# CASE AND COMMENT.

CONSTITUTIONAL LAW—VALIDITY OF REGULATIONS MADE UNDER STATUTE—"THEY SHALL HAVE EFFECT AS IF ENACTED IN THIS ACT." —The cases of *Minister of Health* v. *The King, Ex parte Yaffe*,[1] decided by the House of Lords, and *The King* v. *National Fish Company, Limited*,[2] decided by the Exchequer Court of Canada, are of interest to the members of the profession who are concerned with constitutional law. Lord Hewart, in his book, *The New Despotism*, has emphasized the need for the protection by the judiciary of the subject from the abuse of power by administrative officials. Professor Keith in his recent publication, *An Introduction to British Constitutional Law*, has pointed out that the salutary influence of the judiciary in this respect has been threatened, if not impaired, by the habit of Parliament enacting not merely that regulations may be made by some subordinate body, pursuant to a statute, but that "they shall have effect as if enacted in this Act." The draftsman of this formula undoubtedly expected that the insertion of it in a statute would preclude the courts from inquiring whether a particular regulation made by a designated subordinate body is *ultra vires* or not.

A leading case in the House of Lords, *Institute of Patent Agents* v. *Lockwood*,[3] it was thought, laid it down once for all that the effect of the formula is to place a departmental regulation or order entirely beyond the scrutiny of the courts.[4] In the *Lockwood* case, section 101 of the *Patents, Designs and Trade Marks Act, 1883*, conferred upon the Board of Trade a power to make such general rules as they thought expedient, subject to the provisions of the statute, for regulating the practice of registration under the Act. Sub-section 3 provided that rules made in pursuance of the section (subject as thereinafter mentioned) should be "of the same effect as if they were contained in the Act," and sub-sections 4 and 5 provided that any rules should be laid before both Houses of Parliament, and that if either House, within forty days after the rules had been so laid before the House, resolve that such rules or any of them ought to

[1] [1931] A.C. 494; 47 T.L.R. 337.
[2] [1931] Ex. C.R. 75.
[3] [1894] A.C. 347.
[4] See Allen: Bureaucracy Triumphant, 76; Port: Administrative Law, at p. 149 *et seq.*

be annulled, the same should, after the date of such resolution, be of no effect. The Board of Trade, having made rules in pursuance of the above-mentioned powers and which were laid before Parliament and not objected to within forty days, the House of Lords expressed the opinion that it was not competent for the courts to question their validity.

In *Rex* v. *Inspector of Cannon-Row Police Station, Ex parte Brady*,[5] section 1 (4) of the *Restoration of Order in Ireland Act, 1920*,[6] came in for consideration. The sub-section provided that, "Any such regulations . . . shall have effect as if enacted in this Act," and Lawrence, L.C.J., held, therefore, that "it was not open to the Court to hold that they were *ultra vires*."

The pendulum began, however, to swing in a contrary direction in the case of *R.* v. *Electricity Commissioners*,[7] where it was decided that the courts might intervene by prohibition when the Commissioners were formulating a scheme for the improvement of the existing organization for the supply of electricity in electricity districts. This scheme purported to be, but was not, in exercise of their powers under a statute, which provided, *inter alia*, that upon confirmation of the scheme by the Minister of Transport, it should have effect as if enacted in the Act. It was, however, suggested by the members of the Court that they could have given no relief if the scheme in question had been confirmed.

In *Rex* v. *Minister of Health, Ex parte Yaffe*,[8] the point arose out of the *Housing Act, 1925*, under which the Minister of Health had made an order confirming an improvement scheme, so called, framed by the Liverpool Corporation. Mr. Yaffe, whose property was affected by the scheme, contended that the confirming order of the Minister was *ultra vires*. But the *Housing Act* contained a provision that an order made under this part of the statute "shall have effect as if enacted in this Act." The majority of a Divisional Court felt themselves bound, because of these words, to hold that they had no power to review the Minister's confirming order. The Court of Appeal unanimously reversed this decision and held that the order was *ultra vires*, because it went beyond the statutory conditions under which it could be made. The members of the Court of Appeal were of the opinion that the statute gave validity only to schemes in accord with its provisions. On appeal, the House of Lords decided that where a scheme is not contemplated and pro-

[5] (1921), 37 T.L.R. 854.
[6] 10 & 11 Geo. V., c. 31.
[7] [1924] 1 K.B. 171.
[8] *Supra*.

vided for by the Act, a confirming order of the Minister has no statutory effect, but, as the scheme in question, as confirmed by the Minister, was within the purview of the statute it could not be quashed on *certiorari*. The observations of the Law Lords are noteworthy in so far as they qualify what had been understood to be the sweeping doctrine of the *Lockwod* case. In inquiring as to whether the formula in the *Housing Act* prevented the courts from inquiring into the validity of an order made by a Minister, Viscount Dunedin said: "It is evident that it is inconceivable that the protection should extend without limit. If the Minister went out of his province altogether, if, for example, he proposed to confirm a scheme which said that all the proprietors in a scheduled area should make a *per capita* contribution of £5 to the municipal authority to be applied by them for the building of a hall, it is repugnant to common sense that the order would be protected, although, if there were an Act of Parliament to that effect, it could not be touched." Lord Warrington of Clyffe pointed out that the decision in the *Lockwood* case was made "on the footing that the rules were within the statutory authority," and "on the assumption that they were made in pursuance of the section in question." Lord Thankerton was of the opinion that the expressions of the Law Lords in the *Lockwood* case confirm the principle that "where a power is delegated to a Minister is a discretionary power, the exercise of that power *within the limits of the discretion*[9] will not be open to challenge in a Court of law." Lord Tomlin, after predicating that the jurisdiction of the Minister to make the order was under the Act strictly conditioned, proceeded to ask the question: "Whether the order made by the Minister is in relation to its contents *intra vires?*"

In *The King* v. *National Fish Company, Limited,*[10] certain regulations in question were made under the provisions of the *Fisheries Act.*[11] Audette, J., for reasons not germane to this comment, held that the regulations were *ultra vires*. Counsel for the Crown contended, however, that the Court had no jurisdiction to pass upon their validity because section 46 of the *Fisheries Act,* which was applicable to the regulations made by the Governor in Council, provided that they "shall have the same force and effect as if enacted herein." In answer to this contention, Audette, J., said: "The Governor in Council can only make Regulations within the limited sphere and authority of the subject and area of the Act, with the object of carrying the statutory enactment into operation and effect,

[9] Italics inserted.
[10] *Supra.*
[11] R.S.C. 1927, c. 73, s. 69, as amended by 19-20 Geo. V., c. 42, s. 7.

but not beyond the scope of such enactments. The Regulations must not conflict with the specific enactments of the Statute and cannot operate as an amendment of the same. They can only provide for something to be done consistent with the requirements of the Statute. The Act supplies the governing rule and the Regulation is subordinate to it. One may even go so far as to say that the Regulations are subject to an implied proviso that nothing in them shall be considered to sanction a departure from the Statute." Incidentally, it should be noted that a principle which is not applicable to delegation by the sovereign Imperial Parliament arises with respect to delegation by legislatures in Canada. The Canadian Parliament may delegate, but cannot abdicate or abandon its powers,[12] and it cannot endow with its own capacity a new legislative body not created by the Act to which it owes its existence.[13]

From the principles enunciated by the Law Lords in the *Yaffe* case and the judgment of Audette, J., in the *National Fish* case, it may be stated, with some confidence, that the validity of rules, regulations or orders made under a statute may be examined by the courts, notwithstanding the presence in that statute of the provision, "they shall have effect as if enacted in this Act." Despite this administrative artifice, the resounding words of Lord Shaw of Dunfermline in *R.* v. *Halliday*[14] still ring true: "The form, in modern times, of using the Privy Council as the executive channel for statutory power is measured, and must be measured strictly, by the ambit of the legislative pronouncement. . . . The author of the power is Parliament: the wielder of it is the Government. Whether the Government has exceeded its statutory mandate is a question of *ultra* or *intra vires*. . . . Once let the overmastering generality of the principle of regulation be affirmed . . . all is lost; the law itself is overmastered. The only law remaining is that which the Bench must accept from the mouth of the Government: *Hoc volo, sic jubeo; sit pro ratione voluntas.*"

S. E. S.

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DECISIONS — ENGLISH APPELLATE TRIBUNALS — BINDING EFFECT ON CANADIAN COURTS.—Ford, J., had before him, in *Will* v. *Bank of Montreal*,[1] the case of a cheque fraudulently raised from $50 to

[12] See *In re George Edwin Gray* (1918), 57 Can. S.C.R. 150; article: Delegated Legislation, (1928), 6 C.B. Rev. 245; note: (1930), 8 C.B. Rev. 537.
[13] See *In re The Initiative and Referendum Act*, [1919] A.C. 935 at p. 945.
[14] [1917] A.C. 260 at p. 287.

[1] [1931] 2 W.W.R. 364; [1931] 3 D.L.R. 526.

$1,150 and paid by the Bank, and the respective duties of customer and bank came in for consideration. Ample space had been left by the drawer to fill in at least two figures before the figures $50 and to insert the words "eleven hundred and" before the word "fifty."

There were two decisions, one of the Privy Council and one of the House of Lords, directly in point. The first was *Colonial Bank of Australasia, Limited* v. *Marshall*.[2] There Sir Arthur Wilson, speaking for the Judicial Committee, stated that "whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that the cheque is drawn with spaces such that a forger can utilize them for the purpose of forgery is not by itself any violation of that obligation."

The other was *London Joint Stock Bank* v. *Macmillan*.[3] There it was laid down that, "A customer of a bank owes a duty to the bank in drawing a cheque to take reasonable and ordinary precautions against forgery, and if as the natural and direct result of the neglect of those precautions the amount of the cheque is increased by forgery, the customer must bear the loss as between himself and the banker."

Ford, J., followed the decision of the House of Lords, and cited, as justification for doing so, the admonition given by the Privy Council itself in *Robins* v. *National Trust Co., Ltd.*,[4] where Viscount Dunedin said that, "When an appellate court in a colony which is regulated by English law differs from an appellate court in England, it is not right to assume that the colonial court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the colonial court which is bound by English law, is bound to follow it."

But for this "admonition," the learned judge would probably have felt himself bound by the Privy Council decision as did Lamont, J.A., in *Hogan* (or *McNally*) v. *Regina City*,[5] and Mathers, C.J, in *Penman* v. *Winnipeg Electric Ry. Co. (No. 2)*.[6] He, however, summed up the conclusion of the whole matter in these words:

> If the House of Lords as "the supreme tribunal to settle English law" has settled it in a way differing from that other tribunal by whom "equally . . . the point of difference may be settled," the House of Lords in doing so pointing out in express terms in what respect the other has erred, I, for my part, feel it my duty to apply the law as I find it rightly settled. In doing so I am not in any way refusing to be bound by the judgment of the Privy

[2] [1906] A.C. 559; 75 L.J.P.C. 76.
[3] [1918] A.C. 777.
[4] [1927] A.C. 515; [1927] 1 W.W.R. 692 at p. 696.
[5] (1924), 18 S.L.R. 423; [1924] 2 W.W.R. 307.
[6] [1925] 1 W.W.R. 156.

Council. There is a great difference between a subordinate Court saying that the Privy Council is wrong and refusing to follow its decisions and in following the law as laid down by the House of Lords because that Court has said that the Privy Council has taken a wrong view of English law.

When the Supreme Court of Canada has given a decision upon a point which has been subsequently determined otherwise by the Privy Council, the House of Lords, or the English Court of Appeal, the result will be as stated by Anglin, J., in *Stuart* v. *Bank of Montreal*:[7]

If the Privy Council should determine that the law is not what this court has declared it to be, the view of this court must be deemed to be overruled. A decision of the House of Lords should, likewise, be respected and followed though inconsistent with a previous judgment of this court. In the event of an irreconcilable conflict upon a question between a decision of this court and a subsequent decision of the English Court of Appeal—should such a case arise—in view of what was said by the Privy Council in *Trimble* v. *Hill*,[8] the duty of this court would require most careful consideration.

This passage gives to decisions of the House of Lords a binding authority which has not always been recognized. In *Pacific Lumber Co.* v. *Imperial Timber and Trading Co.*,[9] a case before the Court of Appeal of British Columbia, Martin, J.A., said:

The Supreme Court of Canada primarily settles the law of Canada, being only subject to review by the Judicial Committee of the Privy Council, and save as aforesaid, in its determination of that law the said Court may, if it sees fit, disregard the opinion of any other Court in the Empire, including the House of Lords, which only settles the law for the United Kingdom.

Again, in *Slater* v. *Laboree*,[10] an attempt was made to support an appeal to a Divisional Court by the citation of a decision of the House of Lords which differed from a decision of the Supreme Court of Canada on the same point. The English case cited was *Steele* v. *McKinley*,[11] and counsel argued that "this court is bound by the judgments of the House of Lords case," to which Meredith, C.J., answered that the Ontario court was "bound to follow the decision of the Supreme Court of Canada in *Robinson* v. *Mann*."[12]

The *Macmillan* case was the subject of a reference by Scrutton, L.J., in *In re Polemis and Another and Furness Withy, and Co., Ltd.*,[13] where he said:

[7] (1909), 41 Can. S.C.R. 516 at p. 548.
[8] (1879), 5 App. Cas. 342.
[9] [1917] 1 W.W.R. 507.
[10] (1905), 10 O.L.R. 648.
[11] (1880), 5 App. Cas. 754.
[12] (1901), 31 Can. S.C.R. 484. See also *Chilliwack Evaporating and Packing Co. Ltd.* v. *Chung*, [1918] 1 W.W.R. 870, and *Trumbell* v. *Trumbell*, [1919] 2 W.W.R. 198.
[13] [1921] 3 K.B. 560 at p. 577.

Perhaps the House of Lords will some day explain why, if a cheque is negligently filled up, it is a direct effect of the negligence that some one finding the cheque should commit forgery: *London Joint Stock Bank* v. *Macmillan;* while if some one negligently leaves a libellous letter about, it is not a direct effect of the negligence that the finder should show the letter to the person libelled: *Weld-Blundell* v. *Stephens.*[14]

R. W. SHANNON.

Regina.

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MOTOR VEHICLE—NEGLIGENCE—DEFECTIVE BRAKES—BREACH OF STATUTORY DUTY—"ABSOLUTE" LIABILITY.—The case of *Winnipeg Electric Company* v. *Geel*[1] involves the consideration of what Dr. Winfield refers to as "The Myth of Absolute Liability."[2] This action was for damages for injuries suffered by the plaintiff through the alleged negligence of the defendant in the operation of one of its auto-buses; and the facts in brief are these. The plaintiff was injured when an automobile in which he was riding was struck by a six-ton motor-bus operated by the defendant company. Both vehicles were proceeding on a main city thoroughfare in the same direction, and as they approached an intersection the automatic signal light at that point turned against traffic on the thoroughfare. The driver of the 'bus applied the foot-brake which went to the floor without engaging the brake. He then tried the emergency brake but, finding that it did not respond, he turned the 'bus to direct it toward the curb, and in making this movement the collision with the car in which the plaintiff was riding occurred. The evidence disclosed that a bolt secured by a cotter-pin connecting a rear rod of the foot-brake with one of the brake drums had fallen out, leaving the rod useless; that the emergency brake was connected with an equalizing bar to which the foot-brake was also connected; and that on the foot-brake being put out of commission, the efficiency of the emergency brake would be reduced one-half. The defect which caused the accident in this case appears to have been an unusual one, and the evidence did not disclose that it was to be apprehended that the bolt would prove insecure or that a better inspection than that made was required or would have disclosed the defect. The sufficiency of the inspection of the 'bus made by the defendant previously to the accident does not appear to have been questioned by the plaintiff in cross-examination. The action was tried by a judge and jury, and the defence, in substance, was that the equipment of the 'bus was

[14] [1920] A.C. 956.

[1] [1931] S.C.R. 443.

[2] (1926), 42 Law Q. Rev. 37.

adequate, that the collapse of the brake mechanism, by reason of which the driver lost control of the vehicle, was due to the fracture or dropping out of the cotter-pin, from some unknown cause; that the brakes had been in effective operation in the preceding runs of the 'bus on the day of the collision; and that the 'bus and its equipment had been subjected to a proper inspection, which had revealed nothing pointing to any deficiency in the machinery. The jury found, in answer to questions submitted to them, that there was negligence on the part of the defendant, consisting of (a) not keeping the brakes and braking equipment in proper repair, and (b) insufficient inspection. The relevance of finding (a) is not apparent, as the evidence of the defendant that the brakes were in repair except for the dropping out of the cotter-pin was not questioned at the trial. The jury assessed the damages at a substantial sum, and accompanied their findings with the observation that the driver "did everything under the circumstances to avoid the accident, and we wish to exonerate him from any blame." Judgment was entered for the plaintiff, and the defendant appealed to the Court of Appeal for Manitoba, which divided as follows: Prendergast, C.J.M., and Robson, J.A., would dismiss the appeal; Fullerton and Dennistoun, JJ.A., would allow the appeal and dismiss the action; and Trueman, J.A., held, in effect, that the defendant could not be held liable except on the ground of inadequate brakes, and that as the brake-system on the 'bus had not been attacked as being inadequate and this question had not been left to the jury, the verdict could not be upheld, and he would order a new trial. In the result, the appeal was dismissed, and the defendant appealed to the Supreme Court of Canada. It may be here noted that in *Confederation Life Association of Canada* v. *O'Donnell*,[3] the Supreme Court of Canada ordered a new trial when the Court divided in the same manner as did the learned judges in the Manitoba Court of Appeal in the case now under review.

The writer will restrict his comments to two important provisions of the *Motor Vehicles Act*,[4] namely, section 15[5] and section 62. The material parts of these sections provide respectively as follows:

Section 15. "Every motor vehicle shall be equipped with adequate brakes sufficient to control such motor vehicle at all times."

Section 62. "When any loss, damage or injury is caused to any person by a motor vehicle, the onus of proof that such loss, damage

[3] (1886), 13 Can. S.C.R. 218.
[4] S.M.C.A. 1924, c. 131.
[5] Amended S.M. 1927, c. 39, s. 1.

or injury did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle, and that the same had not been operated at a rate of speed greater than was reasonable and proper . . . . shall be upon the owner or driver of the motor vehicle."

While the ordinary rule is, that he who alleges negligence must prove it, section 62 of the statute altered this, to the extent of requiring the owner or driver of the motor vehicle to prove that the loss, damage or injury did not arise through his negligence or improper conduct and that the vehicle had not been operated at an improper rate of speed. But this provision does not increase or otherwise affect the *degree* of care which the defendant must exercise; nor does it declare anything to be negligence which would not otherwise be negligence.[6] All that the defendant is required to do is to show that the loss, damage or injury did not arise through his negligence or improper conduct; he is not called upon to show how it arose.[7]

Duff, J., in delivering the judgment of himself and Lamont, J., in the Supreme Court of Canada in the *Geel* case, holds that the statute created as against the owners and drivers of motor vehicles, in the conditions therein laid down, a rebuttable presumption of negligence; that the onus of disproving negligence remains throughout the proceedings; that if, at the conclusion of the evidence, it is too meagre or too evenly balanced to enable the tribunal to determine this issue, as a question of fact, then, by force of the statute, the plaintiff is entitled to succeed; that this did not mean that the defendants must "demonstrate their case," but that they must give reasonable evidence in rebuttal of the legal presumption against them and the evidence must be such as to satisfy the judicial conscience of the tribunal of fact; nor did it mean that it is necessarily, in all cases, incumbent upon the owner or driver, against whom the statute is invoked, to adduce evidence showing precisely how, through the agency of the motor 'bus, the loss, damage or injury was brought about; that the circumstances may be such that the proper course, or the only course open to the defendants, is to prove affirmatively that the duty cast upon them by law to exercise proper care in order

[6] *Carnat* v. *Matthews*, [1921] 2 W.W.R. 218; Riddell, J., in *Bradshaw* v. *Conlin* (1917), 40 O.L.R. 494 at pp. 496-7; Duff, J., in *Canadian Westinghouse Company* v. *C.P.R. Co.*, [1925] S.C.R. 579 at p. 584; Harvey, C.J.A., in *Turpie* v. *Oliver*, [1925] 4 D.L.R. 1023 at p. 1024; *Schonberner* v. *Barron*, [1927] 3 D.L.R. 708; *Stanley* v. *National Fruit Co.*, [1929] 3 W.W.R. 522 at p. 526.

[7] *Carnat* v. *Matthews, supra*; Duff, J., in *Canadian Westinghouse Co.* v. *C.P.R. Co.*, [1925] S.C.R. 579 at p. 584.

to avoid such loss, damage or injury was duly discharged; and that the sufficiency of the explanations advanced will be considered by the tribunal in light of the opportunities of knowledge possessed by the parties respectively, and due consideration will be given to the care or absence of care in respect of the presentation and production of available material evidence. His Lordship adopts the judgment of Robson, J.A., in the Court of Appeal for Manitoba, to the effect that, on the evidence, a finding by the jury that the defendant had not acquitted itself of the onus cast upon it could not be set aside by an appellate court as a perverse or unreasonable verdict; and he agrees with the learned trial judge's direction to the jury that by force of the statute cited, the plaintiff having proved that he had suffered injury caused by a motor vehicle owned by the defendant and driven by its servant, was entitled to recover reparation from the defendant unless it established that these injuries "did not arise through the negligence or improper conduct" of the defendant or its driver. Duff, J., also states that it was not incumbent upon the plaintiff, proceeding under the statute, to charge negligence in terms; for the reason that the law presumes negligence in his favour, and the burden of rebutting the presumption lies upon the defendant; and his Lordship cites Manitoba King's Bench Rule, no. 334, which is to the effect that neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied. He held that the appeal should be dismissed with costs.

Cannon, J., in delivering the judgment of himself, Rinfret, J., and Maclean, J., *ad hoc,* dismissing the appeal, refers to the evidence, the jury's finding, and section 15 of the *Motor Vehicles Act,* and holds, that the jury on the evidence could reasonably reach the conclusion that at the time of the accident an inspection was past due, and that if it had been made with thoroughness the defect in the bolt might have been located and remedied; and the learned judge says that the jury thought that there was negligence on the part of the defendant in not keeping the brakes and braking equipment in proper repair, and insufficient inspection of the brakes. His Lordship further holds, that:

> The legislature of Manitoba has laid down an imperative rule which is in very clear terms: we do not need, in order to understand them, to have recourse to the interpretation given by English or other tribunals to regulations which are not perhaps couched in the same terms. The courts' discretion was restricted by the legislature when it imposed the duty on the driver of having brakes sufficient "at all times" to control these dangerous

machines. It was the duty of the defendant to equip all its motor vehicles with adequate brake service to control such vehicles *at all times*. In order to be sure that the brakes were efficient and sufficient at all times, it may be necessary to inspect them daily or even several times a day. The only evidence brought forward by the appellant was that they had done a "light" inspection of the car several weeks before the accident. The jury found this defence insufficient and took the trouble to say so in answering the question which requested particulars of negligence. . . . The latter (i.e., the jury), in finding that the brakes and braking equipment were not kept in proper repair, added, as a necessary consequence, that the inspection of the brakes had been insufficient, in view of the statutory obligation to keep the braking apparatus sufficient, i.e., efficient at all times to control appellant's motor 'bus.

The wording of the Manitoba statutory provision respecting brakes has been amended;[8] but the precise wording of section 15 has been retained in Alberta[9] and Saskatchewan.[10] That part of the judgment of Cannon, J., which is quoted above, therefore, deserves careful consideration; as, not only does it directly affect the provinces mentioned, but the general pronouncement regarding the effect of a breach of a statutory duty is capable of much wider application.

It would seem, from his Lordship's judgment, that Cannon, J., and the learned judges who concur with him, deemed the defendant, in effect, to have been under an absolute liability to the plaintiff. But, with the greatest deference to the learned judges, it is submitted that the facts of this case and the law affecting it do not support such a holding. It may reasonably be said that absolute liability for negligence is unknown to the common law; and it is not until the close of the eighteenth century that negligence is treated as a distinct and independent tort and is no longer regarded as a mere mode in which a tort may be committed. Baron Bramwell in *Degg* v. *Midland Railway Co.*[11] said: "There is no absolute or intrinsic negligence; it is always relative to some circumstances of time, place, or person." Even in Anglo-Saxon times the nearest approach to absolute liability would seem to have been the case of a man engaged in a dangerous occupation, e.g., carrying a deadly weapon; but then he was not indiscriminately liable to any person who might suffer harm from it.[12] Inevitable accident and negligence were both recognized, and the scale of reparations (probably showing the ecclesiastical influence) depended in large measure upon the presence or absence of intent, the observance of care, and the

[8] S.M. 1930, c. 19, s. 14.
[9] S.A. 1924, c. 31, s. 40.
[10] R.S.S. 1930, c. 226, s. 35.
[11] (1857), 1 H. & N. 773 at p. 781.
[12] See generally as to this article: Myth of Absolute Liability, (1926), 42 Law Q. Rev. 37 at p. 40.

surrounding circumstances. Carriers and innkeepers, who for many purposes have been regarded in the light of insurers, have always been able to avail themselves of certain excuses.[13]

Although for the reasons stated above, *absolute* liability for negligence may be considered as not known to the common law, there is, however, *strict* liability, such as was developed from "the archaic law of trespass,"[14] and is instanced in *Rylands* v. *Fletcher*,[15] which was not a case of negligence, but was founded on nuisance and rarely has reference to automobile cases. "Nuisance" and "negligence" are different in their nature and consequences; and unfortunately the rule in the famous case just mentioned has been misunderstood and misapplied. Fundamentally, it applies only to persons who, for their own purposes, bring and keep upon their land a dangerous thing likely to do mischief if it escape; and the thing itself must be capable of escaping and doing damage of its own accord, without any human agency, e.g., an animal, water, sewage, chemicals, noxious vapours. But even *Rylands* v. *Fletcher* is subject to many exceptions.[16] An automobile is not, in itself, a dangerous thing within the meaning of *Rylands* v. *Fletcher*, but is a lawful and usual mode of travelling upon the highway.[17] In order that an automobile may be considered as a "nuisance," it must be "so wholly unmanageable as necessarily to be a continuing danger to other vehicles, either at all times or under special conditions of weather," and "the plaintiff must prove that the defendant has committed a nuisance, and this must be shown by proper evidence.[18]

The material part of section 15 of the *Motor Vehicles Act* provides, as we have already seen, that "every motor vehicle shall be equipped with adequate brakes sufficient to control such motor vehicle at all times." It is submitted that there is nothing in this section or in the Act which gives the plaintiff a right of action against the defendant in respect of the latter's breach of the provision of section 15, or any other section, or imposes on the defendant an absolute liability to the plaintiff in case of breach, as Cannon, J., in his judgment holds. Section 52 (1) imposes a general penalty

[13] See Dr. Winfield's article on "The History of Negligence in Torts," (1926), 42 Law Q. Rev. 184 at p. 186 *et seq.*

[14] Pollock on Torts, 4th ed., p. 501.

[15] (1868), L.R. 3 H.L. 330.

[16] See, for example as to these, the judgment of Middleton, J., in *Slattery* v. *Haley* (1922), 52 O.L.R. 95 at p. 98 *et seq.*

[17] *Slattery* v. *Haley* (1922), 52 O.L.R. 95 at p. 99; Fletcher Moulton, L.J., in *Wing* v. *London General Omnibus Company*, [1909] 2 K.B. 652 at p. 667.

[18] Per Fletcher Moulton, L.J., in *Wing* v. *London General Omnibus Co.*, [1909] 2 K.B. 652 at pp. 665-6.

for violation of any of the provisions of the Act; and proof of defective brakes might render the defendant liable to a fine under the section just mentioned; and if the defect could have been discovered on reasonable inspection, it would be *evidence* of negligence. The obligation to have certain kinds of brakes was created for the public generally, and not for the plaintiff individually or as a member of a particular class to which he belonged.[19] Moreover, the plaintiff does not seem to have based his action on the breach of the statute. The rules in a case such as that now under review are set out as follows in Halsbury's Laws of England,[20] where the leading cases are referred to:

> The failure to perform a duty imposed by a statute under the sanction of a penalty may, although it does not necessarily, give a right of action to an individual injured by that omission.
>
> Where the statute aims at the protection of a particular class, or at the attainment of a particular purpose, which in the ordinary course is calculated to benefit a particular individual or member of a class, an individual injured by a neglect of the obligation, either as one of that class, or by reason of being affected by the failure to attain that particular purpose, may have his remedy although a penalty is imposed by the statute. Where the obligation is to do something for the public generally, or for so large a body of persons that they can only be dealt with *en masse*, and the failure to comply with the obligation is liable to affect all such persons alike, although not necessarily in the same degree, no separate right of action will arise from the mere failure to fulfil the obligation; but a criminal breach of a statutory duty may be used as evidence of negligence in some cases where a duty to take care exists otherwise than by virtue of the statute, as, for example, in the case of passengers on a railway, or on a highway.

Dealing with English statutes similar to the one now under discussion, Beven[21] said: "These alterations in the law, while they permit the use of motor-cars and regulate their user, are directed to the public and police aspects of the case, and do not affect individual rights or remedies. They leave the common law remedy, but they give other remedies to other ends." This is cited with approval by McCardie, J., in the Divisional Court, in *Phillips* v. *Britannia Hygienic Laundry Company, Limited.*[22] In that case the plaintiff sued the defendant for damages done to his motor van. The axle of the defendant's motor lorry broke and caused the damage, and the action in the trial Court was founded on an alleged breach of a statutory regulation and alternatively on the alleged negligence of

[19] See Beven: Negligence, 4th ed., p. 559; *Phillips* v. *Britannia etc. Co.*, [1923] 1 K.B. 539.
[20] Vol. 21, p. 423 *et seq.*
[21] Beven: Negligence, 4th ed., p. 559.
[22] [1923] 1 K.B. 539 at p. 549.

the defendant. The statutory regulation involved read as follows: "The motor car and all the fittings thereof shall be in such a condition as not to cause, or to be likely to cause, damage to any person on the motor car or on any highway"; and observance was enforced by a penalty of fine or imprisonment generally applicable to breach of any of the statutory regulations. The trial judge absolved the defendant from negligence in relation either to the management of the motor lorry or to the state of its axle, but found negligence on the part of the repairers to whom the motor lorry had been sent in not having executed the repairs efficiently; and he gave judgment for the plaintiff on the ground that the defendant's motor vehicle which caused the damage was not in the condition required by the regulation referred to above. This was reversed in the Divisional Court, and the plaintiff appealed to the Court of Appeal, which affirmed the Divisional Court.[23] In the latter Court, McCardie, J., said:[24] "In every case, I believe, the allegation has been that of negligence, and the breach of a statutory regulation has been alleged not as a cause of action in itself, but as evidence of a breach of the common duty to take due care." Bankes, L.J., in the Court of Appeal, discussed the position of the public using the highway, and said:[25]

> In my view the public using the highway is not a class; it is itself the public and not a class of the public. The clause therefore was not passed for the benefit of a class or section of the public. It applies to the public generally, and it is one among many regulations for breach of which it cannot have been intended that a person aggrieved should have a civil remedy by way of action in addition to the more appropriate remedy provided, namely, a fine.

With this conclusion, Atkin and Younger, L.JJ., agreed.

It should also be observed that section 61 of the Manitoba *Motor Vehicles Act* specifically reserves the right to bring a civil action for damages resulting from the negligence of the owner, operator, etc., of any motor vehicle or the negligent use of the highway by them or any of them.

The line of cases, such as *Watkins* v. *Naval Colliery Company, Limited*,[26] which deal with the duty of owners and employers to carry on their works in a certain manner and to provide certain safeguards for the employees and hold that such statutory requirements are absolute, and that a breach of them will involve such

[23] [1923] 2 K.B. 832.
[24] [1923] 1 K.B. 539 at p. 549.
[25] [1923] 2 K.B. 832 at p. 840.
[26] [1912] A.C. 693.

owners and employers in liability to the workmen injured, have no application to the *Geel* case. The statutes in those cases were passed specially for the benefit of a particular class. *Hall* v. *Toronto Guelph Express Co.*[27] can be distinguished from the case under review on the ground that the statute in the *Geel* case did not contain any provision similar to section 41 (1) of the Ontario *Traffic Act*, R.S.O. 1927, c. 251.[28] Moreover, the jury's answers to vital questions at the trial were very ambiguous, and Anglin, C.J., who delivered the judgment of the Court, said that the course of the trial rendered a new trial unavoidable.

It will be seen, therefore, that the plaintiff's remedy and the defendant's liability were those at common law, but with the statutory onus on the defendant and with the breach of the statute available as evidence of negligence.

In conclusion, and with the gravest of submission to his Lordship, it must be remarked that difficulty is experienced in agreeing with his statement respecting the certainty of the meaning of the words used in section 15 of the statute (*supra*), and the absence of need "to have recourse to the interpretation given by English or other tribunals to regulations which are not perhaps couched in the same terms." When construing a statute such as that in the *Geel* case, the effect of *Trimble* v. *Hill*,[29] and *Robins* v. *National Trust Company Limited*,[30] must surely be considered. "Adequate" is always relative; and as regards the words "at all times," it would seem that his Lordship has virtually incorporated the meaning "under all circumstances whatsoever," which would render the statutory requirements in certain contingencies impossible of fulfilment.[31]

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PERSONAL PROPERTY—EMPTY BOTTLES—REFILLING WITHOUT EXAMINATION.—In the case of *Leitch & Co., Ltd.* v. *Leydon*,[1] the House of Lords have recently decided a point of law which may be of interest to Canadian practitioners

L. & Co., Ltd., were manufacturers of aerated waters and used bottles marked with their own name. L. was a grocerman and

[27] [1929] S.C.R. 92.
[28] *Hall* v. *Toronto Guelph Express Co.*, [1929] S.C.R. 92 at pp. 102, 108.
[29] (1879), 5 App. Cas. 342.
[30] [1927] A.C. 515.
[31] As to the effect of this, see 27 Halsbury, vol. 27, p. 194 *et seq.*

[1] [1931] A.C. 90; 47 T.L.R. 81.

dispensed aerated beverages in some instances filling bottles or jugs which his customers would bring to him and then take away with them to their homes. Occasionally bottles so brought were stamped with the name of L. & Co., Ltd., and the company sought to restrain L. from filling such bottles, claiming that in so doing he was violating their right of property. Their Lordships were of opinion, assuming that the property of the bottles belonged to L. & Co., Ltd., that there was no contractual relationship between them and L., and that L. owed no duty to them to examine the bottles tendered to him in the use of his trade in order to be sure that they were not bottles belonging to L. & Co., Ltd., and being used for purposes to which they objected.

The judgment seems to be based upon the fact that no contractual relationship existed between L. & Co., Ltd. and L. It is important from the viewpoint of an owner of bottles, a milkman, for instance, who delivers milk in bottles stamped with his name which a customer subsequently hands over to another milk-dealer for milk received from him. The question arises, is the milk-dealer who receives these bottles responsible to the owner if he fills those bottles with milk? It would seem that he would be liable in damages for using the property of another person, and yet if there was no contractual relationship between them, in the light of the present judgment he would hardly seem to be liable unless he kept the named bottles and used them as his own.

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