CASE AND COMMENT.

CONSTITUTIONAL LAW — MEMBERS OF THE MILITARY FORCES— LEGISLATION BINDING THE CROWN.—In *Rex* v. *Rhodes*,[1] there was raised before Armour, J., on appeal by way of a stated case from the Magistrate for the Town of Eastview in the County of Carleton, a problem similar to that in *Rex* v. *Anderson*[2] on which I have already written a comment.[3] A member of the Royal Canadian Air Force was convicted by the Magistrate for unlawfully operating a motor car without first having obtained a licence to do so, contrary to statute.[4] It was acknowledged that he was a servant of the Crown in the forces of the Dominion, that the motor car was the property of His Majesty in the right of the Dominion and that it was being used, on the occasion in question, for a public purpose within the meaning of the authority of the Royal Canadian Air Force. In quashing the conviction the learned judge, while approving with respect the quashing of a conviction for a similar offence in *Rex* v. *Anderson* (*supra*), preferred to base his judgment on other reasons. In *Rex* v. *Anderson* the decision turned on the taxing-powers of the provinces. In the instant case, the learned judge based his decision on the question of the prerogative. The Ontario *Interpretation Act*[5] lays it down that "no Act shall affect the rights of His Majesty, His Heirs or Successors, unless it is expressly stated therein that His Majesty shall be bound thereby." This enactment embodies the strict common law rule to the exclusion of any doctrine of necessary implication such as has been developed in England.[6] As His Majesty's prerogative in relation to Ontario statutes is laid down in the Ontario *Interpretation Act* in strict terms and without any modifications, the learned judge found that the general terms of the Ontario *Highway Traffic Act*—"no person other than one holding a chauffeur's license shall operate or drive a motor vehicle unless he holds an operator's license issued to him under this section"[7]—did not apply to any of the members of His Majesty's forces, operating motor vehicles in the discharge of their duties. In

[1] [1934] O.R. 44; [1934] 1 D.L.R. 251.
[2] [1930] 3 Man. R. 84; 2 W.W.R. 595.
[3] (1931), 9 C.B.Rev. 512; cf. (1930), 8 C.B.Rev. 747.
[4] *Highway Traffic Act*, R.S.O. 1927, c. 251, s. 66.
[5] R.S.O. 1927, c. 1, s. 10.
[6] Maxwell, *Interpretation of Statutes*, 7th ed., at p. 117 *et seq.*
[7] R.S.O. 1927, c. 251, s. 66.

quashing the conviction, His Lordship based his decision on a new point. It would appear, then, from the decision in *Rex* v. *Anderson* that a Province cannot compel a member of His Majesty's forces to obtain a license to operate a motor vehicle, the property of His Majesty in right of the Dominion of Canada, and used for military purposes, for which a fee is charged payable to the Provincial Treasurer for His Majesty's use in right of the Province, and this rule is strengthened if the provincial *Interpretation Act* is in the strict terms of the common law, as pointed out by the learned judge in the instant case. *Quaere*—if a provincial Interpretation Act is in the terms of the Ontario *Interpretation Act*, would a member of His Majesty's forces be liable to conviction, if he exceeds the speed-limits laid down by provincial statute, while driving a motor vehicle in the discharge of his official duties? On the reasoning of the Nova Scotia Supreme Court in *Rex* v. *McLeod*,[8] it would appear that this is possible.

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MOTOR VEHICLE EQUIPMENT — "ABSOLUTE LIABILITY" FOR BREACH OF STATUTORY REQUIREMENT.—In the conflicting views of the judges of the Ontario Court of Appeal in the recent decisions in *Falsetto* v. *Brown, et al.*,[1] and the decision of the Manitoba Court of Appeal in *Connell* v. *Olsen*[2] are to be found the opposing views with regard to the so-called "absolute liability" arising from failure to comply with statutory requirements as to equipment of motor vehicles. In *Falsetto* v. *Brown* the plaintiff, a young girl, aged 19 years, was a passenger in a Chevrolet sedan which ran into the rear of a Ford truck on the Galt-Kitchener Highway about 10.30 in the evening of August 17th, 1932. The sedan was owned by Brown and was being driven by one, McMaster, with Brown's consent. The truck was owned by the Waterloo Bedding Company, Limited, and was being driven by an employee in the course of his employment. The trial judge found that the plaintiff had been damaged to the amount of $1,500 by the concurrent negligence of the defendants and that each set of defendants was equally in default. The accident occurred on a dark, wet night, the visibility being poor. The truck had no rear light or reflector

[8] [1930] 4 D.L.R. 226.

[1] [1933] 3 D.L.R. 545; [1933] O.W.N. 518; [1933] O.R. 645.
[2] [1933] 1 W.W.R. 654; [1933] 3 D.L.R. 419.

and was not seen by McMaster, who was driving the sedan. The trial judge found that, notwithstanding the absence of the tail-light and reflector, McMaster should have seen the truck and avoided the accident, but he also found that had the truck been equipped with a tail-light McMaster might have seen the truck and avoided striking it. Davis, J.A., who gave the majority judgment of the Ontario Court of Appeal, said that the trial judge had assumed that the *Highway Traffic Act* imposed absolute liability by law on the owner of the truck for the absence of a tail-light and that this was not a correct view of the law but that liability could only be well founded if the omission to have the rear lamp burning at the time of the collision constituted negligence. His Lordship said: "There was such an absolute liability under the statute at the time of the decision of the Supreme Court of Canada in *Hall* v. *Toronto Guelph Express Company.*"[3]

He then referred to an amendment to the Ontario Act and said that the alterations in the statute imposed duties under the sanction of penalties and that no civil right arose from the mere failure to fulfil any of the statutory duties so imposed, and that individuals as such were left to their common law rights, remedies and liabilities and that where there was no statutory onus the plaintiff must allege and prove negligence, and that it was not sufficient to rely upon a breach of a statutory duty. He referred to *Phillips* v. *Britannia Hygienic Laundry Company Limited*[4] and *Winnipeg Electric Company* v. *Geel.*[5] His Lordship also said: "No doubt the owner of a vehicle would be negligent if he or the driver knew that there was no bulb in the socket or that the filament in the bulb was broken or that the wiring was defective or that the battery was ineffective."

Riddell, J.A., who dissented in part, declined to take this view of the finding of the trial judge. He says that the trial judge found that the absence of the light was negligence without referring to the statute, but it is apparent that His Lordship does not agree with the view taken by the majority of the Court upon absolute liability. He further stated:

> Nor am I in the slightest degree troubled by the dictum, for apparently it is no more, of the Judicial Committee in *Winnipeg Electric Company* v. *Geel*,[6] speaking of a certain clause in the Manitoba Act as a penal clause and consequently not material in a case of civil liability. Having decided that the clause in that particular Act was a penal clause it naturally followed that it was not material in a civil action but that is all.

[3] [1929] 1 D.L.R. 375.
[4] [1923] 2 K.B. 832.
[5] [1932] 4 D.L.R. 51.
[6] *Supra*, at p. 52.

In *Connell* v. *Olsen*[7] the Manitoba Court of Appeal considered the Manitoba *Highway Traffic Act* and took, on almost the same set of facts, the opposite view to the majority in *Falsetto* v. *Brown,* holding that it was no excuse that Mrs. Connell was not aware of the light being out, following *Hall* v. *Toronto Guelph Express Company*[8] and *Nesbitt* v. *Carney.*[9] No reference is made in the judgment of Richards, J.A., who gave the judgment of the Manitoba Court of Appeal, to the decision of the Privy Council in *Geel* v. *Winnipeg Electric Company,*[10] although this Manitoba judgment appears to have been decided nine months after the decision of the Privy Council in the case last mentioned. The Privy Council decision had also been in the reports for some months but there was nothing in the headnote which referred to the dictum on civil liability for breaches of the *Highway Traffic Act,* and it was probably not before the Court when *Connell* v. *Olsen* was decided. The accident in *Connell* v. *Olsen* occurred on June 14th, 1930. The *Highway Traffic Act,* Statutes of Manitoba, (1930), chapter 19, was proclaimed as of May 1st, 1930, and this Act, like the Ontario *Highway Traffic Act* considered in *Falsetto* v. *Brown,* appears to have had no section relating to the civil liability for breaches of the Act similar to the former Ontario section 41, the purpose of which the Supreme Court held in *Hall* v. *Toronto Guelph Express Company* to be "not only to impose direct civil liability but also that that liability should be unrestricted." The Manitoba statute did have section 59, which provided merely that no penalty or imprisonment should be a bar to the recovery of damages by an injured person.

When the Saskatchewan Court of Appeal held in *Nesbitt* v. *Carney,*[11] that it is negligence *per se* to operate an automobile without complying with the statutory requirements as to lights, no reference was made to any section imposing civil liability for breaches of the Saskatchewan Act, and a perusal of the Act would indicate that it did not at the time of the accident have a provision expressly imposing civil liability for breaches of its provisions. (See Statutes of Saskatchewan (1928), chapter 73, section 4.) The section was aimed at the criminal liability of the owner in respect of breaches of the Act.

These decisions in the Courts of Appeal of three adjoining Provinces, and the remarks of Lord Wright in *Geel* v. *Winnipeg Electric*

[7] [1933] 1 W.W.R. 654; [1933] 3 D.L.R. 545.
[8] [1929] S.C.R. 92.
[9] [1930] 3 W.W.R. 504.
[10] [1932] 3 W.W.R. 49; [1932] 4 D.L.R. 51.
[11] [1931] 1 D.L.R. 106; [1930] 3 W.W.R. 504, following *Hall* v. *Toronto Guelph Express Company,* [1929] S.C.R. 92.

Company, raise again the question of the circumstances under which civil liability to an action for damages is imposed for the breach of a statutory duty and the extent to which that liability may be absolute.

Salmond on Torts,[12] says with regard to the breach of statutory duties, that the breach of a duty created by statute, if it results in damage to an individual, is *prima facie* a tort for which an action for damages will lie, but the question is in every case one as to the intention of the Legislature in creating the duty. *Prima facie,* persons for whose benefit an Act is passed have a right of action for damages for its breach causing them injury, but on the true construction the Act may not intend a remedy to the individual or it may provide a special remedy, the nature of which indicates that no right to the individual was intended. It is material in this case to consider whether the remedy gives any compensation to the individual injured. And then the learned author said that it is also a question of construction whether the liability is absolute or depends on wrongful intent or negligence, and he quotes Brett, L.J., as follows:

> Where the language used is consistent with either view, it ought not to be so construed as to inflict a liability unless the party sought to be charged has been wanting in the exercise of due and reasonable care in the performance of the duty imposed.

See also Pollock on Torts,[13] and Gibb, Collisions on Land,[14] where the learned author said: "The breach of a statutory regulation is usually *prima facie* evidence of negligence," and he quoted at length from Atkin, L.J., in *Phillips* v. *Britannia Hygienic Laundry.*[15] His Lordship said in part: "It may still be that though the statute creates a duty and provides a penalty, the duty is nevertheless owed to individuals." He was also of the opinion that there might be liability civilly to an individual although the duty was owed to all the public.

The views of Atkin, L.J., in *Phillips* v. *Britannia Hygienic Laundry* were preferred to those of McCardie, J., expressed in the same case, by the majority judgments in an important and recent New Zealand case of *Dominion Air Lines Limited* v. *Strand.*[16] In this case it was held by the New Zealand Court of Appeal (two judges dissenting) that the New Zealand *Aviation Act* of 1918 and the regulations made thereunder were intended for the protection of passengers and owners of goods carried, and imposed a duty for the

[12] 7th ed., p. 635.
[13] 13th ed., p. 200.
[14] 3rd ed., p. 6.
[15] *Supra,* at p. 841.
[16] [1933] N.Z.L.R. 1.

benefit of that class which conferred a right of action upon a passenger injured by a breach. The majority, however, held that there was no "nexus" between the breach of the regulations and the injury which occurred. The pilot of an airplane which crashed had no certificate to operate an airplane carrying passengers. He was entitled to carry goods. The plane crashed and he and two passengers were killed. Negligent operation of the plane was not proved. Had a legal connection between the breach of regulations and the crash been established the majority judges would have held, distinguishing *Phillips* v. *Britannia Hygienic Laundry*, that the duties imposed by the Act gave a right of action.

In Shearman and Redfield on Negligence,[17] referring to American decisions, it is stated in section 13:

> It seems to us that the true rule is, in all such cases, that the violation of such a statute or ordinance should always be deemed presumptive evidence of negligence which if not excused by other evidence including all the surrounding circumstances should be deemed conclusive.

and in section 27(a):

> In all jurisdictions, statutes and ordinances specifically declaring that the person injured by their violation shall have his action for damages such liability is enforced by the Courts without further evidence of the wrongfulness of the Act and it matters little or not at all whether in such case such violations are termed negligence *per se* or not.

and: "The main diversity of decision arises from a difference of construction in regard to enactments having only a penal sanction."

A statement, dealing particularly with lights, in *Corpus Juris*[18] is in point:

> A very reasonable distinction has been drawn between head-lights and tail-lights, it being considered that to drive without head-lights is of itself negligence while driving with the tail-light out is merely evidence of negligence and may be excused if the driver used ordinary care to have it burning.

This statement is based upon the view that by the exercise of ordinary care the driver of a motor vehicle at night would know whether the head-lights were burning or not. This would not necessarily be applicable to driving in a well-lighted city.

A perusal of these cases and authorities leads to the conclusion that *Connell* v. *Olsen* and *Nesbitt* v. *Carney* may have been wrongly decided so far as they held that the statutes of Manitoba and Saskatchewan imposed absolute liability for the absence of lights. This view of the Act does not seem to be justified in the absence of express provisions or language which is inconsistent with the more moderate effect.

[17] 6th ed.
[18] Vol. 42, p. 895, sec. 597.

In addition, while it does seem that the decision in *Phillips* v. *Britannia Hygienic Laundry*, even if the views of Atkin, L.J., are adopted as indicating the effect of the decision, gave too limited a view of the result of a breach of statute in the light of previous decisions, and while *Geel* v. *Winnipeg Electric Company* was decided in the Privy Council not upon the statutory requirements but upon the finding of the jury that there had been no meeting of the onus in the matter of inspection, the Court of Appeal for Ontario in *Falsetto* v. *Brown* has by a majority judgment apparently adopted the view that the Ontario *Highway Traffic Act* does not impose civil liability to an action for damages for breaches of the Act. There can be no doubt that this topic was fully argued before the Privy Council in *Geel* v. *Winnipeg Electric Company* and the dictum of Lord Wright must for this reason be looked upon as more authoritative. He may have thought it advisable, in view of the extent to which the point was argued, to indicate the views of the Privy Council on this subject as well as upon the point upon which the decision turned.

In view of these decisions it seems highly desirable that uniform sections should be added to the Provincial *Highway Traffic Acts* indicating the extent to which civil liability is to be affected by the provisions of the Acts. It will not be sufficient merely to indicate, as was done in section 41 of the Ontario Act, prior to *Hall* v. *Toronto Guelph Express Company*, that civil liability shall be imposed for breaches of the Act, as such a provision will fix the drivers and owners with absolute liability in respect of matters to which no such liability should be implied. It would not be unreasonable to impose absolute liability with respect to lights as the provision will otherwise, so far as civil actions are concerned, be largely useless. It might be well to try to arrive at the same results as a breach of duty at common law. In this way some of the peculiar incidents which have been attached to the breach of a statutory duty might be avoided. See, for instance, the recent Western decision of *Mikenas* v. *Burley*,[19] where it was held that the principle of *volenti* could not be applied where there had been a breach of a statutory provision as to lights and the claimant was a servant. The principle that the maxim *volenti non fit injuria* does not apply where the injury to a servant results directly from a breach of statute is now clearly approved by the Court of Appeal in England in *Wheeler* v. *New Merton*,[20] where the distinction in this regard between *volenti* and contributory negligence is discussed. It may, on the other hand,

[19] [1933] 3 W.W.R. 451.
[20] [1933] 2 K.B. 669.

upon mature deliberation, be considered inadvisable to interfere with these principles which may perhaps be justified upon a basis of public policy. See Beven on Negligence,[21] and Shearman and Redfield on Negligence.[22] Concise sections defining the intentions of the several Legislatures in this regard would remove the present uncertainty.

Since the foregoing article was written a comment upon *Mikenas* v. *Burley* is made by the learned editor of *The Fortnightly Law Journal* in the number issued January 2nd, 1934, at page 162, where he noted the relation between the *Mikenas* v. *Burley* decision and the two Ontario cases in which passengers have been held disentitled as against the driver under the principle of *volenti non fit injuria.* In *Kough, et al.* v. *Adkins*[23] and *Stewart* v. *Godwin*[24] the claimants do not appear to have been servants. Where, as in *Mikenas* v. *Burley,* the claimant is a servant, the discussion of the distinction between *volenti* and contributory negligence in *Wheeler* v. *New Merton* is a useful contribution to the problem.

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RIGHT OF PRINCIPAL TO SUE ON A PROMISE UNDER SEAL MADE TO AGENT IN AGENT'S NAME—TRUST OF A CHOSE IN ACTION.—"At common law no person could acquire a right or incur a liability under an indenture or maintain an action upon it unless he were named a party thereto. This is still the rule . . ." and then a statutory exception is cited.[1] "A contract under seal executed by an agent in his own name cannot be enforced by or against the principal, even though it is expressly stated that the agent is contracting on behalf of the principal."[2]

A recent decision of the English Court of Appeal which affects the above rule suggests that Equity has not wholly spent its powers of law reform and draws attention to the great possibilities offered by an intelligent use of the concept of a trust of a chose in action.

B agrees with C to purchase certain philatelic periodicals from A: B is to supply one-fifth of the price, C two-fifths. As a result of negotiations between B and A, A agrees to sell and B to buy the

[21] 4th ed., pp. 800 and 801.
[22] 6th ed., sec. 223(a).
[23] [1933] O.W.N. 709.
[24] [1933] O.W.N. 712.
[1] Halsbury: Laws of England, 2nd ed., vol. 5, p. 68.
[2] Halsbury: Laws of England, 2nd ed., vol. 1, p. 280.

periodicals. A knows, it appears, that C is interested in the purchase, but for some reason or other, which is not stated, the terms of the agreement are embodied in a sealed document, to which A and B are the only parties. C is not even mentioned in the document. A few days later A and B rescind the agreement and enter into a new one. C in an action against B and A obtains from Maugham, J., a declaration that B holds the benefit of the first agreement as "agent and trustee" for C—and was thus incapable of rescinding it—but is refused a decree for specific performance of the agreement by A, on the ground that C cannot sue on a deed to which he is no party. The Court of Appeal upholds the declaration, admits that B, and B alone, can enforce the promise made to him in the deed, but accepting, without discussion, Maugham, J.'s conclusion that B. holds his claim against A in trust for C, decrees specific performance of the agreement in favour of C.[3]

Once you admit Maugham, J.'s conclusion, the rest appears to follow. B holds his claim against A in trust for C; C can then at any time institute proceedings to obtain leave to sue A in B's name. Why, says the Court, force the parties to go to that trouble and expense when, with A, B, and C all before the Court, we can achieve the same end in these proceedings? Agreed—*if B was a trustee* it is difficult to see how Maugham, J. could decide that B held his claim in trust for C and yet deny that B could be forced to realize his claim for the benefit of C; for, be it remembered, upon the "trust theory" it is B, the trustee, not C, the cestui, who is suing on the agreement. But in what sense is B a trustee?

B is acting for C, he is the agent of C to make the agreement with A. Because of the positive rule of law that a principal cannot sue on a promise under seal made to his agent i.e. a rule that he cannot acquire any right against A by this means, the principal is in precisely the same position as the plaintiff in *Tweddle* v. *Atkinson*: he is a third party trying to enforce a promise which was not made with him. "In all the cases since *'Tweddle* v. *Atkinson',"* an Ontario judge has said "in which a person not a party to a contract has brought an action to recover some benefit stipulated to him in it, he has been driven, in order to avoid being shipwrecked upon the common law rule which confines such an action with parties and privies, to seek refuge under an alleged trust in his favour."[4] In the principal case C, the beneficiary, is not even mentioned in the contract: if the agreement had been made by parol the Court would have called

[3] *Harmer* v. *Armstrong,* [1934] I Ch. 65; 103 L.J. Ch. 1.
[4] *Faulkner* v. *Faulkner* (1893), 23 O.R. 252 at p. 258, per Street, J.

him an undisclosed principal. Faced with an anomalous rule of law it finds that B is not that insignificant conduit pipe we call an agent, but a full blown trustee, and that without any indication upon the deed of a trust or even of a beneficiary for whom B might be twisted into a trustee "under an alleged trust," that is.

It might be argued that the Court was quite right in holding B to be a trustee: he was "a constructive trustee" or "trustee *ex maleficio.*" The Court does not say so. But passing that by, if constructive trustee, constructive trustee of what? Of the new and existing agreement entered into between B and A perhaps, for that could be regarded as a profit unlawfully derived by B from an abuse of his fiduciary position as agent, but not of the original agreement, for that had, in the absence of an "express" trust, vanished into thin air. A man cannot even be a "constructive" trustee of zero. But in our case it is not the new but the old agreement which C is permitted to enforce. The conclusion then follows irresistibly that the Court treated B as an "express" not a "constructive" trustee.

This is by no means the first time that the concept of a chose in trust has been pressed into the service of silent reform in contract law.[5] A married woman could not contract: but she could appoint a trustee to contract for her. No person may sue on a simple contract except him from whom the consideration has moved; but a broker may, on the "trust theory" recover from the shipowner his commission stipulated for in the charter party, for he, *"in effect,* nominated the charterer to contract on his behalf."[6] A principal cannot acquire rights under a promise under seal made to his agent —unless you call him a trustee of his claim for the principal. And so the fictions go on.

It should be noticed that in our case C, as "principal-*cestui,*" is permitted to obtain from A specific performance of an agreement upon which he could never have been sued by A either at law, for he is no party to the deed, or in equity, for he is a mere *cestui* of an agreement made by A with his trustee, B.

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[5] See article: *Contracts for the Benefit of Third Persons* by Arthur L. Corbin, (1930), 46 L.Q.R. 12.

[6] *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London), Ltd.*, [1919] A.C. 801 at p. 806. Italics inserted.