1, 1952

DOMINION OF CANADA

# In the Supreme Court of Canada

OTTAWA

(On appeal from Judgments of the Exchequer Court of Canada rendered by the Honourable Mr. Justice Angers on November 3rd, November 6th, November 20th, November 4th, November 12th and November 13th, 1948, respectively.)

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,
CUNNINGHAM & WELLS, LIMITED,
RAYMOND COPPING,
W. H. TAYLOR, LIMITED,
CANADA AND DOMINION SUGAR COMPANY, LIMITED,

(Suppliants in the Exchequer Court),
RESPONDENTS,

— and —

CANADA STEAMSHIP LINES LIMITED,

(Third Party in the Exchequer Court),
THIRD PARTY RESPONDENT.

## FACTUM OF CANADA STEAMSHIP LINES LIMITED AS RESPONDENT AND THIRD PARTY-RESPONDENT AND OF H. J. HEINZ COMPANY OF CANADA LIMITED AS RESPONDENT.

MONTGOMERY, McMICHAEL, COMMON,
HOWARD, FORSYTH & KER,
HAZEN HANSARD,
Solicitors for Canada Steamship Lines Limited and H. J. Heinz Co. of Canada Ltd.

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## FACTUM OF CANADA STEAMSHIP LINES LIMITED AS RESPONDENT AND THIRD PARTY-RESPONDENT AND OF H. J. HEINZ COMPANY OF CANADA LIMITED AS RESPONDENT.

These are appeals from Judgments of the Exchequer Court of Canada rendered by the Honourable Mr. Justice Angers on November 3rd, November 6th, November 20th, November 4th, November 12th and November 13th, 1948, respectively. By the first Judgment (Vol. II, p. 138) the Court below maintained with costs the Petition of Right of the Respondent Canada Steamship Lines Limited (hereinafter referred to as "C.S.L.") for the sum of $40,713.72. By the second Judgment (Vol. II, p. 169) the Court below maintained with costs the Petition of Right of the Respondent H. J. Heinz Company of Canada Limited (hereinafter referred to as Heinz") for the sum of $38,430.88 and dismissed with costs the Third Party proceedings instituted by Appellant against Respondent C.S.L. By the third Judgment (Vol. II, p. 202) the Court below maintained with costs the Petition of Right of the Respondent Cunningham & Wells, Limited for the sum of $15,159.83 and dismissed with costs the Third Party proceedings instituted by Appellant against Respondent C.S.L. By the fourth Judgment (Vol. II, p. 237) the Court below maintained with costs the Petition of Right of the Respondent Raymond Copping for the sum of $1,662.37 and dismissed with costs the Third Party proceedings instituted by Appellant against Respondent C.S.L. By the fifth Judgment (Vol. II, p. 270) the Court below maintained with costs the Petition of Right of the Respondent W. H. Taylor, Limited for the sum of $3,670.25 and dismissed with costs the Third Party proceedings instituted by Appellant against the Respondent C.S.L. By the sixth Judgment (Vol. II, p. 305) the Court below maintained with costs the Petition of Right of the Respondent Canada and Dominion Sugar Company, Limited for the sum of $108,310.83 and dismissed with costs the Third Party proceedings instituted by Appellant against Respondent C.S.L.

These six cases were tried together and all arise out of a fire which on May 5th, 1944, completely destroyed the C.S.L. Ottawa Street freight shed located between St. Gabriel Basins Nos. 1 and 2 of the Lachine Canal in the inner harbour of Montreal. The learned Trial Judge found in favour of the Suppliant in each of the six cases and condemned the present Appellant to pay the damages sustained by each Suppliant as a result of the fire, the said damages being established by Admissions filed in each case. In the five cases other than the C.S.L. case, the present Appellant called C.S.L. in in warranty by Third Party proceedings, relying on a clause in the lease between Appellant and C.S.L. which will be discussed below. Such Third Party proceedings were in each instance dismissed with costs by the Trial Judge.

The cases are typical of claims arising out of the said fire. Thus the C.S.L. claim was for that Company's own property destroyed in the fire. The Heinz claim was for merchandise, the property of that Company, which was in the shed in question and in the possession of C.S.L. as a carrier, awaiting shipment at the time of the fire. This claim is typical of over 250 other Petitions of Right launched by cargo owners which by arrangement have remained in abeyance pending the outcome of the present proceedings. The Cunningham & Wells, Copping and Taylor claims were for vehicles, equipment and property not in the custody of C.S.L. although being at the scene of the fire on lawful business. The Canada and Dominion Sugar claim was for a quantity of sugar, the property of that Company, which had been stored in a portion of the said shed by agreement with C.S.L.

## PART I — THE FACTS

Save as indicated above and hereinafter, the facts are common to all cases. They are relatively simple and not disputed in any material particular.

The shed in question, which was approximately 750 feet long by 65 feet wide by 25 feet high, and surrounding dock facilities, forming part of the Lachine Canal properties of the Appellant, were occupied by C.S.L. under the lease Exhibit "A", (Vol. I, p. 128). On May 5th, 1944, the said shed was full of merchandise awaiting shipment at the opening of navigation which then impended.

Five or six days previously Wood, the C.S.L.'s shed foreman, had complained to Appellant's Superintendent J. B. O. Saint-Laurent by telephone about the state of repair of the various doors to the shed and thereupon went round the shed with Appellant's foreman Parsons pointing out the unsatisfactory condition of all the doors. (v. Wood, Vol. I, p. 120 sqq.).

Finally, on the morning of May 5th, 1944, Department of Transport employees Cote, Fauteux and Brazeau, who together with Saint-Laurent are admitted to have been servants of the Crown Appellant acting within the scope of their duties or employment (Vol. I, p. 52), arrived at the shed and without further communication with C.S.L. or its employees, proceeded to effect repairs.

Such repairs, undertaken entirely at the discretion of Appellant's said employees, included *inter alia* the removal and replacement of damaged hinges which were bolted to the steel framework of the shed. In order to cut the old bolts Appellant's employees were making use of an oxy-acetylene torch. After working throughout the morning and for part of the afternoon they finally came to the replacement of a hinge near the top of one of the main shipping doors. They had apparently run out of their stock of the proper sized bolts and, finding a 3/8″ hole in the steel upright, in the form of an I-beam, to which the hinge was to be bolted, they elected to enlarge the size of the hole to receive a 1/2″ bolt which they had on hand rather than go for a bolt which would fit. Instead of employing the simple and normal means of a hand or electrically operated drill or reamer, they chose to employ the oxy-acetylene torch to enlarge the hole. This hole was situated on the inner flange of the I-beam which meant that, for the first time, they would be directing the torch towards the interior of the shed (see evidence of Cote, Vol. I, pp. 52 and following; Brazeau, Vol. I, pp. 61 and following).

They knew that the shed contained a large number of bales of highly inflammable cotton waste, piled immediately opposite and within three feet of the point where they proposed to carry out the aforesaid operation. Realizing the danger they took the utterly inadequate precaution of placing a wooden plank on the inside of the shed next to the steel beam to act as a shield but leaving a space between the top of the plank and the roof of the shed. Brazeau, who was sub-foreman in charge, obtained a pail of water and stationed Fauteux inside on top of the bales of waste to watch for sparks, and Cote proceeded to use the torch to enlarge the hole. (Fauteux, Vol. I, pp. 80 sqq). Fauteux (Vol. I, p. 81, line 12) says that he was standing on the bales and was from 4′ to 5′ from the point where Cote was working. This substantially agrees with Wood, the shed foreman, who testifies (Vol. I, p. 65, line 21) that the bales were piled 3′ from the door.

All this was done without the knowledge or concurrence in any way of the C.S.L. employees who were working in and about the shed at different parts thereof. (Wood, Vol. I, p. 122, line 15).

As is well known, and as was known to Appellant's said employees, the cutting of steel or other metal with an oxy-acetylene torch in this way necessarily produces a shower of sparks

which tend to fly for a considerable distance in the direction in which the flame of the torch is being directed. This flame, produced by combining oxygen and acetylene gas under pressure attains great heat, ranging from 5,500° to 6,300° Fahrenheit. The sparks which are thrown off are particles of white hot metal which will ignite anything inflammable with which they come in contact before cooling. They are dangerous over a range of some 15 to 20 feet, leave the point of cutting or burning with great rapidity and force and, if deflected by some solid material, will bounce therefrom. (Mitchell, Vol. I, p. 70 sqq.; Newill, Vol. I, p. 73 sqq).

As could only be expected, the sparks from Cote's torch in the above circumstances, deflected upwards by the plank, bounced off the roof of the shed and ignited the bales of cotton waste on which Fauteux was standing in a matter of seconds after the torch was thus put in operation. Fauteux, who admits he saw a spark or sparks entering the shed, but does not appear to have been keeping any proper lookout, as soon as he discovered the bales on fire under him, leaped down and ran away, shouting "Fire" but making no attempt to use the pail of water or otherwise to extinguish the fire. (Fauteux, Vol. I, pp. 81 to 83 incl.). Appellant's other employees did no more and the fire, thus started, spread with great rapidity from one end of the shed to the other, destroying it and its contents and occasioning the damages here claimed.

Expert evidence of the witnesses Mitchell and Newill (Vol. I, pp. 68 sqq. and 73 sqq), which Appellant made no effort to controvert and stands uncontradicted, is to the effect that an oxy-acetylene torch should never have been used in these circumstances, particularly where the operation could have been accomplished much more simply and without danger by the use of either a drill or a reamer, and that the precautions taken by Appellant's employees were in any event utterly inadequate.

Appellant, while denying liability in its pleadings, introduced no evidence to meet or minimize the gross negligence thus proven and the Court below has found as a fact, in the strongest possible terms, that the conduct of Appellant's said employees amounted to gross negligence (faute lourde), engaging Appellant's responsibility for the resulting damages.

Notwithstanding this, however, Appellant has sought to shift the burden of its responsibility for the gross negligence of

its servants onto C.S.L. by attempting to avail itself of two clauses in its lease Exhibit "A". To meet the direct action of C.S.L. for the latter's own damages it seeks to rely on clause 7 of the lease, reading as follows: —

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

To avoid the claims of the other Suppliant-Respondents Appellant has called C.S.L. in as Third Party, claiming indemnity under clause 17 of the lease reading as follows:—

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

## PART II — THE POINTS IN ISSUE

The Respondents C.S.L. and Heinz respectfully submit that the Judgments *a quo* were right and that the learned Trial Judge properly found Appellant's servants to have been guilty of gross negligence and to have engaged Appellant's responsibility for the damages claimed by their actions.

The Respondent C.S.L. further submits that the Judgments *a quo* were right in rejecting Appellant's defence to the direct action of C.S.L. and in dismissing the Appellant's Third Party proceedings, as well for the reasons given by the learned Trial Judge as for those set out below.

The points in issue on the present appeals are as follows:—

1. As to the direct actions of all Suppliant-Respondents, did the proven conduct of Appellant's servants, admittedly

acting within the scope of their duties or employment, amount to such negligence as would engage the responsibility of Appellant to pay the admitted damages flowing therefrom?

2. As to the direct action of C.S.L. and the Third Party proceedings against it, was it ever the intention of the parties to the lease Exhibit "A" that the Appellant should, by clauses 7 and 17 thereof or otherwise, contract out of or secure indemnity against the consequences of the negligence, gross or otherwise, of its said servants?

3. As a matter of interpretation, can said clauses 7 and 17 or either of them be given any such construction?

4. As a matter of law, and assuming the answer to the preceding question should be in the affirmative, which is not admitted but denied, did the conduct of Appellant's servants amount to gross negligence (*negligence grossiere, faute lourde*) and could the Appellant have validly and legally contracted out of or for indemnity against the consequences of such negligence?

## PART III — ARGUMENT

### A.—THE PRIMARY LIABILITY OF THE CROWN.

1. Section 19 of the Exchequer Court Act (R.S.C. 1927, Chap. 34, as amended in 1938 by 2 Geo. VI, Chap. 28) provides as follows:—

> "19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
>
> .....
>
> (c) every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment."

It has long been settled law that this statutory provision imposes a liability on the Crown in respect of claims arising *ex delicto* and that such liability is to be determined by the laws of the

Province where the cause of action arose *The Queen vs. Filion,* 24 S.C.R. 482; *The Queen vs. Grenier,* 30 S.C.R. 42; *The King vs. Armstrong,* 40 S.C.R. 229, where Davies J. said at page 248:—

> "I think our previous decisions have settled, as far as we are concerned, the construction of clause (c) of the 16th section of the *Exchequer Court Act* (now Section 19) and determined that it not only gave jurisdiction to the Exchequer Court but imposed a liability upon the Crown which did not previously exist, and also that such liability was to be determined by the general laws of the several provinces in force at the time such liability was imposed....."

*The King vs. Desrosiers,* 41 S.C.R. 71, where the then Chief Justice points out at page 76 that Lord McNaghton had said as a ground for refusing leave to appeal to the Privy Council in the Armstrong case:—

"This seems to have been the law for eighteen years."

And at page 78, says:—

> "Since the judgment in *Armstrong vs. The King,* it must be considered as settled law that the 'Exchequer Court Act' not only creates a remedy, but imposes a liability upon the Crown in such a case as the present and that such liability is to be determined by the laws of the Province where the cause of action arose."

2. It follows that the word "negligence" as used in Section 19 of the Exchequer Court Act must, in a Quebec case, be read as meaning the "fault" of Article 1053 C.C.

3. The employees of the Department of Transport, who caused the fire and consequent damages here claimed, are admitted to have been servants of the Crown and acting within the scope of their duties or employment at the time. (See Admission, Vol. I page 52).

4. The Suppliants have proved conclusively and the Trial Judge has found unequivocally that the fire in question and the damages consequent thereupon were solely due to the fault or negligence of such employees. This is a finding of fact which

ought not to be disturbed on appeal, more particularly where, as in the present case, the Appellant has offered no proof which would justify any other finding.

5. That the use of a highly dangerous implement such as an oxy-acetylene torch, with knowledge of the close proximity of inflammable materials, constitutes the grossest kind of negligence, whether under the law of the Province of Quebec or under the common law, is established not only by the uncontradicted expert evidence of Respondent's witnesses (See Mitchell, Case Vol. 1, page 68 and Newill, Case Vol. 1, page 73) but also appears from the following authorities:—

*Aga Heat (Canada) Limited v. Brockville Hotel Company Limited,* 1945 S.C.R. 184, HELD:—

> "Appellant agreed to deliver and erect certain cooking equipment in the kitchen of respondent's hotel and for that purpose to remove a range and canopy. To remove the canopy it was necessary to sever two ducts leading therefrom to a main duct, and appellant's man in charge of the work engaged a workman to do the cutting with an oxy-acetylene torch. It was intended to cut the two ducts near the canopy, but respondent's hotel manager expressed his wish that, for the sake of appearance, they be cut near the main duct (which involved no more labour) and appellant's man in charge agreed that this be done. The hotel manager then left the kitchen. While the workman was using the torch, oil and grease which had accumulated in the main duct caught fire, resulting in a fire which damaged the hotel.
>
> HELD, affirming judgment of the Court of Appeal for Ontario, (1944) O.R. 273, that appellant was liable to respondent in damages."

Estey, J. at p. 190 says:—

> "Notwithstanding all this, when it was decided to cut the lead ducts close to the main duct, no questions were asked and no precautions were taken and they proceeded forthwith to use the oxy-acetylene torch.
>
> It was for the experts in work of this kind to satisfy themselves that the work could be carried on with reason-

able safety, taking precautions such as the course of the work admitted of.

Viscount Finlay in *H. & C. Grayson Ltd. v. Ellerman Line Ltd.* In the doing of this work the appellants must be treated as experts, and while it is true that Mr. Duby may have been the only one present at this work who knew when the main or any duct had been cleaned, there is no evidence that he had knowledge of the risk, and it was for the appellants to prove that the respondents 'knew the dangers attending the use of their machines.' *The Nautilus Steamship Co. Ltd. v. David and William Henderson & Co. Ltd.*

The appellant, as was its right under the contract, had selected this oxy-acetylene torch, which in operation generates a heat of over 6,000 degrees and sends out quantities of sparks. The operation of this torch in such circumstances as we have in this case creates a possibility of fire and requires on the part of those operating it that reasonable precautions should be taken to avoid fire. In this case there were no precautions taken at or near the point of severance and, in my opinion, the duty to do so rested upon the appellants who had undertaken the work, provided the equipment, and employed the men. The respondents on their part had a right to regard the appellants as competent both to do their work and to take reasonable precautions that the premises would not be injured as a consequence of their failure to do so."

*Insurance Company of North America v. Louis Picard & Company Inc.* 9 Insce. Law Reporter 67 — Quebec Superior Court, Errol McDougall, J. HELD: —

"Presumptions may furnish proof as to the existence of a fact in controversy. The person on whom the burden of proof rests is not bound to prove the particular fact which he sets up; it is sufficient if he adduces facts from which an inference or inferences may be drawn probative of such fact; care must, however, be taken not to substitute conjecture for legitimate inference.

Hence, when it is shown that a fire broke out near a place where an acetylene torch had been used under circumstances declared by expert evidence to be danger-

ous, the court may infer that the fire was caused by the use of such torch even if there is no direct evidence to that effect, if this is a reasonable and probable deduction from the proven facts."

*Royal Insurance Co. Ltd. v. Canadian Structural Steel Works Co. Ltd.,* 74 S.C. 8, HELD: —

"Where a workman in the employ of a contractor is engaged in cutting a steel rod with acetylene blow torch and it appears from the evidence that it is a usual precaution in doing such work to make use of a metal shield beyond the metal being cut, which precaution the workman neglected to take, the presumption arising from these facts if a fire breaks out shortly afterwards is inescapable that the fire was set by the blow torch. The contractor and the workman are liable in damages towards an Insurance company, which, after having paid the insured, had been subrogated in his rights."

*H. and C. Grayson, Limited v. Ellerman Line, Limited,* 1920 A.C. 466. HELD:—

"A firm of ship repairers were riveting cleats to the weather deck of a steamer which, under the authority of the Admiralty, they were fitting with apparatus for protection against mines. The rivets were heated in a furnace on the weather deck, and lowered in a bucket through an open hatchway to the 'tween decks, where a riveter drove them into holes bored in the under side of the weather deck to receive them. The steamer was discharging from a hold below the 'tween decks, and a 'tween deck hatchway was open directly below the open hatchway on the weather deck, so that a cargo of jute in the lower hold lay exposed. A boy carrying a red-hot rivet in a pair of tongs to the bucket close by the weather deck hatchway slipped on the deck, and the rivet shot over the coamings and through both the open hatchways on to the cargo of jute and set it on fire.

In an action by the owners of the steamer against the ship repairers for damage to the ship and cargo:—

HELD, that the damage was caused by the negligence of the ship repairers in doing the work as they did

while the jute was exposed, and that the shipowners were not guilty of any negligence."

6. At trial the Appellant sought to suggest that, because the Respondent C.S.L. had complained about the faulty condition of the shed doors and knew that the Appellant's employees were working on them (although it was not shown that C.S.L. knew they proposed to use an oxy-acetylene torch directed towards the interior of the shed), there was some sort of obligation on C.S.L. to have removed the bales of cotton waste to a safe distance. Any such contention is completely answered by the *Aga Heat* case cited supra and by the quoted remarks from the Judgment of Mr. Justice Estey. See also in this connection the Judgment of Schroeder, J., subsequently confirmed by the Ontario Court of Appeals and the Supreme Court of Canada, in *C.N.R. vs. C.S.L.,* 1947 — 4 D.L.R. 505 where he says at page 522:—

"I confess that I can see no merit in the defence of negligence or contributory negligence set up by the defendant against the plaintiff, based upon the condition of the building, the accumulation of dust, the lack of suitable fire walls, and the lack of a sprinkler system or of more adequate firefighting apparatus or equipment. If, as was contended, the building was a veritable fire trap, that was all the more reason why the defendant's servants should have exercised a correspondingly higher degree of care. Middleton, J. A. said in *McAuliff v. Hubbell,* (1931) 1 D.L.R. 835, at p. 837, 66 O.L.R. 349 at p. 353: 'Furthermore, the finding does not justify the maintenance of the action, for there is no duty on the part of the defendants to supply fire escapes or fire-fighting equipment, either at common law or by virtue of any statute. This aspect of the case need not be further considered.'

Upon this point reference may helpfully be made to *Ellerman Lines Ltd. v. H. & G. Grayson Ltd.* (1919) 2 K.B. 514, affirmed (1920) A.C. 466. There is a passage in the judgment of Atkin L.J. at p. 535 which I quote with considerable interest: 'If a workman is sent to my house containing inflammable material to work with fire, am I to remove the source of danger, or is he to take precautions which will avoid danger? If a man comes to my premises containing an oil tank is he to abstain from smoking in

its vicinity or am I to remove the oil tank? And if he chooses to smoke there am I precluded from recovering because I did not remove the oil tank but allowed him to continue at his peril? The doctrine of contributory negligence cannot, I think. be based upon breach of duty to the negligent defendant. It is difficult to suppose that a person owes a duty to anyone to preserve his own property'."

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See also Aylesworth, J.A. in the same case at 1948 — 2 D.L.R. page 447, where he says:—

> "Adopting the language of Lord Simon in *Mersey Docks & Harbour Board vs. Coggins & Griffith (Liverpool),* 1947 A.C. 1, at page 11, Appellant and Appellant alone controlled 'the way in which the act involving negligence was done' and Appellant alone is responsible as the master of the negligent employees."

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7. The damages claimed and awarded by the Trial Judge have also been admitted in each case (see Admissions, Vol. I, pp. 11, 18, 26, 33, 40 and 47). It is therefore respectfully submitted that, leaving aside for the moment the defence raised by the Crown in the C.S.L. case which is dealt with below, all the Suppliants were clearly entitled to succeed.

B.—THE LEASE.

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1. The Appellant, in an attempt to shift the burden of responsibility for the gross negligence of its servants to the Respondent C.S.L., seeks to rely upon the provisions of the lease between them produced as Exhibit "A" (Vol. I, pp. 128 and following) first, as a defence to C.S.L.'s action for the recovery of its own damages and second, as the basis of the Third Party proceedings directed by Appellant against C.S.L. in all the other cases.

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By this lease the Appellant leased to C.S.L. the area shown on the plan thereto annexed (Vol. I, p. 136) with the freight shed erected thereon, being part of the inner or Lachine Canal portion of the Montreal Harbour, the whole for a term of twelve years commencing on May 1st, 1940 and for an annual rental of $12,866.62 in addition to the usual wharfage charges. The lease also provided that the Lessee was to construct, maintain and use at its own cost and expense, a 14-foot loading platform along the entire southerly side of the said shed, covered

by a large canopy extending 20 feet beyond the southerly edge of said platform. This platform and canopy were to become the property of the Crown at the termination of the Lease, without compensation save in the special case provided for by Clause 18. The Lease also provided for the use by C.S.L. in common with the public generally of a 30-foot strip bordering St. Gabriel Basin No. 2 as shown on the said plan.

The Lease contained the following clauses:

(Case Volume 1, page 131, line 23):—

"5. That the Lessor, His Servants or agents, shall, at all times and for all purposes, have full and free access to any and every part of the said land, the said shed and the said platform.

6. That the said land shall be used for purposes in connection with the Lessee's business, only, and for no other purpose or purposes whatever.

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

8. That the Lessor will, at all times during the currency of this Lease, at His own cost and expense, maintain the said shed, exclusive of the said platform and the said canopy."

(Case Volume 1, page 133, line 35):—

"16. That the parcel or tract of land thirty (30) feet in width, situated between St. Gabriel Basin No. 2 and the said land may be used by the Lessee in common with the public generally, it being understood and agreed, however, that the Lessee shall, in the discretion of the Superintending Engineer and in accordance with his direction, have preference in the use thereof.

17. That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims

and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder."

2. The learned Trial Judge elected to dispose of the Appellant's contentions in this regard by holding that it was not competent for the Appellant, under the law of the Province of Quebec, to contract out of the consequences of the gross negligence of its servants. Having taken this line, he did not find it necessary to deal with the equally important, and, from Respondent's point of view, equally conclusive question of construction of the clauses Appellant seeks to rely upon. It is respectfully submitted that, had he directed his attention to this feature of the matter, he would have found that the clauses in question did not have and could not be given the meaning contended for by Appellant.

It is proposed in this Factum to deal first with the meaning to be assigned to these clauses before turning to the ground of decision relied upon by the Trial Judge.

3. *Clause 7 as a defence to the C.S.L. action—*

This clause reads:—

"7. THAT THE LESSEE SHALL NOT HAVE ANY CLAIM OR DEMAND AGAINST THE LESSOR FOR DETRIMENT, DAMAGE OR INJURY OF ANY NATURE TO THE SAID LAND, THE SAID SHED, THE SAID PLATFORM AND THE SAID CANOPY, OR TO ANY MOTOR OR OTHER VEHICLES, MATERIALS, SUPPLIES,, GOODS, ARTICLES, EFFECTS OR THINGS AT ANY TIME BROUGHT, PLACED, MADE OR BEING UPON THE SAID LAND, THE SAID PLATFORM OR IN THE SAID SHED."

It will first of all be noted that nowhere in this clause, nor in Clause 17 discussed below, nor elsewhere in the Lease, is any mention made of negligence or fault of the Crown or of its servants. Unless therefore the language used is capable of no other construction than that the parties intended to release the Crown in advance from claims by C.S.L. for damages resulting from the negligence of the Crown and its servants, the clause cannot avail as a defence to C.S.L.'s present action.

In seeking the common intention of the parties it is proper to have regard to the nature of the contract they have entered into and the circumstances under which they contracted. All the clauses of the contract must be read together.

Here, the C.S.L., a privately owned corporation engaged in the transport of goods by water, and in that connection dealing with the general public, was acquiring facilities for the docking, loading and discharging of its vessels and for the receiving, handling, storage and despatch of freight in that connection. Such facilities, situated as they were in a public harbour or canal owned, operated and subject to the exclusive jurisdiction and control of the Crown, could only be obtained from the Appellant on the Appellant's own terms. To obtain these facilities, C.S.L. was obliged to pay a heavy annual rental, build and maintain a substantial addition to the Crown's property which would in the ordinary course belong to the Crown without compensation and pay regular wharfage dues or charges from time to time exacted by the Crown. It was clearly contemplated that the premises leased were to be operated as a public freight depot to which the shipping public would have access for the purpose of receiving and despatching freight transported by water by C.S.L. While C.S.L. was to maintain the loading platform and canopy it was adding to the existing facilities, it was the obligation of the Crown to maintain all other facilities, that is to say, not only the shed where the fire occurred but also the wharf upon which it was constructed including that portion of the wharf reserved for use in common. While the operations to be carried on were under the control of C.S.L., the premises, with the relatively minor exception noted, were to be maintained in a good state of repair by the Crown.

With these considerations in mind the language employed in Clause 7 becomes less obscure. The claims excluded thereby are not for "damages" but for "detriment, damage or injury" (a) to the facilities leased, in part of which C.S.L. might have an eventual pecuniary interest under Clause 18; and (b) to vehicles and effects brought upon the premises in connection with the contemplated operation.

In the first place, it is clear that, for the major portion of the facilities, which belonged to the Crown, and for all of such facilities, subject to the effect of Clause 18, there could be no claim in damages by C.S.L. against the Crown since they were not C.S.L.'s property. It may be noted here that the amount in

issue in the C.S.L. case includes nothing in respect of the loading platform or canopy nor for loss of use of the facilities nor for loss of business by reason of their destruction.

Since only one phrase is employed, and that phrase does not speak of "damages" and could not have meant a claim for damages founded on negligence in the ordinary sense in respect of the property of the Crown specifically mentioned, some other meaning must have been intended. It is submitted that to contend as does Appellant that the language used in this clause covers claims for damages arising out of negligence of the Crown or its servants is to strain that language to cover a case which was never contemplated; that full effect may be given to the clause by reading it as excluding claims arising out of "damage, detriment or injury" to the facilities, which would have denied C.S.L. the right to full enjoyment of them and for "damage, detriment or injury" to the property belonging to C.S.L. or for which it was responsible occasioned by failure of the Crown either to repair or maintain the same. Thus it would be quite reasonable to anticipate the case of a ship belonging to a third party damaging the wharf with consequent diminution of C.S.L.'s enjoyment and possible consequent damage to property brought on the wharf by C.S.L. or others. Similarly a truck or other vehicle might occasion damages to the shed, the loading platform, etc. and all claims which C.S.L. might otherwise have arising in such circumstances would be barred by the clause. Similarly the damage, detriment or injury to the contents of the shed might have arisen through failure of the Crown to maintain, for example, the roof. Here again any claim which C.S.L. might otherwise have had would be barred by the clause.

But the damages claimed in C.S.L's present action arise from no such causes. They are due solely to the gross negligence of the Crown's servants and it is respectfully submitted that they are not and never were intended to be covered by the exclusion of clause 7 or by any other provision of the lease.

5. *Clause* 17 *and the Third Party proceedings.*

This clause reads:—

"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 WHOMSO-

EVER 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."

Here again there is absolutely no mention made of negligence or fault of the Crown or of its servants. While Clause 17, unlike Clause 7, being a clause providing for indemnification, speaks of "damages" and of claims, etc. "by whomsoever made", it is restrictively drawn as to the origin of such claim and it immediately follows Clause 16 which provides for the use by C.S.L. in common with the public generally of that portion of the wharf in question not specifically demised to it by the lease.

Thus, by the language employed, the indemnification extends only to claims, etc. "in any manner based upon, occasioned by or attributable to"—

(a) "the execution of these Presents";

(b) "any action taken or things done or maintained by virtue hereof";

(c) "the exercise in any manner of rights arising hereunder".

It is clear on the face of it that the claims for which the Crown seeks indemnification from C.S.L. by its Third Party proceedings in these cases do not fall under any of these heads.

It may first of all be said generally of the three cases enumerated that they all clearly contemplate the doing of some positive act by one or other of the parties to the lease and such act must be done by virtue of the lease and/or in the exercise of a right arising under it. The negative idea of an omission, or of something done outside or contrary to the terms of the lease, is completely foreign to the language used.

Turning then to the three cases mentioned, it is submitted—

(a) As to the "execution" of the lease, this word must be taken to have been used in its strict legal sense as including

the performance of all acts which may be necessary to render the document complete in the signing, sealing and delivery thereof (*Metropolitan Theatres Limited and Magee* — 40 O.L.R. 345), rather than as referring to the carrying out of its terms, since the second and third cases enumerated appear to deal with this feature. Doubtless the intention of the Government draftsman in employing this word was to cover the possible case of a rival claimant to the right to occupy and enjoy the facilities which were being afforded to C.S.L. Certainly no broader interpretation or intention can be given to the word so far as C.S.L. is concerned;

(b) "Any action taken or things done or maintained by virtue hereof" must, it is submitted, be read as meaning actions or things taken, done or maintained in a legal and proper manner in accordance with the terms of and as contemplated by the lease. Thus it is conceivable that the Crown, in the exercise of its stipulated right to go upon the premises at all times, might interfere with some third party or even with C.S.L. occasioning a claim in damages or otherwise. On the other land, it is quite possible that a dispute might arise in respect of the joint use of the part of the wharf not specifically demised which would give rise to some such claim. Under the clause C.S.L. would be bound to indemnify and save the Crown harmless from and against any such claims;

(c) The final and, it is submitted, controlling phrase "the exercise in any manner of rights arising hereunder" requires no special comment. Obviously the claims here in question in no way arose from the exercise of a right under the lease. The exercise of any such right would have to be in a legal and proper manner.

Here again it is only necessary to state the proven fact that the damages here in issue were occasioned solely by the gross negligence of the Crown's servants. Clause 17 does not and never was intended to cover any such cause of action, nor does it give the Appellant any right of indemnification in the circumstances.

6. *The law of construction applicable to clauses said to relieve a contracting party from the consequences of its own negligence or that of its servants.*

Such clauses are of course subject to the general rules of interpretation laid down in Articles 1013 and following of the

Civil Code. In the present case Appellant respectfully submits that consideration should be given to the following of such Articles:—

C.C. 1013:—

"When the meaning of the parties in a contract is doubtful, their common intention must be determined by interpretation rather than by an adherence to the literal meaning of the words of the contract."

C.C. 1018:—

"All the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire act."

C.C. 1019:—

"In cases of doubt, the contract is interpreted against him who has stipulated and in favor of him who has contracted the obligation."

C.C. 1020:—

"However general the terms may be in which a contract is expressed, they extend only to the things concerning which it appears that the parties intended to contract."

Clauses 7 and 17 of the lease here in question contain no express words or appropriate language to give them the meaning contended for by Appellant. Full effect can be given to them without straining the language employed and without assigning to them any such meaning. If and to the extent that their meaning can be said to be doubtful, and certainly that is the most which can be said of them in support of Appellant's contentions, then the common intention of the parties must be sought by interpretation. Reference to the entire lease and the circumstances under which it was entered into make it clear that it was never the common intention of the parties to relieve the Crown from and place upon C.S.L. the entire burden of supporting the consequences of the negligence of the former or of its servants.

Whatever their meaning, it is certain that both these clauses were stipulated by and for the exclusive benefit of the

Crown. To the extent that either of these clauses gives rise to a case of doubt therefore Article 1019 C.C., which states what has sometimes been called the *contra proferentes* rule, must be applied and the clauses must be interpreted against the Crown and in favour of C.S.L.

7. In jurisdictions which admit the validity of clauses limiting or excluding liability for the negligence or fault of one contracting party and *a fortiori* indemnity clauses shifting responsibility for the effect of such negligence or fault to the other party in respect of claims by third parties, such clauses have always been subjected to the closest possible scrutiny and most restrictive interpretation.

In the Province of Quebec, prior to the decision of the Supreme Court of Canada in the *Glengoil Steamship Co. vs. Pilkington* (28 S.C.R. 146) the jurisprudence had been substantially unanimous in rejecting such clauses as invalid for the reason that they were contrary to public policy and good morals. See in this connection *Perrault, Stipulations de non-responsabilité,* pages 82 et seq. In the Glengoil case however, the Supreme Court of Canada reversed the lower Courts and the Quebec jurisprudence and held a clause in a bill of lading which expressly provided that the shipowners should not be liable for negligence on the part of the Master or mariners was valid and binding under Quebec law. It is noteworthy however that Mr. Justice Taschereau, who rendered the judgment of the Court, was careful to say at page 159:—

> "Then conditions of this nature limiting the carrier's liability or relieving him from any, are to be construed strictly and must not be extended to any cases but those expressly specified; *Phillips vs. Clark; Trainor v. The Black Diamond Steamship Co.*"

As Perrault says at page 85:—

> "Cette règle d'interprétation est pleine de bon sens. Si l'on pouvait se dégager de toute responsabilité par une clause vague, personne n'oserait contracter."

In *Trainor vs. The Black Diamond Steamship Co.* (16 S.C.R. 156), a case arising in Prince Edward Island, the majority of this Court had held that a condition in a bill of lading specifically referring to "the negligence, default or error in judgment

of the pilot, master, mariners or other persons in the service of the ship" was valid to relieve the shipowner of liability. Chief Justice Sir W. J. Ritchie, who with Fournier, J. dissented from the majority on the question of whether or not the above quoted language could be said to relate, on a proper construction of the clause there in question, to faulty stowage, stated the rule at page 163 as follows:—

> "I think to enable the shipowner to contract against the effect of his own, that is his servants' negligence, the contract should be so clear and unambiguous as not to be open to any reasonable doubt as to the intention of the parties; if not made so clear, the construction should be against the shipowner and in favour of the shipper."

The fundamental rules of legal interpretation do not differ materially in the common law jurisdictions and under the law of the Province of Quebec. As stated by the late Chief Justice Anglin in his judgment in this Court in *Regent Taxi & Transport Co. vs. Congregation des Petits Freres de Marie,* 1929 S.C.R. at page 568, after citing Beal's Cardinal Rules of Interpretation:—

> "These principles of legal interpretation being founded on common sense, apply equally under the civil and the common law systems. (De Chassat, *Interprétation des Lois* (1822) pp. 100, 205 et seq; Langelier, *Droit Civ.* vol. 1, pp. 20, 22 and 91; art. 12 C.C.)".

While he was speaking there of the construction of statutory provisions, the same is true in construing contracts, particularly to find the meaning of a document such as we have here drafted in the English language.

The following English, Canadian and Quebec cases illustrate the universality of the principles of construction which, it is submitted, should be applied in the present case:—

*Price & Co. v. Union Lighterage Co.*, 1904, 1 K.B. 412. In this leading English case, concerning the carriage of goods on a barge where the contract of carriage contained the words "not liable for any loss of or damage to goods which can be covered by insurance", it was held that these words would not preclude a claim for loss of the goods occasioned by the negligence of the barge owner's servants. Lord Alverstone, C.J. says at page 414:—

"Since the case of *Phillips vs. Clark,* 1857 2 C.B. (N.S.) 156; 26 L.J. (C.P.) 168 it has been settled that when a clause in such a contract as this is capable of two constructions, one of which will make it applicable where there is no negligence on the part of the carrier or its servants, and the other will make it applicable where there is such negligence, it requires special words to make the clause cover non-liability in case of negligence."

At page 416 he says:—

"The principle that to exempt the carrier from liability for the consequences of his negligence there must be words that make it clear that the parties intended that there should be such an exemption is applicable to this case."

*Rutter v. Palmer,* 1922 2 K.B. 87, where an automobile was left in the custody of a dealer on terms that it was to be driven "at customer's sole risk", it was held that, because the only basis of the dealer's liability could be the negligence of himself or his servants, this language excluded a claim for damages arising out of the negligent operation of the vehicle. In expounding the same general principle, Scrutton L.J. says at page 92:—

"In construing an exemption clause certain general rules may be applied: first the defendant is not exempted from liability for the negligence of his servants unless adequate words are used; secondly the liability of the defendant apart from the exempting words must be ascertained; then the particular clause in question must be considered; and if the only liability of the party pleading the exemption, is a liability for negligence the clause will more readily operate to exempt him."

*Polemis v. Furness, Withy & Company,* 1921 — 3 K.B. 560. In this case a time charter contained a clause specifying that fire was "always mutually excepted". It was found that the loss of the ship was due to fire caused by negligence of the charterer's servants, and it was held by the English Court of Appeals "that the exception clause did not protect the charterers against loss by fire caused by the negligence of their servants, their being no express stipulation to that effect."

Bankes, L.J. at p. 572 says:—

"The other point relied upon by the appellants was that the damage having been caused by fire they were protected by clause 21 of the charterparty. To this it was replied that the clause had no application in the case of a fire caused by the negligence of the charterers' servants. I see no reason why a different rule of construction of this exception contained in the charterparty should be adopted in the case of the charterer than would undoubtedly be adopted in the case of the shipowner. In the case of the latter clear words would be required excluding negligence. No such words are found in this clause. Neither shipowner nor charterer can, in my opinion, under this clause claim to be protected against the consequences of his own negligence."

*Toronto v. Ada Lambert,* 54 S.C.R. 200, HELD:—

"By an agreement between the Interurban Electric Co. and the City of Toronto, operating the Hydro-Electric System, the former undertook to 'save harmless and indemnify the said corporation. . . against all loss, damages . . . which the corporation may . . . have to pay . . . by reason of any act, default or omission of the company or otherwise howsoever.' An employee of the company was killed in course of his employment and in an action by his personal representative the jury found that the city and the company were each guilty of negligence which caused the accident.

*Held,* that the agreement did not apply to the case of damages which the city would have to pay as a consequence of its own negligence and neither relieved it from liability nor entitled it to indemnity."

Duff, J. at p. 211 says:—

"It is convenient at this point to dispose of the question of indemnity also. The stipulation relied upon has not, in my judgment, the effect of casting upon the appellant municipality responsibility for a condition of things primarily due to the negligence of the appellant itself. Where harm is caused and the appellant municipality is answerable by reason of the fact that its own negligence is a proximate cause of that harm, I do not think such responsibility is fairly within the contemplation of clause 7.

It is true that the phrase 'otherwise however' is a very broad one; but the language of the clause shews that it was framed *alio intuitu* and we should violate a fundamental rule of construction if sweeping words placed at the end of a more specific enumeration were to be read as embracing cases which it is abundantly evident from the clause (when read as a whole) the parties never had in contemplation. It is not the 'act, default or omission' of the Interurban Company for which the appellant municipality is held responsible, it is the municipality's own wrongful act."

Anglin, J. at p. 215 says:—

"Neither should the clause be read as relieving the corporation from liability for, or entitling it to indemnity against claims for injuries partly occasioned by its own negligence, though operating in conjunction with negligence of the company or its servants. *Only an explicit provision couched in unmistakable terms could be given that effect.*"

*Bonhomme v. The Montreal Water & Power Co.,* 48 S.C. 486 — Court of Review — HELD:—

"1. La Couronne, dans ses rapports d'affaires avec les particuliers, est régie par le droit commun.

2. Celui qui loue un terrain de la Couronne alors que cette propriété est déjà louée et occupée par un autre, et qui y fait des travaux, est responsable des dommages qu'il cause au premier locataire.

3. La clause dans le premier bail que le locataire renonce à tout recours en dommages-intérêts contre la Couronne, de quelque nature que ce soit, ne s'applique pas au fait de la Couronne elle-même, qui est tenu de procurer à son locataire une jouissance paisible, et le second locataire ne peut avoir plus de droits que son locateur n'en avait lui-même."

*Lavoie v. Lesage,* 77 S.C. 150. Pratte, J, at p. 151:—

"Considérant que le demandeur a admis que lorsqu'il est allé conduire son automobile au garage du défendeur

il a pris connaissance de l'affiche par laquelle le défendeur déclarait n'être pas responsable du feu, du vol et des accidents;

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;

Considérant, par application des principes ci-dessus, que la clause d'exonération invoquée par le défendeur ne le libère pas de la faute lourde qu'il a commise ou de celle de son préposé, et que partant il doit répondre des dommages que cette faute a causés au demandeur;"

*Watson v. Dame Philips,* 62 S.C. 448, Archer, J. at p. 449:—

"Considering that defendant claims that under section 9 of the lease which reads as follows:—

'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 ap- 'paratus, in order that arrangements may be made 'to have the same remedied with due diligence. And 'the lessor shall not be liable for any damage to 'property in or upon said demised premises, or 'building, from water, steam, snow or rain finding 'its way into said premises or building, from any 'cause whatever however occurring'

she cannot be held liable for the damages claimed by plaintiff;

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;"

In the case of *C.S.L. v. C.N.R.* recently decided by this Court (1949) 2 D.L.R. 461, Schroder J. at trial said (1947) — 4 D.L.R. at page 528:—

"If this clause, which has been quoted above, is relied upon as one exempting the defendant from liability in respect of goods in transit and located on shore at Point Edward then could it be so construed as to exempt the defendant from liability in the event of a fire occurring through the negligence of the defendant or its servants? The following authorities would indicate that the clause, if put forward as one exempting the defendant from liability, would not protect it if the fire were brought about by the negligence of its servants: Re *Polemis & Furness, Withy & Co.,* (1921) 3 K.B. 560; *Price & Co. v. Union Lighterage Co.* (1904) 1 K.B. 412; *Alderslade v. Hendon Laundry Ltd.* (1945) 1 K.B. 189.

It was held in the last-cited case that as no liability could arise for loss of articles except through the defendants' negligence, a condition limiting damages for lost or damaged articles to twenty times the charge made for laundering applied to limit the defendants' liability in cases of negligence, and applied, therefore, to limit the plaintiff's damages; but it was said that in a case where loss might arise from causes other than negligence, such a condition would not apply to limit liability for loss through negligence, unless it was expressly made applicable in clear terms. MacKinnon L.J., at p. 195 refers to the rule or principle which is stated by Scrutton L.J. in a short passage in *Rutter v. Palmer,* (1922) 2 K.B. 87 at p. 92 as follows:—

'In construing an exemption clause certain 'general rules may be applied: First the defendant 'is not exempted from liability for the negligence of 'his servants unless adequate words are used; 'secondly, the liability of the defendant apart from 'the exempting words must be ascertained; then the 'particular clause in question must be considered; 'and if the only liability of the party pleading the 'exemption is a liability for negligence, the clause 'will more readily operate to exempt him'.

Here the loss might arise from causes other than the negligence of either the plaintiff or the defendant or their servants, and the clause relied upon does not in my opinion exempt the defendant from liability. After careful consideration I am constrained to hold that cl. 5(d) of the 1919 agreement imposes upon the plaintiff the risk of damage to or destruction of goods caused by accidental fire only as distinct from a fire caused by negligence on the part of the defendant or its servants and for which the plaintiff would be responsible to the owner of the goods."

His judgment was confirmed in the Ontario Court of Appeals and by this Court. The clause there under consideration read:—

" . . . . . the Grand Trunk agreeing to assume the whole risk at Point Edward from fire and other such causes."

Notwithstanding this language, the C.S.L. was held liable because the fire was found to have been caused by the negligence of its servants. Mr. Justice Kellock in this Court said (1949) 2 D.L.R. at page 471:—

"The terms of para. 5 can be satisfied without such an extension of meaning. 'When a shipowner, who is bound, by the implied terms of his contract, to carry with ordinary care, claims the benefit of the exception, the Court will, if necessary, go behind the proximate cause of damage for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner or of those for whom he is responsible'; *Hamilton, Fraser & Co. v. Pandorf & Co.* (1887), 12 App. Cas. 518, at p. 526, per Lord Watson. On the basis of this principle, as well as from the terms of the contract

of 1919, taken together, para. 5(d) is not to be taken as covering loss arising from fire as here caused."

Thus it is seen that where an exempting clause does not in terms cover the case of negligence, it may only be relied on by the negligent party invoking it if by its terms and the surrounding circumstances it appears conclusively that no other ground or basis of liability was intended to be excluded. Where, as in the present case, effect can be given to the clause or clauses without extending them to cover negligence of the contracting party or its servants, the clause or clauses will not avail to protect that party.

It may be noted that the case of *C.N.R. vs. Montreal,* 43 K.B. 409 relied upon by Appellant below is quite in accord with this principle. There the Railway Company permitted the City to extend a street across its right-of-way on the condition that the City would "hold the Company free and harmless from any expense in connection with such temporary arrangement and protect them from all claims, costs, proceedings and expenses for *accidents* occurring during its continuance". It was quite clear from the circumstances there that the only liability of the Railway Company which the parties could have had in contemplation was one arising from its own or its servants' negligence.

8. It is therefore respectfully submitted that, in the present cases, the Crown could not avail itself of clause 7 of the lease as a defence to the C.S.L. claim nor could it found third party proceedings against C.S.L. on clause 17 in respect of the other claims.

C.—CLAUSES 7 AND 17, EVEN IF SPECIFIC AND CAPABLE OF NO OTHER CONSTRUCTION, WOULD NOT OPERATE TO COVER GROSS NEGLIGENCE (NEGLIGENCE GROSSIERSE, FAUTE LOURDE).

1. The learned Trial Judge found categorically that the fire in question was caused by the gross negligence of officers and servants of the Crown while acting within the scope of their duties or employment (v. Judgment in the C.S.L. case, Vol. II, page 152, line 10 and page 168, line 30). It is submitted that such finding was entirely justified on the uncontradicted evidence of record and having regard to the classic definitions of *"faute lourde"* to which the learned Judge refers at page 155, lines 29 and following.

2. Having reached this conclusion, the Trial Judge holds that, under the authorities which he discusses in detail, clauses 7 and 17 of the lease cannot be availed of by Appellant to protect itself from the consequences of such gross negligence. This feature of the case is dealt with, so far as the defence to the C.S.L. case is concerned, in the Judgment *a quo* in that case at Vol. II, pages 152 to 168 inclusive, and so far as the Third Party proceedings in the other cases are concerned, in the Heinz Judgment, which is typical, at Vol. II, pages 185 to 202 inclusive.

3. It is submitted that the Judgments *a quo* are right in so holding and the present Respondents adopt the reasoning therein contained. In view of the exhaustive treatment of this branch of the case in the Judgments below, it is not proposed to do more here than add the supplementary comments which follow.

4. While some of the French authors appear to suggest that, in France, the existence of a contract between the parties may preclude an action *ex delicto,* no such problem arises under the law of the Province of Quebec. See in this connection the Judgment of this Court in the leading case of *Ross vs. Dunstall* (62 S.C.R. 393) where, for example, Mignault, J. said at page 422:—

> "But, as I take it, his action can stand, notwithstanding the contractual relations between the parties, upon article 1053 as well as upon articles 1527, 1528 C.C. The former article is applied every day in the case of passengers injured while travelling on railway carriages, although a contract is made between them and the railway company for their transportation. And I cannot assent to the broad proposition that where the relations between the parties are contractual there cannot also be an action *ex delicto* in favour of one of them."

See also the decisions of the Quebec Court of Appeals in *Collin vs. Vadenais* (44 K.B. 89) and *Cane vs. Guaranteed Pure Milk Co.* (54 K.B. 473); also the Judgment of Philippe Demers, J. in *Aero Insurance Co. vs. Curtiss Reid* (70 S.C. 213), unanimously upheld by the Court of Appeals (55 K.B. 421). Moreover it appears clearly from the authorities relied upon in the Judgments *a quo* that the same rule applies both in respect of contractual damages and delictual damages.

applied, it does not appear that gross negligence or *faute lourde* was involved. In this Court in the leading case of *Grand Trunk vs. Miller* (34 S.C.R. 45) Girouard, J. dissenting, said at page 64:—

> "If the law of Quebec was like the law of England, I would not hesitate to apply the *Queen vs. Grenier* to a case of negligence of the employer like the present one. But in Quebec, although one can validly contract for exemption from liability for the negligence of his employees and servants, no one can free himself from responsibility for his own fault."

The Privy Council reversed the Judgment of this Court although it did not deal with the matter on this ground (1906 A.C. 187). The point however is that it does not appear that the negligence involved in that case amounted to gross negligence or *faute lourde* or that the matter was considered from this point of view.

It is respectfully submitted that the law of Quebec on the subject is properly expressed in the following passage from Mazeaud, *Traité de la Responsabilité civile,* Vol. 3, No. 2574 where he says at page 604:—

> "Mais la responsabilité délictuelle du fait des préposés repose sur un fondement bien différent. La loi n'autorise pas le commettant à se dégager en prouvant qu'il n'a commis aucune faute personnelle; le responsable est tenu même s'il démontre qu'il n'a rien à se reprocher. Aussi doit-on chercher le fondement de cette responsabilité pour autrui en dehors d'une faute, légalement inexistante, du responsable. Son fondement se trouve dans la faute de la personne dont on répond. C'est que le commettant qui recourt aux services d'un préposé ne fait que prolonger son activité propre. Le préposé n'est qu'un instrument entre les mains du commettant. Plus exactement, il est la main même du commettant. Tout se passe comme si le commettant agissait en personne. Il se produit, au moins à l'égard des tiers, une véritable confusion entre le commettant et le préposé. La faute du second est faute du premier, avec tous ses caractères. Elle est, pour tous les deux, intentionnelle ou lourde. Le commettant a donc, par son préposé, commis une faute qui est à son égard intentionnelle ou présumée telle; une clause de non-responsabilité ne peut l'en décharger."

8. Respondents therefore submit that the learned Trial Judge was right in holding that whatever might be the meaning of clauses 7 and 17 of the lease, they could not operate to protect the Crown against the consequences of the gross negligence or *faute lourde* of its servants or enable the Crown to shift those consequences to the party with whom it had contracted.

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D.—CONCLUSION.

It is respectfully submitted that the Judgments *a quo* are right and should be maintained and the present appeals dismissed with costs here and below for the reasons that:—

(a) The Respondents have made out a case of default or negligence sufficient to bind the Crown;

20 (b) The clauses in the lease upon which the Crown relies do not extend to cover its negligence or that of its servants and ought not to be so construed; and

(c) In any event, such clauses would not avail to protect the Crown where negligence and fault of its servants amount to gross negligence or *faute lourde* as was the case here.

THE WHOLE RESPECTFULLY SUBMITTED.

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Montreal, 9th January, 1950.

Hazen Hansard,
Of Counsel for Canada Steamship Lines Limited as Respondent and Third Party Respondent and H. J. Heinz Company of Canada Limited as Respondent.

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**DOMINION OF CANADA**

# IN THE SUPREME COURT OF CANADA
## (OTTAWA)

(On appeal from Judgments of the Exchequer Court of Canada rendered by the Honourable Mr. Justice Angers on November 3rd, November 6th, November 20th, November 4th, November 12th and November 13th, 1948, respectively.)

BETWEEN:—

**HIS MAJESTY THE KING,**
(Respondent in the Exchequer Court),
APPELLANT,

— and —

**CANADA STEAMSHIP LINES LIMITED,**
(Suppliant in the Exchequer Court),
RESPONDENT,

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**HIS MAJESTY THE KING,**
(Respondent in the Exchequer Court),
APPELLANT,

— and —

**H. J. HEINZ COMPANY OF CANADA LIMITED,**
**CUNNINGHAM & WELLS, LIMITED,**
**RAYMOND COPPING,**
**W. H. TAYLOR, LIMITED**
**CANADA AND DOMINION SUGAR COMPANY, LIMITED,**
(Suppliants in the Exchequer Court),
RESPONDENTS,

— and —

**CANADA STEAMSHIP LINES LIMITED,**
(Third Party in the Exchequer Court),
THIRD PARTY RESPONDENT.

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# FACTUM OF CANADA STEAMSHIP LINES LIMITED AS RESPONDENT AND THIRD PARTY-RESPONDENT AND OF H. J. HEINZ COMPANY OF CANADA LIMITED AS RESPONDENT.

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MONTGOMERY, McMICHAEL, COMMON,
HOWARD, FORSYTH & KER,
HAZEN HANSARD,
Solicitors for Canada Steamship Lines Limited
and H. J. Heinz Co. of Canada Ltd.