No. 15 of 1951.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN

CANADA STEAMSHIP LINES LIMITED . . *Appellant*

AND

HIS MAJESTY THE KING . . . . *Respondent.*

Case for the Respondent.

RECORD.

1. This is an appeal from six judgments of the Supreme Court of Canada dated the 23rd of June, 1950. By the first judgment the Supreme Court of Canada (the Chief Justice, Rand, Kellock, Estey, Cartwright and Fauteux JJ.; Locke J. dissenting) allowed the appeal of the Respondent from the judgment of the Trial Judge in the Exchequer Court of Canada, maintaining the Appellant's petition of right. By the other five judgments the Supreme Court of Canada unanimously allowed the appeal of the Respondent from judgments of the Trial Judge in the Exchequer Court of Canada which had dismissed the Respondent's claim put forward in Third Party Notices to be indemnified by the Appellant. Vol. 3, pp. 1-6. Vol. 2, p. 168a. Vol. 2, pp. 202, 236a, 270, 304a, 337a.

2. The circumstances out of which the appeals arise are as follows :—

(I) By indenture of lease dated 18th November, 1940, His Majesty the King, represented by the Minister of Transport, leased to the Appellant, Canada Steamship Lines Limited for the purpose of receiving and storing therein freight and goods, St. Gabriel Shed No. 1 on the waterfront in the City of Montreal. Vol. 1, pp. 128-135.

(II) By the terms of Clause 8 of the Lease the Lessor agreed to maintain the shed at his own cost and expense. Vol. 1, p. 131, l. 38.

(III) Pursuant to the Lease the Lessee took possession of the leased premises and continued to occupy them at all times material to the present litigation. Vol. 1, p. 89, ll. 26-31.

(IV) A few days prior to 5th May, 1944, the Department of Transport in Montreal, representing the Lessor, received a request

from the Lessee, Canada Steamship Lines Limited, to effect certain minor repairs to the premises including the doors of the shed. An inspection was made and the work undertaken by the employees of the Department of Transport almost immediately.

(v) On 5th May, 1944, repairs were being made to one of the doors of the shed. Upon removal of the hinges it was found necessary to enlarge one of the holes in the steel upright or post to which the hinges were attached, from $\frac{3}{8}$ in. to $\frac{1}{2}$ in.

(vi) For the purpose of enlarging the hole an oxy-acetylene cutting torch was used. During the currency of the repairs which were being effected this torch had already been used for the purpose of burning off rusty bolt heads and hinges.

(vii) Before proceeding with the work a plank was wired against the flanges of the steel H beam on the inside of the shed. This plank when in position extended from the roof to within 3 feet of the cement floor of the shed. The purpose of this was to deflect towards the floor any sparks that might come from the torch while enlarging the hole from the outside. In addition the door was shut.

(viii) As a further precaution, J. A. Fauteux, an employee of the Department of Transport, who had a pail of water, was ordered to watch for sparks inside the shed.

(ix) The man with the torch working from the outside then began to enlarge the hole. He had finished the operation when a spark fell on some bales on which Fauteux, the employee inside, was sitting. Unfortunately these bales were full of cotton waste and almost instantaneously the whole shed was aflame. Fauteux had no chance whatsoever to do anything and had to run for his life. As one of the experts called by Canada Steamship Lines Limited explains, it was a flash fire which burst into full fury at once.

(x) As a result of the fire the shed and its contents were almost completely destroyed.

3. The following proceedings by way of Petition of Right were taken :—

Vol. 1, pp. 2–10.

(i) CANADA STEAMSHIP LINES LIMITED claimed an amount of $42,367.14 alleging that the damages sustained by it were caused by the fault and negligence of the employees and servants of His Majesty acting in the performance of the work for which they were employed, or alternatively were caused by a thing under the care of the said employees. (This latter ground of liability was not pressed.)

Vol. 1, pp. 10–11.

To this Petition of Right the Respondent pleaded that there was no negligence on the part of the employees of the Department of Transport and that the damages were not caused by anything under their care. Furthermore it was pleaded that if the Suppliant

ever had any rights to exercise, the same are barred in virtue of the terms of the lease. (The particular clause of the lease to which this plea had reference was :—

" 7. That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.") Vol. 1, p. 131, l. 30.

(ii) Petitions of right claiming damages for the loss of property in the shed at the time of the fire were filed by the following parties :—

H. J. Heinz & Co. of Canada Ltd.	$38,430.88	Vol. 1, pp. 12–15.
Cunningham & Wells Limited	$15,188.43	Vol. 1, pp. 19–22.
Raymond Copping	$2,121.28	Vol. 1, pp. 27–29.
W. H. Taylor Limited	$7,832.75	Vol. 1, pp. 34–36.
Canada and Dominion Sugar Co. Ltd. ..	$108,310.83	Vol. 1, pp. 41–44.

4. To the last five Petitions of Right the Respondent pleaded denying that there was any negligence on the part of the employees of the Department of Transport and denying that the damages were caused by a thing under their care. Vol. 1, pp. 15–16, 22–23, 29–30, 36–37, 44–45.

5. In addition in each instance the Respondent pursuant to Rule 234 of the General Rules & Orders of the Exchequer Court of Canada filed a Third Party Notice directed to Canada Steamship Lines Limited claiming to be indemnified and saved harmless by it against any liability to the Suppliants on the ground that it was bound to do so in virtue of the Lease. (Clause 17 of the Lease is as follows :— Vol. 1, pp. 17–18, 24–26, 31–33, 38–40, 46–47.

" 17. That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of right arising hereunder.") Vol. 1, p. 133, l. 34.

6. All the cases proceeded to trial at the same time and on the same evidence before the Honourable Mr. Justice Angers, who in due course rendered judgments maintaining all the Petitions of Right and dismissing all the Third Party Notices. Vol. 2, pp. 138–168, 169–185, 202a–219, 237–253, 270a–287, 305–321.

7. Mr. Justice Angers found that the fire was due to what he terms " gross negligence " on the part of the employees of the Department of Transport acting within the scope of their employment. Any finding of negligence was sufficient to enable him to maintain all the Petitions of Right other than that of Canada Steamship Lines Limited. In that case he had to determine whether Clause 7 of the Lease barred the claim. Although the pleadings did not raise any issue as to *faute lourde* and although Vol. 2, p. 152, ll. 10–15, p. 168, ll. 30–34.

the significance of *faute lourde* was not argued, Angers, J., founded his judgment on jurisprudence which in his view established the proposition that it was against public policy for a person to be permitted to contract out of his liability for *faute lourde* and he found, as a fact, that the negligence in this case amounted to *faute lourde*. He therefore held that Clause 7 of the Lease was not a bar to the claim of Canada Steamship Lines Limited.

Vol. 2, pp. 155–168.

8. The recourse which the Respondent sought to exercise against Canada Steamship Lines Limited with respect to the other claims was refused for the same reason.

Vol. 2, pp. 185–202, 219–236, 253–270, 287–304, 321–337.

9. The Respondent entered an appeal to the Supreme Court of Canada from all of these judgments both with respect to the Petition of Right and with respect to the Third Party Notices.

Vol. 2, pp. 343–348.

10. The Supreme Court of Canada came to the conclusion that it would not be justified in reversing the finding of fact of Angers, J., to the effect that there was negligence on the part of the servants of the Respondent acting in the performance of the work for which they were employed. Accordingly the appeals of His Majesty from the judgments in favour of the Suppliants H. J. Heinz Co. of Canada Limited, Cunningham and Wells Limited, Raymond Copping, W. H. Taylor Limited and Canada and Dominion Sugar Co. Limited, were dismissed. No appeal against this dismissal has been taken.

Vol. 3, p. 2, ll. 25–30, p. 3, ll. 19–24, p. 4, ll. 19–23, p. 5, ll. 19–23, p. 6, ll. 19–24.

11. The Supreme Court of Canada, on the ground that Clause 7 was a bar to any recovery, allowed the appeal of His Majesty from the judgment of the Trial Judge in favour of Canada Steamship Lines Limited. The Supreme Court of Canada also allowed the appeals of His Majesty from the dismissal of the Third Party Notices and held that the Appellant was bound by Clause 17 to indemnify His Majesty against the claims under the other Petitions of Right. It is from these judgments of the Supreme Court of Canada that the Appellant is appealing.

Vol. 3, pp. 1–2.

Vol. 3, p. 2, ll. 31–40. p. 3, ll. 25–34, p. 4, ll. 24–33, p. 5, ll. 24–33, p. 6, ll. 25–34.

12. The principal provisions of the lease under discussion are Clauses 7 and 17. These clauses led to the following questions being dealt with by the Supreme Court of Canada :—

(I) Is Clause 7 to be interpreted as barring a claim against His Majesty based on the negligence of his officers or servants ?

(II) Is Clause 17 to be interpreted as requiring the Appellant to indemnify His Majesty in respect of claims of third parties based on negligence of officers or servants of His Majesty ?

(III) If either (I) or (II) or both are answered in the affirmative, is there any exception where the negligence amounts to *faute lourde* ? and

(IV) If there is such an exception, do the facts here support a finding of *faute lourde* ?

13. Rinfret C.J. held that the Respondent's appeals should be allowed. Referring to Clause 7 in connection with *faute lourde* he adopted the definition of Pothier (who, he said, was in most respects the basis of the Civil Code of Quebec) that *faute lourde consiste a ne pas apporter aux affaires d'autrui le soin que les personnes les moins soigneuses et les plus stupides ne manquent pas d'apporter a leurs affaires.* Applying this definition to the facts Rinfret C.J. found it impossible to place the employees here in the category of *les personnes les moins soigneuses et les plus stupides.* Although this would be sufficient to dispose of any question of *faute lourde* he added that on the authorities and true interpretation of a clause, such as Clause 7, he could not either come to the conclusion that gross negligence or *faute lourde* should render Clause 7 inoperative. After referring to decisions of the Supreme Court of Canada and the Court of Appeal of Quebec Rinfret C.J. held that on the interpretation of the clause in accordance with the Civil Code, as well as in law and on the facts, Clause 7 should receive its application and the Petition of Right of the Appellant should be dismissed with costs.

Vol. 3, pp. 7–15.
Vol. 3, p. 9, ll. 31–36.
Vol. 3, p. 9, l. 37–p. 11, l. 40.
Vol. 3, p. 11, l. 41–p. 13, l. 15.

14. With reference to the Third Party claims and Clause 17, Rinfret C.J. did not find it necessary to repeat what he had already said with respect to *faute lourde.* He held that on the facts none could be found in the circumstances of this case, and therefore the ground of the learned trial judge for excluding Clause 17 is not well founded. As to the interpretation of Clause 17 he had no doubt that the claims put forward under the petitions of right fell within the opening words of Clause 17 defining the claims for which the Lessor was to be indemnified. The only inquiry he made was whether these claims were in any manner based upon, occasioned by or attributable to the execution of the lease or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder. In his view "Undoubtedly, unless it were so, it would be difficult to attribute a meaning to that clause." Rinfret C.J. then refers to Clause 8 of the Lease requiring the Crown to maintain the shed and pointed out that the loss forming the basis of the claims in this case arose in a manner attributable to the execution and performance of the Lease by the Crown and, in his view "they are brought strictly within the application of Clause 17."

Vol. 3, p. 13, ll. 16–26.
Vol. 3, p. 13, l. 27.
Vol. 3, p. 14, l. 22–p. 15, l. 2.

15. Rand, J., held the language of Clause 7 to be broad enough to embrace every claim against the Crown for damage to any property of the Respondent in or on the land leased. He then addressed himself to the question whether the clause is to be restricted in any way. On this point he refers to Clause 17 and concludes that the only possible claims that could fall within paragraph 17 are those founded on negligence. It is apparent that in his view it clearly applies to such claims. Referring then to the rule striking negligence from exceptions of liability in contracts of liability in contracts of carriage both by sea and land, Rand, J., points out that this rule had never been applied to a case not involving a bailment and that it must be examined anew. As to the reasons for the rule, he concludes that it is based on the presumed intention of the parties and that it was reasonable to assume that where there were several risks to be excluded negligence or misconduct was not to be excluded. He refers to the test as to whether the words of exemption can be given a "reasonable

Vol. 3, pp. 15–18.
Vol. 3, p. 15, l. 36.

application short of negligence." After pointing out that under the lease in this case the Crown has only one obligation to which Clause 7 might apply, namely to maintain the building, he says: "the only sources of liability are, failure to maintain and negligent performance . . . But what, in reasonableness, is the difference between a culpable refusal . . . which involves either an intentional or negligent disregard . . . and the performance in good faith but accompanied by less than reasonable care? . . ." In his view it would be absurd for the Steamship Company to be bound by Clause 17 to indemnify the Crown for claims by third parties for negligence but to be entitled itself to claim in such case. His conclusion is therefore that Clause 7 is not to be restricted and that its broad language must take effect.

Vol. 3, p. 17, l. 45–p. 18, l. 15.

16. With reference to the question of *faute lourde* Rand, J., states: "In view of the development of the law of insurance in the province and its radical departure from the Coutume de Paris, it would seem to be very questionable that the principle could now be invoked at all; but assuming it could, the scope would not in these days extend beyond the bounds laid down by Pothier . . . It cannot be seriously contended that the conduct of these employees was of the character so described. They were doing their work in the ordinary manner; they had anticipated the possibility of sparks and had taken some considerable, and what they thought to be adequate, precautions against them. To say of their conduct that it was more indifferent than the most careless and the most stupid of men would exercise towards their own interests is either to disregard what they did or to misconceive the standard laid down."

Vol. 3, pp. 18–22.

Vol. 3, p. 19, l. 31–p. 20, l. 16.

17. Kellock, J., found no difficulty in arriving at the conclusion that *faute lourde* had not been established. In his view the legality of such a clause as Clause 7 was concluded by prior decisions of the Supreme Court of Canada. Such a clause is not to be construed as tending to protect the person in whose favour it is made from the consequences of the negligence of his own servants unless there is express language to that effect or unless the clause can have no operation except as applied to such a case.

Vol. 3, p. 20, l. 17–p. 21, l. 20.

Before dealing with the argument of the Appellant to the effect that negligence was not expressly mentioned and that the Crown might be liable for breach of contract, Kellock, J., examined Clause 17 of the lease and concludes that it must be taken to extend to claims for damages by reason of the negligent acts of Crown servants such as those here in question because no third party could have any claim against the Crown except on a basis other than contract. If paragraph 7 stood alone the argument of the Appellant might be valid, but in his opinion the presence of paragraph 17 affects the proper interpretation to be given to paragraph 7.

Vol. 3, p. 21, l. 21–p. 22, l. 22.

18. Kellock, J., then notes that under the terms of the Water Carriage of Goods Act a carrier is not liable for loss arising from fire unless caused by its actual fault or privity. The carrier may, however, waive the benefit of this provision and if the present Appellant did so it could be liable as an insurer to the owners of the goods in the shed, and entitled itself to recover from a wrongdoer. Under these circumstances he thought it would be an anomaly if upon a claim being made by the shipper against the Crown, the Appellant would be liable to indemnify the Crown under the

provisions of paragraph 17 and yet that the Appellant, if called upon to pay directly by the shipper could recover from the Crown on the grounds of negligence of its servants, and Clause 7 of the lease would not be the answer. He therefore concluded that paragraph 7 would be an answer to such a claim and must be read as applying to causes of action founded upon negligence.

19. Estey, J., also adopted the definition of Pothier with respect to *faute lourde* and held that the conduct of the Crown's servants and agents was not so wanton or reckless as to constitute *faute lourde*. Clause 7 was sufficiently comprehenisve to include claims and demands founded on negligence. After noting the argument that Clause 7 should be construed to limit its application to breach of covenant in the lease, Estey, J., refers to the authorities which show that that which determines the matter is the intention of the parties as expressed in the language of the clause as construed in association with the contract as a whole. He suggests that in cases of difficulty or doubt in contracts other than those with common carriers there are two rules: (1) Where liability exists in addition to that founded on negligence the Courts have followed the general principle and restricted the exemption of liability to that other than that founded upon negligence; (2) If however negligence be the only basis for liability, the clause will more readily operate to exempt liability based upon negligence.

Vol. 3, pp. 22-25.

Vol. 3, p. 22, l. 37–p. 23, l. 44.

20. Estey, J., then notes that under Clause 5 the Lessor reserved at all times full and free access to any part of the land, shed and platform, and under Clause 8 undertook to maintain the shed. Clause 7 therefore appears to have been drafted with care because it does not exempt the Crown from damages incurred when it makes default in its obligation to repair and the tenant makes the repairs and claims the cost thereof by way of damages from the Lessor. In his opinion in preparing Clause 7 the parties would have in mind at least the more likely sources of liability on the part of the Lessor including liability for damages arising out of the exercise of the privilege of access or duty to maintain that would be uppermost in their minds. The former liability would almost invariably be founded on negligent conduct. As to the latter the lessee being in possession would notify the landlord of the need for repair. If any detriment, damage or injury should occur to the premises, goods or freight after the notice and prior to the completion of the repairs, it would more likely arise from neglect on the part of the lessor, his servants and agents. It must be assumed, therefore, that the parties in drafting that clause would fully appreciate that the most probable source of liability upon the lessor would be negligent conduct.

Vol. 3, p. 23, l. 45–p. 24, l. 32.

21. Dealing with the argument that detriment, damage or injury to goods might result from the collapse of a shed or breaking of a water main or some other source quite apart from any question of negligence and that Clauses 7 and 17 should apply only to such liability, Estey, J., thought that these possibilities are in comparison to the possibility of damage from negligence so remote as to make it unreasonable to conclude that the parties having regard to the language of the Clauses 7 and 17 intended so to restrict the exemption therein provided for. Clauses 7 and

Vol. 3, p. 24, l. 33–p. 25, l. 20.

17 must be read and construed together and as part of the lease as a whole. Clause 17 was not to be limited to cases where the action taken or the things done or the exercise of the right would be done in a legal and proper manner. When Clause 17 is read as a whole the parties were there providing for liability not in a restricted but rather in a general sense including liability founded in negligence. Indeed, unless liability for negligence be included in this Clause 17, Estey, J., thought that it lacks subject matter or content. While conceding that liability may under Clause 7 arise apart from negligence and that such a fact might be significant as an aid in determining intention it is the expressed intention of the parties that concludes the issue, and Estey, J., was of opinion this intention was made clear in Clause 17. When these clauses are read together, as they must be, with due regard to the relationship between the parties (landlord and tenant) and their respective positions, rights and obligations under the lease and the wide and comprehensive language used, it appears that the parties intended the Lessor should be exempt under both clauses for liability founded on negligence.

Vol. 3, p. 25, ll. 21–30.

Vol. 3, p. 25, ll. 33–44.

22. Locke, J., found, as did the other members of the Court, that there was no proof of *faute lourde*.

Vol. 3, p. 25, l. 45–p. 28, l. 11.

He then examined Clause 7 and concludes that it would, if given an unrestricted meaning, afford a complete answer to the Appellant's claim. He notes that a clause such as Clause 7 would not relieve a common carrier of liability for negligence and refers to the authorities. He then refers to the decisions with respect to clauses in other types of contracts where a provision exempting from liability in general terms has been found effective on the ground that since the only possible claim would be for negligence, the parties must be held to have intended to exclude such liability. Locke, J., notes that under the provisions of Section 19 (*c*) of the Exchequer Court Act the Crown might be held liable for damage to property resulting from the negligence of its servants in the discharge of their duties, a liability, to him, quite distinct and not in any way dependent on the contractual obligation to maintain the shed during the currency of the lease. He says that under the contract to maintain the shed the Crown might be held liable in damages if the foundation of the shed gave way due to lack of repair causing the collapse of the building and injuring goods on the premises or if there were a metal roof which was allowed to be eaten away by rust permitting the entrance of rain and damaging property. Such liability would be in contract and not in tort. He therefore concluded that the liability of the Crown as in the case of the common carrier was not confined to that for the negligence of its servants ; but there was here, as with the carrier, a double liability. In his opinion, the liability in negligence, not having been expressly or by necessary implication excluded, remains.

Vol. 3, p. 28, l. 12–p. 31, l. 15.

Vol. 3, p. 31, l. 16–p. 32, l. 5.

Vol. 3, p. 32, ll. 6–26.

23. Locke, J., then proceeded to consider Clause 17 and found that the work being done by the servants of the Crown was done by them " by virtue hereof " in that it was in the discharge of the obligation to maintain the shed. He was unable to see how there could be any liability on the part of the Crown towards third persons for anything done falling within the ambit of this clause other than for the negligence of the Crown's

officers or servants within sub-section (*c*) of Section 19 of the Exchequer Court Act. He concluded that this being so, these general words must be construed as obligating the Respondent to indemnify the Crown against claims of the other Respondents all of which are founded upon negligence of that nature.

24. Cartwright, J., stated that he was in agreement with what he understood to be the opinion of all the other members of the Court that the conduct of such employees, while clearly negligent, did not amount to *faute lourde*. He therefore found it unnecessary to consider the question whether under the law of Quebec a party can validly provide by contract that he shall not be liable for his own *faute lourde* or that of his employees. After stating that there is no law in Quebec that renders invalid a stipulation in a contract that a party shall not be liable for the negligence of his employees he proceeded to examine the terms of the lease and the general rule of construction contained in the Civil Code of the Province of Quebec. Dealing first with Clause 7 and giving to the words used their ordinary and grammatical meaning, he held that they are wide enough to bar the Appellant's claim. After referring to the authorities cited in support of the argument that a clause of the nature of Clause 7 should be so construed as not to exempt from liability for damage caused by negligence unless either words are used expressly referring to negligence or the circumstances are such that the only possible liability for damage which could fall upon the party for whose benefit the clause is inserted is one arising from negligence, Cartwright, J., concludes that the rule for which Canada Steamship Lines Limited contends is too widely stated. In his opinion if there is a potential and indeed probable source of liability to which a party is exposed although free from any blame, then the meaning of general words of exemption may be restricted to liability arising from such source. He found no good ground for holding and he found nothing in the authorities cited to the Court that appeared to decide that general words of exemption wide enough in their ordinary sense to cover every sort of liability should be held not to cover liability arising from negligence merely because some other equally blameworthy source of liability could be imagined. He noted that the source of possible liability other than negligence to which it was suggested Clause 7 would apply is liability for damage resulting from a breach of the covenant to maintain the shed. The suggestion that because this was a ground of liability, other than negligence, upon which the words of Clause 7 can operate, they should be interpreted not to cover a claim for damage caused by negligence, appeared to him a construction which would not be consonant to reason or to common sense. It would bring about the surprising result that a person who had covenanted to do work would escape liability for damage resulting from his failure or refusal to fulfil his covenant at all but would be liable for similar damage resulting from negligence of his employees in doing the work which he had agreed to do. It seemed to him that to fail or refuse to perform a contractual obligation is at least as blameworthy as to be guilty of some negligent act or omission in the course of its performance.

Vol. 3, pp. 32–37.

Vol. 3, p. 33, l. 35–p. 36, l. 37.

25. Cartwright, J., was of the opinion that the construction of Clause 7 was aided by a consideration of Clause 17. It was not possible to suggest any damages for which the Lessor would be held liable to third

Vol. 3, p. 36, l. 38–p. 37, l. 13.

persons except damages caused by the negligence of the Lessor's servants. In his view the words of Clause 17 were apt to describe the claims with respect to which the Crown sought indemnity, and he held that such claims are based upon, occasioned by, or attributable to an action taken or a thing done by virtue of the lease, that is the action or deed of the Lessor's employees in repairing the doors of the shed pursuant to the obligation so to do cast upon the Lessor by paragraph 8 of the lease. He can find no reason why the parties should agree that the Lessee must indemnify the Lessor against the claims of Third Parties arising against the Lessor by reason of the negligence of his servants while the Lessee should remain free to claim damages from the Lessor for the loss of its own goods from the same clause. He thought that the construction to be gathered from the whole document and which is the more consonant to reason and common sense is that the intention of the parties was that all the risks of liability for damages to goods on the demised premises was to fall upon the Lessee.

Vol. 3, pp. 37–42.

26. Fauteux, J., held that there could be no doubt as to the validity of a stipulation excluding liability for negligence of one's employees. He appears to have been clearly of the opinion that any negligence on the part of the Crown's servants did not amount to *faute lourde* as he said " there is no need here to go further and deal with respect to a fault amounting to *faute lourde*." He then notes that the language of Clause 7 was adequate to bar liability resulting from breach of one or several obligations created by the contract. He notes that the contract was not the only source of obligation and that the law itself imposed the duty not to cause damage to others. He was unable to agree that the cause of the damage was to be found exclusively in the inexecution of the obligation to repair. After indicating that the language of Clause 7 was apt to cover only damages *ex contractu* or only damages caused *ex delicto*, or both, he found that the meaning of the parties being open to question their common intention must be ascertained by interpretation rather than by adhering to the literal meaning of the words of Clause 7. He found it particularly relevant to consider Clause 17 and stated that as there was no contractual relationship between the Crown and Third Parties the claims and demands for damages therein referred to must of necessity be for damages *ex delicto*. Thus Clause 17, in his view, affords manifest evidence that the minds of the parties were directed to other obligations than those flowing simply from the contract, that the legal duty not to do damage to others was considered and dealt with and this precisely in terms all embracing and thus consistent with the generality of the terms of Clause 7 as they can be and are, in fact, interpreted by the Respondent. The general intention and the will of the Lessor to be effectively relieved of all responsibility in this respect as well as with respect to contractual obligations cannot be better manifested implemented in greater measure and in a more efficient manner than they are by the terms of Clause 17. Fauteux, J., also referred to the governing provision of the lease as to interpretation and found that to obtain the lease the Lessee agreed by Clause 7 to waive all rights to any damages against the Lessor and by Clause 17 assumed obligations which it did not have under the law. In his view Clause 17 was not only adequate to maintain the Third Party Notices but read with the other covenants quite indicative that the parties meant all that they have said by the generality

of the opening words of Clause 7 " any claims or demands." On the whole he was " satisfied that the lease was granted on the condition that all the risks relating to breaches of obligation, contractual and legal were to be borne exclusively by the Lessee."

The Respondent submits that the judgments appealed from are correct and should be affirmed for the following, among other,

REASONS.

(1) BECAUSE Clause 7 of the lease constitutes a bar to any recourse against the Respondent by the Appellant ;

(2) BECAUSE the Appellant in virtue of Clause 17 of the lease is obliged to indemnify and save harmless the Respondent with respect to the judgments obtained by the other Suppliants ;

(3) BECAUSE there is no rule of law which precludes the Respondent from stipulating against the consequences of the fault or negligence of his officers and servants ;

(4) BECAUSE there is no rule of law which precludes the Respondent from stipulating against the consequences of the *faute lourde* of his officers and servants ;

(5) BECAUSE the evidence negatives *faute lourde* on the part of the Respondent's officers and servants.

A. J. CAMPBELL.

FRANK GAHAN.

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