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EFFECT OF THE VIOLATION OF A STATUTE BY THE PLAINTIFF IN A TORT ACTION.

If often happens that a person, while in the act of violating the provisions of some statute, is himself injured, due to the wrongful act of another person. The injured party brings an action in tort, and the question arises whether his violation of the statute shall operate as a defense. During the past few years this question has received judicial notice in the courts of most of the provinces of Canada. No uniform answer has been given, and the reasons underlying the various decisions have differed widely. In Saskatchewan, in particular, the results arrived at and the distinctions drawn have caused considerable speculation among the members of the Bar.

Etter v. *City of Saskatoon*[1] is the earliest Saskatchewan decision directly involving the problem in a tort action. The facts were not complicated. Plaintiff drove his motor car over a pile of dirt left in a public street by the defendant city, the car being damaged. Plaintiff's car was being operated without displaying a license plate for the current year. Section five of the Saskatchewan *Vehicles Act*,[2] in force at the time, read as follows:

> 5. No motor vehicle shall be used or operated upon any public highway which shall not have been registered under this Act or which shall not display thereon the number plate as prescribed by this Act.

It was held by the Saskatchewan Supreme Court, *en banc*, that, regardless of the negligence of the defendant, plaintiff could not recover. In the principal opinion, delivered by Mr. Justice Brown, the entire reasoning of the court is contained in one short paragraph at p. 418, as follows:

[1] 39 D.L.R. 1; (1916-17) 10 S.L.R. 415.
[2] Statutes of Sask., 1912, Cap. 38.

Under the circumstances, the plaintiff was distinctly prohibited by statute from operating his car at the time of the accident. He was therefore operating it illegally, and the defendants owed him no other duty than not to wilfully or maliciously injure. See *Contant* v. *Pigott*,[3] *also Greig* v. *City of Merritt*.[3a]

No additional reason is given and no additional authority cited. Of the two cases referred to, *Contant* v. *Pigott* (*supra*) is a decision of the Court of Appeal of Manitoba and has recently been overruled, in effect, by the same court.[4] *Greig* v. *City of Merritt* (*supra*) is a county court decision from British Columbia and the opposite view seems to be held by the Court of Appeal of that province.[5]

It is submitted, with respect, that the authority of the Saskatchewan decision is very doubtful, that it is contrary to precedent and principle and not in accord with common law rules of statutory construction.

(1) The failure to display a license plate or to obtain a license had no causal connection with the damage suffered. It is an elementary principle that, apart from statute, the wrongful act of a litigant must be causally connected with the result under examination, and our courts have been occupied for centuries in working out the rules of proximity. But the presence or absence of a license plate can hardly change the likelihood of damage when the car collides with an obstruction. Nor is an argument tenable which, working backward from the prohibition, would make the going on the street the proximate cause of the accident. Such an argument would make the plaintiff liable for all injuries inflicted while so driving, regardless of his due care. Some such argument has been adopted in one or two American cases where the defendant, driving a motor car while intoxicated, in violation of statute, has been convicted of manslaughter, although his intoxication in no way influenced his driving at the time of the fatality.[6] Such an analysis has been rejected in English courts.[7] And in cases of civil negligence where the common law has adopted the anomaly of depriving the plaintiff of any relief in case of contributory fault, the very phrase "contributory negligence" signifies a causal connection with the resulting injury. Also in cases of violation of a statutory duty the Judicial

[3] 5 W.W.R. 946.
[3a] 24 W.L.R. 328.
[4] (1928) 2 W.W.R. 528.
[5] *Walker* v. *Br. Col. Elec. Ry. Co.* [1926] 1 D.L.R. 1162; (1926) 1 W.W.R. 503.
[6] See cases collected, 41 *Harv. Law Rev.* 669.
[7] *The Queen* v. *Dalloway*, (1847) 2 Cox Crim. Cases 273.

Committee[8] and the Canadian courts[9] have been very strict in the requirement that the violation must be the cause of the damage, whether the default of plaintiff or defendant be in question.

(2) There is no general principle in our law that a plaintiff cannot recover for damages suffered while he is himself practicing an illegal act. One need only consider the position of a trespasser on land as a wrongdoer. Thus in *Bird* v. *Holbrook*[10] plaintiff was injured by a spring-gun while trespassing on defendant's land. The spring-gun had been set by defendant, apparently for the purpose of wounding any trespasser who might appear. It was held that plaintiff could maintain his action. According to Sir John Salmond[11] a perceived trespasser can probably recover when injured by an affirmative act of negligence. This would seem to be the doctrine also of the Supreme Court of Canada [12]

In *Walton* v. *The Vanguard Motorbus Co.*[13] plaintiff's lamp-post had been damaged by a motor-omnibus belonging to defendant colliding with it. In the county court plaintiff was non-suited, "as they had not shown any right to erect the standard on the footpath." An appeal was allowed, Lord Alverstone, C.J., stating that "he was of opinion that the defendants were not entitled to raise the point that the lamp-post was an object that they were entitled to knock down without being held liable for negligence."

(3) The doctrine of illegality as applied to contracts suggests itself as an analogy. It is quite true that, generally speaking, any illegality renders a contract absolutely void. This illegality may go to the making, the performance, the consideration or the purpose.[14] The analogy in result is far-reaching, for the defendant is in a better position than the plaintiff, whether in an original action on the alleged contract or in an action for restitution—*in pari delicto potior est conditio defendentis.*

But the analogy is only superficial. In the contract case the alleged right, a right *in personam*, is created by the contract, and the law says the contract is void for illegality, or, in other words, no contract exists, no right has been created. Hence no right of action can arise from the breaking of the alleged contract. In the tort

[8] *The Grand Trunk Rv. Co.* v. *McAlpine.* [1913] A.C. 838.
[9] *Suffern* v. *McGivern* [1923] 4 D.L.R. 541; (1923) 3 W.W.R. 817.
[10] (1828) 4 Bing. 628.
[11] *Law of Torts,* 6th Ed., 454, citing *Petrie* v. *Rostrevor Owners* (1898) 2 Ir. R. 556.
[12] *Sievert* v. *Brookfield,* (1905) 35 S.C.R. 494.
[13] (1908) 25 T.L.R. 13.
[14] See Salmond & Winfield: *Law of Contracts,* 144 et seq.

case the original right exists independently, a right *in rem.* In the contract case the essential question is whether a right has been created. In the tort case whether the plaintiff shall be deprived of a right.

It may be admitted that the doctrine of illegality in contracts is not confined to actions upon the contract as such. The maxim *ex turpi causa non oritur actio* bears an extended meaning. In the words of Maule, J.,[15] "the plaintiff cannot recover, where, in order to maintain his supposed claim, he must set up an illegal agreement to which he himself has been a party." Thus in detinue for a note the defendant pleaded that the note had been given by way of pledge for advances. Plaintiff by way of replication set out that the advances had been knowingly made for immoral purposes. Since the plaintiff was forced to set up the illegal agreement he could not recover.[16] So also the agreement was disclosed in the declaration or proof thereof in *Ex parte Bell,*[17] *Edgar* v. *Fowler*[18] and *Cope* v. *Rowlands.*[19] The action itself need not be in contract. In *Fivaz* v. *Nicholls* (*supra*) the declaration was in case yet the plaintiff found it necessary to disclose an agreement to compound a felony. Sir Frederick Pollock cites this case as the only instance of its kind known to him.[20]

On the other hand if the plaintiff is not required to disclose the illegal agreement, he will succeed. Thus A having received money from B to the use of C, A cannot set up an illegal transaction between B and C. *Tenant* v. *Elliott.*[21] *Farmer* v. *Russell.*[22] The distinction is stated clearly in *Simpson* v. *Bloss.*[23]

(4) The language used in some of the cases suggests the so-called maxim in equity: "He who comes into equity, must come with clean hands." This seems to be a modern version of an older saying: "He that hath committed iniquity shall not have equity," and according to Dean Roscoe Pound[24] was first so expressed in *Dering* v. *Earl of Wichelsea.*[25] In that case Lord Chief Baron Eyre is re-

[15] *Fivaz* v. *Nicholls* (1846) 2 C.B. 501 at p. 513.
[16] *Taylor* v. *Chester* (1869) 38 L.J.Q.B. 225.
[17] (1813) 1 M. & S. 751.
[18] (1803) 3 East 221.
[19] (1836) 2 M. & W. 149.
[20] Pollock on Torts, Tenth Ed. 187.
[21] (1797) 1 B. & P. 3.
[22] (1798) 1 B. & P. 296.
[23] (1816) 7 Taunt. 246. See also cases cited Salmond & Winfield: *Law of Contracts,* 151, Note (g).
[24] *On Some Maxims of Equity* in Cambridge Legal Essays, 259, 263.
[25] (1787) 1 Cox Eq. 318; 2 B. & P. 270.

ported to have made use of the following language: "If this can be founded on any principle, it must be that a man must come into a Court of equity with clean hands: but when this is said it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal, as well as in a moral sense."

The above quotation probably indicates the principle as well as any general statement can. And a perusal of the Chancery decisions, such as *Overton* v. *Banister*[26] or *In re Lush's Trusts*,[27] will show that the equitable doctrine has no bearing on our problem, directly or indirectly.

(5) The plaintiff, before the passing of the statute, enjoyed a right. This may be described as a right not to be interfered with, the size of which has been fairly well worked out by common law decisions. He still enjoys this right unless it has been taken away by the legislation under examination.

It is an old and well established rule that statutes should be construed, if possible, so as to respect pre-existing rights of person or property. "Statutes are not presumed to make any alteration in the common law further or otherwise than the Act does expressly declare; therefore in all general matters the law presumes the Act did not intend to make any alteration; for if the Parliament had that design they would have expressed it in the Act."[28] In the words of Bowen, L.J.,[29] "in the construction of statutes, you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature." This principle of construction has been recognized time after time in the English courts,[30] the Judicial Committee[31] and in Canada.[32]

Later Saskatchewan Decisions.

In *Waldron* v. *R. M. of Elfros*[33] damages were claimed for the death of the driver of a motor car in an accident, due to the alleged negligence of the defendant municipality in failing to keep the road

[26] (1844) 3 Hare 503.
[27] (1869) L.R. 4 Ch. App. 591.
[28] *Arthur* v. *Bokenham* (1708) 11 Mod. 150.
[29] *In re Cuno* (1889) 43 Ch. D. 12 at p. 17.
[30] See cases collected in Maxwell: Interpretation of Statutes, 6th Ed. 501 et seq.
[31] *Western Counties Ry. Co.* v. *Wind. & Ann. Ry. Co.* (1882) 7 A.C. 178 at p. 188.
[32] *Abell* v. *County of Kent* [1920] 61 S.C.R. 345.
[33] (1922) 16 S.L.R. 141.

in repair. The defendant relied on certain sections of the Saskatchewan *Vehicles Act*,[34] viz., 23. Every motor vehicle shall be equipped with adequate brakes . . . 25.(1) Every motor vehicle other than a motor cycle shall, while in operation on the public highway . . . (a) Carry on the front at least two lighted lamps . . . (b) Carry at the rear a lighted lamp. . . It was argued that the case stood on all fours with *Etter* v. *City of Saskatoon* (*supra*).

At the trial this defense was refused by Bigelow, J. The reasoning of the judgment involved two propositions: (1) *Etter* v. *City of Saskatoon* (*supra*) was explained on the basis that the plaintiff was a trespasser on the highway. Hence, applying the peculiar rules of law with reference to trespassers on land, there was no cause of action. (2) The present case was distinguished on the ground that the statutory provision with reference to the licensing of motor vehicles was expressed in the negative, whereas the provisions with reference to lights and brakes were worded in the affirmative. It was concluded that the former operated as a prohibition, therefore one travelling in the face of the prohibition was a trespasser. The latter was said not to impose a prohibition. It may be noted that the statute imposed the same penalty for the violation of each of these provisions.

No doubt an individual may find himself in the position of a trespasser on the highway. Being upon a highway for purposes other than its proper use as a highway will constitute one a trespasser.[35] Use as a highway means use for the purpose of passing and repassing and purposes reasonably incidental thereto. The owner of the fee may maintain an action against such a trespasser,[36] or use reasonable force in ejecting him.[37] In the cases cited the adjoining proprietor was the owner of the land used as a highway, the public enjoying an easement.

The result reached by Mr. Justice Bigelow in *Waldron* v. *R. M. of Elfros* (*supra*) seems entirely sound for reasons before stated. But while conceding that one may be in the position of a trespasser on a highway, the reasons advanced by the same learned judge in explanation of *Etter* v. *City of Saskatoon* (*supra*) are not convincing.

(1) No authority was cited for the conclusion drawn from the negative wording of the statute. It is respectfully submitted that no English decision in point is available.

[34] R.S.S. 1920, Cap. 182.
[35] *The Queen* v. *Pratt* (1855) 4 E. & B. 860.
[36] *Hickman* v. *Maisey* [1900] 1 Q.B.D. 752 (C.A.).
[37] *Harrison* v. *Duke of Rutland* [1893] 1 Q.B.D. 142 (C.A.).

(2) It seems probable that in some cases the problem has been confused with a weak rule of construction having to do with enabling Acts. There the question frequently arises whether the provision is imperative or merely directory. It has been laid down that negative language will make such a statute imperative.[38] Yet according to the observation of Alderson, B., in the course of argument in *Mayor of London* v. *The Queen*,[39] 'The words "negative" and "affirmative" statutes mean nothing.' Certainly negative provisions frequently have been given a directory interpretation.[40] But granting the soundness of this rule of construction it is difficult to see how it affects our problem. We have been considering a different type of statute, and aside from that, the problem is altogether different. In the cases cited dealing with the interpretation of enabling Acts the question was whether a right had been created by an act which did not meet the requirements of a statute. In our case we take as a premise that the violation of the statute by the plaintiff was illegal, and the question is whether others may injure him with impunity. Even though "everything in respect of which a penalty is imposed by statute, must be taken to be a thing forbidden, and absolutely void to all intents and purposes whatsoever,"[41] our problem is logically untouched.

(3) The rule of construction mentioned above, that clear and emphatic language is required in order to take away a pre-existing right, is equally applicable when it is sought to divest the plaintiff of his rights by calling him a trespasser. A provision which leaves no doubt that the plaintiff is without remedy may be easily drawn.[42]

The judgment given at trial in *Waldron* v. *R. M. of Elfros* (*supra*) was affirmed by the Saskatchewan Court of Appeal.[43] Lamont, J.A., (Haultain, C.J.S., concurring) does not pursue the trespass argument, although in one instance the word "outlaw" is used. Apparently the conclusion is reached that the conduct of the plaintiff was not illegal, or perhaps not even prohibited (at page 157). In citing *Victorian Daylesford Syndicate* v. *Dott*,[44] a confusion with the contract cases is shown. *Maxwell on Statutes*[45] is quoted to the effect that construction should be "governed by considerations of

[38] *R.* v. *Leicester* (1827) 7 B. & C. 6, 12.
[39] (1848) 13 Q.B. 30, 33.
[40] See cases collected in *Craies on Statute Law*, 3rd Ed. 231-2.
[41] *In re Cork and Youghal Ry. Co.* (1869) 4 Ch. App. 748, 758.
[42] See R.S.C. 1906, Cap. 37, Sect. 294 (3).
[43] (1923) 17 S.L.R. 152.
[44] [1905] 2 Ch. 624.
[45] 6th Ed. 649.

convenience and justice." In connection with the reliance placed upon the wording of the statute, i.e. in the negative or affirmative, it may be pointed out likewise that even the grammatical meaning of words may be modified in order to avoid absurdities.[46] A perusal of the statute in question[47] will disclose that about half of the penal sections are worded negatively, the others affirmatively. Applying the doctrine of the Saskatchewan decision, a person just under sixteen years of age (section 28) is an outlaw when driving a motor car upon the highway; while a person over sixteen may operate his car without brakes or lights (sections 23 and 25) and his presence upon the highway will not be illegal. Other remarkable results might be mentioned, but there is a presumption against attributing absurd intentions to the legislature.[48] The truth seems to be that the draughtsman uses the negative wording when it lends itself to the situation, and so of the affirmative. Frequently the two forms are mingled in a heterogeneous manner.[49] It is interesting to note that the provisions of modern statutes dealing with crimes are almost uniformly worded in the affirmative.

In the further judgments delivered in the Court of Appeal much the same ground is covered. McKay, J.A., (Turgeon, J.A., concurring) concludes[50] from the wording of the section that plaintiff was not a trespasser, in contrast to the situation in *Etter* v. *City of Saskatoon* (*supra*). Martin, J.A., for the same reason, concludes that the effect "was not to make it unlawful for a motor car to be upon the highway when there is a failure to comply with the provisions of the section." (With reference to lights and brakes.) Again we find at p. 167 contract cases cited for the proposition that "if it is found the act is prohibited, then the principle is that no man can recover in an action founded on that which is a breach of the provisions of a statute." As explained above, this statement would appear to be entirely irrelevant. On the other hand, if the quotation is aptly made, then *Waldron v. R. M. of Elfros* (*supra*) would appear to be wrongly decided.

A recent district court decision in Saskatchewan may be mentioned.[51] Plaintiff's motor car was damaged through the negligent operation of defendant's car. The *Vehicles Act*[52] required registra-

[46] *Grey* v. *Pearson* (1857) 26 L.J. Ch. 473, 481.
[47] *Vehicles Act*, R.S.S. 1920, Cap. 182.
[48] [1893] 2 Ch. 603 (C.A.).
[49] See *The Liquor Act*, Statutes of Sask., (1924-25) Cap. 53.
[50] 17 S.L.R. 152 at p. 158 *et seq.*
[51] *Miller* v. *British Amer. Oil Co.* (1927) 2 W.W.R. 519.
[52] Statutes of Sask., 1920, Cap. 42, Sect. 6 (1).

tion and display of license in substantially the same terms as the act of 1912. Plaintiff's car had not been licensed, and defendant invoked *Etter* v. *City of Saskatoon.* McLorg, D.C.J., gave judgment for the plaintiff. *Etter* v. *City of Saskatoon* (*supra*) was distinguished on the basis that the action in that case had been brought against the municipality whose duty it was to look after the condition of the roads. The opinion was expressed, therefore, that the Court of Appeal had not intended that the doctrine should operate to bar the owner of an unlicensed car in an action against a negligent third party. Another possible way out would have been on the ground that the plaintiff if a trespasser, was a perceived trespasser. The case points to a large limitation of the doctrine, and suggests an interesting study as to what persons may take advantage of the position of another as a trespasser on land.

Certain Decisions of the Supreme Court of Canada.

In *Goodison Thresher Co.* v. *Township of McNab*,[53] an action was brought against the defendant municipality for damages sustained by reason of a traction engine belonging to the plaintiff falling through a bridge of the municipality, which was alleged to have been insufficiently constructed to bear such a weight. The appeal was from the Court of Appeal of Ontario, which had reversed the judgment of a Divisional Court sustaining a verdict for plaintiff.

Chapter 242 of the Revised Statutes of Ontario, 1897, read, in part, as follows:

> 10. (3) . . . . before crossing any such bridge or culvert it shall be the duty of the person or persons proposing to run any engine or machinery mentioned in any of the sub-sections of this section to lay down on such bridge or culvert planks of such sufficient width and thickness as may be necessary to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine or machinery; and in default thereof the person in charge and his employer, if any, shall be liable to the municipality for all damages resulting to the flooring or surface of such bridge or culvert as aforesaid.

Plaintiff's engine came within the purview of this provision, and plaintiff had failed to place the planks as required. The defendant municipality relied upon this omission as a defense.

The Supreme Court of Canada admitted the validity of this defense as applied to the facts of the case. But two important considerations should be noted.

[53] [1910] 44 S.C.R. 187.

(1)The failure to place the planks as required was a proximate cause of the accident. The case was argued upon the findings of facts of the trial judge. On this phase of the case Davies, J., says at p. 189: "Both here and in the Court of Appeal the case was argued upon the findings of facts of the trial judge which were accepted by both parties. These findings . . . were . . . that the use of planks as required by the statute would have added to the sustaining power of the stringers sufficiently to have enabled them to have carried the weight of the engine in safety." Idington, J., at pp. 192-3 observes: "I am, with great respect, unable to comprehend how a man can recover damages suffered by him from doing that in an illegal manner which if done in a legal manner would have caused him no injury." Duff, J., states the matter in much the same way at p. 194: "I think the action should be dismissed because I think the findings of the learned trial judge shew that the *mishap* was caused by the failure of the plaintiff's servants to perform the conditions under which alone they were entitled to take the engine upon the bridge."

(2) The purpose of the statutory provision was inquired into. A majority of the judges decided that the purpose was to protect the bridge from being broken through. It had been argued that the wording of the provision shewed merely an intention to protect the surface of the bridge. This view had been urged by Moss, C.J.O.,[54] and was accepted by two of the five judges (Fitzpatrick, C.J., and Girouard, J.,) who dissented in the Supreme Court of Canada. The majority, as has been stated, took a different view. This appears clearly in the opinion of Davies, J., at p. 191: "I do not agree, however, with the contention that the object of the proviso was simply and only the protection of the surface of the bridge from being injured. The proviso went much further than that and was, to my mind, clearly intended to protect the planks of the bridge from being broken through by reason of the great weight." So also Duff, J., at p. 195.

The omission of the plaintiff having caused the result intended to be guarded against, the decision is perfectly in accord with accepted legal principles. By the same reasoning the recovery by the municipality on its counterclaim for damage to the bridge is justified even without invoking the aid of the final part of the statutory provision quoted.

The decision seems clear enough. But unfortunately, Davies, J.,

[54] (1908) 19 O.L.R. 188 at p. 203.

used the expressions "condition precedent" and "on the bridge unlawfully," in the course of his judgment. No particular objection can be taken to these phrases as used in the opinion, but the reporter seized on them to make a "snappy" and entirely misleading head-note. This effort, which with the results flowing from it shews adequately the iniquity of head-notes, was, in part, as follows,[55] (after quoting the pertinent portions of the statute):

Held . . . . that the strengthening of a bridge or laying of planks over it is a condition precedent to the right to run an engine over the same, and any engine crossing without observing such condition is unlawfully on the bridge and liable for injury resulting therefrom.

An illegitimate offspring of *Goodison Thresher Co.* v. *Township of McNab* appeared in Manitoba a few years later. This was *Marion* v. *Rural Municipality of Montcalm,*[56] which went to the Court of Appeal. As in the earlier case plaintiff's engine had dropped through a bridge located in defendant municipality. The reporter states at p. 683: "The trial judge found that the cause of the accident was that the stringers of the bridge were rotten and that the bridge had been built 5 or 6 years ago and had not been adequately inspected and repaired. He further found that the engine was broken by the fall and without any act of negligence on the part of the plaintiff." A by-law provided, "that all owners of traction engines and outfits shall carry 3-inch planks to be placed over the bridges to protect them." This the plaintiff had failed to do and the trial judge gave judgment for the defendant. According to the report, p. 684, "The trial judge held that . . . . the by-law having imposed a duty on owners of traction engines to lay planks over bridges before crossing same, the plaintiff having failed to do so could not succeed. *Goodison* v. *Township of McNab*[57]." No other authority is cited, and the Court of Appeal dismissed plaintiff's appeal without reasons, without citation of authorities, but with costs. It will be noted that there was no finding of a causal relation between the result and the omission of the plaintiff. The contrary is indicated.

It may be recalled that *Contant* v. *Pigott* (*supra*) which laid down the same doctrine in the case of motor vehicles, was decided two years earlier, in 1913. No authority was cited either by the trial judge or by the Court of Appeal, but it is not unreasonable to suppose that *Goodison Thresher Co.* v. *Township of McNab* (*supra*) was before the court. Then a little later *Contant* v. *Pigott*

[55] 44 S.C.R. 187 at p. 188.
[56] (1915) 34 W.L.R. 683.
[57] 44 S.C.R. 187.

(*supra*) is the sole decision of a court of appeal relied on in *Etter* v. *City of Saskatoon* (*supra*).

In Ontario the same development is disclosed in *Sercombe* v. *Township of Vaughan*,[58] in the Appellate Division. Plaintiff's motor truck broke through a bridge in defendant township. By the Ontario *Load of Vehicles Act*,[59] "No vehicle shall have a greater width than 90 inches except traction engines." The plaintiff's motor truck came within the prohibition and was almost 96 inches wide. The trial court had given judgment for the plaintiff. This was reversed on account of plaintiff's violation of the statutory provision quoted above. No examination as to the purpose of the provision was made and there was a finding as to causal relation. Indeed, Riddell, J., says, at p. 144, "That the extra width had or might have had nothing to do with causing the accident has, I think, no significance—the motor-truck should not have been there at all. . . The same considerations dispose of the appeal against the dismissal of the counterclaim." It is respectfully submitted that the decision is unsound in principle and that the judgment for the defendant on the counterclaim is contrary to an authoritative line of English decisions. This will be treated of presently. It should be noted that only three decisions were cited: *Goodison Thresher Co.* v. *Township of McNab* (*supra*); *Etter* v. *City of Saskatoon* (*supra*); and an earlier Ontario trial decision, *Roe* v. *Township of Wellesley*.[60]

Reference should be made to decisions in the Supreme Court of Canada dealing with trespassers on the property of railway companies. *The Grand Trunk Railway Co.* v. *Anderson*[61] was an action under Lord Campbell's Act for the death of one McKenzie, who was killed by a locomotive, while walking on defendant's track, due to the negligence of defendant's servants. *The Railway Act*[62] imposed a penalty on everyone, not connected with or employed by the railway, for walking upon the track. Now without any statute the deceased was a trespasser unless expressly or tacitly licensed by the defendant.[63] The judgment of the court (except for formal words of agreement) was delivered by Sedgewick, J., and on reading his opinion it will be found that the real question was whether a tacit license to walk along the track had been given. Reference was made to the statute, the learned justice being of opinion that the

[58] (1919) 45 O.L.R. 142.
[59] Ontario Statutes of 1916, Cap. 49, Sect. 16.
[60] (1918) 45 O.L.R. 142.
[61] [1898] 28 S.C.R. 541.
[62] Statutes of Canada, 1888-89, Cap. 29, Sect. 273 (1).
[63] *Grand Trunk Ry. Co.* v. *Barnett*, [1911] A.C. 10.

fences and cattleguards, coupled with the statute, were a sufficient warning to all the world against trespassing. Taschereau, J., dissented, holding with the Ontario Court of Appeal that the deceased, under the circumstances, was not a trespasser.

The Maritime Coal, Railway and Power Co. v. *Herdman*,[64] presented a situation almost identical with the preceding case, the action being under the Nova Scotia Fatal Accidents Act. Section 264 of the Nova Scotia *Railway Act*[65] is identical in wording with the federal provision noted above. Of the five judges hearing the appeal, Davies, C.J., and Anglin, J., held that the deceased was not a trespasser, but was on the track by the tacit permission of the defendant. For the majority, Idington, J., (Brodeur, J., concurring) seems to rely on the statute, on the deceased's original position as a trespasser and on an argument that no duty to the deceased, even as a licensee, was violated. Mignault, J., relied more strongly, but not entirely, on the statute.

The same problem was involved in *Acadia Coal Co. Ltd.* v. *MacNeil*,[66] where two children, aged nine and seven respectively, had been killed. Newcombe, J., delivered the judgment of the court, and doubted the pertinency of the section of the Nova Scotia *Railway Act*, previously referred to. To quote from the judgment at p. 503: "As to the statute, I do not consider that it affects the case. The decisions of this Court in *Grand Trunk Ry. Co.* v. *Anderson* (*supra*) and *Maritime Coal, etc., Co.* v. *Herdman* (*supra*) to which we are referred, would govern in identical cases, but in my view of the law, I am not disposed to extend them. . . . There are, I think, . . . cogent reasons for thinking that the subsection was framed *alio intuitu*." The learned justice then went on to say that even if the provision should be considered, it was in the nature of criminal legislation, and the presumption that children under fourteen years of age have not sufficient capacity to know that they are doing wrong must operate in favor of the plaintiff. As the children were found to be licensees, the plaintiff had judgment.

Later Modification in Ontario.

Reference has been made to *Sercombe* v. *Township of Vaughan* (*supra*). A year later *Godfrey v. Cooper*[67] was decided in the Appellate Division. Plaintiff was riding in the motor car of one Flem-

[64] [1919] 59 S.C.R. 127.
[65] R.S.N.S., 1900, Cap. 99.
[66] [1927] S.C.R. 497.
[67] (1920) 47 O.L.R. 565.

ming, as a passenger for hire. Flemming was not licensed to carry passengers for hire, as required by statute. Plaintiff was injured in a collision between Flemming's car and a car driven by defendant. Both Flemming and defendant were negligent.

The court disposed of Flemming's contributory negligence on the basis of lack of identification of passenger and driver, but the same way out was not taken in the matter of the driver's lack of a license. Instead, the *Sercombe* case (*supra*) was distinguished. Apparently the doctrine of that case is to be restricted to cases in which the municipal body responsible for the repair of the highway is a party. To quote Mr. Justice Middleton at p. 572: "The question is very widely different from that which arises in an action against the municipality for damages by reason of the non-repair of a highway. There there is no wrongful act resulting in injury, but a mere failure to perform a statutory duty; and, before the plaintiff can succeed, he must show that the defendant owed a duty to him, and he fails in this when it appears that by reason of some fact he is not lawfully upon the highway. An example of the application of this principle is found in *Sercombe* v. *Township of Vaughan*, (*supra*)." The judgment delivered by Riddell, J. followed similar lines. Latchford, J., concurred with Middleton, J. Meredith, C.J.C.P., dissented, holding that the *Sercombe* case (*supra*) could not be distinguished in principle.

While the majority judgment does not profess to question *Sercombe* v. *Township of Vaughan* (*supra*) the cases cited and arguments advanced tend to a weakening of that decision. For example, Middleton, J., writes at p. 573: 'The section here invoked (sec. 4) is expressed in the negative form: "no person shall for hire, pay or gain, drive a motor vehicle on a highway" unless licensed; but the whole scope of the Act indicates that it is intended to require those operating vehicles upon the highway to observe its requirements, and failure to do so subjects the offender to certain penalties, but does not make him a trespasser in the sense that he is an "outlaw" within the meaning of the Massachusetts cases.'

The result reached is substantially the same as in the Saskatchewan District Court decision.[68] As remarked before, these cases suggest an interesting question as to how far the disadvantage of being a trespasser extends. Inasmuch as the writer does not believe the necessity of distinguishing the two types of cases should arise, a discussion of the problem is beyond the scope of this article.

[68] *Miller* v. *Br. Amer. Oil Co.* (1927) 2 W.W.R. 519.

Conclusion.

In casting about for the true principle a very forcible analogy is presented in the converse case where the defendant has violated the provision of a statute causing damage to the plaintiff. In this situation there is, of course, the preliminary requirement of a causal relation between the violation and the damage.[69] Granting the causal relation, there seems to have been some early authority that any person injured could bring his action.[70] But the law is now well settled that the intention of the legislature must be considered, and if it appears that there was no intention to give a right of action to the person injured, then an action will not lie.[71] On the other hand this intention may be found and there is authority to the effect that once it is established that the violation caused the injury, prima facie the plaintiff has a good cause of action.[72] But even if there was an intention to create a cause of action it must also appear that the damage was of the character the statute aimed to prevent.[73] That the purpose of the statute must be considered is a principle well recognized in Canada.[74]

In a system of law that depends on a logical development of precedent and principle the same application should be made when the plaintiff has violated the provisions of a statute. An examination of the several judgments delivered in *Goodison Thresher Co.* v. *Township of McNab* (*supra*) would indicate very clearly that such is the view of the Supreme Court of Canada. On the whole it may be said that the decisions of the various provincial courts have been tending in that direction, through an interesting period of evolution. But false starts may retard the growth of the law just as accidents retard the growth of the individual organism in the plant or animal world.

A further problem is suggested by the following situation: The plaintiff is injured as a result of his violation of a statutory duty, combined with the wrongful act of the defendant. The defendant is uninjured. Should the plaintiff be entirely barred of recovery? In the case of contributory negligence there is a complete defence, but this rule is anomalous, and has been corrected by statute in many jurisdictions. Judges often refer to the violation of a statute

[69] *The Grand Trunk Ry. Co.* v. *Labrèche* [1922] 64 S.C.R. 15.
[70] *Couch* v. *Steel* (1853) 23 L.J.Q.B. 121.
[71] *Atkinson* v. *Newcastle Water Co.* (1877) 46 L.J. Ex. 775 (C.A.).
[72] *Groves* v. *Wimborne* [1898] 2 Q.B. 402 (C.A.).
[73] *Gorris* v. *Scott* (1874) L.R. 9 Ex. 125.
[74] [1907] 39 S.C.R. 593.

as negligence,[75] but it is doubtful if that is the proper view.[76] Space will not permit a discussion of this problem, but an examination of the cases cited in this article leaves little doubt that our courts would give a complete defense.

The state of the law in the various provinces should be noticed briefly. In British Columbia a considered judgment of the Court of Appeal[77] has allowed an unlicensed driver to recover against a negligent defendant. The decision, does not, in terms, cover the situation where a municipality is the defendant, as in *Grieg* v. *City of Merritt*,[78] a county court decision in the same province. But the language is very broad, and *Etter* v. *City of Saskatoon* (*supra*) is distinctly disapproved of. Other decisions such as *MacLure* v. *Gen. Accident Assur. Co.*,[79] *Perrin* v. *Vancouver Drive Yourself Auto Livery*,[80] and *Boyer* v. *Moillet*,[81] indicate that there is nothing of the doctrine left in British Columbia. In *Boyer* v. *Moillet*, Macdonald, C.J.A., after referring to the rule of construction that rights of individuals are not deemed to be taken away without express words said, at page 220: "There is nothing in the Act from beginning to end to suggest that the rights of individuals in civil actions were to be disturbed." In Alberta the law is doubtful. In *Halpin* v. *Grant Smith & Co.*,[82] the owner of an unregistered motor vehicle was allowed to recover against a negligent independent contractor, by a judgment in the Appellate Division. Since the contractor is probably in the same position as an occupier of land the judgment seems conclusive on its face. But Stuart, J., (Harvey, C.J., concurring) considered that the defendant was guilty of something more than negligence, and that the condition in which he left the highway constituted a "trap." Doubt was also expressed whether the plaintiff had any rights against another traveller on the highway. Beck, J., considered that the plaintiff was not a trespasser, or if so, only a "technical" trespasser. Ives, J., dissented. In a later trial decision[83] there is a dictum by Ford, J., at p. 471 that a violator of the *Vehicles Act* is not a trespasser even as against a defendant municipality. The point was not raised on appeal (p. 474). In Manitoba the earlier decision, *Con-*

[75] (1922) 16 S.L.R. 141, 144.
[76] See the remarks of Idington, J., 44 S.C.R. 193-4.
[77] *Walker* v. *B.C. Elec. Ry.* (1926) 1 W.W.R. 503.
[78] 24 W.L.R. 328.
[79] (1925) 35 B.C.R. 33.
[80] (1920) 30 B.C.R. 241.
[81] (1920) 30 B.C.R. 216.
[82] (1920) 15 A.L.R. 537.
[83] *Scott* v. *City of Calgary*, (1926) 22 A.L.R. 467.

tant v. *Pigott* (*supra*) has been overruled.[84] This does not, in terms touch the situation where a municipality is the defendant, but the court did not distinguish. In Nova Scotia the owner of an unlicensed car has been allowed to recover from a defendant negligently driving another car in *Martin* v. *Ralph*[85] and in *Sampson* v. *Robertson.*[86] These cases were decided in the Supreme Court.

No legal foundation has been advanced for this group of cases which finds its extreme in *Etter* v. *City of Saskatoon* (*supra*) and *Sercombe* v. *Township of Vaughan* (*supra*). The "public policy" argument has not been relied on definitely, and the hope may be expressed that it will not be. There seems no good reason why courts should make outlaws of men who violate statutes which affect the public only very remotely. When a defendant comes into court and argues that he should not make good the damage he has caused, and gives as his sole reason that the plaintiff is also a bad man, he is making the oldest retort of the human mind when charged with evil. Since the act of the plaintiff has no causal relation with the damage, and since the damage is the question at issue, it appears that the answer of the defendant is a material fallacy of the type *argumentum ad hominem.* It is respectfully submitted that a court of law should *not* answer: let him who is without fault among you cast the first stone.

F. C. CRONKITE.

University of Saskatchewan,
Saskatoon, Sask.

[84] *Bullock* v. *Hansen* (1928) 3 W.W.R. 528.
[85] (1921) 54 N.S.R. 277.
[86] (1924) 57 N.S.R. 498.