1,1952

15 1951

DOMINION OF CANADA

# In the Supreme Court of Canada

OTTAWA

On Appeal from Judgments of the Exchequer Court.

BETWEEN:—

HIS MAJESTY THE KING, (Respondent in the Exchequer Court), APPELLANT,
— and —
CANADA STEAMSHIP LINES LIMITED, (Suppliant in the Exchequer Court), RESPONDENT.

---

HIS MAJESTY THE KING, (Respondent in the Exchequer Court), APPELLANT,
— and —
H. J. HEINZ COMPANY OF CANADA LIMITED, (Suppliant in the Exchequer Court), RESPONDENT.
— and —
CANADA STEAMSHIP LINES LIMITED, (Third Party in the Exchequer Court), THIRD PARTY.

---

HIS MAJESTY THE KING, (Respondent in the Exchequer Court), APPELLANT,
— and —
CUNNINGHAM AND WELLS LIMITED, (Suppliant in the Exchequer Court), RESPONDENT.
— and —
CANADA STEAMSHIP LINES LIMITED, (Third Party in the Exchequer Court), THIRD PARTY.

---

HIS MAJESTY THE KING, (Respondent in the Exchequer Court), APPELLANT,
— and —
RAYMOND COPPING, (Suppliant in the Exchequer Court), RESPONDENT.
— and —
CANADA STEAMSHIP LINES LIMITED, (Third Party in the Exchequer Court), THIRD PARTY.

---

HIS MAJESTY THE KING, (Respondent in the Exchequer Court), APPELLANT,
— and —
W. H. TAYLOR LIMITED, (Suppliant in the Exchequer Court), RESPONDENT.
— and —
CANADA STEAMSHIP LINES LIMITED, (Third Party in the Exchequer Court), THIRD PARTY.

---

HIS MAJESTY THE KING, (Respondent in the Exchequer Court), APPELLANT,
— and —
CANADA AND DOMINION SUGAR CO. LIMITED, (Suppliant in the Exchequer Court), RESPONDENT.
— and —
CANADA STEAMSHIP LINES LIMITED, (Third Party in the Exchequer Court), THIRD PARTY.

# APPELLANT'S FACTUM

F. P. BRAIS, K.C.,
Solicitor for the Attorney General of Canada.

F. P. VARCOE, K.C.,
Ottawa Agent.

U. PERRAULT & CIE, PRINTERS, MONTREAL, HA. 3080

# INDEX

DOMINION OF CANADA

# In the Supreme Court of Canada

OTTAWA

On Appeal from Judgments of the Exchequer Court.

BETWEEN:—

HIS MAJESTY THE KING, (Respondent in the Exchequer Court), APPELLANT,
— and —
CANADA STEAMSHIP LINES LIMITED, (Suppliant in the Exchequer Court), RESPONDENT.

---

HIS MAJESTY THE KING, (Respondent in the Exchequer Court), APPELLANT,
— and —
H. J. HEINZ COMPANY OF CANADA LIMITED, (Suppliant in the Exchequer Court), RESPONDENT.
— and —
CANADA STEAMSHIP LINES LIMITED, (Third Party in the Exchequer Court), THIRD PARTY.

---

HIS MAJESTY THE KING, (Respondent in the Exchequer Court), APPELLANT,
— and —
CUNNINGHAM AND WELLS LIMITED, (Suppliant in the Exchequer Court), RESPONDENT.
— and —
CANADA STEAMSHIP LINES LIMITED, (Third Party in the Exchequer Court), THIRD PARTY.

---

HIS MAJESTY THE KING, (Respondent in the Exchequer Court), APPELLANT,
— and —
RAYMOND COPPING, (Suppliant in the Exchequer Court), RESPONDENT.
— and —
CANADA STEAMSHIP LINES LIMITED, (Third Party in the Exchequer Court), THIRD PARTY.

---

HIS MAJESTY THE KING, (Respondent in the Exchequer Court), APPELLANT,
— and —
W. H. TAYLOR LIMITED, (Suppliant in the Exchequer Court), RESPONDENT.
— and —
CANADA STEAMSHIP LINES LIMITED, (Third Party in the Exchequer Court), THIRD PARTY.

---

HIS MAJESTY THE KING, (Respondent in the Exchequer Court), APPELLANT,
— and —
CANADA AND DOMINION SUGAR CO. LIMITED, (Suppliant in the Exchequer Court), RESPONDENT.
— and —
CANADA STEAMSHIP LINES LIMITED, (Third Party in the Exchequer Court), THIRD PARTY.

---

# APPELLANT'S FACTUM

## I.—STATEMENT OF FACTS

By indenture of lease dated November 18th, 1940, (Ex. A. Case, pp. 1 to 9) His Majesty the King, represented by the Minister of Transport, leased to the Respondent, 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.

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.

A few days prior to May 5th, 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.

On May 5th, 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 3/8″ to 1/2″.

For the purpose of enlarging the hole an oxyacetylene 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.

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 three 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.

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.

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.

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

The following proceedings by way of Petition of Right were taken:

(a) *Canada Steamship Lines Limited* claims 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. Alternatively it is claimed that the damages were caused by a thing under the care of the said employees.

To this Petition of Right the Appellant 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 following clause of the Lease (Case Page 131, Line 30):

"7. That the Lessee shall not have any claim or "demand against the Lessor for detriment, damage or in- "jury 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."

(b) *H. J. Heinz Co. of Canada Ltd.* claims damages of $38,430.88 alleging liability on the part of the Appellant for substantially the same reasons as given by Canada Steamship Lines Limited. This claim results from damage to property of the Suppliant which was in St. Gabriel Shed No. 1 at the time of the fire.

(c) *Cunningham & Wells Limited* claims $15,188.43 damages sustained as a result of the destruction of certain of its trucks and trailers and other equipment which were in the shed at the time of the fire. Here again the allegations of liability are substantially the same as in the other cases.

(d) *Raymond Copping* claims damages of $2,121.28 with respect to a truck and other merchandise destroyed as a result of the fire.

(e) *W. H. Taylor Limited* claims damages of $7,832.75 for loss of a truck destroyed in the fire.

(f) *Canada and Dominion Sugar Co. Ltd.* claims $108,310.83 for damages to sugar stored in the shed at the time of the fire.

To the last five Petitions of Right the Appellant 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.

In addition in each instance the Appellant 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 Clause 17 of the Lease, which reads as follows (Exhibit A, Case Page 133, Line 35):

> "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 prosecu- "ted, in any manner based upon, occasioned by or attri- "butable 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 rights arising hereunder."

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 judgment maintaining all the Petitions of Right and dismissing all the Third Party Notices.

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". Any finding of negligence was sufficient to enable him to maintain all the Petitions of Right other than that taken by Canada Steamship Lines Limited, but in the case where Canada Steamship Lines Limited is the Suppliant, the Trial Judge had to determine whether any recourse against the Appellant was not barred in virtue of Clause 7 of the Lease cited above. This question he resolved against the Appellant on the ground that as a matter of law it is impossible to stipulate against the consequences of gross negligence.

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

The Appellant has entered an appeal from all of these judgments both with respect to the Petitions of Right and with respect to the Third Party Notices.

Inasmuch as it had been possible to reach an agreement as to damages in each case this aspect of the matter is no longer the subject of any dispute.

## 2.—ERRORS IN JUDGMENT.

The Appellant respectfully submits that there is error in the judgments a quo in that:

(1) The evidence does not reveal any negligence on the part of the employees of the Department of Transport;

(2) Clause 7 of the Lease constitutes a bar to any recourse against the Appellant by Canada Steamship Lines Limited;

(3) In virtue of Clause 17 of the Lease, Canada Steamship Lines Limited is obliged to indemnify and save harmless the Appellant with respect to the judgments obtained by the other Suppliants;

(4) There is no rule of law which precludes a person from stipulating against the consequences of the gross negligence of his employees;

(5) In any event there is no rule of law which precludes the Crown from stipulating against the gross negligence of its employees.

(6) The evidence negatives gross negligence on the part of the Appellant's employees.

## 3.—ARGUMENT.

### 1. THE PROOF DOES NOT DISCLOSE ANY NEGLIGENCE ON THE PART OF THE EMPLOYEES OF THE DEPARTMENT OF TRANSPORT.

There is no dispute as to the facts.

About four or five days prior to the fire, a request was made to the Department of Transport in Montreal, representing the Lessor, by Canada Steamship Lines Limited, the Lessee, to effect certain repairs to the doors of the shed which by the terms of the lease the Lessor was bound to make. Parsons, the carpenter foreman of the Department in Montreal, made an inspection of the premises in company with William Wood, the shed foreman of Canada Steamship Lines Limited, following which the necessary work was begun.

It appears from the testimony of Raoul Brazeau (Brazeau Case Page 101 et seq.) that on the day of the fire he was working with his oxyacetylene blow torch from ten in the morning until after three in the afternoon, burning off hinges and rusty bolts from the doors of the shed, including the door opposite where the fire began.

In addition to removing the rusty hinges and bolts, it was necessary to enlarge a hole in the steel beam or post to which one of the hinges was attached. This hole was 8 to 10 feet from the ground and about 18 inches from the top of the post. The post itself was a steel H beam, a cross section diagram of which is filed as Exhibit B, Case Page 137. The hole to be enlarged was in the flange seen at X-X. The metal was approximately 1/4″ thick and the hole had to be enlarged from 3/8″ to 1/2″.

Before proceeding with the enlargement of the hole, certain very definite precautions were taken. Brazeau, who was the employee using the torch, says that before enlarging the hole he spoke to the foreman because he feared there might be some sparks and it was he who suggested that a plank be fastened to the beam closing off the space where the hole was to be enlarged.

Accordingly a wooden plank some 8 to 10 feet long was wired to the beam to close off the space between the flanges. The way the space was closed off appears from the cross section diagram, Exhibit B, Case Page 137, the plank being indicated by the letters P-P.

This plank extended from the roof to within 3 feet of the cement floor.

Fauteux seems to think that while the end of the plank was touching the roof, there might have been an opening of a couple of inches on account of the slope of the roof. (Fauteux Case, Page 96, Line 30). Brazeau says that the plank extended right up to the roof and states that there was no open space at the top. (Brazeau, Case, Page 62, Line 48).

The experts called by the Respondent, Canada Steamship Lines Limited, are inclined to belittle this precaution, but we have it from the expert Newill that any sparks from the torch cool rapidly as they progress. (Newill, Case Page 74, Line 35). The other expert, Royston Mitchell, is not prepared to go further than to say that sparks can be seen more than 10 to 15 feet away from the torch.

It appears from the evidence of Fauteux that while the hole was being enlarged he did see some sparks being deflected on the cement floor by the plank. These caused no damage what soever. If any spark did come out of the top of the plank he did not see it and this notwithstanding the fact that he was sitting on top of a pile of bales of cotton waste directly opposite where the hole was being enlarged. He does say (Fauteux, Case Page 82, Line 30) that one spark fell on the bales, but he adds that he does not know just where it did fall (Fauteux Case Page 83, Line 35). He further informs the Court that it was after the enlarging operation was finished that this spark came along (Fauteux Case Page 83, Line 48). All that he can really say is that a spark fell near him, (Fauteux, Case Page 84, Line 40). that it was about 7 or 8 feet from the ground and that he was 4 or 5 feet from the ground (Fauteux, Case Page 86, Line 25).

This man had been instructed to sit on top of the pile of bales and watch what was going on. He had with him a pail of water which he tells the Court was only 2 feet away from him (Fauteux, Case Page 84, Line 48).

We respectfully submit that under these circumstances not only was there no absence of precautions but that the precau-

tions taken were reasonable. What these men contemplated was the possibility of sparks from the torch coming into the shed. By the installation of the wooden plank they closed off the space opposite the hole and deflected the sparks onto the cement floor where they would be harmless. At the other end the plank was put as close to the roof as possible. That this was efficaceous is shown by the fact that at most only one spark escaped.

In addition Fauteux had a pail of water with him. Surely this would normally have been sufficient to put out any incipient fire caused by sparks. Moreover it must be borne in mind that the employee using the torch was just outside the door and had told Fauteux if he saw sparks to shout (Brazeau, Case Page 62, Line 32). What occurred was beyond the contemplation of anyone working in and around the building, including both the employees of the Department of Transport and the foreman and employees of Canada Steamship Lines Limited.

As soon as the spark fell, the whole shed was in flames. Fauteux says that the spark must have fallen on the bales because the fire caught immediately, as he says, "Le temps de le dire." (Fauteux, Case Page 86, Line 29). He was not able to use the pail of water which he had, but had to run for his life. He states that he was not expecting anything like that to happen. (Fauteux, Case Page 62, Line 48). And he adds, (Fauteux, Case Page 84, Line 8):

> "D.—Quand vous avez vu la flamme, qu'est-ce que vous avez fait? R.—J'ai eu seulement à me sauver.
>
> D.—Vous avez eu à vous sauver? R.—Oui.
>
> D.—Y avait-il une chaudière d'eau pas loin de vous? R.—Oui, monsieur.
>
> D.—Vous ne vous en êtes pas servi? R.—On n'en a pas eu le temps.
>
> D.—Vous vous êtes sauvé? R.—Oui."

Brazeau also tells us how fast the fire started. He too had to run. No witness for the Respondents has come forward to assert the contrary.

Actually what caused the fire to develop so rapidly was the fact that the bales contained wool waste which is extremely inflammable. The witness, Newill, explains that "fires originate from material of that nature largely in the nature of a flash fire" and adds that "a flash fire is ignition of dust or small

particles on the surface that burn with extreme rapidity. (Newill Case Page 74, Line 8 and following).

There is nothing to show that any person knew or should have known that these bales were highly inflammable.

Isaie Cote, the foreman, simply states that the precautions taken were because sparks sometimes fly. He knew that there were bales of waste nearby, (Cote, Case Page 56, Line 22), but says nothing about their inflammability. He does admit (Cote, Case Page 59, Line 1) that he told Brazeau there was danger of fire, but here the only thing contemplated appears to have been the ordinary fire which might be caused by sparks if nothing was done. William Wood, the shed foreman of Canada Steamship Lines Limited, places the bales of cotton and woolen waste as being within 3 feet of the door (Wood, Case Page 65, Line 20). All day long the employees of the Department of Transport had been working with the blow torch on these doors and yet no person ever thought to warn them that it was dangerous. True, the doors were open when the other operations were being carried on, but the work was carried on in close proximity to the bales with the sparks flying off in all directions and having at least a radius of 10 to 15 feet according to the expert Mitchell. (Mitchell, Case Page 73, Line 13).

The evidence of Fauteux is to the effect that there were bales covered with ordinary bagging. His testimony in this connection is as follows (Fauteux, Case Page 86, Line 33 et seq.):

> "D.—Qu'est-ce qu'il avait dans ces ballots? R.—Pour moi, c'était une espèce de "waste" de coton. Je ne les ai pas développés. Pour moi, c'est quelque chose d'inflammable.
>
> D.—C'était couvert, ces ballots, par de la grosse toile? R.—De la grosse toile.
>
> D.—Ce que l'on appelle de la toile à poches? R.—Oui, monsieur."

This is an ex post facto deduction. It is rather obvious that this man did not realize that he was sitting on what turned out to be no more nor less than a powder keg.

Brazeau's testimony on this point is limited to the fact that there were bales in the shed.

True, there is the evidence of the experts called by Canada Steamship Lines Limited, namely, Royston Mitchell and Georges Newill.

Mitchell and Newill both suggest that the enlarging of the hole could have been done with an instrument called a reamer, the use of which would have been entirely free from danger. Perhaps a reamer could have been used but the question which has to be considered is whether in this particular instance the oxyacetylene torch was negligently used.

From the evidence of Mitchell and Newill it is clear that they base their opinion on two factors. The first is that there is always some danger of fire in the use of a torch of this nature. This is correct but becomes immaterial if the torch is used with prudence. The second is the fact that in this particular instance there were present in the shed bales of cotton and wool waste which to their knowledge are of a very inflammable nature, so inflammable that if fire broke out no precautions taken beforehand would be adequate (Mitchell, Case Page 79, Line 45). Both these gentlemen have the great advantage of hindsight and of technical knowledge. In addition the witness Newill has spent the greater part of his life investigating fires and knows how easily they may be caused.

We respectfully submit that the employees of the Department of Transport took ordinary precautions and the fact that had they known of the highly inflammable nature of cotton and wool waste added precautions or a different method of procedure might have been adopted does not, in the actual case, in the absence of such knowledge, render them liable for their actions.

That there was some danger to be expected was clearly contemplated by the Appellant's employees who took, we submit, reasonable steps to guard against that danger. There was nothing to indicate to them that there was any extraordinary danger and accordingly they were not bound to take any steps to guard against it.

It must be borne in mind that it has been laid down time and time again by this Honourable Court that the test to be adopted is not whether it is possible that some damage will arise from a particular action but the reasonable probability of it arising. In this connection we would refer to the following re-

marks of The Honourable Mr. Justice Taschereau in the case of *Ouellet vs. Cloutier* (1947 S.C.R. at P. 521) at Page 526:—

> "Il se peut qu'il était possible qu'un accident semblable arrivât. Mais ce n'est pas là le critère qui doive servir à déterminer s'il y a eu oui ou non négligence. La loi n'exige pas qu'un homme prévoie tout ce qui est possible. On doit se prémunir contre un danger à condition que celui-ci soit assez probable, qu'il entre ainsi dans la catégorie des éventualités normalement prévisibles. Exiger davantage et prétendre que l'homme prudent doive prévoir toute possibilité, quelque vague qu'elle puisse être, rendrait impossible toute activité pratique. (*Bacon v. Hôpital de St-Sacrement* (1); Savatier, *Responsabilité Civile,* tome 1, no 163; Mazeaud, *Responsabilité Civile,* 2e éd. tome 2, p. 465; Demogue, *Des Obligations,* tome 6, no 538, p 576; Planiol et Ripert, *Droit Civil,* 1930, *Des Obligations,* tome 6, p. 531; *Volkert v. Diamond Truck Co.* (2) *Donoghue v. Stevenson* (3)."

Reference may also be made to the decision in the case of *Thériault vs. Huctwith* (1948 S.C.R. P. 86).

We therefore respectfully submit that there is no proof of any negligence on the part of the Appellant's employees and accordingly all the Petitions of Right should have been dismissed. Obviouslv if this contention is upheld, the portion of our factum which follows and which deals with the position of the Appellant and the Respondent, Canada Steamship Lines Limited, arising out of certain clauses of the Lease, becomes entirely academic.

Moreover we would submit that the evidence shows that the sole effective cause of the fire was the negligence of the employees of the Respondent, Canada Steamship Lines Limited.

As has already been indicated, the employees of the Department of Transport had no knowledge that the bales just inside the shed and close to the door contained highly inflammable material. Accordingly we have submitted that the precautions taken were proper when looked at in the light of what they could reasonably have anticipated.

The same is not true of the responsible officers of Canada Steamship Lines Limited who were on the spot. They knew that the bales were highly inflammable, they knew what work was being done, they knew that an oxyacetylene torch was being used;

yet they did not take any steps to remove the bales or even to warn the employees of the Department of Transport of the danger of what they were doing. Here there was clearly negligence on their part and this omission was, in our submission, the sole effective cause of the fire.

In this connection, reference may be made to the following authorities:

(1) *Canadian International Paper Co. vs. Chenel,* (1935) 59 B.R. 242:—

"Commet une faute qui constitue la cause prochaine d'un incendie communiqué aux bâtiments voisins d'un établissement (comprenant une scierie et un chantier de bois non exploité) et encourt de ce chef une responsabilité civile par application de l'article 1053 C.C., le propriétaire de cet établissement qui maintient sur sa propriété une accumulation dangereuse de matières inflammables, néglige de compenser par des mesures de vigilance cette aggravation du danger inhérent à cet état de choses, laisse passer le public à travers cette propriété, et ne prend pas les précautions exigées par la prudence pour prévenir ou éteindre immédiatement les incendies qui peuvent être accidentellement allumés et pour en empêcher la communication aux propriétés voisines."

(2) *Clermont & al, et Charlebois,* (1924) 37 B.R. 151:—

"Pour repousser la présomption que la loi fait peser sur lui, dans le cas du sinistre de la propriété par lui occupée, le locataire, ou même le possesseur précaire, tout en n'étant pas tenu de prouver l'origine du feu, doit pouvoir établir qu'il n'a rien fait qui eut pu être cause de l'incendie et que celui-ci s'est produit sans sa faute, ou celle de personnes dont il est responsable, — sa responsabilité autrement se trouve engagée, envers le propriétaire."

(3) *Cairns vs. Canadian National Railways,* 9 C.R.C. 306;

(4) *Goodhue vs. Grand Trunk Railway Co.,* 10 L.N. 252;

(5) *Leger vs. The King,* 43 S.C.R. 164:—

In this case, sparks from a locomotive set fire to the roof of the freight shed from which it spread to the suppliant's pro-

perty. The roof of the freight shed had on several previous occasions caught fire in a similar way and the Government officials, although notified on many of such occasions, had only patched it up without repairing it properly.

HELD that the Government officials were guilty of negligence in having a building with a roof in such condition so near to the track and the owner of the property destroyed was entitled to recover the total amount of his loss.

Possibly the spark which set the fire off came from the oxyacetylene torch, but we submit that in law the only cause of the occurrence was the fault of Canada Steamship Lines Limited in failing either to remove the bales from the shed or to warn the employees of the Department of Transport of the danger of what they were doing.

It must not be forgotten that the burden is upon the suppliants to prove their cases. Moreover, it should be borne in mind that as between the Respondent Canada Steamship Lines Limited Articles 1629 and 1630 of the Civil Code create a legal presumption in favour of the Appellant that the fire was caused by the fault of the Lessee or of persons for whom it is responsible. Furthermore, it must be realized that as between Canada Steamship Lines Limited and the other suppliants, the duty was upon the former in virtue of Article 1802 C.C. "to apply in the keeping of a thing deposited the care of a prudent administrator."

We submit that far from having discharged the burden imposed upon the suppliants, the proof shows that the fire was due to the fault of Canada Steamship Lines Limited.

It has been urged that the Appellant is liable in virtue of Article 1054, C.C., on the ground that the damage was caused by a thing under its care, to wit, the oxyacetylene torch. This contention is, we submit, clearly untenable. The damage was not caused by the torch but by the use which was made of it. The torch continued at all times to do what it was supposed to do. It has been held time and again that where the damage is not caused by the thing but by human intervention in the use of the thing, Article 1054, C.C. has no application. See *Power vs. Lacombe,* 1928 S.C.R. 409; *Curley vs. Latreille,* 60 S.C.R. 140; *Wilson vs. C.P.R.,* 75 S.C. 510; *Montreal Tramways Co. vs Lapointe,* 31 K.B. 374; *Montreal Tramways Co. vs. Frontenac Breweries,* 33 K.B. 160. See also Perusse vs. Stafford, 1928 S.C.R. 416, where Anglin C.J.C. said (P. 418):

"In the second place, it is contended that fault is presumed against the defendant under article 1054 of the Civil Code, because the injury was caused by a thing under her care. Our view is that that provision has no application to a case where, as here, the real cause of the accident is the intervention of some human agency — the question whether such human agency — that of the driver in this case — is at fault being a question of fact. Damage is not caused by a thing which is in the control of the defendant within the meaning of art. 1054 CC, where it is really due to some fault in the operation or handling of the thing by the person in control of it"

Even if it could be said that Article 1054 C.C. was applicable to this case, the proof would abundantly justify the conclusion that the Appellant has exculpated itself. In this connection, we would refer to the following remarks of Sir Lyman Duff, C.J. in the case of *Colpron vs. Canadian National Railway Company,* 1934 S.C.R. 189, at P. 192:—

"It is not open to dispute that the language of the Judicial Committee just quoted embraces and, indeed, actually contemplates a case in which 'the damage complained of' has occurred in such circumstances that no reasonable precautions on the part of the employer could have prevented it. Nor do I think there is any room for controversy as to what 'reasonable precautions' means as applied to an issue raised by such a claim. I think one must put oneself in the position of an employer assumed to be both prudent and competent and to have applied his mind seriously to the risks of harm to which his employees might be exposed in the course of their employment. Then, I think, one must ask oneself whether the facts in evidence, in themselves or in the inferences properly arising from them, establish that the occurrences which caused the damage complained of would not fall within the risks reasonably foreseeable by such an employer so applying himself to the matter of the safety of his employees, under a proper sense of his duty in that respect. If the facts in evidence are such as properly to satisfy the tribunal of fact that this proposition has been established, then I think the exonerating paragraph applies and the defendant has brought himself within its terms."

Applying this principle to the present case, we respectfully submit that the Department of Transport employees were

prudent and competent and applied their minds seriously to the risks of harm which might be caused by the use of the oxy-acetylene torch, and establishes that the occurrence which caused the damage, i.e. the existence of the highly inflammable bales, did not fall within the risks reasonably foreseeable by such persons applying themselves to the matter of the safety of the property in the shed, under a proper sense of their duty in that respect.

2. THE PROVISIONS OF CLAUSE 7 OF THE LEASE CONSTITUTE A BAR TO ANY ACTION BY CANADA STEAMSHIP LINES LIMITED AGAINST THE APPELLANT.

Clause 7 of the Lease (Exhibit A, Case Page 131, Line 31) reads as follows:

> "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."

We respectfully submit that the language of this clause is clear and precludes any recourse being exercised by the Respondent Canada Steamship Lines Limited against the Appellant.

The Trial Judge apparently found no difficulty in interpreting the clause as his Notes of Judgment are devoted solely to a consideration of whether the clause was legally binding on the Respondent Canada Steamship Lines Limited.

Since the decision of the Supreme Court of Canada in 1897 in the case of *Glengoil Steamship Company vs. Pilkington*, 28 S.C.R., 146, it is clear that clauses of non-responsibility contained in contracts are legal and binding and are not against public order. It is also clear that by appropriate words one can stipulate against liability both for breach of contract and for tort. Taschereau J., at Page 156, discusses the value of these contracts the world over, and concludes, insofar as Quebec is concerned, as follows:

"Is a condition in a bill of lading, stipulating that the owners will not be responsible for the negligent acts of the master, illegal and void? The Court of Appeal answers in the affirmative, on the ground, as appears from their formal judgment, that such a stipulation is immoral and illegal because, being prohibited by Article 1676 of the Civil Code, it is unlawful under Article 990, which enacts that the consideration of a contract is unlawful when it is prohibited by law, or contrary to good morals or public order. We have come to the opposite conclusion. Far from prohibiting such a contract, this Article 1676 implies that it is a perfectly licit one. It certainly does not take away the right to expressly agree to a limitation of this liability. On the contrary, it impliedly admits it, for, if it did not exist, this enactment as to notices would altogether be a superfluous one."

The decision in the Glengoil case (supra) was followed by this Honourable Court in the latter decision of *The Queen v. Grenier,* 30 S.C.R. 42 and in the case of *Vipond vs. Furness Whithy & Co. Limited,* 54 S.C.R. 521, where Chief Justice Sir Charles Fitzpatrick said (P. 524):

"The binding effect of such a clause cannot be doubted."

The principle laid down in the Glengoil case (supra) has been followed by the Quebec Court of Appeal in at least two instances. The first is the case of *Canadian Northern Quebec Railway Company vs. Argenteuil Lumber Company,* 28 K.B., 408, where the holding is as follows:

"A party to a contract may legally stipulate that he will not be responsible for the negligence of his employees. Therefore, a clause in an agreement between a Railway Company and a private individual for the building of a siding, connecting with the Company's railways, which purports to exempt the Company for liability for injury or loss caused by its negligence or that of its servants in the use of said siding, is not against public order, as far as the fault of the Company's employees is concerned."

The second is the case of City of Montreal, 43 K.B 409, where the validity of such a clause was also upheld. The holding is as follows:

"La clause d'un contrat stipulant immunité en faveur d'une partie, pour le cas de dommages susceptibles d'être causés par sa propre faute, sans distinguer entre la faute contractuelle et la faute délictuelle, telle distinction n'existant pas dans notre loi, — n'est pas contraire à l'ordre public, — est légale et valide. En conséquence, dans l'espèce, une compagnie de chemin de fer dont la voie traverse à niveau la rue d'une municipalité, peut s'immuniser et se garantir par contrat avec la dite municipalité contre la responsabilité lui résultant d'accidents pouvant survenir à la traverse, même par la faute de ses propres employés."

Translated, this holding reads as follows:

"The clause in a contract stipulating immunity in favour of one party, in the case of damages susceptible of being caused by his own fault, without distinguishing between contractual fault and delictual fault, such distinction not existing in our law, — is not contrary to public order, — it is legal and valid. In consequence, in this case, a Railway Company whose tracks cross the street of a municipality at a level crossing, may in a contract with the said municipality free itself of the liability resulting from accidents happening at the crossing, even by the fault of its own employees."

It was said in the Glengoil case (supra) that a condition of this nature is to be construed strictly and not to be extended to any case other than those expressly specified. However, the rule of strict construction would seem to play no role in the present instance where the words used are precise and admit of but one meaning

Respondent Canada Steamship Lines Limited will contend that where, as in Clause 7 of the Lease, liability is excluded without specific reference to negligence or fault, only contractual liability and not delictual liability is excluded. In other words, it will be argued that Clause 7 only excludes the right to obtain damages under the contract of lease and does not exclude the right to recover damages for tort.

The decision of this Honourable Court in the case of *Ross v. Dunstall*, 62 S.C.R., 393, may be cited in support of the proposition that there can be at one and the same time contractual liability and delictual liability, but that does not mean that

there is any essential difference between contractual fault and delictual fault. As appears from the following remarks of the Honourable Mr. Justice Taschereau, in the case of *Pettigrew vs. McLean*, 1945, S.C.R. 62, at Page 66, the contrary would seem to be the case:

> "Dans les causes que je viens de citer, les faits ne se présentaient pas comme se présentent ceux qui font l'objet du présent litige. En effet, l'intérêt qu'il y avait de distinguer entre la responsabilité contractuelle ou quasi-délictuelle ne reposait que sur la question de savoir si le conducteur bénévole était responsable de sa faute lourde, de sa faute légère, ou de sa faute très légère. La jurisprudence a répondu que dans l'un ou l'autre cas, la faute lourde n'était pas nécessaire pour engendrer la responsabilité, et que la preuve d'une faute très légère ou légère était suffisante, pour qu'il y ait responsabilité, quasi-délictuelle dans le premier cas, et contractuelle dans le second. La différence entre les fautes légère et très légère semble bien difficile à établir, et j'avoue qu'il m'est impossible, à moins de rester dans les sphères de la théorie, de tracer une ligne de démarcation facilement applicable aux cas concrets qui se présentent tous les jours. Aussi, est-il moins nécessaire de rechercher s'il y a responsabilité quasi-délictuelle ou contractuelle du conducteur bénévole, quand les parties sont domiciliées dans la province de Québec, où l'accident se produit, et où s'instruit le procès. Que la responsabilité soit quasi-délictuelle ou contractuelle, peu importe! Elle est engendrée, dans les deux cas, par des fautes dont la différence de degré est à peine déterminable. Le demandeur n'a qu'à poser le dilemne, et il doit obtenir des dommages."

Reference should also be made to the judgment in the case of *Canadian National Railways vs. City of Montreal*, 43 K.B. 409, where it is categorically stated that the law of Quebec does not recognize any distinction between contractual and delictual fault. (Page 410):—

> "Considérant que la prétention de l'intimée que la dite clause ne doit pas recevoir son application, parce que l'appelante se serait rendue coupable de faute lourde, fût-
>
> elle fondée en fait, ne l'est pas en droit, notre loi — sauf la loi sur les accidents du travail — ne connaissant pas de

distinction entre les fautes, qu'elles soient contractuelles, ou délictuelles (16 Laurent, 230; Rapport des Codificateurs, 8 de Lorimier, page 624-5)."

The matter is more fully dealt with in the notes of Surveyer J., sitting *ad hoc* who said (Page 412):—

"En matière de faute délictuelle, Laurent dit (vol. 16, No. 230); 'Qui a jamais songé à appliquer aux délits et aux quasi-délits la théorie des fautes graves, légères in abstracto, légères in concreto?'

C'est donc en matière contractuelle qu'existe cette définition. En matière contractuelle, voici ce que disent nos codificateurs (8 de Lorimier, pp. 624-5; 'L'ancienne distinction, entre culpa lata, culpa levis et culpa levissima, qu'on supposait dérivée du droit romain, mais que Le-Brun et, après lui, Marcadé, soutiennent être une invention des juristes, prévalent dans l'ancien droit français et souvent donnait lieu à de grandes subtilités et à des inconvénients dans la pratique. Le Code français a sagement aboli ces distinctions et adopté une règle simple qui a été formulée dans notre article amendé 1064. (4 Marcadé, nos. 506-7)'.

Si la faute lourde n'existe pas, il est inutile de considérer si le fait reproché à l'appelante constituerait ou non faute lourde dans les pays où elle existe. En France, on l'a définie: la faute commise à dessein et en pleine connaissance de cause: (Sirey, 1882-2-24). Ce ne serait pas notre cas."

To the same effect see also the following extracts from Mazeaud, *"Traité de la Responsabilité Civile"*, Tome 1, Nos. 688 and 691.

"688. De nombreux auteurs affirment qu'il y a sur ce point une différence sensible entre la faute quasi-délictuelle et la faute contractuelle. La faute quasi-délictuelle, c'est, d'après eux, la faute que ne commet pas l'excellent père de famille; aussi la culpa levissima suffit-elle à engager la responsabilité quasi-délictuelle. La faute contractuelle consistant au contraire dans la faute que ne commet pas le bonus pater familias, c'est la culpa levis qui est nécessaire pour engager la responsabilité contractuelle.

691. Voilà pourquoi les tribunaux n'établissent aucune distinction quant au degré entre la faute quasi-délictuelle et la faute contractuelle (1) ; pour eux, culpa levis et culpa levissima, c'est tout un ; pratiquement, il n'y a pas de différence entre le bon et l'excellent père de famille (2)."

Moreover, even if the distinction existed, the Respondent's position would be untenable. In the present instance, the Clause of non-responsibility is found in the Lease and at the very least was to apply to any liability on the part of the Lessor arising out of contractual fault. This liability would arise out of "faute légère" (slight fault). Such being the case, what justification would there be for holding that delictual fault "faute très légère" (very slight fault) would not be excluded. Surely, if one excludes the greater fault, the lesser fault is also excluded.

The Respondents' contention is also made untenable by the following decisions:

*The Queen vs. Grenier,* 30 S.C.R. 41.

*Conrod vs. The King,* 49 S.C.R. 577.

*Gagnon vs. The King,* 17 Ex. R. 301.

*Gingras vs. The King,* 18 Ex. R. 248.

*Thompson vs. The King,* 20 Ex. R. 467.

In each of the above cases the provision in the contract of employment was that "the Railway Department shall be relieved of all claims for compensation for injury or death of any member". There was no specific reference to claims for negligence. Notwithstanding in each instance it was held that an action in damages for negligence was barred by virtue of the clause of non-responsibility.

Certain cases cited in support of the proposition that only contractual fault is excluded by such a clause must now be examined.

The first is the decision of the Court of Appeal in 1929, in *Quebec Harbour Commissioners vs. Swift Canadian Company,* 47 K.B., 118. The headnote reads in part as follows:

"Dans un contrat d'entreposage, la clause d'exonération de responsabilité est valide en tant qu'elle s'applique à la faute contractuelle. Elle libère le débiteur de la faute légère, mais non de la faute lourde ni de la faute délictuelle."

There would appear to be nothing in the formal judgment of the Court, however, or in the notes of Bernier J., to justify the headnote.

Bernier J. cites at considerable length the jurisprudence and doctrine in France with reference to clauses of non-liability. Under French law, according to some of the authors, one cannot contract out of delictual fault and, as regards contractual fault, such a clause only changes the burden of proof. This is quite contrary to our law as established by the case of Glengoil Steamship Company vs. Pilkington, 28 S.C.R., 146.

Judge Bernier then cites the decision in the Glengoil case (supra) and concludes as follows:

"Avec ces autorités et ces décisions, il me semble qu'il faut conclure comme suit:

'Ou bien la clause de non-responsabilité, mentionnée sur le reçu d'entrepôt, lequel reçu d'entrepôt a été remis à la demanderesse, à une pleine et entière valeur, ou bien cette clause met simplement le fardeau de la preuve d'une faute, sur les épaules de la demanderesse. La demanderesse a-t-elle prouvé, dans son enquête devant la Cour qu'il, y avait faute contractuelle de la part de la défenderesse? Je ne le crois pas.

'Ou bien encore, cette clause liait-elle la demanderesse, à toutes fins que de droit, dans son contrat d'entreposage? Je réponds affirmativement.' "

Judge Bernier says:

"Either the clause of non-responsibility mentioned in the warehouse receipt has full and complete effect or else this clause simply places the burden of proof upon the shoulders of the plaintiff."

He continues:

" 'Has plaintiff proven to the Court that there was no contractual fault on the part of the defendant? I do not believe so. Or, on the other hand, does this clause bind the plaintiff, for all legal purposes, in its warehousing contract! I answer affirmatively'."

Judge Bernier's conclusion can be read in one of two ways. It may mean that the clause in question exonerated the defendant from all liability whether contractual or delictual, or it may mean that the clause simply excluded all liability under the contract. But in neither event is there any statement that because fault or negligence was not mentioned in the contract, the rule of law is that only contractual fault is excluded. This point does not seem to have been considered by Judge Bernier at all nor was it necessary for the determination of the case. The reporter's headnote is in any event erroneous and this may explain the subsequent decisions which we will now discuss.

The next case is that of *Thedford Celery & Fruit Co. vs. Harbour Commissioners of Montreal,* 74 S.C., 451, where the Harbour Commissioners had stipulated as follows:—

"3. All goods are stored at the storer's risk of loss or damage caused by water, heat, frost, dampness, rush, dust, moths, rats, mice, vermin, depreciation from time, leakage, failure to detect leakage, or concealed leakage."

Mr. Justice McDougall held that such a clause could not relieve against delictual fault, but shifted the burden of proof to plaintiff. As a result, if the latter fails to establish fault, his action should be dismissed.

Judge McDougall bases himself upon the headnote in the case of the *Quebec Harbour Commissioners vs. Swift Canadian Company.* We have already indicated that there is nothing in that case to justify the headnote. McDougall J. also refers to French authors whose views on the points under consideration are not in conformity with our law.

In another case of *Lavoie vs. Lesage,* 77 S.C., P. 150, Hon. Mr. Justice Pratte seems to have fallen into the same error for we read at Page 151:—

"Considérant que si, par l'acquiescement du demandeur, cette déclaration du défendeur équivaut à une clause

de non-responsabilité faisant partie du contrat intervenu entre le demandeur et le défendeur, cette clause doit être considérée comme ne visant que la responsabilité contractuelle du débiteur; qu'en effet, en l'absence de preuve au contraire, on ne peut présumer que les parties au contrat, lorsqu'elles ont convenu sur ce point, aient envisagé d'autres relations juridiques que celles découlant du contrat qu'elles formaient, et que par conséquent, la clause d'exonération précitée n'a d'autre effet que d'affranchir le débiteur de l'obligation de prouver que s'il n'a pu rendre la chose dont il avait la garde la cause en est à un cas fortuit ou à une force majeure, et n'enlève pas au créancier le droit de réclamer des dommages-intérêts s'il peut prouver la faute du débiteur; que même si la clause d'exonération précitée pouvait libérer le débiteur de certaine responsabilité quasi-délictuelle elle serait sans effet sur la responsabilité découlant de sa faute lourde."

An analysis of the three foregoing cases therefore reveals that an assertion that contractual liability only is excluded if fault or negligence is not specifically mentioned in the clause of non-responsibility does not rest on any good authority. The reason for this erroneous viewpoint is the fact that in France generally speaking it is held to be against public order to exclude delictual liability. Accordingly in France as a matter of interpretation, such a clause would be held to exclude contractual liability rather than delictual liability. In Quebec delictual liability may be excluded and therefore there is no need for any such rule of interpretation.

There are five further cases to which reference should be made.

The first is the decision of the Court of Review in 1915 in the case of *Bonhomme vs.The Montreal Water & Power Company,* 48 S.C., 486. In that case the Crown, after having granted a lease to the plaintiff, granted leasehold rights in the same property to the defendant. Both leases contained a clause that the lessee should have no right of action against the Crown for damages. In an action by the first lessee against the second lessee for damages Judge Panneton said: (Page 489)

"Dans le bail du demandeur et celui de la défendederesse, il y a également une clause par laquelle l'un et l'autre renoncent à toute demande en dommages de quel-

que nature que ce soit, contre le gouvernement. J'interprète cette clause comme libérant le gouvernement de toute responsabilité pour tous autres dommages qui peuvent être causés aux locataires par n'importe quelle personne ou n'importe quelle chose autres que par les actes du gouvernement. Je ne puis pas étendre la signification de cette clause comme donnant droit au gouvernement d'infliger aux locataires tout dommage qu'il lui conviendra d'infliger."

These remarks while obiter are clearly in accordance with sound principles as a clause of non-responsibility cannot give one person the right to deliberately cause damage to another. This would be against public order.

While the authorities agree that one cannot stipulate against the consequences of dol or fraud this of course does not mean that one cannot stipulate against fault. (See *Glengoil Steamship Co. vs. Pilkington* (Supra).

The second decision which is more pertinent to the present case, is that of *Watson vs. Dame Philipps,* 62 S.C., 448. In that case the lease provided:—

"That the lessee shall give to the lessor prompt written notice of any accidents to, or defects in the water pipes, electric light fixtures or heating apparatus, in order that arrangements may be made to have the same remedied with due diligence. And the lessor shall not be liable for any damages to property in or upon said demised premises, or buildings, from water, steam, snow or rain finding its way into said premises or building, from any cause whatever occurring."

The lessee sustained damage because the lessor's employee turned on the water on the upper floor of the building without closing the taps. As a result, the plaintiff's store was flooded. It was urged that the clause above cited barred any recourse by the plaintiff.

The Court held: (P. 449)

"Considering that to enable defendant to contract against the effect of her employee's negligence the contract should be so clear and unambiguous as to not be open to any reasonable doubt as to the intention of the parties;

Considering that by the wording of said clause it does not seem to be the intention of the parties to contract the defendant out of her employee's negligence;

Considering therefore that it is not necessary for the purpose of this case to decide if defendant could contract herself out of the liability for the negligence of her employee which is at least very doubtful;"

Accordingly judgment went for $90.00.

As far as one can see from the report, the Court did not consider any of the cases which we have discussed and simply referred to the French authors and to the decision of this Honourable Court in the case of *Trainor vs. Black Diamond Company of Montreal,* 16 S.C.R., 157, an appeal from the Supreme Court of Prince Edward Island which, insofar as applicable, appears to favour the defendant rather than the plaintiff.

All that one can say about this case is that it would clearly appear to have been wrongly decided. A different result in our submission should have been reached when one considers the apparent clarity of the wording of the clause there under consideration.

The third decision is that of Pagnuello J. in the case of *Brasell vs. La Compagnie du Grand Tronc,* 11 S.C., 150, to which reference is made by the trial judge in his notes of judgment. (See Case page 329).

This case was decided on February 4th, 1897, and is based upon a consideration of the French Authorities. In view of the later decision of this Honourable Court in the case of the *Glengoil Steamship Co. vs. Pilkington,* 28 S.C.R., 146, the Brasell case cannot be considered as being any authority.

Two other cases may be briefly noted. In *The Manufacturers Paper Company vs. The Cairn Line Steamship Company.* 38 S.C., 357, Archibald J. refused to follow the Glengoil decision while in *Trudeau vs. Cite de Montreal,* 78 S.C., 536, Fortier J. clearly misapplied the decision of the Court of Appeal in *C.N.R. vs. Cite de Montreal,* 43 K.B. 409.

We respectfully submit that an examination of the jurisprudence indicates that there is no good authority for the proposition that, unless expressly mentioned, delictual liability is

not excluded by a clause such as the one under consideration. Even if French authors and commentators can be cited to contrary effect, due to the difference between the law in France and the law in Quebec, they cannot be accepted as any guide. As already stated, in France, almost all the authors agree that is is against public order to stipulate against delictual liability. In this connection, reference may be made to Mazeaud, *Traité de la Responsabilité Civile,* Tome 3, Nos. 2570 et 2571.

Moreover, the principle for which the Respondent Canada Steamship Lines Limited contends, is, we submit, quite beyond all reason. In virtue of Clause 8 of the Lease (Exhibit A, Case Page 131, Line 38), the Lessor was at all times at his own costs to maintain the shed. The repairs were, therefore, being effected pursuant to the Appellant's obligations under the Lease and if they were carried out negligently, the Lessee would normally have had an action in damages under the provision of sub-section 3 of Article 1641 of the Civil Code. Such a recourse being barred by Clause 7 of the Lease, there would be an absolute lack of logic in permitting the Lessee to recover the same damages, simply because it based his action upon Article 1053, C.C. instead of Article 1641 (3) C.C. There is no rule of construction that permits such an absurd result and the reason for the lack of any such rule is the absurd result which it would produce.

The parties to the contract in the Lease must have intended to be governed by the words they used, and, it having been stipulated that the Lessee was to have no claim against the Lessor, for damages to the types of property mentioned in Clause 7, the rights and obligations of the parties are restricted according to its terms. In this connection, the matter is well put by Savatier (*Traité de la Responsabilité,* Tome 1, No. 153):

> "153. Non exclusion de la responsabilité délictuelle par le contrat.
>
> Quand deux fautes, l'une contractuelle, l'autre délictuelle, co-existent, encore faut-il que l'utilisation concurrente de l'une ou de l'autre soit conciliable. Or, le contrat peut faire obstacle à l'utilisation de la faute délictuelle. Peu importe que, d'après une jurisprudence d'ailleurs trop absolue, les clauses de non-responsabilité soient interdites en matière délictuelle, il n'en est pas moins vrai que le contrat peut être construit de telle manière qu'il ne laisse pas concevoir, dans certains compartiments, l'usage d'une responsabilité délictuelle, parce qu'il l'absorberait dans la responsabilité contractuelle.

Et d'abord, nous croyons que, d'une façon générale, le simple devoir de ne pas nuire à autrui, bien qu'il puisse, en l'absence de tout contrat, fonder une responsabilité délictuelle, est recouvert et absorbé par le contrat, toutes les fois que la cause du dommage réside exclusivement dans l'inexécution d'un engagement contractuel. Même si l'inexécution, par le bailleur, de ses obligations, abime les meubles du locataire, nous pensons que la faute commise reste contractuelle, parce que le devoir général de ne pas nuire à autrui est ici absorbé, pour le bailleur à l'égard du locataire, par ses obligations contractuelles. Mais il en serait autrement, comme nous l'avons dit, si le bailleur avait violé, outre le contrat, des devoirs déterminés à lui imposés par la loi et la morale."

This author says:—

"When two faults, one contractual and the other delictual, exist at the same time, again it is necessary that the concurrent application of one or the other must be reconcilable. However, the contract may create an obstacle to the use of delictual fault. It matters little that in accordance with a much too absolute jurisprudence, clauses of non-responsibility are forbidden in delictual matters because it is none the less true that the contract may be drafted in such a way that it cannot be construed to contemplate in certain parts the use of delictual responsibility because it would be absorbed in the contractual responsibility.

Moreover, we believe, generally speaking, that the simple duty not to cause damage to another, although it may in the absence of any contract create a delictual liability, is covered and absorbed by the contract each time that the cause of damage is to be found exclusively in the inexecution of a contractual obligation. Even if the inexecution by the Lessor of his obligations causes damages to the property of the Lessee, we think that the fault committed remains contractual because the general duty of not causing damage to another is here absorbed for the Lessor as regards the Lessee by his contractual obligations. But it would be otherwise, as we have already said, if the Lessor had violated outside the contract the determinate duties imposed upon him by the law and by good morals."

If, therefore, as Savatier says, one cannot invoke delictual liability when the fault is at the same time contractual, it would seem that the present case would fall within the category of contractual fault and be excluded.

It must not be forgotten that the lease is a contract entered into between His Majesty the King and Canada Steamship Lines Limited, a large corporation having very extensive business activities. Under such circumstances, it is to be presumed that the terms of the lease received the serious consideration of the officials and advisers of Canada Steamship Lines Limited and that when it agreed to a contract embodying Clause 7, it intended to be governed by the plain words thereof, namely, that it was to have no claim against the Crown for any damage to anything while in the shed.

But, coming back to the main submission, it is our contention that the language used by the parties must receive its full effect, irrespective of any question of "faute contractuelle" or "faute délictuelle". The distinction may be important in France where, according to some authors, it is against public order to exclude delictual liability. This is not the situation in Quebec and, accordingly, the French doctrine has no weight.

Applying the plainwords of the text to the facts of this case, we respectfully submit that Clause 7 of the Lease is a bar to any recourse by Canada Steamship Lines Limited.

3. IN VIRTUE OF CLAUSE 17 OF THE LEASE CANADA STEAMSHIP LINES LIMITED IS OBLIGED TO INDEMNIFY AND SAVE HARMLESS THE APPELANT WITH RESPECT TO ANY LIABILITY ON HIS PART ARISING OUT OF THE FIRE.

Clause 17 of the Lease (Exhibit A, Case Page 133, line 35) reads as follows:—

> "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 rights arising hereunder."

It has been established without contradiction that the repairs which were being effected at the time of the fire were being made by the employees of the Lessor pursuant to a request made by the Lessee. (See Depositions of J.B.O. St. Laurent, Case Page 110 et seq., R. Parsons, Case Page 113 et seq., and W. Wood, Case Page 120 et seq.).

By the Third Party proceedings the Lessee prays that the Lessor indemnify and save him harmless from and against what certainly falls within the category of "all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted." Furthermore, the claims, demands, damages, suits and proceedings of the Respondents are based upon or occasioned by and are attributable to an action taken, a thing done, and the exercise of rights under the terms of the lease, viz., the making of repairs pursuant to the obligation of the Lessor under Clause 8 of the Lease.

We therefore respectfully submit that the demand of the Appellant to be indemnified by the Respondent, Canada Steamship Lines Limited, is well founded.

All that has been said above with reference to Clause 7 is equally applicable in considering Clause 17. There is this to be added which is important. Even if it could be said by any stretch of the imagination that Clause 7 does not exclude delictual liability, the same cannot be said as regards Clause 17 which deals with the right of the Crown to be indemnified with respect to claims made by Third Persons. The claims of such Third Persons could only arise out of a tort and accordingly the intent of the parties to exclude delictual liability is readily apparent.

Furthermore, it must be emphasized that Clauses 7 and 17 complement and supplement each other. By Clause 7 any claim by the Lessee against the Lessor is precluded and by Clause 17 the Lessee is bound to indemnify the Lessor with respect to claims made by Third Parties. Looking at both Clauses together it is, we submit, obvious that the intent of the parties was to free the Crown from all liability whether to the Lessee or to Third Parties arising out of the lease or anything done in virtue of the lease.

## 4. THERE IS NO RULE OF LAW WHICH PRECLUDES A PERSON FROM STIPULATING AGINST THE CONSEQUENCES OF HIS GROSS NEGLIGENCE.

In considering the validity of Clause 7, we have already had occasion to analyze and criticize the judgments of the Quebec Courts which are cited as authorities for the proposition that gross negligence cannot be excluded.

In the case of *Commissaires du Havre vs. Swift Canadian Company,* 47, K.B. 118, the headnote which might appear to indicate that this was the holding of the Court is erroneous and not justified by anything contained in the judgment. Indeed, a critical examination of the notes of Bernier J. would seem to indicate that he entertained a contrary opinion. The subsequent cases of *Thedford Celery & Fruit Company vs. Harbour Commissioners,* 74 S.C. 451 and *Lavoie vs. Lesage,* 77, S.C. 150, would seem to be based on the headnote in the case of *Commissaires du Havre vs. Swift.* Actually in the case of Lavoie and Lesage, no authority cited. Moreover, no consideration whatsoever has been given to the principle laid down by this Honourable Court in the case of *Glengoil Steamship Company vs. Pilkington,* 28, S.C.R. 146.

Likewise, no consideration has been given to the judgment of the Court of Appeals in the case of *Canadian National Railways vs. the City of Montreal,* 43 K.B. 409 where the proposition that gross negligence cannot be excluded is categorically refuted. In that case the Canadian National Railways Company had closed the railway crossing at St. Elizabeth Street. On two separate occasions the City of Montreal had sought leave from the Board of Railway Commissioners to reopen the crossing, but without success. Later on a temporary arrangement was entered into between Canadian National Railways Company and the City of Montreal which was embodied in a contract containing the following provision:—

> "The said corporation further agrees to hold the company, free and harmless, from any expense in connection with such temporary arrangement, and protect them from all claims, costs, proceedings, and expense for accidents occurring during its continuance."

Subsequently, one Copping was injured while crossing the tracks, the barriers not being down. The Railway Company was sued and took a warranty action against the City of Montreal basing its claim upon the clause cited above.

It clearly appears from the report (P. 412) that the City pleaded that the clause could not cover "faute lourde" of the Railway employees so as to exonerate it from the resultant liability.

This contention was rejected by the Court in the following language (Page 410):—

> "Considérant que la prétention de l'intimée que la dite clause ne doit pas recevoir son application, parce que l'appelante se serait rendue coupable de faute lourde, fût-elle fondé en fait, ne l'est pas en droit, notre loi — sauf la loi sur les accidents du travail — ne connaissant pas de distinction entre les fautes, qu'elles soient contractuelles, ou délictuelles (16 Laurent, 230; Rapport des Codificateurs, 8 de Lorimier, Page 624-5)."

To the same effect are the following remarks of the Honourable Mr. Justice Surveyer who was sitting ad hoc and who rendered the judgment of the Court (Page 412):—

> "Mais l'intimée ajoute, avec le savant juge de première instance 'que la clause de garantie invoquée par la demanderesse en garantie ne peut couvrir les fautes lourdes de ses employés et l'exonérer des responsabilités qui en découlent.'
>
> L'intimée cite, à l'appui de ce principe, Boutaud. . . (factum, p. 14), s. 65.
>
> "Il ne s'agit pas ici de faute intentionnelle ou de dol. L'intimée, comme le savant juge, plaide 'faute lourde'.
>
> A cela, il y a une réponse bien simple: Sauf depuis la loi des accidents du travail, qui a créé une faute qualifiée d'inexcusable, et qui tient le milieu entre la faute intentionnelle et la faute lourde du droit romain, nous ne connaissons pas de distinction entre les fautes, ni délictuelles, ni contractuelles.

En matière de faute délictuelle, Laurent dit (vol. 16 no 230): 'Qui a jamais songé à appliquer aux délits et aux quasi-délits la théorie des gautes graves, légères in abstracto, légères in concreto?'

C'est donc en matière contractuelle qu'existe cette définition.

10

En matière contractuelle, voici ce que disent nos codificateurs 8 de Lorimier, pp. 624-5): 'L'ancienne distinction entre culpa lata, culpa levis et culpa levissima, qu'on supposait dérivée du droit romain, mais que LeBrun et après lui, Marcadé, soutiennent être une invention des juristes, prévalait dans l'ancien droit français et souvent donnait lieu à de grandes substilités et à des inconvénients dans la pratique. Le Code français a sagement aboli ces distinctions et adopté une règle simple qui a été formulée dans notre article amendé 1064. (4 Marcadé, nos. 506-7)'.

20

Si la faute lourde n'existe pas, il est inutile de considérer si le fait reproché à l'appelante constituerait ou non faute lourde dans les pays où elle existe. En France, on l'a définie: La faute commise à dessein et en pleine connaissance de cause: (Sirey, 1882-2-24). Ce ne serait pas notre cas."

30 It is also pertinent to note that in the case of *Canadian Northern Railways vs. the City of Montreal* the Court of Appeal followed its own judgment in the case of *Canadian National Quebec Railway vs. Argenteuil Lumber Company,* 28, K.B. 408, where the holding was as follows:—

"A party to a contract may legally stipulate that he will not be responsible for the negligence of his employees. Therefore, a clause in an agreement between a Railway Company and a private individual for the building of a siding, connecting with the company's railways, which purports to exempt the company from liability for injury or loss caused by its negligence or that of its servants in use of said siding, is not as being against public order, as far as the fault of the company's employees is concerned."

40

Both these judgments are of course based on the principle laid down by this Honourable Court in the case of *Glengoil Steamship Company vs. Pilkington* (supra).

The learned Trial Judge in his judgment professes to follow the law in France and he quotes numerous authorities which at first glance would seem to bear out his contention.

We would first point out that neither the legal decisions of the Courts in France upon kindred subjects nor the reasoning of French jurists can bind Canadian Courts. See *McLeod vs. Attorney General For Quebec,* 15 D.L.R. 855, at P. 868, *McArthur vs. Dominion Cartridge Company,* 1905 A.C. 72, at P. 77, *Quebec Railway Light, Heat & Power Company vs. Vandry,* 52 D.L.R. 136, at P. 138-139, *Curley vs. Latreille,* 60 S.C.R. 131, Anglin, J. at P. 134, Mignault, J. at P. 177

Moreover, we respectfully submit that the point of view adopted by Angers, J is not only not in conformity with our law but also not in keeping with contemporary thinking in France.

At the outset it is necessary to understand the various principles contended for by the French authors and commentators.

Many authors can be cited for the proposition that delictual liability cannot be excluded because to do so would be against public order. This is clearly at variance with our law. Secondly, as regards the exclusion of contractual liability, there is a considerable difference of opinion. Some writers contend that it only reverses the burden of proof while others take the position that it should receive full effect subject to the limitations hereinafter mentioned.

All agree that a person cannot stipulate against the consequences of his wilful actions or dol. It is said that to allow this to be done would defeat any contract and in effect result in the party not being bound at all. This principle is well established and would appear to be in accordance with logic and sound common sense.

The problem which arises is whether a person can exclude his liability arising out of his "faute lourde" or gross fault. The writers who contend that such liability cannot be excluded base themselves on the maxim, "culpa lata dolo aequi paratur". They therefore reason that faute lourde is equivalent to dol or fraud and should be dealt with accordingly.

The writers who take the opposite view reason that faute lourde is still faute, i.e., unintentional action, and urge that as

long as wilfulness cannot be inferred there is no reason why it should be assimilated to dol.

Before passing on to a consideration of the authors who adopt this point of view, it would be well to make the following comments with reference to the judgment a quo.

(a) On Page 325, Line 20, the learned Trial Judge refers to Boutaud: "Des clauses de non-responsabilité et de l'assurance de la responsabilité des fautes."

As will appear further on, the citation is taken out of its context. The writer does not say in the extract cited by Angers J. that a clause excluding faute lourde is invalid. He simply says that if faute lourde is excluded the party is bound by his contract and may be sued on it although his liability is restricted.

(b) Savatier, "*Traité de la responsabilité civile*", which is cited by Angers J. at Pages 325 and 326 of the case, gives it as his opinion that a clause excluding liability with respect to the dol or faute lourde of a person's employees is valid.

(c) Mr. Justice Angers refers to Josserand at Pages 326 and 327 of the case. Actually, this author is definitely against the principle that faute lourde cannot be excluded although he admits there are authorities to the contrary. (Josserand, No. 612 and No. 624).

Turning now to the authors in France in favour of the principle that the consequences of faute lourde may be excluded, we would make the following references:

P. Voisinet — "*La Faute Lourde en droit privé français*", page 69:—

> "1. — L'exonération de la faute lourde n'est contraire ni à la morale, ni à l'ordre public.
>
> S'exonérer des conséquences de sa faute n'est-ce pas acquérir le droit de mal? Sous l'apparence d'une faute grossière, n'est-ce pas se réserver le droit d'agir intentionnellement et dans l'intention de nuire?
>
> Ce raisonnement, qui a été tenu, contient une erreur certaine, car le débiteur, malgré la clause, voit ses obliga-

tions rester les mêmes. Il ne peut commettre un acte intentionnellement nocif, il ne peut même pas se relâcher de sa diligence habituelle sans commettre un dol.

Par la clause, le débiteur n'est pas dispensé de remplir ses obligations, il est simplement à l'abri de toute responsabilité au cas où il commettrait une faute involontaire, même lourde. Aussi ne faut-il pas ici faire appel à l'article 1132 c. civ. qui oblige le débiteur à exécuter le contrat de bonne foi. La clause ne permet en rien de se soustraire à son devoir. Ce n'est pas manquer à la bonne foi que de faillir involontairement, même par faute grossière. La bonne foi ne disparaît qu'avec l'intention de nuire ou la conscience du mal que l'on veut causer au prochain.

Boutaud, depuis longtemps, a démontré qu'il fallait permettre l'exonération de la faute lourde. Il est curieux de constater combien pourtant il fit peu école. Son argumentation serrée semble néanmoins irréfutable. — Elle a été reprise par Fromageot et Sainctelette et plus près de nous par M. Josserand, qui soutiennent eux aussi l'exonération possible de la faute lourde.

On est hanté, écrit Boutaud, par l'idée de l'immoralité de la faute lourde; c'est parce qu'on se figure que le débiteur exonéré acquiert la liberté de nuire à son créancier. Mais c'est là une fausse conception de la clause. Le débiteur qui stipule qu'il ne devra pas de dommages-intérêts pour les fautes mêmes lourdes qu'il pourra commettre dans l'exécution de son contrat, reste obligé. Il ne pourra même pas accomplir l'obligation promise d'une façon extravagante, (L'extravagance intentionnelle). Le débiteur qui néglige les soins que lui impose le contrat parce qu'ils se sent protégé par la clause, commet un dol. La jurisprudence a ici encore confondu dol et faute lourde; elle a commis, dit, Sainctelette, dans une formule heureuse, 'cette monstruosité d'assimiler, si gros qu'il soit, le manque d'exécution de bonne foi. . . à un dol, à un fait dommageable posé intentionnellement et méchamment'.

Le reproche d'immoralité qu'on adresse aux clauses est donc sans fondement. Quant à l'ordre public, les clauses ne lui sont pas si contraires qu'on vaut bien le dire. Des intérêts multiples continuent à solliciter le débiteur qui a stipulé l'exonération de sa faute lourde. Il garde un inté-

rêt de premier ordre à donner à ses affaires tous les soins qu'il doit y apporter. Le client n'abonde pas chez le commerçant ou chez l'industriel négligent.

Au point de vue de l'intérêt général et non plus seulement du créancier, on a dit que les clauses étaient susceptibles d'entraîner des pertes de biens. Le débiteur qui ne risque rien sera normalement moins diligent que celui qui sait qu'il portera le poids des dommages causés par sa faute. La société, l'ordre public, sont intéressés à ces pertes de richesses. La réponse est facile si l'on pense qu'il est, en principle, parfaitement licite pour un propriétaire d'un bien, de le détruire ou de consentir à sa destruction. La tentative de suicide n'est-elle pas elle-même punie?

L'ordre public, au surplus, est une notion si vague qu'elle peut servir à toutes interdictions. Elle s'estompe parfois si bien derrière des intérêts pratiques qu'on ne l'aperçoit plus. On a admis petit à petit les assurances. Ce qui était contraire à l'ordre public, voire à la morale, est devenu un bienfait de notre temps. Qui oserait aujourd'hui proscrire l'assurance? Et pourtant, si l'on déclare illicite de faire supporter à une personne les conséquences de la faute d'une autre comme cela se produit dans les clauses, il l'est tout autant de les faire supporter à plusieurs, chacune pour une fraction, même si cette fraction est négligeable.

Si la faute légère n'est pas contraire à l'ordre public, la faute lourde ne l'est pas non plus. Pourquoi distinguerait-on dans une même notion? La faute par essence est non intentionnelle à tous ses degrés. 'La négligence', écrit Boutaud, 'l'imprudence, la maladresse sont des défauts inhérents à la nature humaine, ce ne sont pas des vices dont il soit défendu, d'éluder les conséquences quand on le peut'. La jurisprudence a admis qu'on pouvait ne pas répondre de sa faute légère. Elle a résolument laissé de côté le principe qui veut que chacun soit personnellement tenu des conséquences de sa faute. Elle doit aller jusqu'au bout et admettre l'exonération de toute faute.

Distinguer dans la même notion, c'est d'ailleurs non seulement illogique, mais contraire aux intérêts des parties. Si le créancier consent une clause, c'est qu'il y trouve son avantage, et cet avantage consiste dans une chance de

gain. Le contrat affecté d'une clause exonératoire reste, en effet, toujours u ncontrat aléatoire. L'assurance, sur ce point, peut être rapprochée utilement des clauses d'exonération.

"Dans les deux cas, la faute lourde apparaît comme un risque. Le risque, pour un client qui aura passé un contrat contenant clause avec une compagnie de chemin de fer, sera dans la chance de perte de l'objet expédié; mais, par contre, si celui-ci arrive normalement à destination, l'expéditeur aura gagné la différence entre le plein tarif et le tarif réduit. Le client de la compagnie risque de gagner ou de perdre, il ne serait sûr de perdre que s'il avait consenti une exonération du dol. L'illicité qui serait certaine si l'on se réservait le droit de mal agir, ne se retrouve pas quand on veut simplement risquer. Et, parlant de la clause exonératoire pour faute lourde, monsieur Josserand pouvait écrire: 'Vainement la considérerait-on comme immorale et comme périlleuse pour le créancier, du moment que le débiteur répond de ses fautes intentionnelles, il est efficacement obligé, l'ordre public est satisfait.' "

In support of his conclusion that exoneration from the consequence of faute lourde is not contrary to public order or good morals, Voisinet makes the following points:—

(1) By a clause of non-responsibility the debtor is not freed from the necessity of discharging his obligation. He is only exempt from liability if in good faith he involuntarily is negligent.

(2) It cannot be said that such clauses are contrary to good morals. Many interests force the debtor to fulfil his obligations properly. As the author says, customers will not abound where the merchant or businessman is negligent.

(3) Insurance which was formerly held to be against public order is now recognized as being of great benefit. He asks why if it is illegal for one person to suffer the consequences of the fault of another, why should it be possible for several persons to suffer the consequences of another's fault, as in the case of Mutual Insurance?

(4) If parties put such clauses in contracts, it is because they find the same to be to their mutual benefit.

Cr. Sainctlette — *"De la Responsabilité de la garantie"*, page 18:—

"6. Que l'on ne puisse stipuler l'impunité de ses faits délictueux ou quasi-délictueux, c'est ce qui est hors de doute. Mais, dans ces derniers temps, il a été plaidé, écrit et jugé que l'on ne peut valablement s'exonérer, pour le tout ou pour partie, des suites de la faute commise de bonne foi dans l'exécution d'un contrat. J'exposerai plus loin, à propos du contrat de transport, la curieuse histoire de cette hérésie, née d'une équivoque, fomentée par l'âpreté des intérêts particuliers et entretenus par l'ignorance. Ici, je me bornerai à rappeler la vraie doctrine.

7. Les principes sont ceux-ci: les contractants fixent eux-mêmes, par leur accord, l'étendue de leurs obligations réciproques; ils tracent nécessairement les limites des réparations; dues en cas d'inexécution de ces obligations; la loi les laisse libres d'augmenter ou de restreindre cette sanction naturelle de leurs obligations, sous la seule condition que le lien contractuelle reste sérieux. Les contractants peuvent stipuler qu'ils apporteront dans l'accomplissement de leurs obligations le maximum des soins que donnerait l'homme le plus attentif, le plus actif, le plus sévère, ou seulement le minimum de soins que donnerait un homme qui ne serait pas de mauvaise foi. Et la raison d'être de cette limite au minimum, c'est qu'on ne peut pas à la fois vouloir et ne pas vouloir, vendre et ne pas vendre, donner et retenir, servir et trahir. Les conventions doivent être exécutées, de bonne foi, ou elles ne sont plus des conventions. Mais dès qu'il n'y a point de mauvaise foi, le contrat existe et subsiste dans la mesure où les parties ont voulu s'obliger.

8. C'était la règle du droit romain. Un des hommes qui, dans notre pays, enseignent avec le plus d'exactitude, dit à ce sujet: 'C'est une règle élémentaire que toute convention licite fait loi entre les parties. S'il en est ainsi, les dispositions légales relatives à la prestation due cas fortuit, de la faute et du dol ne s'imposent pas fatalement aux créanciers et aux débiteurs. Dès qu'ils sont d'accord pour y déroger en aggravant ou allégeant la responsabilité du débiteur, rien ne s'y oppose; et pareille convention les liera conformément à l'adage rappelé ci-dessus. Il n'y a qu'une seule convention, dans cet ordre d'idées, qui soit

interdite, c'est celle qui porterait que le débiteur ne sera pas tenu de son dol; car elle encouragerait le dol en lui assurant d'avance l'impunité; et, partant, elle serait nulle comme immorale.'

9. C'est aussi la théorie du droit français. Quelle serait la portée des articles 1150, 1152, 1226 du Code Civil, si ce n'était de consacrer le droit des contractants de régler par leur commun accord l'inexécution autant que l'exécution du contrat? Comme l'a fait remarquer la cour de cassation de Belgique, la cause pénale suppose la faute. Compensation des dommages-intérêts que le créancier souffre de l'inexécution de l'obligation principale (art. 1229), elle n'est pas due dans le cas où le débiteur justifie que l'inexécution provient d'une cause étrangère qui ne peut lui être imputée (art. 1147). Elle est due toutes les fois, et alors seulement, qu'il y a demeure et faute (art. 1230).

10. M. le président Larombière, dans son traité si étudié *des Contrats,* n'est pas moins affirmatif que monsieur Cornil. J'extrais ce qui suit de son commentaire de l'article 1137: 'Quoiqu'il en soit, il est un point constant en matière de fautes contractuelles, c'est que les parties peuvent stipuler que le débiteur sera tenu de plus ou de moins de soins que n'en exige la nature du contrat. Ainsi, le débiteur pourra ne devoir que sa vigilance habituelle là où la loi exige d'un bon père de famille là où le débiteur ne devrait, de droit, que les soins habituels soit, enfin, convenu qu'il sera responsable de la faute la plus légère.

'Mais quelle que soit la liberté accordée aux contractants à cet égard, ils ne peuvent jamais convenir qu'ils ne seront pas tenus de leur dol, c'est-à-dire des actes qu'ils auront commis de mauvais foi et tout exprès pour causer un dommage.'

11. Le savant et judicieux continuateur de Macardé, M. Pont n'a pas eu l'occasion d'exposer ses principes des obligations, mais il en fait une très intéressante application à la matière du mandat.

'Le mandataire'; dit-il, 'sur l'article 1992, peut prendre à sa charge les cas fortuits et de force majeure. Il peut même se rendre assureur de l'opération, c'est la convention del credere.'

A l'inverse, bien qu'il soit responsable, en principe, des fautes par lui commises dans sa gestion, le mandataire échappera cependant à toute responsabilité s'il a été convenu entre les parties qu'il ne réponderait pas de ses fautes. Dans ce cas, le préjudice résultant d'un manquement quelconque de la part du mandataire dans l'exécution du mandat resterait pour le mandant qui n'aurait droit à aucune réparation.

Mais la stipulation ne saurait affranchir le mandataire de la responsabilité de son dol. Une gestion dolosive ou de mauvaise foi ne saurait être couverte par aucune convention, quelque expresse qu'elle soit.'

Quoiqu'il en soit de ce point, MM. Larombière et Pont se gardent de comprendre dans l'exception la faute lourde.

M. l'abbé, au contraire (loco sit.) fait suivre l'analyse qu'il a donnée de la doctrine romaine de cette réflection:

'Cet ensemble d'idées et de règles satisfait la raison. Il a passé dans notre ancienne jurisprudence; nous n'en donnerons pas d'autre preuve que ce passage du nouveau Denizart, Vo Faute: 'La faute grossière est assimilée au dol d'où il suit que les parties qui contractent ne sont pas plus libres de se décharger de répondre des fautes grossières que de répondre du dol'.

Il y a deux erreurs: 1o. Le droit moderne a proscrit expressément la théorie romaine (art. 1137, alinéa 1o.) et Bigot de Préameneu, qui valait un peu mieux que les compilateurs de nouveau Denizart, a dit pourquoi.

'La théorie dans laquelle on divise les fautes en plusieurs classes, sans pouvoir les déterminer, ne peut que répandre une fausse lueur, et devenir la matière de contestations plus nombreuses. L'équité elle-même répugne à ces idées subtiles.'

Donc, la théorie des trois degrés de faute n'est pas admise. Donc, il n'y a plus, en droit francais, de fautes grossières, lourdes, légères et très légères: il y a tout simplement des fautes, c'est-à-dire des manques d'exécution

des contrats; 2o. a fortiori, le droit français n'a nulle part, commis cette monstruosité d'assimiler, si gros qu'il soit, le manque d'exécution, de bonne foi, d'un contrat, à un dol, à un fait dommageable causé intentionnellement et méchamment. Cela eût répugné à la raison autant qu'à l'équité de Bigaud de Préameneu et de Portalis."

Sainctlette points out that the fundamental principle involved is freedom of contract. He says agreements should be carried out in good faith or they are not agreements at all. However as long as there is no bad faith the contract exists and subsists in the measure in which the parties desire to obligate themselves. Such being the case, there is only one agreement which is against public order, namely, an agreement which would free a person from the consequences of his own bad faith.

Boutaud — Des clauses de non-responsabilité et de l'assurance — de la responsabilité des fautes, Page 225:—

"129. Le motif que nous donnons pour repousser l'exonération du dol et qui nous parait seul juridique, quoiqu'aucun auteur à notre connaissance n'ait songé à l'invoquer, indique assez que nous ne saurions admettre, en droit, l'autre limitation que l'on propose généralement d'apporter à la liberté des clauses de non-responsabilité; nous voulons parler de la faute lourde.

Le débiteur, qui stipule qu'il ne devra pas de dommages-intérêt pour les fautes mêmes lourdes qu'il pourra commettre dans l'exécution de son contrat, reste obligé. Sa responsabilité est restreinte; mais l'exécution de son obligation peut être poursuivie en justice. Il ne lui sera même pas permis d'accomplir la prestation promise d'une façon extravagante, comme l'a écrit M. Desjardins (1). L'extravagance d'un homme sain d'esprit serait une faute intentionnelle, et les parties n'ont voulu, et n'ont pu vouloir, que l'exonération des fautes non intentionnelles."

This author while agreeing that it is possible to stipulate against the consequences of faute lourde would allow the judge to decide in each case whether the clause of non-liability should receive effect or not. If the fault was so great as to make it possible to infer fraudulent intent the clause should not be applied so as to free a person from the consequences of his dol; otherwise the clause should receive full force and effect.

In considering this question, the obvious similarity between this type of clause and an Insurance Policy insuring against the results of one's negligent actions immediately comes to mind. Fromageot — "De la faute comme source de la Responsabilité", Page 68, endeavours to make the distinction that while in a case of a clause of non-liability the tortfeasor would be relieved of liability, in the case of an Insurance Policy he is still bound towards the victim although he has an Insurance Policy behind him to indemnify him. This argument, when one is dealing with what is supposed to be a question of public policy, does seem specious. A more logical point of view is set forth by Boutaud:—

*"Des clauses de non-responsabilité et de l'assurance — De la responsabilité des fautes"*, at P. 206:

"120. L'assurance des fautes a fait une large brèche au principe de la responsabilité personnelle. Chacun de nous ne supporte plus toutes les conséquences de ses imprudences et de ses négligences: un tiers, l'assureur, en prend sa part, souvent très grande.

Si une Cie d'assurance peut légitimement se charger des fautes que nous commettons, la même faculté sera-t-elle laissée à un particulier? Sera-t-il permis à celui avec qui nous ferons une convention de nous dire: par négligence ou imprudence, vous pourrez manquer à votre contrat; je ne vous en tiendrai pas compte, si vous me consentez tel avantage que nous allons déterminer? Sera-t-il défenda d'acquiescer à cette proposition ou, plus souvent, d'en prendre l'initiative?

Chose curieuse! tandis qu'on laissait s'implanter chaque jour davantage l'assurance des fautes, on a entrepris une véritable campagne contre les clauses d'exonération. — Est-ce donc qu'il y a une différence si profonde entre ces deux conventions qui ont l'une et l'autre pour effet de faire supporter par l'un les fautes commises par un autre? On le dit. Et voici comment on raisonne.

S'il y a une assurance de la faute, dit-on, celui qui l'a commise en reste responsable. Il a seulement une action contre un tiers pour en obtenir la réparation. Celui-là, au contraire, qui bénéficie d'une clause d'exonération est sûr de ne pas être inquiéter. Il peut impunément commettre des imprudences, abrité derrière la bienfaisante conven-

tion. — On ajoute que la victime directe de la faute reste sans recours dans le cas de l'exonération, au lieu qu'elle peut toujours obtenir une indemnité de celui qui lui cause un préjudice, s'il est assuré, d'autant mieux même qu'il a un meilleur assuré.

Pour répondre à cette argumentation, nous devons examiner quelle est exactement la nature de la clause d'exonération.

Lorsque deux personnes font une convention, trois situations peuvent se présenter:

Ou bien le contrat est muet sur la diligence que le débiteur doit apporter dans l'exécution de son obligation. La loi, parlant alors pour les parties, dit qu'il est tenu d'agir en bon père de famille.

Ou bien le contrat impose au débiteur une diligence exceptionnelle, le chargeant même des cas fortuits. Toute inexécution l'oblige alors à payer des dommages-intérêts, ne fût-il pas en faute.

Ou enfin le créancier promet au débiteur de le tenir indemne de tous dommages-intérêts, pour les fautes qu'il pourra commettre dans l'exécution de ses obligations. C'est dans cette hypothèse que nous trouvons une convention de non-responsabilité.

Est-ce une clause d'exonération des fautes? N'est-ce pas plutôt une convention, ayant pour effet de changer la nature des actes qui rendront l'exécution impossible ou en diminueront l'efficacité?

C'est la première conception qui nous paraît seule exacte. Nous avons déjà dit que la question de faute ne se réduit pas à une question d'obligation, comme on le prétend parfois. En le soutenant, on confond deux hypothèses, qu'il faut soigneusement distinguer: celle où le degré de soins a été fixé d'une manière précise, de telle sorte que ce soient les seuls dont le débiteur soit tenu; et celle où le débiteur est obligé de s'acquitter de son obligation, en y apportant la vigilance d'un bon père de famille, sauf à être exonéré de toute responsabilité, s'il y manque. — Que peut-être, dira-t-on, une obligation qui manque de sanction?

L'obligation serait mal fondée. Et la preuve en est que, si dans la seconde hypothèse on néglige intentionnellement les soins d'un bon père de famille, on devra être responsable de leur omission; alors que, dans la première, on ne saurait jamais imputer au débiteur de n'avoir pas pris les soins dont on l'a dispensé.

121. Si tel est la conception qu'il faut se faire de la clause de non-responsabilité, voyons si elle diffère autant qu'on le dit de l'assurance des fautes.

Que font un assureur et son client, lorsqu'ils conviennent que l'on supportera les fautes de l'autre? L'assureur dit à l'assuré: les fautes, dont vous serez l'auteur et qui causeront un dommage soit à votre propre chose soit à tel de vos créanciers ou à telle catégorie de tiers, constitueront aussi, à mon égard, des fautes qui me porteront préjudice; mais je consens, malgré cela, à vous rendre indemne des dommages qui pourront en être la suite. — Voilà donc un fait qui oblige son auteur à payer des dommages-intérêts: c'est une faute. Il ne change pas de nature dans les rapports de l'assuré avec son assureur. Et cependant celui-ci ne peut l'invoquer, pour se soustraire au paiement de l'indemnité.

Dans l'hypothèse d'une clause d'exonération, c'est la victime directe qui renonce à ce prévaloir des fautes de son débiteur. Dans l'hypothèse de l'assurance des fautes, c'est encore une victime de la faute, qui consent à ne pas l'invoquer. Dans l'un et l'autre cas, on trouve donc, d'un côté, l'auteur d'un acte dommageable qui en devrait réparation, de l'autre, celui à qui l'acte préjudicie, qui consent à ne pas demander cette réparation. Qu'importe qu'au cas d'une assurance il puisse y avoir un troisième personnage (il n'existe pas toujours, mais seulement dans les assurances de responsabilité), qui souffre de la même faute que l'assureur, et qui garde son droit à des dommages-intérêts? Il reste toujours que la faute n'est pas supportée par celui qui l'a commise.

Cette tierce personne, qui n'existe pas dans les assurances de réparation, mais seulement dans les assurances de responsabilités, peut se confondre avec l'assureur, même dans ces dernières. L'assureur peut avoir, par exemple, des immeubles qu'il donne à bail. Le résultat sera le même

pour lui, soit qu'il assure la responsabilité de son locataire, soit qu'il lui consente une clause d'exonération. Sauf une différence, pourrait-on être tenté de dire: le locataire sera exonéré sans prime; il devrait en payer une, s'il se faisait assurer. Un pareil raisonnement serait injurieux pour le bon sens de l'assureur. Croit-on vraiment qu'ayant deux appartements de même valeur, il les louera le même prix à celui qui lui demandera une clause d'exonération, et à celui qui lui signera une police d'assurance? Inutile d'insister: la clause d'exonération contient une prime implicite, que la force de l'habitude cache parfois à des yeux très clairvoyants, mais dont l'existence est certaine.

La seule différence, au point de vue de l'exonération de la faute, entre les deux conventions dont nous nous occupons est donc la suivante: dans un cas l'assureur est une Cie d'assurance, dans l'autre un créancier, qui est le plus souvent un simple particulier."

Further on he says, (P. 210) :—

"Serait-il vrai, et c'est incontestable en fait, nous avons déjà insisté sur ce point, que l'assurance a sa base dans la mutualité et la loi des grands nombres, nous ne voyons pas où serait la raison qui permettrait de valider la convention par laquelle un assureur prendrait à sa charge la faute d'autrui, si l'ordre public commandait que chacun supportât les conséquences de sa faute! Toute société doit avoir un objet licite (art. 1833). S'il était illicite de se décharger des conséquences de sa faute sur son semblable, la convention, qui repartirait entre plusieurs associés la réparation des fautes que chacun d'eux pourrait commettre, serait tout aussi immoral."

This author points out that if an Insurance Company may legitimately burden itself with the damages caused by the fault of others, why should not the same faculty be given to a private individual? After a critical analysis of the question, he concludes that in principle there is no difference between the two situations.

It follows that an individual should be permitted to exonerate himself from all the consequences of his own fault.

We therefore respectfully submit that even in France there is good authority for the statement that a person may validly stipulate against the consequences of his "faute lourde" or gross fault and this whether his own or that of his employees.

The rather lengthy references to the French authors have been necessitated by the copious references to other French authors in the judgment of Angers, J. We would wish to reiterate that neither the decisions in France nor the writings of the French jurists are binding on our Courts.

We would also wish to point out that while this Court in the case of *Home Insurance Company et al vs. Lindal & Beattie,* 1934, S.C.R. 33, held that it was against public policy for a person to be indemnified against the consequences of his crime, in a later decision, namely, *La Foncière vs. Daoust,* 1943, S.C.R. 165, it was held that the application of this rule must be limited to a clear case.

Bearing in mind this restriction of the principle and that an insurance contract is not immoral under the conditions indicated by Boutaud it would seem to follow that a clause of non-liability in an agreement of lease between a Lessor and a Lessee is valid.

Furthermore, it should be pointed out that as regards Clause 17 of the lease, no distinction can be made between it and the case of an insurance policy. The Respondent, Canada Steamship Lines Limited, in agreeing to indemnify and save harmless the Crown from the claims of Third Parties, is in exactly the same position as an insurance carrier quo ad its insured.

For all of the foregoing reasons we respectfully submit that there is no rule of public policy which makes it illegal for a person to make a stipulation freeing him from the consequences of the faute lourde of himself or his employees.

## 5. IN ANY EVENT THERE IS NO RULE OF LAW WHICH PRECLUDES THE CROWN FROM STIPULATING AGAINST THE GROSS NEGLIGENCE OF ITS EMPLOYEES.

The clauses under consideration appear in a contract to which the Crown is a party. At common law the rule was that the Crown was not liable for the negligence of any of its officers and servants and the English law on this subject was recognized as applicable in Canada by the decisions of this Honourable Court in the case of *The Queen vs. McFarland,* 7 S.C.R. 216

and *The Queen vs. McLeod,* 8 S.C.R. 1. It is settled law that in Canada no Petition of Right lies against the Crown for negligence unless authority for such proceeding can be found in the terms of some statutory enactment. If it cannot be found in any such Statute, it does not exist at all.

The right of the present Suppliants to have recourse against the Appellant must be found within the limits of Section 19 of the Exchequer Court Act, Chapter 34 R.S.C. 1927. Moreover, it has been held time and time again by this Court that the liability of the Crown which was created by Section 19 of the Exchequer Court Act is not to be extended. The principle is firmly laid down by Chief Justice Sir Lyman Duff in the case of *The King vs. Dubois,* 1935 S.C.R. 378, at P. 398, as follows:

> "It is important, in applying legislation of this character, to be on one's guard against a very natural tendency. For the reasons I have given, the conclusion is inescapable that the purpose of the statute is not to establish the doctrine respondant superior as affecting the Crown throughout the whole field of negligence. The area of responsibility, even in respect of negligence, is restricted."

Reference may also be made to the decision of Thorson, J. in the case of *McArthur vs. The King,* 1943 Ex. C.R., 77, where all the authorities are reviewed.

In the light of the historical background and bearing in mind the principle of strict interpretation to be used when considering the liability of the Crown under Section 19 of the Exchequer Court Act, how can it be said that it is against public order for the Crown to relieve itself from the consequences of the fault of its employees, be it simply fault or faute lourde?

Prior to the first enactment in Canada creating liability on the part of the Crown for the negligence of its officers or servants, there could have been no objection to the validity of clauses in a contract between the Crown and a Third Party similar to the ones under consideration. They might have been unnecessary but certainly they were not against public order and indeed only set forth what was public order.

Where in the Exchequer Court Act is the right to make such stipulations removed and where is it stated that such stipulations are now to be considered as against public order? No such provision is to be found.

By Statute the Crown is liable in certain instances for the negligence of its officers or servants, but as said by Sir Lyman Duff, "The purpose of the Statute is not to establish the doctrine respondant superior as affecting the Crown throughout the whole field of negligence." We respectfully submit that the "whole field of negligence" includes the Crown's right to stipulate that it is not to be liable for any negligence on the part of its officers or servants. This right, not having been taken away by Statute, still exists.

The matter may be put in a different way. Any liability on the part of the Crown is imposed with respect to negligence. This is the only basis of liability. It becomes therefore quite contrary to the Statute and to the rule of strict construction with reference to its interpretation to consider the question of gross negligence. To introduce into any discussion of the Crown's liability any consideration of the grossness of the negligence is to introduce something which is immaterial to the issue and to make anything turn on the grossness of the negligence would be to proceed on the basis of something which is beyond the terms of and foreign to the Statute.

We therefore respectfully submit that there is no rule of law which precludes the Crown from stipulating against gross negligence of its employees.

## 6. THE EVIDENCE NEGATIVES GROSS NEGLIGENCE ON THE PART OF THE EMPLOYEES OF THE DEPARTMENT OF TRANSPORT.

It should be noted at the outset that while the English equivalent "gross negligence" may be used, the notion with which we are concerned is that of "faute lourde". It is to the Civil law and not to the Common law to which we must turn for guidance.

In his notes of judgment the Trial Judge has defined what constitutes faute lourde. (Case Page 324, Line 20):

"Lalou, *'Traité de la responsabilité civile'*, P. 280:—

> 415-8°—Faute lourde. A première vue la notion de faute lourde paraît assez simple. On pourrait dire avec les jurisconsultes romains qu'elle consiste dans "le fait

de n'avoir pas compris et de n'avoir pas prévu ce que tout le monde aurait compris et prévu" or avec Pothier, comme nous le rappelions supra, no 415-2° "dans le fait de ne pas apporter aux affaires d'autrui le soin que les personnes les moins soigneuses et les plus stupides ne manquent pas d'apporter à leurs affaires".' "

These are the classic definitions and will be found repeated in every authoritative work which may be consulted.

Moreover, it must be borne in mind that this conception of faute lourde is closely tied in with the notion of dol or fraud to which in the opinion of many authorities it must be assimilated. Here the maxim constantly employed ish "culpa la dolo aequi paratur".

The foregoing definitions demonstrate clearly what must be the character of the acts or omissions before a case of faute lourde is made out. The acts or omissions must be so grave as to be equivalent to dol or fraud.

We respectfully submit that nothing of this nature is present in the proof in the present case. It cannot be said for a moment that the Crown's employees failed to do what the least careful and the most stupid persons would have done in the conduct of their own affairs. They were competent and careful workmen; they did take precautions, they were conscious of their obligations and they did what to them seemed appropriate to carry on their work in safety. That they did not take the best course cannot serve to hide the fact that what they did was done in good faith and in the presence of the Respondent, Canada Steamship Lines Limited. No one, we respectfully submit, could characterize their actions as being the equivalent of deliberate wrong-doing or as being fraudulent.

Can it be doubted for a moment that insurers under policies of fire insurance would not have been liable to the Suppliants as the result of the fire even if what was being done had been done by the Suppliants' own employees? To put this question is to resolve it in favour of the position which the Appellant adopts.

In this connection, the jurisprudence with respect to Article 2578 of the Civil Code is significant. By that Article it is stated that the insurer is liable for losses caused by the insured "otherwise than by fraud or gross negligence".

In the case of *Roy vs. La Compagnie d'Assurance,* 47 K.B., the Quebec Court of Appeal had occasion to consider the meaning of this Article and we would particularly refer to the following remarks of Tellier, J. at Page 258:

"Il reste à voir s'il y a eu négligence grossière.

La négligence grossière est, je crois, la même chose que la faute grossière ou la faute lourde, lata culpa. Elle est à peu près l'équivalent de la fraude ou du dol.

Elle consiste à ne pas apporter aux affaires d'autrui le soin que les personnes les moins soigneuses et les plus stupides ne manquent pas d'apporter à leurs affaires. Cette faute est opposée à la bonne foi.

D'après Agnel et de Corny, le fait constitue une faute lourde lorsque le dommage a été causé par une négligence, telle qu'il est impossible de croire que le propriétaire d'une chose s'en fût rendu coupable, si cette chose n'avait pas été assurée.

Voici quelques arrêts rapportés dans ledit répertoire, sous le même titre:

119. La faute lourde assimilable au dol, et de nature à dégager la responsabilité d'une compagnie d'assurance, est seulement la faute commise à dessein et en pleine connaissance de cause. Lyon, 17 fév. 1882.

124. La tendance générale de la jurisprudence est d'ailleurs assez favorable aux assurés. Ainsi, un arrêt a décidé que les compagnies d'assurance contre l'incendie ne peuvent, en cas de sinistre, échapper aux conséquences de leurs engagements que si elles prouvent que l'incendie est le résultat d'une faute telle qu'elle implique une intention dolosive de l'assuré; et que la preuve d'une imprudence grave ne suffirait pas. Poitiers, 12 mai, 1875.

133. C'est aux compagnies d'assurance qu'il appartient d'établir le dol ou la faute lourde équivalente au dol qu'elles imputent à l'assuré, et d'où elles prétendent faire résulter une cause de déchéance. Lyon, 23 juin 1863.

Voir aussi *Supplément du Répertoire,* même titre, no 111."

This question again came up for consideration in the case of *L'Urbaine Compagnie d'Assurance vs. Sanschagrin,* 63 K.B. 367. In that case a cuspidor had been placed under an oil stove to catch the oil which was leaking from the oil pipe. A guest who had been invited to the house did the natural thing of throwing a lighted match into the cuspidor containing the oil which immediately caught fire. It was urged that there was gross negligence on the part of the assured in using the cuspidor for the purpose noted. Rejecting this contention, Mr. Justice Bond said (Page 372):—

> "In the case now under consideration, while there may have been some lack of reflection in using a cuspidor for the purpose instead of some less obvious receptacle, for matches and spills, it does not, in my opinion, amount to gross negligence on the part of the respondent, depriving him of the right to claim under his policy;"

What is required before there can be a case of gross negligence sufficient to discharge the insurer is indicated by the case of *Larose vs. Corporation d'Assurance Mutuelle,* 68 S.C. 331, where the assured set fire to his barn when he was drunk.

There is also the further decision of the Quebec Court of Appeal in the case of *Payeur vs. La Compagnie d'Assurance Mutuelle,* 3 I.L.R., 522. In that case the assured was using a gasoline engine in a barn and used gasoline to prime it. It was urged that the assured was grossly negligent. Rejecting this contention, Galipeault, J. says (Page 529):—

> "The judgment does not mention this ground raised by the Appellant. Besides, negligence for which the plaintiff would be responsible to the point of losing all right to an indemnity would be gross negligence, faute lourde, equivalent to fraud. (*Roy vs. la Compagnie d'Assurance,* 47, K.B. 264)".

The question is also considered by St. Jacques, J. at Page 532 as follows:—

> "The company's second ground of defence, to the effect that 'the fire was caused by the imprudence, the negligence and the gross fault of one of the employees of the plaintiff, to the knowledge and in the presence of the plaintiff appears to have been raised for the first time when the plea was produced.

It is true that the plaintiff committed a grave act of imprudence which was the cause of the fire.

Should C.C. 2578 be applied here?

It appears to me that 'gross negligence' which, by the terms of this article, takes from the insured all recourse against the insurance company, must have a more serious character than that with which the plaintiff is reproached. It must consist in acts which are almost the equivalent of fraud.

The burning of the barn, of the hay crop which was in it and of the animals, must inevitably have caused a loss much more considerable than the amount of the insurance. We cannot presume that, in the phrase of Pothier, '(no matter) how stupid may have been his act, it was made with a fraudulent intention.' "

Reference should also be made to the notes of Bond, J. where he says (Page 536):—

"As to the conduct of the appellant, while I consider it to have been stupid, I am unable to say that it amounted to gross negligence, vitiating the policy."

On must not be misled by the extent of the damage caused by the negligent acts of the employees of the Crown, if indeed they were negligent. It is the character of the act or omission and not its consequences which is important. We respectfully submit that any examination of the record will indicate that there is an entire absence of that mentality on the part of the Crown's employees, only from which faute lourde could be implied. They intended no harm and the harm was not caused deliberately. They were certainly not reckless to the point where it could be said that the consequences of their actions were indifferent to them. Quite the contrary, they were mindful of what they were doing and took those precautions which their intelligence and their experience indicated to them to be adequate. If, as the event proved, the precautions taken were not adequate, it cannot be said that they were guilty of faute lourde.

The learned Trial Judge has referred to certain English authorities dealing with the question of gross negligence. They would seem to be of little, if any, assistance in the present case where it is the notion of faute lourde which must be considered.

The same may be said of the decisions of this Court when dealing with cases arising under that provision of the law in Ontario which enacts that 'except in case of gross negligence a Corporation (Municipal) shall not be liable for a personal injury caused by snow or ice on a sidewalk'. C. 192 R.S.O. 1914. These cases and also the decision of the Courts in Western Canada dealing with what constitutes gross negligence so as to render an automobilist liable to his passenger, do show that even under the common law before there can be gross negligence there must be a state of facts from which indifference to consequences may be inferred. See *Holland vs. Toronto*, 1927, D.L.R. 99, Anglin C.J.C., at Page 105. Nothing of the sort exists in the present case.

We would therefore wish to summarize our position as follows:—

(1) That all Petitions of Right should have been dismissed on the ground that there was no fault on the part of the employees of the Crown;

(2) That if there was any fault on the part of the employees of the Crown, the Petition of Right of Canada Steamship Lines Limited should be dismissed in any event by an application of Clause 7 of the contract of lease;

(3) That if there was any fault on the part of the Crown, the Third Party proceedings should be maintained so as to order Canada Steamship Lines Limited to indemnify and save harmless the Crown against the claims of the other Suppliants.

The whole respectfully submitted.

Montreal, December 15th, 1949.

F. P. Brais, K.C.,
Solicitor for the Attorney General of Canada.

**DOMINION OF CANADA**

# IN THE SUPREME COURT OF CANADA

**OTTAWA**

On Appeal from Judgments of the Exchequer Court.

BETWEEN:—

HIS MAJESTY THE KING, (Respondent in the Exchequer Court), APPELLANT,
— and —
CANADA STEAMSHIP LINES LIMITED, (Suppliant in the Exchequer Court), RESPONDENT.

---

HIS MAJESTY THE KING, (Respondent in the Exchequer Court), APPELLANT,
— and —
H. J. HEINZ COMPANY OF CANADA LIMITED,
(Suppliant in the Exchequer Court), RESPONDENT,
— and —
CANADA STEAMSHIP LINES LIMITED, (Third Party in the Exchequer Court), THIRD PARTY.

---

HIS MAJESTY THE KING, (Respondent in the Exchequer Court), APPELLANT,
— and —
CUNNINGHAM AND WELLS LIMITED, (Suppliant in the Exchequer Court), RESPONDENT,
— and —
CANADA STEAMSHIP LINES LIMITED, (Third Party in the Exchequer Court), THIRD PARTY.

---

HIS MAJESTY THE KING, (Respondent in the Exchequer Court), APPELLANT,
— and —
RAYMOND COPPING, (Suppliant in the Exchequer Court), RESPONDENT,
— and —
CANADA STEAMSHIP LINES LIMITED, (Third Party in the Exchequer Court), THIRD PARTY.

---

HIS MAJESTY THE KING, (Respondent in the Exchequer Court), APPELLANT,
— and —
W. H. TAYLOR LIMITED, (Suppliant in the Exchequer Court), RESPONDENT,
— and —
CANADA STEAMSHIP LINES LIMITED, (Third Party in the Exchequer Court), THIRD PARTY.

---

HIS MAJESTY THE KING, (Respondent in the Exchequer Court), APPELLANT,
— and —
CANADA AND DOMINION SUGAR CO. LIMITED,
(Suppliant in the Exchequer Court), RESPONDENt,
— and —
CANADA STEAMSHIP LINES LIMITED, (Third Party in the Exchequer Court), THIRD PARTY.

---

# APPELLANT'S FACTUM

---

F. P. BRAIS, K.C.,
Solicitor for the Attorney
General of Canada.

F. P. VARCOE, K.C.,
Ottawa Agent.