CASE AND COMMENT

FINAL JUDGMENTS — APPEAL TO THE SUPREME COURT OF CANADA BY APPELLANT WHO HAS BEEN GRANTED ALTERNATIVE RELIEF IN COURT BELOW. — In *Vernon* v. *Hankey* Buller J. said that "Motions for new trials have been very much encouraged of late years, and I shall never discourage them; for nothing tends more to the due administration of justice, or even to the satisfaction of the parties themselves, than applications of this kind."[1] The satisfaction of the parties to which Buller J. refers cannot be a feature of the many actions in which litigants, having appealed against a judgment of the trial court, have been granted a new trial by the Court of Appeal. They have found that, if they asked for a new trial in the alternative, they are thereby prevented from appealing to the Supreme Court of Canada.

A leading case is *Mutual Reserve Fund Life Association* v. *Dillon*.[2] This was an action on a life insurance policy and judgment at the trial was given for the plaintiff, Dillon, on the answers of the jury. The defendant appealed to the Ontario Court of Appeal for an order dismissing the action or alternatively for an order that a new trial be had on the grounds of misdirection and non-direction by the trial judge. The Court of Appeal considered that the defendant was entitled to judgment in its favour on the findings of the jury, but that the plaintiff had been prevented by the trial judge from adducing evidence on a material point, and accordingly a new trial was ordered.[3]

The defendant appealed to the Supreme Court of Canada and was met with the objection that, having been successful in the Court of Appeal, it had no right to appeal. This argument succeeded and the court quashed the appeal. The Chief Justice (Rt. Hon. Sir H: E. Taschereau) did not indicate in his reasons that there might be two sides to the matter, and said:

> The respondent moves to quash this appeal upon the ground that the judgment appealed from is not a final judgment within the meaning of the Supreme Court Act. Under section 24 of the said Act an appeal is given from final judgments only, and section 2, subsection 'e' enacts that the expression 'final judgment' means any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded.
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[1] (1787), 2 T.R. 113, at p. 120.
[2] (1903), 34 S.C.R. 141.
[3] (1903), 5 O.L.R. 434.

The respondent, though she loses thereby the benefit of the verdict that she has recovered, does not appeal from that judgment, as she undoubtedly would have had the right to do since the amendment to the Supreme Court Act of 1891, 54 and 55 V., c. 25, sec.2. But singular to say, it is the appellants who, though they obtained from the Court of Appeal one of the alternatives they prayed for, would now contend that they are aggrieved by that judgment, because, they argue, the court should have granted the other of their alternative demands, and should have dismissed the respondent's action. They, on the one hand, hold on to the judgment granting them their demand for a new trial, and, on the other hand, would ask us to set it aside, but upon condition that we should enter a judgment dismissing the action, and that should we dismiss their appeal, they retain the benefit of the order for a new trial.

We are of opinion that this is not an appeal from a final judgment within the meaning of that word under the Supreme Court Act. No appeal lies from a judgment simply refusing to dismiss or to nonsuit plaintiff. There is no final determination whatever in the judgment of the Court of Appeal, that the appellants complain of . . . They cannot and do not appeal from the judgment ordering a new trial.

True, it is, that if we allowed the appeal and dismissed the motion, that would put an end to the litigation. But, as we said in *Barrington* v. *The Scottish Union and National Ins. Co.*[4] that is not the criterion of the jurisdiction of this court; that is mistaking the exit door for the entrance door of the court. Our jurisdiction does not depend upon the judgment that we might possibly give, but upon the judgment that has been given by the court appealed from.

The sections of the Supreme Court Act referred to in *Mutual Reserve* v. *Dillon* have been amended but the jurisdiction of the court with respect to the question there in issue is unchanged.[5] Section 36 of the present Supreme Court Act confers jurisdiction on the court to entertain appeals from

(a) a final judgment, or
(b) a judgment upon a motion for a nonsuit or directing a new trial.

The old section 2(e), which defined "final judgment", now appears as section 2(b) and reads as follows:

2(b) 'final judgment' means any judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding.

[4] (1890), 18 S.C.R. 615.

[5] Sections 2(e) and 24 of the act referred to in *Mutual Reserve* v. *Dillon* are found in R.S.C., 1886, c. 135. Section 2(e) was re-enacted in R.S.C., 1906, c. 139; it was amended by 1913, c. 51, s. 1, 1914, c. 15, s. 1, and 1920, c. 32, s. 1(a). It now appears as s. 2(b) of R.S.C., 1927, c. 35 and has not been further amended. Section 24 was amended by 1891, c. 25, s. 2 and 1892, c. 29, ss. 742 and 750 and appeared in R.S.C., 1906, c. 139, as sections 36 and 38. These sections were amended and consolidated by 1920, c. 32, s. 2 and 1925, c. 27, s. 2 and appear in R.S.C., 1927, c. 35, as s. 36. It has not been further amended.

A defendant has always had an appeal as of right to the Supreme Court of Canada from a judgment dismissing his motion for a non-suit or from a judgment refusing a new trial, provided of course that other requirements in the act are met, *e.g.* as to the amount involved and the time for appealing. Ever since the broadened definition of "final judgment" was enacted in 1920, c. 32, s. 1(a), the court properly holds that it cannot hear an appeal under s. 36(a) unless it is an appeal from a judgment deciding some substantive right in controversy. An appellant from a judgment refusing a motion for a non-suit and granting a new trial is appealing from an apparently interlocutory judgment which does not decide a question of substantive right and which does not come within s. 36(b), so that the court is without jurisdiction. Such an appellant is likely to be surprised to find his appeal to the Supreme Court of Canada quashed because the rule in *Mutual Reserve* v. *Dillon* is of such limited application that it is not well known.

In cases where the defendant in the Court of Appeal asked only for judgment on his motion for a non-suit and the court ordered a new trial on its own motion, the Supreme Court of Canada will not hear the case on the merits. Such an order is considered to be in the discretion of the court below, from which no appeal lies, as provided in s. 38 of the act. A leading case on this point is *Barrington* v. *The Scottish Union and National Ins. Co.* (*supra*).

Mutual Reserve v. *Dillon* was followed in *Corporation of Delta* v. *Wilson*,[6] *Ainslie Mining & Ry. Co.* v. *McDougall*,[7] *Grand Trunk Ry.* v. *Gilchrist*,[8] and cited with approval in *Kinney* v. *Fisher*.[9] In *Corporation of Delta* v. *Wilson* it does not appear that the appellant corporation expressly asked for a new trial.[10] However, it is presumed that this aspect of the case was covered by chapter 56, section 76(3), of the Revised Statutes of British Columbia, which provides that a notice of appeal shall be deemed to include a motion for a new trial unless it states otherwise.

The judgments of the several Courts of Appeal in the foregoing cases really disposed of two issues. On the one hand, they dismissed the defendant's motion for a non-suit, if only by implication, and on the other hand they granted a motion for a new trial. The Supreme Court of Canada has jurisdiction under

[6] Noted in Cameron's Supreme Court Practice (3rd ed.), p. 110.
[7] (1908), 40 S.C.R. 270.
[8] Cameron, *op. cit.*, p. 111.
[9] [1924] 2 D.L.R. 329.
[10] See Cases in Supreme Court of Canada, Vol. 259 (1904), p. 38, in the Great Library, Osgoode Hall.

s. 36(b) to hear an appeal from the first part of these judgments, but not from the second. *Mutual Reserve* v. *Dillon* holds that in such circumstances a defendant cannot appeal to the Supreme Court of Canada on the ground that his motion for non-suit should have been successful, at the same time holding to the order for a new trial. The thought naturally occurs to a defendant, who is reluctant to permit the plaintiff to repair a defective case at a new trial, that he may be able to resolve his difficulty by making an election.

The decision of the Supreme Court of Canada in *C.P.R.* v. *Rutherford* transforms theory into practice.[11] In this case the plaintiff was given judgment at the trial on the jury's answers. The defendant appealed to the Court of Appeal for an order dismissing the action or alternatively for a new trial. The Court of Appeal ordered a new trial to clear up certain facts holding that there was conflicting evidence.[12] On appeal to the Supreme Court of Canada the defendant was met with the contention that it had no right of appeal. Kerwin J. disposes of the matter as follows:

> In the present instance, while the Company's formal notice of appeal to the Court of Appeal did ask in the alternative for a new trial, the report of the decision of that Court in [1945] O.R. 44, and the Company's memo. of points of law and fact, required to be filed by an appellant before the Court of Appeal, indicate that the only question argued was whether the judgment at the trial should be reversed and judgment entered in favour of the Company dismissing the action. Furthermore, counsel for the appellant stated at bar that he does not wish to hold the order for a new trial but desires to appeal from the order of the Court of Appeal which in fact refused his application to have the action dismissed, which is the judgment that he seeks in this Court. If he fails in that, he is satisfied to have the judgment at the trial restored. Under these circumstances, it would appear that the rule set forth in the cases referred to does not apply.[13]

Although his Lordship stresses the fact that the defendant had elected to rely on its motion for a non-suit at the hearing before the Court of Appeal, there seems to be no reason in principle why it should not also have been permitted to argue there that it was entitled to a new trial.

The Supreme Court of Canada is a statutory court and has only the jurisdiction conferred on it by the Supreme Court Act; in some respects its jurisdiction is more limited than either the Court of Appeal for Ontario or the Judicial Committee of the

[11] [1945] S.C.R. 609.
[12] [1945] O.R. 44.
[13] [1945] S.C.R. 609, at p. 613.

Privy Council. An interesting example of this is found in the case of *Toronto Ry. Co.* v. *King*,[14] where the Supreme Court of Canada quashed an appeal on the ground that the order for a new trial by the Ontario Court of Appeal was made in the exercise of its judicial discretion, and yet the appeal by special leave was heard on its merits by the Privy Council.[15] While a defendant can argue before the Court of Appeal that the action should be dismissed while holding an order in the alternative that there should be a new trial, he cannot do so in the Supreme Court of Canada. It is submitted that such a defendant is entitled to abandon the order for a new trial even at the opening of the hearing in the Supreme Court of Canada so that the appeal is brought within s. 36(b) of the act. There seems to be no authority dealing directly with a litigant's right to abandon an advantage, but the right is often asserted and the principle well established; a plaintiff can abandon part of his claim to bring it within the jurisdiction of an inferior court, and in the ordinary course of an action from trial to the Supreme Court of Canada, the litigants abandon those parts of their cases on which they no longer rely. In *C.P.R.* v. *Rutherford* the appellant abandoned the advantage gained by the success of one of its motions to the Court of Appeal, in order to bring its appeal within s. 36(b) of the Supreme Court Act. On the surface it appears to have converted, by its own election, an interlocutory judgment into a final one, which would perhaps be a remarkable feat, but when the substance of the Court of Appeal's decision is considered, it is clear that the defendant has merely thrown away the interlocutory part of the decision. It is submitted, therefore, that *C.P.R.* v. *Rutherford* is authority for a departure from a too rigid rule and that an appellant is entitled to abandon his right to a new trial at any stage of the proceedings up to the actual hearing in the Supreme Court of Canada.

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DOMICILE — EVIDENCE OF INTENTION TO CHANGE DOMICILE — ADMISSIBILITY OF EVIDENCE — QUEBEC.—On June 26th, 1947, the Privy Council, in *Vezina* v. *Trahan*,[1] confirmed the majority decision of the Quebec Court of Appeal in *Trahan* v. *Vezina*.[2] The issue was as to Vezina's domicile and hence as to the juris-

[14] Cameron, *op. cit.*, p. 138.
[15] [1908] A.C. 260.
[1] As yet unreported.
[2] [1946] K. B. 14.

diction of the Quebec court in an action for separation and alimony by his wife after a divorce obtained by him in Nevada. Both consorts were born in the United States and it was conceded that Vezina's domicile of origin was in Massachusetts. In 1917, when he was 23, he came to Montreal, where he became a traveller for the Heinz Company. In 1919 he was married in Worcester, Mass., to his present wife, the couple returning at once to Montreal where he continued his work. In 1924 he moved with his family to Worcester where he went into business with a brother-in-law. Unsuccessful, in 1928 he moved back to Montreal where he has lived ever since, engaging very successfully in various undertakings, which he has headed, establishing a country home and bringing up his children, though retaining his American citizenship. In August 1942 the present action was begun. It was contested on the merits and the trial court judgment was rendered only on June 26th, 1944. During the hearing, the defendant's plea was amended to allege a Nevada divorce obtained on January 25th, 1944, and that he had no longer his domicile in Quebec. He offered no proof against his wife's allegations of cruelty, but relied on proof of his domicile of origin, which he maintained he had never abandoned, and on declarations of his intention to return sooner or later to that domicile.

The question of the admissibility of these alleged declarations is a striking feature of the various judgments. Two articles of the Quebec Civil Code bear on the question:

> 80. Change of domicile is effected by actual residence in another place, coupled with the intention of the person to make it the seat of his principal establishment.
>
> 81. The proof of such intention results from the declarations of the person and from the circumstances of the case.

Loranger J., the trial judge, while deciding on all the facts that Vezina had taken and maintained a domicile of choice in Quebec, appears to have held that the oral evidence (taken under reserve) of three witnesses to whom Vezina had stated his intention to return to the United States and end his days there was inadmissible. And as against that evidence, in any case, was that of his children who testified that he had declared to them his intention to rebuild his country home near Montreal and there to end his days — evidence which he admitted was given in good faith by his children.

In appeal, the notes of judgment disclose a distinction between declarations made as to his intention by an interested person in giving testimony and declarations previously made by him. Thus St. Germain J. in his notes quotes Mignault J. in *Taylor* v. *Taylor*:[3]

> Obviously the declarations must be contemporaneous ones, and not those which a party may make as a witness at the trial,

and, while accepting contemporaneous declarations as admissible, adds (translated):

> I am firmly of opinion that the declarations that a person may make at the trial cannot be accepted as proof, in a case wherein the question of his domicile is precisely in issue — a declaration, for example, that he has always intended his domicile to be at such and such a place.

The alleged oral declarations to third parties being contemporary ones, his Lordship was of opinion that they were admissible in evidence, though the evidence of Vezina's three witnesses was off-set by that of his children.

Gagné J., in his notes, says (translated):

> As for the declarations made by the party in the course of his testimony, it is evident that they must be admitted as legal proof [*il est évident qu'elles doivent etre admises comme preuve légale*], but they must be weighed with great circumspection, because it is too easy for the party to affirm an intention favourable to his interests without contradiction being possible.

Pratte J., in his notes, was of opinion that (translated):

> It is proper to add that [positive] acts tending toward the realization of some purpose are more certain proof of the existence of an intention than is the simple declaration of intention made after the event [*après coup*]; and hence that a declaration of intention not to renounce a domicile of origin should not prevail against a contrary intention manifested by a line of conduct.

The formal judgment of the Court of Appeal does not mention the admissibility of declarations to third parties contemporaneously, or by the interested party in the witness box. As for evidence of declarations made to third parties, the Privy Council held:

> Their Lordships agree with the Court of King's Bench that the oral evidence of statements made by the Appellant was admissible.

So that at least on that point there is no room for future doubt; if ever, in view of article 81, there could have been a reasonable doubt, the article being so definite.

There weighed also against Vezina, in the Quebec judgments, besides the incredibility of the oral evidence of intention, certain

[3] [1930] S.C.R. 26, at p. 30.

documentary evidence. His marriage at Worcester, Mass., in 1919, was preceded by a formal notarial contract of marriage which stipulated separation as to property. If he was at his marriage domiciled in Massachusetts, he was separate at common law; if in Quebec, he would be in community in the absence of a contract stipulating separation. In that contract he described himself as "of the City of Montreal, Commercial Traveller". In addition, he declared that "In consideration of the said intended marriage, the future husband hereby doth give unto the future wife . . . the household furniture . . . garnishing and ornamenting actually the future common domicile of the said consorts, situate at . . . Outremont, near Montreal, Canada". As to that, the Privy Council, differing from the trial judge (and *semble* from opinions in appeal) held that "the words above quoted in the ante-nuptial contract are words of gift and have no reference to an intention on the part of the Appellant to set up a permanent home at . . . Outremont". With that one can readily agree, for the word "domicile", in the sense of mere location of housing or residence is too loosely used, in our deeds, in our Codes, in fact too colloquially, and without proper international connotation. But the description of himself as "of Montreal", though the Privy Council judgment does not so hold, had the connotation of domicile in the international sense, though rebuttable.

There were other circumstances indicating a choice of domicile in Quebec. As the Privy Council puts it:

> There are also the undoubted and admitted facts that he had resided in Montreal from 1928 until the beginning of these proceedings in 1942, that he had acquired a very considerable position in the business world of Montreal, that after the divorce in Nevada he went through a form of marriage and returned to live in Montreal, and that so far from having any real family home in Massachusetts his parents appeared to be living in different states, one in New York and the other in Connecticut.
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> Great importance is to be attached to the findings of the learned Judge who saw and heard the witnesses, and it is clear that Mr. Justice Loranger was not prepared to accept the evidence of the Appellant.

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CONSTITUTIONAL LAW — LABOUR RELATIONS — RAILWAY HOTELS. — Two references to the Court of Appeal for British Columbia involved the application of the federal labour regula-

tions known as P.C. 1003 to hours of work in (a) mines regulated by provincial legislation and (b) a hotel operated by a Dominion railway. The first reference, *Reference re Application of Hours of Work Act to Metalliferous Mines*[1] involved primarily a local question of the application of two provincial statutes to metalliferous mines. The act[2] governing the mines had provided for an eight-hour day. In 1946 the Hours of Work Act[3] had been amended to provide for a forty-four hour week. The latter act was declared subject to the mining act. The court, through Sloan C.J.B.C., held that, in the absence of a weekly limitation in the mining act, the provision in the Hours of Work Act governed. The question then arose as to whether the latter provision applied to mines which had negotiated contracts for a forty-eight hour week with the employees' bargaining agent duly certified under P.C. 1003, which was in force in the province both for federal and provincial matters. The Chief Justice did not find it necessary to enter upon a discussion of the constitutional problems that might arise in such circumstances. The regulations were purely procedural, whereas the provincial statute law was substantive:

> . . . P.C. 1003 contains regulations which, in pith and substance, are not in relation to those same subject-matters covered by the provincial Hours of Work Act. The primary intent and purpose of P.C. 1003 was to create the procedure for an orderly manner of collective bargaining. . . These regulations, however, do not bind the employee or employer to include in the agreement any specified conditions affecting hours of work or rates of pay.[4]

Employers and employees were not, in the absence of provisions in the federal regulations, to be allowed to contract themselves out of the relevant provincial statute law. Their agreements entered into under P.C. 1003 must conform as much with the Hours of Work Act as with the Control of Employment of Children Act, The Minimum Wage Act, The Semi-Monthly Payment of Wages Act. On the other hand, if the federal regulations had dealt with these matters, another view might be held:

> I am free to concede that if by its terms P.C. 1003 wrote into negotiated agreements substantive and specific covenants covering hours of work and other conditions of employment, and used clear, mandatory and unambiguous language in the expression of its intent to oust provincial jurisdiction in those respects, then in that event, the Dominion regulations would govern.[5]

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[1] [1947] 1 W.W.R. 841 (B.C., C.A.).
[2] Metalliferous Mines Regulation Act, R.S.B.C., 1936, c. 189, s. 28.
[3] R.S.B.C., 1936, c. 122, s. 3(1), as amended 1946, c. 34, s. 3.
[4] [1947] 1 W.W.R. 841, at pp. 844-5.
[5] *Ibid.*, at p. 845.

The second reference, *Reference re Application of Hours of Work Act to Employees of C.P.R. in Empress Hotel, Victoria,*[6] raises substantial constitutional problems. Briefly it involved the question as to how far provincial labour legislation applied to a federal railway's employees employed in a hotel owned and operated by the railway "for the comfort and convenience of the travelling public". In particular, the C.P.R. had entered into a collective agreement with respect to rates of pay, hours of work and other terms and conditions of employment with a union local certified under P.C. 1003 for practically all the employees of the Empress Hotel. The agreement became effective on September 1st, 1945. In 1946 the provincial legislature amended the Hours of Work Act to provide for a forty-four hour week. Apart from the problem dealt with in the first reference (and the decision on this point was merely applied by the majority in this case), the agreement and judgments dealt with two points: (a) whether the federal parliament had exclusive jurisdiction in the matter as "railway legislation"; (b) if not exclusive, whether the jurisdiction was concurrent and whether the Dominion in such circumstances had legislated. The majority held against the Dominion on both approaches, while O'Halloran J. A. would have held that the Dominion had exclusive authority and therefore found no need to discuss the other problems.

Robertson J. A., speaking for the majority of the court, said that there was "no doubt that the *lines of railway* operated by the company are under the exclusive jurisdiction and control of the Dominion"[7] under the B.N.A. Act, s. 92(10). Whether his Lordship is looking, for federal jurisdiction, to clause (a) of s. 92(10), which clause excepts from provincial legislative competence "lines of . . . railways . . . and other works and undertakings connecting the province with any other or others of the provinces and extending *beyond the limits of the province*", or to clause (c) under which works declared to be for the general advantage of Canada are exempted from provincial jurisdiction, he keeps coming back to the phrase "lines of railway".

> It is to be observed that it is only the 'lines of railway' of the company, not its undertaking, which have been declared to be for the general advantage of Canada.
>
> The Dominion's powers are restricted to lines of railway mentioned in head 10 of sec. 92.[8]

[6] [1947] 1 W.W.R. 927 (B.C.,C.A.).
[7] At p. 938 (italics mine).
[8] At pp. 939-940.

Even within this limitation, the decision, we submit, might have displayed a broader application than that reached by Robertson J. A. His Lordship, in an effort to determine what is meant by the term "lines of railway", turns the clock back eighty years. "What was the meaning of these words in 1867 when the B.N.A. Act, 1867, was passed?"[9] Fortunately no definition as of that date is available from the cases. But, may we, with respect, submit that, while it may be quite proper to interpret the words in an ordinary statute as of the date when it was passed,[10] the interpretation of the B.N.A. Act should be on a broader basis. It is not only a statute: it is a constitution. However much we may have to admit, and deplore, the limited construction given to the statute by the Judicial Committee in some cases in the past, this submission is not mere wishful thinking. "Persons" eligible for the Senate *may* not have included women in 1867; women were included in 1930.[11] The power to establish a general court of appeal for Canada did not include power in 1867 to make such court final and exclusive, but did in 1947.[12] Or more directly, of the judicial expressions in the last twenty years wherein a wide and flexible interpretation is called for[13] none is more significant than the present Lord Chancellor's earlier this year in his interpretation of another section of the same act:

> It is, as their Lordships think, irrelevant that the question is one that might have seemed unreal at the date of the B.N.A. Act. To such an organic statute the flexible interpretation must be given that changing circumstances require, and it would be alien to the spirit, with which the preamble to the Statute of Westminster is instinct, to concede anything less than the widest amplitude of power to the Dominion Legislature under s. 101 of the Act.[14]

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[9] At p. 940.

[10] And there is doubt as to whether even this is a valid rule. *Cf.* Maxwell: The Interpretation of Statutes (9th ed., 1946), at pp. 82-4, where it is stated that "the language of a statute is generally extended to new things which were not known and could not have been contemplated by the legislature when it was passed", and where there are cited many instances of extended meanings — e.g. *A. G.* v. *Edison Telephone Co.* (1880), 6 Q B.D. 244, which held that the word "telegraph" in the Telegraph Act 1869 included a "telephone" even though the latter was unknown in 1869. What of a "railway" yesterday and today?

[11] *Edwards* v. *A.G. for Canada*, [1930] A.C. 124.

[12] *A.G. for Ontario* v. *A.G. for Canada*, [1947] 1 D.L.R. 801.

[13] *E.g.* Lord Sankey L. C. in the "Persons" case, *supra* note 11, at pp. 134-5: "Over and above that, their Lordships do not think it right to apply rigidly *to Canada of today* the decisions and reasons therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries, to countries in different stages of development"; at p. 136: "The [B.N.A.] Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada"; at p. 143: "the object of the Act, . . . to provide a constitution for Canada, *a responsible and developing State.*" (Italics mine).

[14] Lord Jowitt L. C., [1947] 1 D.L R. 801, at pp. 814-5.

The majority judgment of Robertson J. A., however, proceeds to hold that as the term "lines of railway" refers to the rails and the right-of-way, it does not include an hotel, even though that hotel is part of the railway's world-wide transportation system. His Lordship's conclusion follows dictionary definitions (editions later than 1867 are used) of "railroad":

> The words 'lines of railway' connecting two provinces seem to point primarily to the rails and the right-of-way. Again, the words in sec. 8 of the 1902 Act [giving the C.P.R. power to erect and operate hotels] 'along any of its lines of railway' seem to indicate that the railway mentioned in the section is primarily the right-of-way and the rails.[15]

With the utmost respect, we cannot but say that this appears to be a most unnatural interpretation. But the shock is tempered by the holding that this is not the entire meaning of the term. "Whatever is absolutely necessary for the physical use of the railway is to be treated as part of the line of railway."[16] This includes "roundhouses, stations, rolling stock, equipment", but not the Empress Hotel. "No one would suggest that a hotel as such is a railway." Nor would anyone normally suggest, it is submitted, that a round house as such is a railway. But each when taken as part of a system of transportation may very well be part, an essential part, of a railway system. It is obvious that his Lordship concludes that the Dominion has not the exclusive right to legislate in relation to hours of work in this hotel. His Lordship briefly concludes that the provision[17] of the federal Railway Act, whereby power to regulate the hours of duty of employees is entrusted to a federal board, is not an exercise of federal power, assuming that the Dominion and the provinces have overlapping jurisdictions.

With respect, the dissenting opinion of O'Halloran J. A. approaches the subject not only from a more realistic point of view, but, it is submitted, from a view that is sounder in law. Very briefly, his Lordship declared that the construction, maintenance and operation of the hotel formed "an integral part of the 'works and undertakings' " of the railway company within s. 92 (10)(c) of the B.N.A. Act, under which clause, by legislation in 1883 and 1888,[18] not merely the lines of railway but "The

[15] [1947] 1 W.W.R. 927, at p. 940.
[16] *Ibid.*, at p. 941.
[17] R.S.C., 1927, c. 170, s. 287(j).
[18] 1883, 46 Vict. c. 24, s. 6; 1888, 51 Vict. c. 29, s. 306. The 1888 Act superceded the 1883 Act. The 1883 Act had, as Robertson J. A. notes, declared "the lines of railway" of the C.P.R. to be a work for the general advantage of Canada. But the 1888 Act makes it clear that it is the railway itself which is brought under s. 92(10)(c).

Canadian Pacific Railway" was declared to be a work for the general advantage of Canada. It was true that clause (c) referred only to "works", whereas clause (a) spoke of "works and undertakings", but the former must be read as denoting the works and undertakings referred to in clauses (a) and (b) of s. 92(10), namely, in this case, the railway and such other works and undertakings as are found essential to the efficient operation of the railway as a transcontinental and world-wide transportation system. Included in these works is the Empress Hotel, "an integral part" of that system. And the words "lines of railway" cannot be limited to "lines of rail" when the natural meaning that flows from the legislation of 1883, and more particularly of 1888, is that:

> not only its 'lines of rail' as such, but everything which might become essential to the transportation system in order to make it a modern, convenient and efficient transportation system, measured in terms of the competition it would receive from other large transportation systems. To my mind, with respect, any other view is foreign to the historical setting in which the Canadian Pacific Railway Company was planned and conceived as a great transcontinental and Imperial system.[19]

It was true that the hotel was not built until after the turn of the century, and that the company did not receive express power to build hotels until 1902, but it did have the general power under its charter in 1881, which made applicable the relevant Railway Act giving power to erect and maintain all necessary buildings, in addition to stations, depots, etc., for the accommodation and use of passengers.

Assuming then that the management of the hotel was part of a railway undertaking, what of legislative power? Labour conditions throughout such a system were part of the carrying on of the business of the company as a whole — a matter of railway and steamship management, not a matter of property and civil rights *within each of the several provinces.* Not only that, but there is the alternative suggestion:

> In my judgment also the fixing of hours of work of employees of a Dominion-wide undertaking such as the Canadian Pacific Railway Company is not a matter of local or provincial concern. Considering the interests affected, it concerns the Dominion as a whole and such being the case, legislation with respect to that subject-matter falls within the sole competence of the Dominion Parliament under sec. 91 to the exclusion of provincial legislation: *Atty-Gen. for Ont.* v. *Canada Temperance Federation.*[20] [21]

[19] [1947] 1 W.W.R. 927, at p. 933.
[20] [1946] 2 D.L.R. 1, at p. 5 (J.C.P.C.).
[21] [1947] 1 W.W.R. 927, at p. 935.

It is refreshing to see this reference to the general power of the Dominion under the opening words of s. 91, as resurrected by Lord Simon in 1946. Though not essential to the decision, since his Lordship finds that this is truly railway legislation under s. 92(10)(c), the idea that labour legislation is a national matter — is in itself within federal competence — may be a forerunner of new and fresh efforts to make the constitution work as it was intended to work.

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ANIMALS STRAYING ON THE HIGHWAY — ONTARIO — THREE FURTHER COMMENTS.

In the comment on *Searle* v. *Wallbank*[1] in the Canadian Bar Review for April 1947 the author discusses the effect of *Direct Transport Co. Ltd.* v. *Cornell*[2] in imposing strict liability, as a result of section 74(3) of The Highway Improvement Act,[3] upon the owner of an animal strayed on a highway in Ontario for damaged caused thereby. He then goes on to say:

> The following year the legislature amended the section by adding a proviso that it would not create any civil liability. The situation must, therefore, be considered as if this statutory prohibition against straying did not exist.

In fact, the amendment[4] to section 74(3) made in 1939 provides that:

> This subsection shall not create any civil liability . . . for damages caused to the property of others . . .

The decision of the Court of Appeal for Ontario in *Direct Transport* v. *Cornell* was an unsatisfactory decision, and perhaps wrong in principle. It was criticized at the time in (1938), 16 Canadian Bar Review at page 494. But the legislature, in reversing it by statute as regards injury to property, made it stronger as regards injury to the person. "Expressio unius, exclusio alterius" is a well-established principle in the construction of statutes. If the Court of Appeal was able to read into s. 74(3) as it stood in 1938 an intention to create civil liability as

[1] [1947] 1 All E.R. 12.
[2] [1938] O.R. 365.
[3] R.S.O., 1937, c. 56.
[4] Statutes of Ontario, 3 Geo. VI, 1939, c. 19.

well as to impose a penalty, it could with greater reason see such an intention, in so far as injury to the person is concerned, in the section as amended in 1939. Consequently, farmers in Ontario would still be well advised so to arrange their fences and gates that their animals will stray onto township roads and not on the King's Highway.

In *Searle* v. *Wallbank* the effect of any provision on the English statute books similar to s. 74(3) of the Ontario Highway Improvement Act was not argued. However Lord Du Parcq does comment on the subject at page 22:

> Counsel refrained from contending before your Lordships that the provisions of the Highway Acts could affect the rights of the parties between themselves. Rightly, I think, he accepted as correct the observations of Erle, C. J. in *Cox* v. *Burbridge*[5] (at page 435): 'As between the owner of the horse and the owner of the soil of the highway . . . . we may assume that the horse was trespassing . . . So it may be assumed that, if the place in question were a public highway, the owner of the horse might have been liable to be proceeded against under the Highway Act. But, in considering the claim of the plaintiff against the defendant for the injury sustained from the kick, the question whether the horse was a trespasser as against the owner of the soil, or whether his owner was amenable under the Highway Act, has nothing to do with the case of the plaintiff.'

It may be of interest to compare the provision in the Highway Acts with the section of the Ontario Highway Improvement Act. The English statute reads:

> If any Horse, Mare, Gelding, Bull, Ox, Cow, Heifer, Steer, Calf, Mule, Ass, Sheep, Lamb, Goat, Kid, or Swine is at any time found straying on or lying about any Highway . . . the Owner or Owners thereof shall, for every Animal so found straying or lying, be liable to a Penalty not exceeding Five Shillings . . . together with the reasonable Expense of removing such Animal . . . to the Fields or Stable of the Owner or Owners, or to the Common Pound . . .[6]

It is to be noted, in considering the dictum of Lord Du Parcq approving the language of Erle C. J., that it is more difficult to interpret the English statute than the Ontario statute as doing more than imposing a penalty. Thus it is very doubtful whether *Searle* v. *Wallbank* can be relied on for assistance in overcoming the Ontario Highway Improvement Act. It is not proposed to discuss here whether, granting that the section does affect civil liability, the Court of Appeal was right in the *Direct Transport* case in imposing "strict" liability. The reader is re-

[5] (1863), 13 C.B. (N.S.) 430.
[6] 27-8 Victoria, c. 101, s. 25.

ferred to the comment in 16 Canadian Bar Review, mentioned earlier, for this question.

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I am indebted to Mr. Depew for calling attention to my misquotation of section 5 of The Highway Improvement Amendment Act, 1939.[1] I do not, however, agree with his comment on *Direct Transport Co. Ltd.* v. *Cornell*[2] that:

> the legislature, in reversing it by statute as regards injury to property made it stronger as regards injury to the person.

The question is whether the legislature, in adding the proviso, intended to make property damage an exception to a general rule of absolute liability, or whether it was declaring that section 74(3) of The Highway Improvement Act[3] was never intended to create civil liability. If the former, the result would be that the owner of a car wrecked in a collision with animals would have no right of action, while a gratuitous passenger in the same car who was injured would be able to recover. The writer knows of no other statute where such a distinction is made. Absurdity is not an excuse for avoiding the plain meaning of a statute, but where there are two possible interpretations, one leading to an absurdity and one not, the court will conclude that the legislature did not intend to lead to an absurdity.[4] The method of construction summarized in the maxim "Expressio unius, exclusio alterius", referred to by Mr. Depew, cannot be applied without limitation. It is common to put provisions into statutes *ex abundanti cautela*.[5] It is submitted that the reference to property damage was made in the light of the decision of the Court of Appeal in *Direct Transport* v. *Cornell* (*supra*), a property-damage case, and that the whole proviso must be looked at to determine its meaning.

The unhappy wording of the 1939 amendment was discussed in an article in 10 Fortnightly Law Journal at page 71; it appears to be due to a misconception of the nature of an action for statutory negligence. A statute does not create civil liability directly. Civil liability results from damage suffered, as a result of the breach of a statutory duty, by a member of a class of citizens for

[1] Statutes of Ontario, 3 Geo. VI, c. 19.
[2] [1938] O.R. 365.
[3] R.S.O., 1937, c. 56.
[4] 31 Halsbury (2nd ed.) 497, para. 635.
[5] 31 Halsbury (2nd ed.) 506, para. 651.

whose protection the statute was passed. See *East Suffolk Rivers Catchment Board* v. *Kent*[6] where Lord Atkin said at page 88:

> [A statutory duty to do or abstain from doing something] is primarily a duty owed to the State . . . The duty is not necessarily owed to a private citizen. The duty may, however, be imposed for the protection of particular citizens or class of citizens, in which case a person of the protected class can sue for injury to him due to the breach. The cases as to breach of the Factory or Coal Mines Act are instances. As a rule the statutory duty involves the notion of taking care not to injure and in such cases actions for breach of statutory duty come within the category of negligence: see *Lochgelly Iron and Coal Co.* v. *M'Mullen*, [1934] A.C. 1.

In each case the following questions arise:

(a) is the statute for the protection of a particular class of citizens;[7]

(b) does the statute impose a duty in favour of those persons in addition to a general duty owed to the state;[8]

(c) did the damage result from the breach of such duty.

The 1939 amendment provides that section 74(3)[9] "shall not create any civil liability . . . for damages caused to the property of others . . ." Since the only way civil liability could be created is as a result of the breach of a statutory duty owed to the owner of the property, the only reasonable meaning of the proviso is that it is a declaration by the legislature that no such statutory duty is intended to be created. If the legislature had intended to make property damage an exception to a general rule of absolute liability the language would have been less positive: *e.g.* "provided that the owner of horses etc., shall not be liable for damages caused to the property of others . . ."

If there is no duty owing to persons whose property is damaged, it is submitted that there can be no duty owing to persons who are injured. It seems obvious that the class of persons for whose benefit a statute is passed cannot be determined by reference to the nature of damage subsequently suffered. The duty imposed by statute is to "take care not to injure" or cause property damage, and the class of persons in whose favour that duty is imposed must necessarily be determined before the injury

[6] [1941] A.C. 74.

[7] In *Wynant* v. *Welch*, [1942] O.R. 671, Gillanders J. A., with whom the other members of the Court of Appeal agreed, doubted whether a by-law similar to section 74(3) of The Highway Improvement Act was for the benefit of a particular class as distinct from the public at large.

[8] This depends on the intention of the legislature. Tests which may be applied in determining whether such intention exists are mentioned by Masten J. A. *in Direct Transport Co. Ltd.* v. *Cornell*, [1938] O.R. 365.

[9] The Highway Improvement Act, R.S.O., 1937, c. 56.

or damage occurs. If there is no duty imposed by the statute in favour of injured persons, then of course there is no liability under the statute.

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The case of Weatherston versus Depew argued above will have to await decision in the courts in actions between other litigants. That there will be other litigants in these circumstances is beyond question in a Canada where the civilizations of the domestic animal and of the combustion engine battle for vain mastery in and out of the courts.

Anticipating such future litigation, it is respectfully suggested again that *Direct Transport* v. *Cornell*[1] was wrongly decided not only on the ground that the duty created by the statute carried with it liability only for proven negligence rather than strict liability,[2] but also on the ground that no duty giving rise to civil action was created by the statute at all.

If a claim for personal injuries should arise by reason of animals running at large on the King's Highway, then it is respectfully submitted that the authority of *Direct Transport* v. *Cornell* should be challenged on the grounds that:

(1) It is a decision dealing only with property damage.[3]

(2) It is based on three cases, *Hall* v. *The Toronto Guelph Express Co.*,[4] *Irvin* v. *Metropolitan Transport Co.*,[5] and *Lochgelly* v. *McMullan*,[6] where there was either an express right of action given by the statute or where elements were present not found in the *Direct Transport* case.

(3) The true rule is stated in Halsbury,[7] "The failure to perform a duty imposed by a statute under the sanction of a penalty may, although it does not necessarily, give a right

[1] [1938] O.R. 365 (C.A.).

[2] As urged by Dr. C. A. Wright in (1938), 16 Can. Bar Rev. 494.

[3] The judgment of the House of Lords in *Read* v. *Lyons*, [1946] 2 All E.R. 471, noted in (1947), 25 Can. Bar Rev. 76, suggests that a difference in liability may exist between property and personal injury claims.

[4] [1929] S.C.R. 92, where reliance was placed on s. 41(1) of The Highway Traffic Act, R.S.O., 1927, c. 251, now changed on this very point to R.S.O., 1937, c. 288, ss. 46 and 47.

[5] [1933] O.R. 823, where it was held that s. 35(a) of The Highway Traffic Act, R.S.O., 1927, c. 251 as amended was passed in favour of those who are travelling on the highway and suffer damage from breach of the statute: Masten J. A. at page 833.

[6] [1934] A.C. 1, where a clear right of action was given in terms by the Imperial statute and the real question was, had it been qualified.

[7] 23 Halsbury (2nd ed.) 653, para. 923.

of action to an individual injured by that omission. Where a statute aims at the protection of a particular class or at the attainment of a particular purpose which in the ordinary course is calculated to benefit a particular individual or member of a class, an individual injured by a neglect of the obligation, either as one of that class, or by reason of being affected by the failure to attain that particular purpose, may have his remedy although a penalty is imposed by the statute".[8]

(4) It is a question in each case of construction of the legislature's intention.[9]

(5) The intention of the legislature on the face of The Highway Improvement Act[10] was not the same as the intention of the legislature in enacting The Highway Traffic Act.[11] It was in fact to define and control the measures to be taken in Ontario to improve the Highways. It is essentially an administrative act dealing with the Department of Highways,[12] the Highway Improvement Fund,[13] the Highway Committee,[14] County Road Systems,[15] Suburban Roads,[16] Township Roads,[17] The King's Highway[18] and the like. If its penalties carry with them liabilities to persons injured by the acts which they punish, a host of new causes of action have been created. It is clearly an act to benefit the public as a whole and there is little evidence that stray animals are to be kept off the highway for the benefit of any particular class. They were ordered off first in 1922 when the volume of traffic, the conditions of travel and the implications of liability were very different.[19]

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[8] The subject is discussed in Salmond's Law of Torts (10th ed., 1945), chap. XVI, at pp. 505-512.

[9] 23 Halsbury (2nd ed.) 652, para. 922; Salmond on Torts, *op. cit.*, p. 506.

[10] R.S.O., 1937, c. 56.

[11] R.S.O., 1937, c. 288.

[12] Ss. 2-6.

[13] Ss. 7-9.

[14] Ss. 10-11.

[15] Part II.

[16] Part III.

[17] Part IV.

[18] Part V, where s. 74(3) is found followed by s. 75 giving and limiting actions against the Department for damages.

[19] In this connection the legislative history of the present section 74(3) is of interest. By The Provincial Highway Act of 1917, 7 Geo. V, c. 16 it was recited to be expedient to establish a system of highways which should be under the direction and control of the Minister of Public Works and Highways. By section 26(1) the Minister was given the powers now given by s. 74(1) of the Consolidated Statute including the power of "prohibiting its use by any class of vehicles or animals". Section 26(2) provided for punishment by summary conviction. Section 26(3) was added in 1919 by

The issue may be put rhetorically. Is the intention of the legislature to create civil liability so crystal clear that the working farmers of the Province must insure the speedy, carefree motorist against all the consequences of dumb and innocent yet greedy beasts pasturing on the rich grasses and soft shoulders of the King's Highway?

It is submitted with respect that, in view of the debates which the law occasions, the legislature should make clear its intention to create or not to create a civil liability for personal injuries by the section in dispute, or, it failing, that the courts should distinguish *Direct Transport* v. *Cornell* or, in the proper place, overrule it.

P.W.

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A FRIEND AT COURT

Davy: I beseech you, Sir, to countenance William Visor of Wincot against Clement Perkes of the hill.

Justice Shallow: There are many complaints, Davy, against that Visor: that Visor is an arrant knave, on my knowledge.

Davy: I grant your worship, that he is a knave, Sir; but yet, God forbid, Sir, but a knave should have some countenance at his friend's request. An honest man, Sir, is able to speak for himself, when a knave is not. I have served your worship truly, Sir, this eight years; and if I cannot once or twice in a quarter bear out a knave against an honest man, I have but a very little credit with your worship. The knave is mine honest friend, Sir; therefore, I beseech your worship, let him be countenanced.

Justice Shallow: Go to; I say, he shall have no wrong.

(Shakespeare: Henry IV, Part II, Act V, Scene I)

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9 Geo. V, c. 17, s. 7 and provided that fines and penalties went to the Department. In 1920 the power to make regulations prohibiting the use of the highway by any class of animals was stricken out by 10-11 Geo. V. c. 23, s. 6. In 1922 the substance of the present section was enacted by 12-13 Geo. V., c. 30, s. 3. The legislation was consolidated as s. 72 in The Highway Improvement Act, 1926, 16 Geo. V., c. 15, as s. 73 in R.S.O., 1927, c. 54, and as s. 74 in R.S.O., 1937, c. 56. Then came the 1939 amendment which occasions this controversy: 3 Geo. V., c. 19, s. 5.