THE CANADIAN BAR REVIEW

THE CANADIAN BAR REVIEW is the organ of the Canadian Bar Association, and it is felt that its pages should be open to free and fair discussion of all matters of interest to the legal profession in Canada. The Editorial Board, however, wishes it to be understood that opinions expressed in signed articles are those of the individual writers only, and that the REVIEW does not assume any responsibility for them.

☛ **Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 2, Ontario.**

COUNCIL MEETING OF THE CANADIAN BAR ASSOCIATION

The Mid-Winter Council Meeting of The Canadian Bar Association will be held at the Seigniory Club, Montebello, P.Q., on Saturday, February 10th, 1940, at 11.00 A.M.

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CASE AND COMMENT

NEGLIGENCE—PROXIMITY—OPPORTUNITY FOR INSPECTION —LIABILITY OF DISTRIBUTOR OF RECONDITIONED CAR.—In the famous case of *Donoghue* v. *Stevenson*[1], the House of Lords made it clear that in English and Scots law alike a manufacturer and also a repairer[2] of an article owes a duty of care, not only to those to whom he stands in a contractual relationship but, in certain circumstances, to ultimate purchasers and consumers and others with whom he has no contract.

As Lord Atkin put it, the English law recognizes a duty to one's neighbour to take care, but the question of who is one's neighbour is interpreted in a restricted sense. Neighbours in law are persons who are so closely and directly affected by the acts or omissions of the manufacturer that the manufacturer ought reasonably to have had them in contemplation as being affected at the time of the negligent act or omission.

It remains for subsequent decisions to define the limits of this doctrine. Light is thrown upon the subject by a recent

[1] [1932] A.C. 562.
[2] *Malfroot* v. *Noxal Ltd.* (1935), 51 T.L.R. 551.

decision of Tucker J. in *Herschthal* v. *Stewart & Ardern, Ltd.*[3] The question there which came up squarely for decision was whether the proximate relationship between the manufacturer and the consumer upon which the duty of care is based is destroyed by a mere opportunity of inspection of the article in question, or whether the opportunity of inspection, in order to break the proximity of relationship, must be an opportunity which, in the circumstances, the manufacturer or repairer might reasonably anticipate would be used.

In the case cited the defendant company, a distributor of motor cars, had sold a reconditioned car to the U.P. Company. Delivery of the car was made one evening to the plaintiff H, one of the directors of the U.P. Company. H had no contractual relationship with the Company but was known to be one who was likely to use the car and who would be a probable victim of any danger or injury resulting from want of skill in repairing the car.

The following morning, H drove the car for a few miles and, while so doing, the back wheel dropped off and H was injured.

The learned judge held that, if there was a duty to take care, the facts required him to hold that care had not been taken. He found, further, that there had been an opportunity for inspection of the car, but that, in the circumstances, it was improbable in the ordinary course of human affairs that such an opportunity would be used.

Was this opportunity enough to break the chain of proximity and relieve the defendant from any duty of care towards the plaintiff, or was the proximate relationship unaltered when the opportunity was one which the repairer could have known was not likely to be used? Tucker J. decided that the duty of care existed notwithstanding the bare opportunity of inspection and that the plaintiff must succeed. It is respectfully submitted that he was right.

The contrary argument was based largely upon some expressions used in the leading case of *Donoghue* v. *Stevenson*. In that case the bottle of ginger beer in which rested the decomposed snail was opaque, and its contents were to be consumed immediately after it was opened. There was no possibility of inspection at all. It was, therefore, unnecessary for the court to decide what would have been the result if there had been an opportunity of inspection but no probability in the circumstances that such

[3] [1939] 4 All. E.R. 123, 56 T.L.R. 48

an opportunity would be used. The headnotes, both in the Official Reports[4] and in the report in the Times Law Reports,[5] indicate the restricted scope of the actual decision. The headnote in the Official Reports reads : "By Scots and English law alike, the manufacturer of an article of food, etc., sold by him to a distributor in circumstances which *prevent* the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health." In the Times Law Reports the headnote reads : "By Scots and English law alike, a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they leave him with no reasonable *possibility* of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products is likely to result in injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care." The statement of the law contained in this headnote is taken from the speech of Lord Atkin.

In *Dransfield* v. *British Insulated Cables Ltd.*,[6] Mr. Justice Hawke held that the principles in *Donoghue* v. *Stevenson* should be limited to the precise words used by Lord Atkin and that a mere possibility of examination negatived the existence of the proximate relationship upon which the duty of care was based.

Mr. Justice Tucker, who had been the unsuccessful counsel in *Dransfield* v. *British Insulated Cables Ltd.*, had the satisfaction in the case here noted of being able to disagree judicially with Mr. Justice Hawke. To support his conclusion, he referred to *Malfroot* v. *Noxal Ltd.*,[7] *Stennett* v. *Hancock*,[8] *Kubach* v. *Hollands*[9] and a dictum of Greer L.J. in *Farr* v. *Butters*,[10] a case in which the question here discussed was immaterial. Although he had been counsel in *Otto* v. *Bolton*,[11] Tucker J. does not refer to the observations of Atkinson J. in that case, which indicated that the latter judge might have agreed with Hawke J. But the real contest seemed to lie between a literal application of passages in the leading case and a consideration of the broader principles which formed the basis of the decision.

[4] [1932] A.C. 562.
[5] 48 T.L.R. 494.
[6] (1937), 54 T.L.R. 11.
[7] (1935), 51 T.L.R. 551.
[8] [1939] 2 All E.R. 578.
[9] 53 T.L.R. 1024.
[10] [1932] 2 K.B. 606.
[11] 53 T.L.R. 438, [1936] 2 K.B. 46.

The test suggested by Lord Atkin to determine whether a person is one's neighbour in the contemplation of the law so as to create a duty towards him is the question whether or not the manufacturer, if he considered the matter, could reasonably anticipate that such person would be closely and directly affected by the consequences of negligence. One must put oneself in the position of the manufacturer or repairer and ask the question: "Who is reasonably likely to be injured if this article is not manufactured with care?" All those whom such a manufacturer could contemplate as being closely and directly affected are within the ambit of the duty. If lapse of time, change of condition or later inspection are likely to intervene, then the connection of the manufacturer with the injury is too remote.

The observations about opportunity for inspection are sometimes expressed as a qualification of the rule but they are, it is suggested, merely an illustration of it. If the manufacturer expects, or would if he gave thought to the matter expect, that some article that he distributes will, before its actual use, be examined, either by the consumer or some third person, then it is improbable that the ultimate purchaser will be affected by his (the manufacturer's) lack of inspection. The probable intervention of a third party or the purchaser himself, with the likelihood of detection of defects, absolves the manufacturer from the duty of anticipating that his own lack of inspection may cause injury. If this is the true principle, why should the mere opportunity of inspection, when the circumstances negative the likelihood of such opportunity being employed, bring it outside the realm of reasonable anticipation on the part of the manufacturer that the ultimate purchaser or consumer may very well be affected by his negligence? If the test of a duty lies in the consideration of what might be within the scope of reasonable anticipation by the manufacturer, then the mere accident of opportunity for inspection should not break the chain of proximity. The wide social reasons for the existence of the liability mentioned by Lord Atkin in his speech[12] apply with equal force to the cases where there was a possibility but no likelihood of inspection. It would be illogical for the law to penalize a consumer who is injured by reason of the manufacturer's negligence simply because he fails to make an inspection which, ex hypothesi, in the ordinary course of events a reasonable man could not be expected to make, and which in all probability it would be beyond his limited means and knowledge to do adequately.

[12] [1932] A.C. at pp. 582-3.

Tucker J. refers to *Grant* v. *Australian Knitting Mills Limited*.[13] He points out that in this case the Privy Council found no difficulty in imposing liability upon the manufacturer of the underwear, although there was opportunity for washing it after purchase and before use and thereby rendering it innocuous. The fact is that most people, when they buy underwear, do not wash it before use. Therefore, if it contains dangerous irritants, the mere possibility or opportunity of removing them does not break the chain of proximity which is necessary to establish liability.

It is interesting to observe that in *Davis* v. *Foots*,[14] noted in a previous number of this REVIEW,[15] the only Lord Justice of Appeal who discussed the application of *Donoghue* v. *Stevenson* to that case used the narrower test suggested by some of the observations in the *Donoghue* case and not the broader test found by Tucker J. in this case to embody the true rule. Lord Justice Du Parcq held that no liability could be based on the principles of *Donoghue* v. *Stevenson* because there was a reasonable opportunity for examining the gas fittings which caused the tragedy, before turning on the gas. The learned judge did not consider whether the unfortunate couple who had just returned from their honeymoon might be reasonably expected to use the opportunity, which undoubtedly existed, of inspecting the connections before turning on the gas.

Against the view adopted by Tucker J. might be advanced an application of the language of Lord Macmillan in the leading case. He speaks of control being retained by the manufacturer where he wraps up the product or otherwise encloses it so as to prevent interference before it reaches the ultimate consumer. If this language is to be applied, it might be stretching the idea of control very far to hold that the manufacturer retained any control in a case in which the car, for example, had been used for some hours by the purchaser before the occurrence of the accident.

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QUASI-CONTRACT—WAIVER OF TORT—ELECTION—SUCCESSIVE CONVERTERS.—In the American Law Institute's Restatement of Restitution it is stated that "a person upon whom a tort has been committed and who brings an action for the benefits

[13] [1936] A.C. 85.
[14] 56 T.L.R. 53, [1939] 4 All E.R. 4.
[15] (1939), 17 Can. Bar Rev. 753.

received by the tortfeasor is sometimes said to 'waive the tort'. The election to bring an action of assumpsit is not, however, a waiver of a tort but is the choice of one of two alternative remedies."[1] The recent English case of *United Australia Ltd.* v. *Barclays Bank Ltd.*[2] has a bearing on this question of election. A cheque payable to the plaintiff company was endorsed by its secretary, without authority, to M. Trust Ltd. The defendant bank accepted it for collection and credited M. Trust Ltd. with it. The plaintiff company sued M. Trust Ltd. to recover the value of the cheque as a loan or as money had and received. M. Trust Ltd. went into liquidation and the action never came to final trial. The plaintiff company put in a proof of the sum allegedly owing to it in the liquidation but the proof was not admitted, there being hardly any funds to meet the claims of creditors. Subsequently it sued the bank for damages for conversion. The Court held that the proceedings against M. Trust Ltd. were necessarily based on the abandonment of a claim in tort and on a treating of the secretary's act as authorized. Accordingly, the company was precluded from pursuing a remedy in tort against the bank, and its election was not affected by the fact that the action against M. Trust Ltd. had not proceeded to final judgment.

Two problems are suggested: (1) What constitutes a binding election? (2) Is an election affected by the fact of there being successive tortfeasors? As against a sole tortfeasor the choice of remedy, Professor Corbin suggests,[3] should not be conclusive until the plaintiff has done an act making it impossible to choose again or unjust to the defendant. The doctrine of election is really an application of the doctrine of estoppel. Merely to institute proceedings in one form of action should not be conclusive. After a non-suit or voluntary dismissal the plaintiff may bring the same action; if so, there is no reason to bar him from using an alternative form. *State Bank* v. *Braly's Estate*[4] lends support to this thesis which seems unassailable in principle. One may readily accept the proposition that a judgment on the merits should bar all other suits for the same cause of action against the same defendant.[5] But anything short of this, unless the defendant would be prejudiced by a change of

[1] C. 7, Introductory Note, at p. 525. *Cf. Lamine* v. *Dorrell* (1705), 2 Ld. Raym. 1216, 92 E.R. 303; *Lythgoe* v. *Vernon*, 5 H. & N. 180, 29 L.J. Ex. 164, 157 E.R. 1148.

[2] [1939] 1 All E.R. 676.

[3] *Waiver of Tort, Suit in Assumpsit* (1910), 19 Yale L.J. 221.

[4] (1934), 139 Kan. 788, 33 P. (2d.) 141.

[5] *Hitchin* v. *Campbell* (1771), 2 Wm. Bl. 827.

remedy, should not amount to an election. The principal case is, of course, an authority against this view.

It may be quite consistent, however, to sue the same defendant in tort after having obtained a judgment against him in assumpsit, no question of an election arising. For example, A loans money to B on the faith of a false and fraudulent representation by B. On B's failure to repay the money when due, A sues in assumpsit and recovers a judgment which remains unsatisfied. Subsequently A sues B in deceit because of the fraudulent misrepresentation. The judgment in assumpsit cannot be pleaded in bar of the action because A in suing in assumpsit affirms the contract and seeks to recover for a breach of it. In suing in deceit he is also affirming the contract and suing for damages for the fraud which induced him to enter into it. There is no inconsistency in bringing the two actions.[6]

Where there are successive converters and a suit in assumpsit is brought against one, there is authority which holds that this is a ratification of the tort and, consequently, an admission that the second wrongdoer came rightfully by the property in question.[7] This could justify the decision in the principal case; the bank would be deemed to have come rightfully by the cheque in view of the previous suit in assumpsit against M. Trust Ltd.[8] There is another view, however, which, more realistic, holds that the action in assumpsit against the first converter is not really a waiver of the tort since the tort is the very foundation of the action; there is a waiver merely of damages for the conversion and a suit for the value of the property taken.[9] The theory that waiving the tort and suing the first wrongdoer in assumpsit is a ratification of his act which protects subsequent takers of the converted property from an action of conversion may, however, deserve support where the person sued in assumpsit professed to act on behalf of the plaintiff.

BORA LASKIN.

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DISCIPLINARY JURISDICTION OF COURT OVER SOLICITORS—DUTY TO COURT IN CONDUCT OF LITIGATION.—The attention of the profession is directed to the speech of Lord Atkin in *Myers* v.

[6] *Whittier* v. *Collins* (1885), 15 R.I. 90. See also *State Bank* v. *Braly's Estate* (1934), 139 Kan. 788, 33 P (2d.) 141.

[7] *Terry* v. *Munger* (1890), 121 N.Y. 161.

[8] See FALCONBRIDGE, BANKING AND BILLS OF EXCHANGE, 5th ed. (1935), pp. 632-633, on the question of successive conversions.

[9] *Huffman* v. *Hughlett & Pyatt* (1883), 79 Tenn. 549.

Elman,[1] in which he states: "From time immemorial Judges have exercised over solicitors, using that phrase in its now extended form, a disciplinary jurisdiction in cases of misconduct. At times the misconduct is associated with the conduct of litigation proceeding in the Court itself. Rules are disobeyed, false statements are made to the Court or to the parties by which the course of justice is either perverted or delayed. The duty owed to the Court to conduct litigation before it with due propriety is owed by the solicitors for the respective parties, whether they be carrying on the profession alone or as a firm. They cannot evade the consequences of breach of duty by showing that the performance of the particular duty of which breach is alleged was delegated by them to a clerk. Such delegation is inevitable, and there is no one in the profession, whether in practice or as a judge, who will not bear ungrudging tribute to the efficiency and integrity with which, in general, managing clerks, whether admitted or unadmitted, perform their duties. The machinery of justice would not work without them. But as far as the interests of the Court and the other litigents are concerned, it is a matter of no moment whether the work is actually done by the solicitor on the record or his servant or agent. If the Court is deceived, or the litigant is improperly delayed or put to unnecessary expense, the solicitor on the record will be held responsible, and will be admonished or visited with such pecuniary penalty as the Court thinks necessary in the circumstances of the case. Misconduct of course may be such as to indicate personal turpitude on the part of the person committing it, and to lead to the conclusion that the party committing it, if an officer of the Court, is no longer fit to act as such. Over conduct such as that punitive jurisdiction will be exercised, but it seems hardly necessary to state that no punishment based on personal misconduct will be inflicted unless the party visited is himself proved to be personally implicated."

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CONTRACTS—STATUTE OF FRAUDS—PART PERFORMANCE—REFERABILITY.—The reasons for judgment of the Ontario Court of Appeal (delivered by Robertson C.J.O.) in *Haskett* v. *O'Neil*[1] are an interesting application of the equitable doctrine of part performance. The appellant and respondent entered into an agreement, which was never reduced to writing, for the division of their father's estate, the respondent taking as part of her share a farm property. The sole point on the appeal was whether or

[1] (1939), 56 T.L.R. 177, 183.
[1] [1939] O.W.N. 573, [1939] 4 D.L.R. 598.

not there were sufficient acts of part performance to take the agreement out of the Statute of Frauds. The respondent had dug a well on the land, ploughed part of it and repaired fences. It was argued on behalf of the appellant that these acts were not referable to the alleged contract. Robertson C.J.O. found that the acts were so referable. He said, in part: "One must have regard to the way in which reasonable people carry on their affairs and if the acts relied on are of such a character that, judged by the standards in accordance with which reasonable people commonly act, they would not be done except in part performance of a contract such as is alleged, that is sufficient part performance to avoid the operation of the Statute."[2] Acts of part performance are an objective guarantee of the existence of some contract between the parties with relation to the land, and unless the acts relied upon are unequivocally referable to some contract, they cannot be relied upon. Such referability was completely lacking in *Fox* v. *White*,[3] yet in that case an oral bargain with respect to land was enforced by the Ontario Court of Appeal. The Court distinguished *Maddison* v. *Alderson*[4] the leading authority on the doctrine of part performance ,on the ground that in that case the plaintiff failed to prove a contract, in spite of the fact that Lord Selborne, Lord O'Hagan and Lord Fitzgerald all devoted themselves to a close examination of the doctrine and stressed the necessity of the referability of the acts of part performance to the alleged contract.[5] In *Haskett* v. *O'Neil*, mo mention is made of *Fox* v. *White*, and it may be safely assumed that the latter case is no longer authority in Ontario for the startling proposition that acts of part performance need not be referable to the alleged oral contract.

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[2] At p. 576. The term "part performance" is a misnomer. The acts need not be done in pursuance or fulfilment of the oral contract; it is sufficient if they are done on the faith of the existence of the contract: *Jennings* v. *Robertson* (1852), 3 Gr. 513, at pp. 522-523.

[3] [1935] O.W.N. 316.

[4] (1883) 8 App. Cas. 467. In *Folsetter* v. *Yorkshire*, [1932] 3 D.L.R. 1950 and *Briese* v. *Dugard*, [1936] 1 D.L.R. 723, *Maddison* v. *Alderson* was distinguished on the same ground, and the necessity of referability was disregarded. But see *Stratchuk* v. *Montreal Trust*, [1936] 3 D.L.R. 310.

[5] WILLIAMS, VENDOR AND PURCHASER, 4th ed. p. 13. In the following cases, following *Maddison* v. *Alderson*, the plaintiff failed because his alleged acts of part performance lacked referability: *Campbell* v. *McKerricher* (1884), 6 O.R. 85; *Freel* v. *Royal* (1907), 10 O.W.R. 258; *Coulter* v. *Elvin* (1911), 2 O.W.N. 678; and *Noecker* v. *Noecker* (1917), 41 O.L.R. 296. The necessity of unequivocal acts referable to the alleged contract was recognized by Kelly J. in *Ireland* v. *Cutten*, [1939] 4 D.L.R. 681.

TRUSTEES — LIMITED INVESTMENT CLAUSE — POWER TO INVEST IN SECURITIES AUTHORIZED BY LAW.—Simmonds J. recently held in *Re Warren, Public Trustee* v. *Fletcher*[1] that trustees who were directed by the trust instrument to invest in specific types of securities, which did not include securities authorized by law, may also invest the trust fund in securities authorized by the Trustee Act. Powers conferred by that Act on trustees "are in addition to those conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far as a contrary intention is not expressed in the instrument, if any, creating the trust and have effect subject to the terms of the trust".[2] The rule is that a trustee may always invest in securities authorized by the Trustee Act unless he is expressly prohibited by the trust instrument from so doing.[3] There is no doubt that the decision of Simmonds J. is a correct interpretation of the Trustee Act, which should be construed as enlarging trustees' powers, and it is interesting to note that an earlier decision of MacDonald J. in *Re McCormick*[4] is to the same effect.

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NEGLIGENCE — STANDARD OF CARE — INFANTS.—The standard of care required of an infant plaintiff is said to be only such care as the great mass of children of his age, intelligence and experience ordinarily exercise under the same or similar circumstances.[1] But common sense "necessitates the recognition of the fact that at some age prior to twenty-one and in some situations, a minor is fully as competent as a person over twenty-one and should be held to the same standard of conduct."[2] There is, however, a dearth of authority in Canada in connection with this question,[3] which, in any event, does not seem to be one

[1] [1939] Ch. 684.

[2] The Trustee Act, (Eng.) 1925, 15 Geo. V. ch. 19, sec. 69 (2); See The Trustee Act, R.S.O. 1937, ch. 165, secs. 65 and 66.

[3] For a case of such express prohibition see *Ovey* v. *Ovey*, [1900] 2 Ch. 524, in which the testator directed the estate to be invested in 3 per cent. consolidated bank annuities "and no other securities".

[4] (1915), 22 B.C.R. 327, 25 D.L.R. 735.

[1] *Quinn* v. *Ross Motor Car Co.* (1914), 157 Wis. 543, 147 N.W. 1000; Salmond on Torts, 9th ed., p. 66; Harper on Torts, p. 309, s. 141.

[2] Shulman, *Standard of Care Required of Children* (1928), 37 Yale L.J. 618.

[3] For the view that children under seven are conclusively presumed to be incapable of negligence, that as to children between seven and fourteen there is a rebuttable presumption of incapacity for care and that as to children between fourteen and twenty-one there is a similar presumption of capacity, see *Nagle* v. *Allegheny Valley Ry.* (1878), 88 Pa. 35, 32 Am. Rep. 413. See also, *Hird* v. *Milne*, [1930] 3 D.L.R. 513 (Man.), in which the driver of a car involved in an accident was a 16 year old girl with some three months' driving experience. Per Kilgour J.: The standard of skill and

which would lend itself to general rules. The Court must decide in each case in which an infant's conduct is alleged to be negligent whether, in the circumstances, he is to be held to the same standard as that of an adult or whether proof of a lesser degree of care will absolve him from negligence.

This apparently was the approach in a recent New Zealand decision, *Tauranga Electric-Power Board* v. *Karora Kohu*.[4] A 17 year old boy who was riding a bicycle was killed in a collision with a motor truck. Regulation 22, relating to bicycles, which was part of the Traffic Regulations, 1936, made under the authority of s. 10 of the New Zealand Motor-Vehicles Amendment Act, 1936, applied to "every rider" of a bicycle and created certain penal offences. The Court of Appeal held that it was misdirection in law to tell the jury that they might take into consideration the age of the boy for the purpose of deciding that he was not guilty of contributory negligence in breaking the provisions of the regulation. The reasons advanced were: (1) Under New Zealand law every person of or over the age of 14 years is in substantially the same position so far as responsibility to the criminal law is concerned. (2) In New Zealand the nature of negligence in the driving of a motor vehicle is the same in both civil and criminal cases.[5] (3) A person of 15 years is entitled, subject to satisfactory evidence of his qualifications, to a motor driver's licence. Myers, C.J. stated :[6]

> I can see no reason in principle why any lower standard of care should be permitted in the case of a normal person 16 or 17 years old than in the case of a person of or over the age of 21 years, or why the age of the younger person should be a factor in deciding whether or not he has committed a breach of the regulations and has thereby been guilty of negligence.

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experience which the law requires of a person handling a swift, powerful and potentially dangerous machine on a public highway, of varying surface resistance, and through open and sheltered stretches, is not that of a novice. *Daggy* v. *Miller* (1914), 162 N.W. 854 (Iowa). *Cf. Millannos* v. *Fatter* (1932), 139 So. 878, 18 La. App. 708 (violation of ordinance forbidding persons under the age of 16 years to operate automobiles is in itself negligence).

[4] [1939] N.Z.L.R. 1040.

[5] *Rex* v. *Storey*, [1931] N.Z.L.R. 417.

[6] [1939] N.Z.L.R. 1040, at 1045.