CASE AND COMMENT

CONTRACT—TIME OF ESSENCE—NECESSARY IMPLICATION—EXTENSION OF TIME.—The trial judge in *Bernard* v. *Williams*[1] said that it is "quite clear that as between vendor and purchaser the time for completion has never been treated as of the essence of the contract unless in the clearest terms it is made so." This statement is, unquestionably, too narrow. The plaintiff contracted to purchase from the defendant a lease of a house and garage, and the defendant, knowing that the plaintiff intended to use the premises for the business of a garage proprietor as soon as he obtained possession, agreed to make certain alterations to allow the installation of petrol pumps. Possession was to be given on December 6 but the time was extended by mutual agreement to December 15.

A Divisional Court to which the case was taken on appeal decided that time was of the essence in spite of the fact that there was no express stipulation to that effect in the contract; that a provision that time was of the essence was necessarily implied from the nature of the property and the surrounding circumstances.[2]

Talbot, J., applying the doctrine of *Barclay* v. *Messenger*,[3] held that the mere extension of time from December 6 to December 15 did not amount to a waiver on the part of the plaintiff of the condition that time was of the essence of the contract. The learned judge did not refer to the cases of *Kilmer* v. *British Columbia Orchard Lands Limited*[4] and *Steedman* v. *Drinkle*,[5] decided by the Judicial Committee of the Privy Council. The Judicial Committee in the *Steedman* case purported to explain their decision in the *Kilmer* case rather naively by reference to an argument of counsel in the latter case. Viscount Haldane said: "The date of payment of the instalment which was not paid had been extended, so that the stipulation (as to time being of the essence) had not been insisted

[1] (1928), 44 T.L.R. 437.

[2] See *Parkin* v. *Thorold* (1852), 22 L.J. Ch. 170 at p. 173; *Tilley* v. *Thomas* (1867), L.R. 3 Ch. 61; *Sanderson* v. *Burdett* (1869), 16 Gr. 119; *Crossfield* v. *Gould* (1883), 9 O.A.R. 218; *Harris* v. *Robinson* (1892), 21 Can. S.C.R 390; *Thomson* v. *McPherson* (1912), 3 O.W.N. 791; *Hayden* v. *Rudd* (1922), 66 D.L.R. 618; *Gamble* v. *Wright* (1926), 31 O.W.N. 482.

[3] (1874), 43 L.J. Ch. 449. See also *Hicks* v. *Laidlaw* (1912), 2 D.L.R. 460; annotation: Time of Essence, Equitable Relief, (1912), 2 D.L.R. 464; Fry on Specific Performance, 6th ed., p. 522.

[4] [1913] A.C. 319.

[5] [1916] 1 A.C. 275.

on by the company. The learned counsel who argued the case for the purchaser contended that when the company had submitted to postpone the date of payment they could not any longer insist that time was of the essence. Their Lordships appear to have adopted this view, and on that footing alone to have decreed specific performance as counterclaimed."[6]

Walsh, J., in *Tooley* v. *Hadwen*,[7] was of the opinion that the *Kilmer* case as explained in the *Steedman* case destroyed the authority of *Barclay* v. *Messenger*. The view of Jessel, M.R., in the latter case was stated thus: "If a man says a contract is to depend upon payment of money by a certain day and the party entitled to receive the money says, 'I will extend your time; I will, give you a week or a month,' why that should put the party in a better position than if it had been originally put in the contract, I cannot conceive. It appears to me plain that a mere extension of time and nothing more is only a waiver to the extent of substituting the extended time for the original time and not a total destruction of the essential character of time."[8] It is possible that a party to a contract may waive the essentiality of time but it is submitted in view of the remarks of Jessel, M.R., that he does not do this when he merely substitutes one date for another. The doctrine of *Barclay* v. *Messenger* as applied in the *Bernard* case is decidedly preferable to that which is arrived at by interpreting the Privy Council's explanation of what was argued, but not decided, in the *Kilmer* case.

S. E. S.

* * *

STATUTE OF FRAUDS—EARNEST TO BIND THE CONTRACT.—The case of *Farr, Smith and Company, Limited* v. *Messrs, Limited*[1] is of special interest, as it is one of the very few cases which deal with the nature of earnest to bind a contract of sale. The expressions in the Statute of Frauds, "give something in earnest" or "in part payment" are often treated as meaning the same thing, but the language clearly indicates that the earnest is "something to bind the bargain," or "the contract," whereas it is manifest that there can be no part payment till after the bargain has been bound or closed.[2] Formerly, a small money payment which was not regarded

[6] [1916] 1 A.C. 275 at p. 280.
[7] (1918), 41 D.L.R. 190.
[8] (1874), 43 L.J. Ch. 449 at p. 456. Compare remarks of Romilly, M.R., in *Parkin* v. *Thorold* (1852), 22 L.J. Ch .170 at 174.

[1] [1928] 1 K.B. 397.
[2] See Benjamin on Sale, 6th ed., 255.

as part of the price was sometimes made to bind the bargain.[3] In *Blenkinsop* v. *Clayton*[4] it was held that there must be an actual transfer of the thing which is to constitute the earnest. Wright, J., in the *Farr, Smith* case went further and stated that the earnest must be a tangible thing given to bind the bargain at the moment when the contract is concluded. The learned judge pointed out that it will be forfeited if the contract goes off owing to the default of the party who gives it. If, on the other hand, the contract is fulfilled, the earnest may still serve a further purpose and operate by way of part payment. In the *Farr, Smith* case, the defendants had entered into a contract to supply goods to a partnership firm which subsequently transferred its business to a newly-formed limited company. It was agreed that, in consideration of the handing over by the new company of a cheque and three bills for the price of the goods, the defendants would deliver the goods to the new company. Wright, J., decided that the documents were not given at the time the contract was made to bind the bargain; there were then only promises to deliver them. The transfer a few days later could not operate as the giving of earnest, but rather in fulfilment and partial performance of the contract.[5]

S. E. S.

* * *

CHARITABLE GIFTS — DISCRETION — RELIGIOUS PURPOSES — PURPOSES BENEFICIAL TO THE COMMUNITY.—In spite of the declared attitude of the Courts in favour of charitable gifts,[1] charity has been decided against in four recent cases.

In *Re Hawkins*[2] a bequest in trust, "to be divided among such charitable and such purposes as he (the trustee) may in his sole discretion see fit," was held not to constitute a charitable gift. It is well established that if a bequest is in trust for charity, it is no objection that the charity is not particularly defined,[3] but the gift

[3] See *Bach* v. *Owen* (1793), 5 T.R. 409, where the buyer paid a halfpenny "to bind the bargain," and this was held sufficient to pass the property in the subject-matter of the sale.

[4] (1817), 7 Taunt. 597.

[5] See also *Sumner and Leivesley* v. *John Brown & Co.* (1909), 25 T.L.R. 745; articles: 29 Law Q. Rev. 323, 442; 31 Law Q. Rev. 50.

[1] See *Weir* v. *Crum-Brown*, [1908] A.C. 162 at p. 167; *Dundee Magistrates* v. *Morris* (1858), 3 Macq. 134, H.L., *per* Lord Cranworth, at p. 166: "There has always been a latitude allowed to charitable bequests"; *Anderson* v. *Dougall* (1867), 13 Gr. 164.

[2] (1929), 36 O.W.N. 347.

[3] See Lord Eldon in *Morice* v. *Bishop of Durham* (1805), 10 Ves. 522 at pp. 527-8.

must be for charitable objects and none other.[4] If there is a discretion which permits the trustee to apply the fund outside of the charitable field, the gift cannot take effect as a gift to charity.[5] If the testatrix had used the expression, "among such charitable *or* such purposes, etc.," it would be plain that such a discretion had been given to the trustee.[6] The use of the conjunctive "and" in the *Hawkins* case was by way of addition for the purpose of enlarging the number of objects, within the area of selection, which need not have the qualification of being charitable.[7]

Especially in view of the fact that the courts have gone rather far in construing vague expressions as indicating a purpose to advance religion, and therefore the object is charitable,[8] the result reached by Eve, J., in *In re Bain, Public Trustee* v. *Ross*[9] is, to say the least, not an obvious one. A gift to the vicar of a church, "for such objects connected with the church as he shall think fit," was held not to be charitable. The statement of Eve, J., that the church might be engineering an agitation against the adoption of this or that revised Prayer-book[10] does not appear to be conclusive. Sir John Romilly, M.R., in *Thornton* v. *Howe*,[11] said: "I am of the opinion that the Court of Chancery makes no distinction between one sort of religion and another."[12]

On appeal from the judgment of Eve, J., the majority of the Court of Appeal held[13] that the gift was for the benefit of objects connected with the fabric and services of the church and was therefore charitable. Russell, L.J., in dissenting, held that the words of the gift could not be so widely construed and that they would

[4] See Vankoughnet, C., in *Anderson* v. *Dougall* (1867), 13 Gr. 164 at p. 165.

[5] *Morice* v. *Bishop of Durham, supra; In re Tetley, National Provincial and Union Bank of England, Limited* v. *Tetley*, [1923] 1 Ch. 258.

[6] See *Ellis* v. *Selby* (1836), 1 My. & Cr. 286 ("charitable or other purposes" held not a charitable gift).

[7] *Cf. Re Huyck* (1905), 10 O.L.R. 480 ("charitable and philanthropic" held to be a charitable gift). See also *In re Eades, Eades* v. *Eades*, [1920] 2 Ch. 353; *Re McPherson* (1919), 17 O.W.N. 22. For a case where the use of the word "such" involved the change of word "and" to "or," see *In re Tetley, National Provincial and Union Bank of England, Limited* v. *Tetley, supra.*

[8] See Tyssen: The Law of Charitable Bequests, 2nd ed., p. 122.

[9] (1929), 45 T.L.R. 302.

[10] (1929), 45 T.L.R. 302 at p. 303.

[11] (1862), 31 Beav. 14 at p. 19.

[12] See also *Bowman* v. *Secular Society, Limited*, [1917] A.C. 406 at p. 449. *Cf. In re Davidson, Minty* v. *Bourne*, [1909] 1 Ch. 567; *Cameron* v. *The Church of Christ, Scientist* (1918), 57 Can. S.C.R. 298; 43 D.L.R. 668 ("The whole of my estate must be used for God only" held not to be a bequest but only a pious ejaculation as to the effect of certain specific bequests).

[13] (1929), 45 T.L.R. 616.

permit the vicar to apply the fund to the men's club conducted under the *aegis* of the church. As to the club Russell, L.J., was of the opinion that it was impossible to say that it was a charitable object. This view does not take into account the place of social work in the advancement of religion in many churches to-day.

The problem before the Courts in *In re Grove Grady, Plowden* v. *Lawrence*[14] and *In re Patten, Westminster Bank, Limited* v. *Carlyon and others,*[15] was whether the respective gifts fell within the fourth class of charities outlined by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel,*[16] "trusts for other purposes beneficial to the community, not falling under any of the preceding heads." The mere fact that the purpose is beneficial to the community does not make it charitable.[17] Moreover, these purposes cannot be classified or reduced to any principle and all that one can do is to look at the cases and see what has been decided.[18] The truth of this statement is apparent from a perusal of the *Grove Grady* and *Patten* cases.

In *In re Grove Grady* a testatrix gave a residuary fund amounting to about £200,000 to trustees for the purpose of founding sanctuaries for birds and animals, so that they might be unmolested by man. The majority of the Court of Appeal (Hanworth, M.R., and Russell, L.J.) decided that the gift did not necessarily involve a benefit to the community. Hanworth, M.R., was of the opinion that in the proposed sanctuaries animals would be free to molest and harry each other and that the reserves would not be places of refuge for those of a timid nature. In view of the authorities[19] and apply-

[14] (1929), 98 L.J. Ch. 261.
[15] [1929] 2 Ch. 276; 45 T.L.R. 504.
[16] [1891] A.C. 531 at p. 583.
[17] See *In re Tetley, National Provincial and Union Bank of England* v. *Tetley, supra.* In Ontario the Mortmain and Charitable Uses Act, R.S.O. 1927, c. 132, s. 1(2) provides that "any purpose beneficial to the community, not falling under any of the foregoing heads" shall be deemed a charitable use. As the statute deals solely with land, it is submitted that in that province it is sufficient for the purpose of upholding a devise as a charitable gift, to show that it is beneficial to the community. The law relating to charitable bequests in Ontario is unchanged, see *Cameron* v. *The Church of Christ, Scientist, supra.*
[18] Tyssen, The Law of Charitable Bequests, 2nd ed., p. 103.
[19] In the following cases it was decided that a charitable gift had been made: *University of London* v. *Yarrow* (1857), 1 De G & J. 72 (hospital for animals useful to mankind); *In re Douglas* (1887), 35 Ch. D. 472 (home for lost dogs); *Armstrong* v. *Reeves* (1890), 25 L.R. Ir. 325 (protection of animals); *Re Toronto Humane Society* (1920), 18 O.W.N. 414; *In re Foveaux, Cross* v. *London Anti-Vivisection Society,* [1895] 2 Ch. 501 (society for suppression and abolition of vivisection); *Re Gwynne* (1912), 3 O.W.N. 1428, 5 D.L.R. 713 (abolition of vivisection). In *In re Grove Grady,* 93 L.J. Ch. 261 at p. 270, Russell, L.J., said: "*In re Foveaux* . . . might possibly, in the light of later knowledge in regard to the benefits accruing to mankind from vivisection, be (decided differently)."

ing the test of benefit to the community, there is much to be said in favour of the dissenting opinion of Lawrence, L.J. The conduct of a sanctuary on rational lines would serve as an elevating lesson to mankind and tend to cultivate a spirit of humanity and mercy towards the brute creation.

Romer, J., in *In re Patten,* decided that gifts to two clubs in trust to pay the income to the respective Staff Christmas Funds were not charitable. These funds consisted of donations, given annually by the members of the clubs, which were distributed among the staff of the clubs in January of each year. The learned judge was of the opinion that the public were in no way interested in the question whether the members of the two clubs were well or ill-served.[20] A gift to a fund established by the Sussex County Cricket Club for the purpose of teaching young cricketers the game so as to enable them to earn their livelihood by becoming professional cricketers was also held not to be charitable. This decision is in line with that in *In re Nottage, Jones* v. *Palmer,*[21] where it was held that a gift for the encouragement of yacht-racing was not charitable.

S. E. S.

* * *

TRUSTEES—POWER TO CONVEY—ONTARIO REGISTRY ACT.—Purchasers who have accepted title to real property for many years past under the authority of *McKinley* v. *McCullough*[1] may find a disconcerting judgment in the recent case of *Re Thompson and Jenkins,*[2] in which a vendor was forced to produce evidence of his power to sell property registered in his name as "A, trustee for X Syndicate."

A review of the case law on the subject shows that the *McKinley* case has been accepted as authority for the rule that the Registry Act[3] furnished the necessary protection to registered owners who had purchased from "A, trustee." The words "in trust" are evi-

[20] *Cf. Reeve* v. *Attorney-General* (1843), 3 Hare, 191; *Loscombe* v. *Wintringham* (1850), 13 Beav. 87; *Re Fitzgibbon* (1922), 51 O.L.R. 500; 69 D.L.R. 524 where gifts for uplift and encouragement of servants were held to be charitable.

[21] [1895] 2 Ch. 649. *Cf. In re Gray, Todd* v. *Clough-Taylor* (1925), 41 T.L.R. 335, where a gift to promote sport in a regiment was held to be charitable because it would conduce to the physical efficiency of the Army.

[1] *McKinley* v. *McCullough* (1919), 46 O.L.R. 535.

[2] (1928), 63 O.L.R. 33; 35 O.W.N. 20.

[3] Registry Act, R.S.O. 1927, c. 155, ss. 70-72.

dence of a trust for someone,[4] but notice of a trust instrument is only constructive notice of its contents; the Registry Act spreads its protection over all purchasers but those who have had actual notice, and therefore a purchaser could accept a conveyance from such a trustee without inquiring as to the actual terms of the trust. For examples of this interpretation, see *Re Gidley and Frost*,[5] and more recently the dissenting judgments of Masten and Riddell, JJ., in *Re Toronto and Suburban Railway and Rogers*.[6] From a closer scrutiny of the *McKinley* case, to which Middleton, J., invites us in the course of his judgment, it appears, however, that the rationale for the decision in that case was the rule laid down that, "after the lapse of thirty years during which the conveyance (by the trustee) had stood without challenge, possession having gone with the paper title, it should be presumed that the sale was properly made."

The problem then, of the words "in trust," so elaborately discussed at that time, really remained unanswered, and now comes squarely before the Court when the trustee himself tries to sell. Magee, J.A., who gave the dissenting judgment when the *McKinley* case came before the Appellate Division, considered the question the same as if it were the trustee selling, instead of a vendor thirty years subsequent to that date; and now Middleton, J., partially approves of that dissenting judgment by his suggestion, "that if in the *McKinley* case the trustee had been selling, the decision would have been in accordance with the view I am now expressing."

Such obiter as this tends to relegate the *McKinley* case to an authority of minor importance, and the purchaser can no longer hope for assistance from the Registry Act. The argument of constructive notice, so eagerly seized on hitherto, while sound enough so far as it goes, does not answer the second objection dealt with by the learned judge in the *Thompson and Jenkins* case, namely, the power of the trustee to dispose of the property. The notice afforded by the words "in trust" is not so much notice of a cestui que trust as notice of a limitation of the estate of the registered owner, and a purchaser is put on his guard to inquire as to the power of that registered owner to sell, it appearing on the face of the abstract that he is not the real owner.[7]

[4] See *Duggan* v. *London and Canadian Loan and Agency*, [1893] A.C. 506.

[5] (1922), 23 O.W.N. 217.

[6] (1920), 48 O.L.R. 72.

[7] See the judgment of Magee, J.A., 46 O.L.R. 535 at p. 544.

A previous case directly in support of this new one is *Re Thompson and Beer.*[8] This case has hitherto been considered as overruled, however, and at this point one cannot help expressing a certain perplexity at the comments of Middleton, J., in the *McKinley* case, where he speaks disapprovingly of it. This appears to obscure the issue more than ever, and when one considers how often officers of various unincorporated organizations take property "in trust" on behalf of those organizations, there being no trust deed in existence, it becomes quite apparent how practical the problem is. Nevertheless, until our courts throw some further light on the matter, the prudent course appears to be to demand proof of a trustee's power to sell, except in those cases where the conveyance is of such long standing that the *McKinley* case may be invoked.

NELSON MACFARLANE.

Toronto.

* * *

NEGLIGENCE — INJURY TO GRATUITOUS PASSENGER — RESPONSIBILITY OF OWNER OF VEHICLE.—A person who undertakes the carriage of another gratuitously is bound to exercise such care as is "reasonable under all the circumstances": *Armand* v. *Carr.*[1] The rights of a guest or gratuitous passenger to recover against the owner for damages sustained are greater than those of a mere licensee: *Harris* v. *Perry & Co.*,[2] *Karavias* v. *Callinicos.*[3]

In the case of *Pratt* v. *Patrick and Others,*[4] the plaintiff sued, under Lord Campbell's Act on behalf of herself and her four infant children, for damages resulting from the death of her husband in the following circumstances. On May 17, 1923, the defendant Patrick was being driven in his motor car by his friend, a man named Essex, they being accompanied by Pratt, the deceased husband of the plaintiff. The judge found that, owing to the negligence of Essex, the car which he was driving collided with a motor lorry belonging to the firm of Sessions & Co., who were also made defendants to the action, but against whom the action was dismissed, the judge holding that there was no evidence of negligence against their driver. In the collision Pratt received injuries of a nature so serious that he died. Acton, J., gave judgment for the plaintiff. In this case the learned judge stated that the legal questions for

[8] (1919), 17 O.W.N. 4.

[1] [1926] S.C.R. 575.
[2] [1903] 2 K.B. 219.
[3] [1917] W.N. 323.
[4] [1924] 1 K.B. 488.

decision upon the facts were as follows: (1) What is the duty of care, if any, owing by the owner to a person who is invited to ride in the car gratuitously? (2) What is the degree of responsibility of an owner of a car for a person whom he permits to drive it?

The answer to the first of these questions was found in the case of *Harris* v. *Perry & Co.*,[5] which decided that a person who undertook the carriage of another gratuitously owed a duty to exercise reasonable care. Collins, M.R., there stated:

> The principle in all cases of this class is that the care exercised must be reasonable; and the standard of reasonableness naturally must vary according to the circumstances of the case, the trust reposed, and the skill and appliances at the disposal of the person to whom another confides a duty. There is an obvious difference between the measure of confidence reposed and responsibility accepted in the case of a person who merely receives permission to traverse the premises of another, and in the case where a person or his property is received into the custody of another for transportation.[6]

Collins, M.R., then quoted Parke, B., in *Lygo* v. *Newbold*:[7] "A person who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care."

A discussion of the principles and an annotation of this case are to be found in the Cambridge Law Journal,[8] where the author, dealing with the second question, commented as follows:

> As regards the second question, the learned Judge referred to the case of *Samson* v. *Aitchison*.[9] This was an appeal from the decision of the Supreme Court of New Zealand reversing the decision of the Judge in the Court of first instance, to the Judicial Committee of the Privy Council, which reaffirmed the decision of Williams, J., in the Court of first instance. In this case it was decided that, where the owner of a vehicle, being himself in possession and occupation of it, requests or allows another person to drive, this will not exclude his right and duty of control, and that, therefore, in the absence of further proof that he has abandoned that right by contract or otherwise, the owner is liable as principal for damage caused by the negligence of the person actually driving. Lord Atkinson, in giving judgment, quoted from the decision of the Judge of the Court of first instance: "I think that where the owner of an equipage, whether a carriage and horses, or a motor, is riding in it while it is being driven, and had thus not only the right to possession, but the actual possession of it, he necessarily retains the power and the right of controlling the manner in which it is to be driven, unless he has in some way contracted himself out of this right or is shown by conclusive evidence to have abandoned his right. If any injury happen to the equipage, while it is being driven, the owner is the sufferer. In order to

[5] *Supra.*
[6] [1903] 2 K.B. 219 at p. 226.
[7] (1854), 9 Ex. 302 at p. 305.
[8] 2 Cambridge Law Journal, 107.
[9] [1912] A.C. 844.

protect his own property, he must be able to say to the driver, 'Do this or do that'; the driver would have to obey, and if he did not the owner in possession would compel him to give up the reins or steering wheel. The owner indeed has a duty to control the driver. If the driver is driving at a speed known to the owner to be dangerous, and the owner does not interfere to prevent him, the owner may become responsible criminally." The duty to control postulates the existence of the right to control. If there was no right to control, there could be no duty to control. No doubt, if the actual possession of the equipage has been given by an owner to a third person, that is to say, if there has been a bailment by the owner to a third person, the owner has given up his right to control.

The judgment in the *Pratt* case goes on to point out that in the case of *Marshall* v. *York, Newcastle and Berwick Ry. Co.*,[10] it was held that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely.

It is interesting here in view of the second question in the *Pratt* case to refer to the Ontario case of *Driscoll* v. *Colletti*,[11] decided under the Highway Traffic Act of Ontario,[12] which reads:

> The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council, unless at the time of such violation the motor vehicle was in the possession of some person other than the owner or his chauffeur, without the owner's consent, and the driver of a motor vehicle not being the owner shall also be responsible for any such violation.

This sub-section was carried in the above form into R.S.O., 1927, c. 251, s. 41 (1) together with an amending sub-section added in 1926 (16 Geo. V. c. 58, s. 10) which is later referred to but the section has now been repealed in its entirety (1929, 19 Geo. V. c. 68, s. 9) and the following substituted therefor:

> The owner of a motor vehicle shall incur the penalties provided for any violation of this Act or of any regulation made by the Lieutenant-Governor in Council, unless at the time of such violation the motor vehicle was in the possession of some person other than the owner or his chauffeur, without the owner's consent, and the driver of a motor vehicle not being the owner shall also incur the penalties provided for any such violation.

Dealing with the section as it read at the time of the *Driscoll* case, Riddell, J.A., said: "Any one on the highway has the protection of the statute, but does it go further? Can one who is riding as a non-paying passenger in the car and is injured by the negligence

[10] (1867), L.R. 2 Q.B. 442 at p. 445.
[11] (1926), 58 O.L.R. 444.
[12] (1923), 13 and 14 Geo. V., c. 48, s. 42 (1).

of the driver claim damages from the owner?"[15] The decisions in the cases of *Parlov* v. *Lozina and Raolovich*,[16] and *Gray* v. *Peterborough Radial Railway Co.*,[17] are then reviewed. In the *Gray* case, Orde, J., held the owner of the motor vehicle liable. The learned judge in that case speaking of section 19 of the Motor Vehicles Act,[18] (the predecessor of section 42 (1) referred to in the *Driscoll* case) said:

> I am of the opinion that the provisions of sec. 19, in view of the wide judicial interpretation already given to them by the decisions I have mentioned, are not to be limited to cases of injuries to persons using the highway other than the occupants of the motor vehicle itself, but extend to cases like the present, where the occupant of the car is in no sense a party to the use of the vehicle upon business which is not that of the owner and is not aware of the fact that the car is being so used.[19]

In the *Parlov* case, Middleton, J., said:

> I realise fully that an action brought against the owner of an automobile who is entertaining his friends gratuitously does not commend itself to one and bears rather hardly upon the co-owner of the car, but it is admitted (in the *Parlov* case the owner admitted liability), that the provisions of the Motor Vehicles Act leave no way of escape for him, when once the other owner is liable.[20]

In the *Driscoll* case the Appellate Division held that a person who is carried in the car as a non-paying passenger—as the plaintiff was —and is injured by the negligence of the driver, may recover damages from the owner, following the *Parlov* case. Mr. Justice Riddell stated that, "were the case of first instance, I think I should be of the opinion that the plaintiff here was not in such a position that the defendant must be responsible to him."[21]

The amendment to section 41 in 1926 reads as follows:

> This section shall not apply to any action brought by a passenger in a motor vehicle against the owner or driver of the vehicle in respect of any injuries sustained by him while a passenger.

This amendment modified the liability of the owner in the case of a passenger and remedied the situation commented upon in the cases above referred to. It then appeared to be clear that in the case of a passenger, the owner, simply as such, was not liable by

[15] (1926), 58 O.L.R. 444 at p. 449.
[16] (1920), 47 O.L.R. 376.
[17] (1920), 47 O.L.R. 540.
[18] R.S.O. 1914, c. 207, as amended by 7 Geo. V., c. 49, s. 14, and 8 Geo. V., c. 37, s. 8.
[19] (1920), 47 O.L.R. 540 at p. 547.
[20] (1920), 47 O.L.R. 376 at p. 377.
[21] (1926), 58 O.L.R. 444 at p. 450.

statute. By the amendment of 1929, however, the whole section was repealed and no distinction is now made in the Act in this respect between a passenger or other person. The *Driscoll* case was followed in Ontario in *Hopcroft* v. *Bouey*.[21a] Although this case was tried after the 1926 amendment, the provision was not in force when the accident in question in this case occurred.

In the case of *Moffatt* v. *Bateman*,[22] the facts were that the defendant was driving the plaintiff without profit or reward in his buggy drawn by two horses. The plaintiff and defendant arrived within about a mile of Willis' Station, and were driving up a slight incline at a pace under eight miles an hour where the road was crossed by two plough furrows. In crossing one of these furrows the buggy was jolted, and the kingbolt, by which the front wheels of the carriage were attached to the hind part, broke, and the horses went away with only the forecarriage and wheels. Both the plaintiff and defendant were thrown out and became insensible. A verdict at the trial with a jury, was given for the plaintiff with £1,500 damages. This case was taken on appeal to the Judicial Committee of the Privy Council from the Supreme Court of Victoria. The appeal was allowed over-ruling the judgment of the Court below. The headnote to the case reads as follows:

Action for negligence by the defendant in conveying the plaintiff, who was a decorator and gardener in his service, to perform for him certain work. The defendant drove, and while on the road the kingbolt of the carriage broke, the horses bolted, the carriage was overturned, and the plaintiff injured. There was no evidence of gross neglect on the part of the defendant:

Held (overruling the judgment of the Court below),

First, that in the absence of any evidence of gross negligence on the part of the defendant the plaintiff was not entitled to recover damages;

Secondly, that the evidence did not disclose such negligence as to render the defendant, performing a gratuitous service for the plaintiff, responsible.

The case of *Scott* v. *The London and St. Katharine's Docks Company*, 3 H. & C. 596, distinguished.

The *Moffatt* case was decided in 1869, and was followed in *Nightingale* v. *Union Colliery Co.*[23] The headnote to which case reads as follows:

In the absence of evidence of gross negligence, a carrier is not liable for injuries sustained by a gratuitous passenger, *Moffatt* v. *Bateman*, L.R. 3 P.C. 115, followed. *Harris* v. *Perry & Co.*, [1903] 2 K.B. 219, distinguished.

[21a] (1927), 31 O.W.N. 383.
[22] (1869), L.R. 3 P.C. 115.
[23] (1904), 35 Can. S.C.R. 65.

Although a railway company may have failed to properly maintain a bridge under their control so as to ensure the safety of persons travelling upon their trains, the mere fact of such omission of duty does not constitute evidence of gross negligence necessary to maintain an action in damages for the death of a gratuitous passenger.

At the trial of first instance, with a jury, in the *Nightingale* case judgment was entered for the plaintiff upon the findings of the jury.

In the case of *British Columbia Electric Ry. Co.* v. *Wilkinson*,[24] the *Nightingale* case was distinguished and the plaintiff held entitled to recover damages at common law.

It will be observed that in both the *Moffatt* and *Nightingale* cases it was held that "gross negligence" must be proved in order to hold the defendant liable for injuries to a guest or gratuitous passenger.

In *Armand* v. *Carr*,[25] the standard in the *Nightingale* case is rejected, and Chief Justice Anglin, speaking of the defendant driver in this case, said:

If there was any error on his part, it certainly amounted, at the most, to nothing more than an excusable mistake in judgment and did not involve any breach of duty owing to his passengers such as would predicate a failure to take that care which would have been "reasonable under all circumstances." We regard this as the test of the responsibility of one who undertakes the carriage of another gratuitously—*Karavias* v. *Callinicos*,[26] *Harris* v. *Perry & Co.*,[27] rather than some lower standard, which counsel for the appellant argued is implied in the decision of this court in *Nightingale* v. *Union Colliery Co.*[28]

In the case of *Harris* v. *Perry & Co.* it was held that the defendant must be taken, through his representative, to have permitted the plaintiff to ride on the engine, and that his liability was that of a person who undertakes the carriage of another gratuitously; that the duty in such a case is that the care exercised must be reasonable under all the circumstances; that there was evidence of such a failure of due care on the part of the defendant's servants as would make him responsible for damage arising therefrom; and that the plaintiff was entitled to judgment. This case was in the first instance tried before a jury, and on appeal, Collins, M.R., said:

Mr. Bray, for the defendant, insisted that, inasmuch as the plaintiff was at most a bare licensee, there was no evidence that the defendant had in any way fallen short of his duty to him as such so as to justify a finding of negligence causing the accident. I was very much impressed by this argument at the hearing, and was at one time disposed to think that the plaintiff,

[24] (1911), 45 Can. S.C.R. 263.
[25] *Supra.*
[26] *Supra.*
[27] *Supra.*
[28] [1926] S.C.R. 575 at p. 581.

for whom a platform had been provided as the proper means of locomotion for purposes of inspection in the tunnel, in riding on the engine merely for his own convenience must be taken to have accepted all risks incident thereto. I must deal with the case, however, on the footing of the findings of the jury, unless there was no reasonable evidence upon which they could be supported.[29]

In the *Karavias* case the facts were as follows: the action was brought to recover damages for personal injuries owing to the alleged negligence of the defendant in driving a motor car. On November 5, 1916, the plaintiff went for a gratuitous drive in the defendant's motor car as his, the defendant's, guest. The car was an open one, with a moveable hood which dropped back, and it had two seats. The defendant drove the car and the plaintiff sat next to him. The hood was down when the car started. During the drive it began to rain, and the plaintiff asked the defendant if he might pull up the hood. The defendant said, "Yes, if you can." The plaintiff pulled the hood forward, but was unable to hold it owing to the wind, and he asked the defendant to stop the car. The defendant said that it was not convenient to do so as they were going up a hill, but that he would stop a little farther on. The plaintiff, finding that he could not hold the hood, again asked the defendant to stop, and the defendant again said that it was not convenient to do so there. The defendant then took his right hand off the wheel to take hold of the strap of the hood so as to assist the plaintiff. The car thereupon swerved to the left and collided with an iron post at the side of the road, and the plaintiff's elbow struck the post and was seriously injured. The questions left to the jury and the answers thereto were as follows: (1) Were the injuries to the plaintiff caused by the failure of the defendant to exercise due and reasonable care? Yes. (2) Was the defendant guilty of gross negligence? No. The jury assessed the damages at £100. The learned judge gave judgment for the plaintiff. The defendant appealed, and contended that he could only be liable for "gross negligence," which the jury had negatived and in support of his appeal the *Moffatt* case was cited. The defendant's appeal was dismissed. There was also an application by the plaintiff for a new trial, on the ground that the damages were wholly inadequate. A new trial was ordered, Pickford, L.J., saying that the verdict was evidently a compromise and that in the special circumstances the new trial would not be confined to the question of damages, but that the whole action would be re-tried.

It would appear therefore that the true test of liability for a gratuitous passenger or guest, would be as expressed in the *Armand*

[29] [1903] 2 K.B. 219 at p. 224.

case, that is, a duty to take such care as is reasonable under all the circumstances and that it is not necessary for the plaintiff to prove "gross negligence."

Regarding the question of onus of proof in the case of a passenger, it has been held in the case of *Perusse* v. *Stafford*,[30] that section 53 (2) (a) of the Motor Vehicles Act,[31] which is practically identical with section 42 (1) of the Ontario Act,[32] and which creates a presumption of fault against the owner of a motor vehicle which he must rebut, applies only in the case of a person injured while travelling upon a highway and does not apply in favour of a passenger in an automobile which is driven by the owner's servant. By section 42 (2) of the Ontario Act the law which imposes the onus of proof upon the owner or driver of a motor vehicle is expressly negatived in the case of a passenger in the motor vehicle.[33]

As regards the liability of the owner of a motor vehicle for injury to an invitee, by the recent amendment of 1929, above quoted, it would appear that the owner of the motor vehicle is not now responsible for the negligence of another person other than in such circumstances as appeared in the English case of *Pratt* v. *Patrick*,[34] and others above referred to. This recent amendment has been dealt with by Mr. G. F. Henderson, in the June number of the CANADIAN BAR REVIEW.[35]

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INSURANCE—AUTOMOBILE—STATUTORY CONDITIONS—FAILURE OF INSURED TO CO-OPERATE IN RESISTING CLAIM.—In *Cadeddu* v. *Mount Royal Assurance Co.*[1] it was proved that the plaintiff had an auto accident in which his guest Dickson was injured, and that Dickson recovered, in court, damages of $2,500 from Cadeddu. Now Cadeddu was insured against just such liability, yet the insurance company refused to reimburse him, in spite of the fact that, knowing the whole circumstances, the company had fought the damage claim of Dickson through the court. The company founded its attitude on its policy, which contained statutory conditions: (1) Requiring immediate written notice of accident, etc.; and (2) Forbidding the

[30] [1928] S.C.R. 416.
[31] R.S. Quebec 1925, c. 35.
[32] R.S.O. 1927, c. 251.
[33] *Stock* v. *Moran* (1929), 36 O.W.N. 278.
[34] *Supra.*
[35] 7 C.B. Rev. 385.

[1] [1929] 2 W.W.R. 161; [1929] 2 D.L.R. 867.

assured to assume liability, and requiring him to co-operate in resisting claims.

But how had Cadeddu co-operated to resist this claim? Immediately after the accident an assurance adjuster, acting for Dickson, had come in and got Cadeddu to make a statutory declaration as to how the accident happened. In that declaration the driver admitted his own misjudgment in handling the car. There was no collusion between Cadeddu and Dickson, but that declaration did undoubtedly prejudice the defence. Did that hasty step by Cadeddu forfeit his policy? If so, did the company in defending elect to affirm the policy? And in any case, was it equitable for the Court to relieve against the forfeiture?

Six judges gave Cadeddu satisfaction. Technically, said the Court, he had forfeited his policy. But the company's solicitor, knowing of Cadeddu's breach, went ahead and fought the case, and lost. In words to Cadeddu, their solicitor had disclaimed liability; yet it "so acted." That made Cadeddu safe. Whether the Court would have granted him relief had that been found necessary was doubtful, for these statutory conditions are "highly salutary."

McPhillips, J.A., seems to have put the plain man's aspect of it pointedly: "Surely a person driving a motor car and suffering an accident is at liberty to state the facts accounting for the happening—it cannot be said that his mouth is closed because of the fact that he holds an insurance policy, and that if he speaks no remedy can be had—it would be against public policy if it was the case."[2]

G. C. THOMSON.

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[2] [1929] 2 W.W.R. 161 at p. 163; [1929] 2 D.L.R. 867 at p. 869.