler*, [1973] 1 All E.R. 897; *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp. et al.*, [1979] 1 S.C.R. 633, 89 D.L.R. (3d) 1, [1978] 6