1901

*May 29,30.

*Oct. 29.

THE DOMINION CARTRIDGE COMPANY (DEFENDANT)..... } APPELLANT;

AND

ARCHIBALD McARTHUR, ÈS QUALITÉ, (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Negligence—Use of dangerous materials—Proximate cause of accident—Injuries to workman—Employer's liability—Presumptions—Findings of jury sustained by courts below.

As there can be no responsibility on the part of an employer for injuries sustained by an employee in the course of his employment, unless there be positive testimony, or presumptions weighty, precise and consistent, that the employer is chargeable with negligence which was the immediate, necessary and direct cause of the accident which led to the injuries suffered, it is the duty of an appellate court to relieve the employer of liability in a case where there is no evidence as to the immediate cause of an explosion of dangerous material which caused the injuries, notwithstanding that the findings of a jury in favour of the plaintiff, not assented to by the trial judge, have been sustained by two courts below.

Taschereau J. dissented, taking a different view of the evidence and being of opinion that the findings of the jury, concurred in by both courts below, were based upon reasonable presumptions drawn from the evidence, and that, following *The George Matthews Co.* v. *Bouchard* (28 S. C. R. 580), and *The Metropolitan Railway Co.* v. *Wright* (11 App. Cas. 152) those findings ought not to be reversed on appeal.

The Asbestos and Asbestic Co. v. *Durand* (30 S. C. R. 285) discussed and approved.

APPEAL from the judgment of the Court of Queen's Bench, affirming the judgment of the Court of Review, at Montreal, upon the case reserved by the trial judge,

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and Girouard JJ.

refusing with costs the motion of the defendant for judgment *non obstante veredicto*, and granting, with costs, the motion of the plaintiff *ès qualité* for judgment upon the verdict rendered by the jury at the trial, and ordering, in conformity with the verdict, that judgment should be entered for the plaintiff for $5,000, with costs, as damages for injuries sustained by the plaintiff's minor son, Hector McArthur, through an accident occasioned on account of the negligence of the defendant.

1901

THE DOMINION CARTRIDGE COMPANY v. McARTHUR.

The material facts are sufficiently stated in the judgments reported.

Under the provisions of art. 491 C. P. Q., the trial judge abstained from rendering judgment for the plaintiff, in whose favour the verdict of the jury had been given, but reserved the case for the consideration of the Court of Review for the special causes stated in the following certificate, viz. :

"This case came on to be heard before me and a special jury, on the first of February, 1900. The trial continued with the exception of the intervening Saturday and Sunday until the 5th of February when the jury returned a verdict for the plaintiff."

"To question seven, the jury answered that the explosion occurred through the fault and neglect of the company by their neglect to provide proper machinery, and by their neglect to take proper precautions to prevent an explosion ; and to question nine, that the damages suffered amounted to $5,000."

"I therein took until this day, Friday, the 9th of February, to further consider whether I should render judgment upon the verdict or reserve the case for the consideration of the Court of Review."

"I now determine and adjudge not to render judgment upon the verdict, but to reserve the case for the consideration of the Court of Review, when and as

1901

THE DOMINION CARTRIDGE COMPANY v. MCARTHUR.

thereto moved according to law, and for the following special causes:"

"1. Simpson, the general manager, who designed the automatic shot shell loading machine in question, is designer, draughtsman and machinist. Rousseau, the machine foreman of the company, is a practical machinist; he approved the designs and built the machine by himself, or under his immediate supervision."

"2. After construction, the machine was tested for some days before employees were allowed to handle it; a short time afterwards a 'knock out' was added, and a detail in the loading mechanism strengthened by the replacement of brass by iron material."

"3. At the date of the accident the machine had been in use for from 12 to 14 months, saving an interruption of a few weeks during which work was suspended."

"4. The machine automatically loaded from six to seven thousand shells a day; no primer exploded, no accident of any kind occurred, and no complaint nor suggestion was made that risk or danger existed in consequence of any defect in the machine."

"5. When Hector McArthur entered the company's employ in June, 1897, he was assigned to the duty of keeping the machine supplied with wads and powder; saving a few weeks, he continued in the performance of this work until the occurrence of the explosion, a year afterwards; he never reported or suggested to the foreman or other superior officer that his employment was attended with danger in consequence of any defect in the machine."

"6. The company's officers believed that the machine was working safely and satisfactorily."

"7. After the explosion, no exploded shell was found."

"8. The shot shell room was under the constant supervision of a competent foreman; the evidence is further without contradiction that every possible precaution was taken to insure the safety of the employees in the room."

"C. P. DAVIDSON,"
"*J. S. C.*"

Macmaster K.C. and *Fleet* for the appellant. The evidence showed no negligence on the part of the company which could be the proximate cause of the explosion from which the injuries resulted. The certificate of the trial judge makes it quite obvious that he did not approve of the findings of the jury. The origin of the accident is totally unexplained, and it has been shown that the machine in question was constructed by competent machinists; that it had worked well for the fourteen months it had been in use, loading thousands of cartridges daily without accident or complaint or suggestion of any defect or danger in its operation. The trial judge's certificate vouches for the excellent condition of all the machinery in the factory and the great care taken to ensure the safety of the employees. We rely upon the decisions in *Webster* v. *Friedeberg* (1); *The Metropolitan Railway Co.* v. *Wright* (2); *Phillips* v. *Martin* (3); *Wakelin* v. *The London and South Western Railway Co.* (4); *The Municipality of Brisbane* v. *Martin* (5); *The New Brunswick Railway Co.* v. *Robinson* (6); *The Canadian Coloured Cotton Mills Co.* v. *Kervin* (7); *Deroches* v. *Gauthier* (8); *Mercier* v. *Morin* (9); *Montreal Rolling Mills Co.* v. *Corcoran* (10); *Tooke* v. *Bergeron* (11); *Canada Paint Co.* v. *Trainor* (12).

(1) 17 Q. B. D. 736.
(2) 11 App. Cas. 152.
(3) 15 App. Cas. 193.
(4) 12 App. Cas. 41.
(5) [1894] A. C. 249.
(6) 11 S. C. R. 688.
(7) 29 S. C. R. 478.
(8) 3 Dor. Q. B. 25.
(9) Q. R. 1 Q. B. 86.
(10) 26 S. C. R. 595.
(11) 27 S. C. R. 567.
(12) 28 S. C. R. 352.

1901

THE DOMINION CARTRIDGE COMPANY v. MCARTHUR.

On the whole it is respectfully submitted that the judgments appealed from were erroneous, and the appellant should be relieved. The plaintiff's action should be dismissed, or in any event a new trial should be granted, and in the latter event, the appellant's motion, asking for particulars as to the allegations of the respondent's declaration in the Superior Court, should be granted.

Hutchins and *Harvey* for the respondent. We have the findings of the jury in our favour, and both the Court of Review and the Court of Appeal have concurred in those findings as justified by the evidence. This court should not reverse concurrent findings of all the courts below especially when the facts have been found by a jury. There was no attempt to non-suit, and the trial judge considered that there was evidence upon which the jury was required to render a verdict. The main ground on which appellant moved for a new trial was that a witness failed to appear and give evidence at the trial; it never was contended that the plaintiff's evidence was not full and complete. The jury believed plaintiff's witnesses and found negligence against the company, and that the machine was defective, improper and obsolete. Both courts below thought likewise. The doubts that appear to have arisen in the judge's mind, after the trial was over, can be of no consequence. He was not called upon to find the facts or draw inferences, that being the special function of the jury. We refer to *The Asbestos and Asbestic Co.* v. *Durand* (1); Arts. 1205, 1238, 1242 C. C.; *The George Matthews Co.* v. *Bouchard* (2), and the authorities there considered; *Grand Trunk Railway Co.* v. *Rainville* (3); *Citizens Light & Power Co.* v. *Lepitre* (4).

(1) 30 S. C. R. 285.
(2) 28 S. C. R. 580.
(3) 29 S. C. R. 201.
(4) 29 S. C. R. 1.

Many of the cases cited by the appellant are good authorities for refusal to reverse concurrent findings of courts appealed from. It is clear, in this case, from the evidence, that there was no contributory negligence on the part of the employee who was injured, but on the contrary it is shown that the company accumulated large quantities of explosive materials in dangerous proximity to its employees and failed to take reasonable and proper precautions to prevent accidents. The company was bound to take extra precautions under the circumstances of their trade but failed to do so, and the injuries complained of resulted. The whole jurisprudence is against reversing in such a case.

The judgment of the majority of the court was delivered by :

GIROUARD J.—I consider that the principles of law involved in this appeal have been finally settled by this court in a long and unbroken series of decisions, more particularly in *Montreal Rolling Mills Co.* v. *Corcoran* (1); *Tooke* v. *Bergeron* (2); *Cowans* v. *Marshall* (3); *Burland* v. *Lee* (4); *Canada Paint Co.* v. *Trainor* (5); *The Dominion Cartridge Co.* v. *Cairns* (6); *The George Matthews Co.* v. *Bouchard* (7).

In the latter case the court reviewed the decisions which had been rendered in France since *Montreal Rolling Mills Co.* v. *Corcoran* (1), had been decided, and we did not fail to notice that in all of them—some ten or twelve determined chiefly by the Court of Cassation—the rule has been re-affirmed invariably and most emphatically that no employer is responsible for

(1) 26 S. C. R. 595.
(2) 27 S. C. R. 567.
(3) 28 S. C. R. 161.
(4) 28 S. C. R. 348.
(5) 28 S. C. R. 352.
(6) 28 S. C. R. 361.
(7) 28 S. C. R. 580.

1901

THE DOMINION CARTRIDGE COMPANY v. MCARTHUR

Girouard J.

injuries suffered by an employee in the course of his employment, unless the latter proves, by positive testimony, or by presumptions weighty, precise and consistent, that there is fault on the part of the former, and that this fault is the immediate, necessary and direct cause of the injury he sustains. We added that this jurisprudence was (1898), accepted as settled in France, and that no hope for a change favourable to the cause of the workingman could be entertained, except by and through legislative authority. They did apply to the legislature and secured the passing of a statute known as "*la loi du* 9 *avril*, 1898," which in cases of injuries from accidents in the course of their employment, grants them partial compensation from the employer, in the form of a pension or insurance, *de plein droit*, without proving any fault. See Pandectes Francaises, 1899, part 3, p. 49, and also the very interesting foot notes by Mr. Fernand Chesney.

This special relief has already occasioned many contests before the tribunals of France, but has been undoubtedly the cause of a considerable decrease in the number of suits for indemnity under the common law.

But whenever the employee injured is demanding full compensation under that law, that is, the Civil Code, the *arrêts* continue to be unanimous in exacting proof of a fault which certainly caused the injury. Cass. 30th March, 1897; P. F. '98, 1,111; Cass. 12th June, 1899; Cass. 1900, 1,20; Orléans, 18th February, 1898; Orléans, '99, 2,22; Cass. 11th December, 1899; Cass. 1901, 1,15; Cass. 13th December, 1899; Cass. '93.

The *arrêts* of 30th March, 1897, and of 13th December, 1899, are especially interesting in the present case. It will be sufficient to quote the former.

Attendu que, le 10 mars, 1894, le sieur Grande, employé à bord d'un paquebot de la Compagnie Transatlantique a été victime de l'explo-

sion de la chaudière et que le landemain il succombait aux suites de ses blessures ; que sa veuve a assigné la Compagnie Transatlantique en dommages intérêts ; que pour repousser cette demande l'arrêt attaqué conclut que l'accident a donné lieu à deux enquêtes et vérifications technique faites immédiatement, l'une par la commission de surveillance, l'autre par M. Vance, expert commis par le juge d'instruction ; qu'il résulte de ces deux mesures d'instruction que les foyers et chaudières du Maréchal Bugeaud étaient construites conformément aux règles de l'art, en bon état d'entretien et qu'il leur est impossible de déterminer la cause d'un accident qui doit rentrer dans la catégorie des accidents fortuits déjouant toute prévision et ne pouvant engager aucune responsibilité.

I am not aware that the soundness of this doctrine has been questioned by any member of this court. The only dissent I can find is in the appreciation of the evidence in one or two cases.

It is suggested that a recent decision of this court in *The Asbestos and Asbestic Co.* v. *Durand* (1), is not entirely in harmony with this jurisprudence. The head-notes and summary of facts by the reporter, which form no part of the opinion of the court, do not accurately represent that opinion as it is there stated that "the cause of the explosion" which produced the accident was unknown*. That opinion clearly shows that we simply held that sufficient evidence had been adduced to establish negligence on the part of the employer, which was the cause of the accident, so as to justify us not to interfere with the unanimous findings of facts by two courts. The proof adduced was not direct ; it was by presumptions which are recognised by the Quebec Civil Code as legal evidence.

Art. 1205 : Proof may be made by writings, by testimony, by presumptions, etc.

(1) 30 Can. S. C. R. 285.

*[NOTE BY REPORTERS.—The head-notes and statement of the case referred to were prepared under directions of the late Mr. Justice King and the printed proofs specially revised by him. See remarks by Taschereau J. at page 406 *infra*.]

1901

THE DOMINION CARTRIDGE COMPANY v. MCARTHUR.

Girouard J.

Art. 1238 : Presumptions are either established by the law, or arise from facts which are left to the discretion of the courts.

Art. 1242 : Presumptions not established by law are left to the discretion and judgment of the court.

Our lamented brother King, who delivered that opinion, did not find that the cause of the explosion was unknown; he merely held that the court might reasonably presume that it was caused by the excessive accumulation of a highly dangerous material in close proximity to the workmen. He said:

> Clearly, therefore, upon the evidence adduced by the defendants themselves, there was, at the time of the explosion, an unnecessary and unreasonable quantity of this highly dangerous explosive in dangerous proximity to the workmen engaged in carrying on their work; and no attempt is made to excuse or explain the circumstance.
>
> The negligence involved in this was one of the efficient causes of Rivard's death, which, as admitted and found, was caused by the explosion that in fact took place, and was not the conjectural consequence of a smaller explosion.
>
> The peril to life from high explosives is so great, and as shown by the evidence, the cause of their explosion frequently so obscure, that damage may fairly be anticipated as likely to ensue from the act of one who accumulates an unusual and unreasonable quantity in dangerous proximity to others. In placing it where an opportunity for damage may be created, either by the nature of the substance or by fortuitous circumstances or neglect of others or other causes, he takes the chance of the happening of such other event and cannot disconnect himself from the fairly to be anticipated consequence of his own negligence.
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> * * * * * * * * *
>
> In the declaration (after averring that the explosion which caused the death was that of at least three boxes of dualine, in the building contiguous to that occupied by the deceased), it is averred that "it was an act of gross neglect on the part of the defendant to leave such a large quantity of explosive matter, such as dualine, in the said building, and the death of the said Theodore Rivard resulted from, and was due to the carelessness, gross neglect, and fault of the defendant."
>
> In what has been adduced there is proof of this allegation, and hence the appeal should be dismissed.

The present case is similar to the preceding one in one respect, namely, that the accident was caused by

1901

THE DOMINION CARTRIDGE COMPANY v. MCARTHUR.

Girouard J.

an explosion. But, as to the cause of this explosion, it is very different. Here we are left entirely in the dark. No negligence or fault whatever is established, and no presumption is possible. The courts below do not even attempt to indicate any. All the witnesses declare they cannot account for the accident. Alone the plaintiff attributed it to a jam of the cartridges in the automatic machine. But that was a mere supposition. He is not even certain that his back was not turned to the machine at the time of the explosion. It is proved that the machine was perfect and worked regularly and properly. The trial judge so found and certified under the provisions of the new Code of Civil Procedure and there is ample evidence in support of his finding.

The Court of Appeal did not review the evidence. The Court of Review did, Mr. Justice Langelier delivering a long and elaborate opinion. But he accepts a supposed negligence as proved. He says:

Mais qu'est-ce qui a amené l'explosion dans la machine? Aucun témoin, n'a pu le dire, mais H. M. et Stewart *pensent* qu'elle a été causé par le fait que, comme cela était arrivé souvent, d'après eux, une cartouche aura éte saisie dans le sens de sa longeur par les pinces, et un doigt de celles-ci frappant sur la capsule en a emené l'explosion.

It is of no importance to know what the witnesses think, but what they have seen and can testify as facts. In *The Asbestos and Asbestic Co.* v. *Durand* (1), there was indisputable evidence of fault, and not a mere suggestion or surmise as in this case. The plaintiff should have been non-suited.

The appeal is therefore allowed with costs and respondent's action dismissed with costs.

TASCHEREAU J. (dissenting).—I would dismiss this appeal. In the case of *The George Matthews Company*

(1) 30 S. C. R. 285.

1901

THE DOMINION CARTRIDGE COMPANY v. McARTHUR.

Taschereau J.

v. *Bouchard* (1) this court refused to disturb the concurrent findings of fact of two courts of the province, though it was very doubtful if the injuries complained of by the plaintiff had actually been caused by the negligence of the defendant.

Now the appellant here is asking us to give less consideration to findings of fact by a jury, concurred in by two courts, than findings of fact by a judge were in that case deemed to be entitled to.

The respondent has proved and the jury have found that the accident in question was not caused by his own fault or negligence. And it clearly was not caused by the act of God. Neither was it a fortuitous event; art. 17, subsec. 24 C. C., or an inevitable accident; *The "Schwan"* (2); *Eugster* v. *West* (3).

Then there is ample evidence, (a complete analysis of it has been made by Mr. Justice Langelier, in the Court of Review; I refer more particularly to the depositions of Aikins, Stuart and the two McArthurs), that the machine used by the appellant was defective, one employed nowhere else in factories of this kind, and discarded altogether by the appellant itself since this accident, presumably because the workmen would thereafter have nothing whatever to do with it. And the jury have given credit to that evidence, though the appellant endeavoured to prove the contrary by its employees. It is further proved that the explosion took place in the machine itself.

Now, the jury, seeing an explosion in a defective machine, and having before them evidence that it was utterly impossible to otherwise account for it, have drawn the inference of fact that the machine exploded because it was defective. There is nothing in the case to justify me in saying that the two courts

(1) 28 Can. S. C. R. 580. (2) [1892] P. D. 419.
(3) 35 La. Ann. 119.

of the province (eight judges), were clearly wrong in holding that this conclusion was not an unreasonable one. *Metropolitan Railway Co.* v. *Wright* (1); Art. 501 C. C. P. It falls within the exclusive province of a jury to pass upon presumptive evidence of this nature. The suppositions and conjectures the appellant would rely upon cannot militate against the common sense view of the facts that guided this verdict. The company placed a defective instrument in the respondent's hands; the jury found consequently, that it had not taken the extra care required when there is an extra risk, clearly a question of fact; the instrument exploded and injured the respondent. It seems to me that from the facts proved, as it was in evidence, that the explosion could not reasonably be traced to any other cause, the jury could fairly infer that the appellant's negligence in not providing a safer machine was the cause of the respondent's injuries.

It is possible that, upon the evidence, a judge might be satisfied that appellant had taken all the care reasonably required under the circumstances. But that was a fact for the jury, who, we have to assume, received and acted upon the directions expected from the presiding judge in such a case. As *per* Brett J. in *Bridges* v. *The North London Railway Co.* (2) at page 232. And they having found that the appellant has not acted with the prudence and care that the law required on its part, to disturb their verdict would be to usurp their functions.

To use the words of Mr. Justice Brett, in *Bridges* v. *The North London Railway Co.* (2).

> If such decisions may be overruled on the mere ground that the courts or judges do not agree with them, the juries are bound to matters of fact by the view of the judges as to facts. That cannot be.

(1) 11 App. Cas. 152.
(2) L. R. 7 H. L. 213.

1901

THE DOMINION CARTRIDGE COMPANY v. MCARTHUR.

Taschereau J.

Or as said in other words by the Privy Council in the case of *The Connecticut Mutual Life Ins. Co.* v. *Moore* (1).

If the only question for their lordships were whether or not they take the same view of the evidence as the jury, they might be disposed to say that the evidence on the part of the defendants somewhat preponderates. But this is not enough to justify them in granting a new trial; to hold it to be enough would be, in fact, to substitute a court for a jury.

It is much better and more in conformity with our system of trial by jury, that juries should sometimes render verdicts against the weight of evidence as estimated by trained judicial minds, than that their verdicts should be too readily set aside by the judgment of judicial minds, who, in matters of fact, are subject to the same infirmity as jurors and are not less liable to differ among themselves. Vide *The Connecticut Mutual Life Ins.* Co. v. *Moore* (2); *Dublin, Wicklow & Wexford Railway Co.* v. *Slattery* (3); *Smith* v. *South Eastern Railway Co.* (4); *Washington & Georgetown Railroad Co.* v. *Harmon's Administrator* (5).

Certainly, as the appellant argued, the plaintiff has to prove his case upon an action of this nature. But it is a fallacy to contend, as they virtually do, that a stricter proof should be required from him than which would be required to convict a man of murder or manslaughter by negligence. Arts. 213, 220 Crim. Code.

As said by Baron Pollock in *Bridges* v. *The North London Railway Co.* (6).

The plaintiff, no doubt, is bound to make out her case, and cannot, by bare suggestion, challenge its rebuttal, and if what I have stated was mere speculation, it ought not to have gone to the jury, but if it was an inference which could be fairly drawn from facts proved in the same manner as things unseen or unproved—which in the eyes of the law are the same—are constantly inferred and found

(1) 6 App. Cas. 644.
(2) 6 Can. S. C. R. 634.
(3) 3 App. Cas. 1155.
(4) [1896] 1 Q. B. 178.
(5) 147 U. S. R. 571.
(6) L. R. 7 H. L. 213.

as facts by a jury, then the evidence should have been submitted to the jury, together with any which the defendants chose to adduce, and which might have exculpated or further inculpated them according as their witnesses knew more of the occurrence and confirmed or displaced the evidence for the plaintiff.

Or as Lord Penzance puts it in *Parfitt* v. *Lawless* (1).

It is not intended to be said that he upon whom the burden of proving an issue lies is bound to prove every fact, or conclusion of fact, upon which the issue depends. From every fact that is proved, legitimate or reasonable inference may, of course, be drawn and all that is fairly deducible from the evidence is as much proved for the purpose of a *primâ facie* case as if it had been proved directly. I conceive, therefore, that in discussing whether there is, in any case, evidence to go to the jury, what the court has to consider is this, whether, assuming the evidence to be true, and *adding to the direct proof* all such inferences of fact as, in the exercise of reasonable intelligence, the jury would be warranted in drawing from it, there is evidence to support the issue.

It is upon that principle that in the case of *The Canada Atlantic Railway Co.* v. *Moxley* (2), in the Ontario Court of Appeal, and in this court (3), the verdict of the jury based upon an inference of facts was upheld, though there was much room for doubt.

And the following other cases, *inter alia*, show that the tendency of modern rulings in this court has been, as in the English courts, Pollock on Torts, (5 ed.) pp. 413, 414, if not to enlarge, at least not to curtail the functions of the jury. *St. John Gas Light Co.* v. *Hatfield* (4); *Grand Trunk Railway Co.* v. *Weegar* (5); *Toronto Railway Co.* v. *Grinstead* (6); *The Toronto Railway Co.* v. *The City of Toronto* (7); *Drennan* v. *City of Kingston* (8), confirmed in this court (9); *The Canadian Coloured Cotton Mills Co.* v. *Talbot* (10); *The Manufacturers Accident Ins. Co.* v. *Pudsey* (11); *The Grand*

(1) L. R. 2. P. & D. 462.
(2) 14 Ont. App. R. 309.
(3) 15 Can. S. C. R. 145.
(4) 23 Can. S. C. R. 164.
(5) 23 Can. S. C. R. 422.
(6) 24 Can. S. C. R. 570.
(7) 24 Can. S. C. R. 589.
(8) 23 Ont. App. R. 406.
(9) 27 Can. S C. R. 46.
(10) 27 Can. S. C. R. 198.
(11) 27 Can. S. C. R. 374.

1901

THE DOMINION CARTRIDGE COMPANY v. McARTHUR.

Taschereau J.

Trunk Railway Co. v. *Rainville* (1); *The Halifax Electric Tramway Co.* v. *Inglis* (2).

In the recent case of *The Asbestos and Asbestic Co.* v. *Durand* (3) a non-jury case, the cause of the *explosion* was unknown; (the syllabus of the case, as it appears in the report is, I have ascertained, in the handwriting of the learned judge himself who delivered the judgment, and *ipsissimis verbis*, given by the reporter as handed down by him); but the defendant was held liable because by allowing an unnecessary quantity of dynamite to accumulate in dangerous proximity, it could not

> disconnect itself from the fairly to be anticipated consequences of its own negligence,

it being clear that the injured party was not himself the cause of his injuries.

Now, if an inference of fact of this nature can lawfully be drawn by the court in a non-jury case, a jury, it seems to me, can likewise reasonably do so, where, as here, it is likewise found that the plaintiff was not guilty of negligence.

The appellants seem to place great reliance upon the certificate of the learned judge who presided at the trial. But, as I read it, that certificate does not help their case. First, as to the facts, the jury's conclusions, not the judges, it is trite to say, must prevail. *Ad questionem facti non respondent judices.* Secondly, article 469 of the Code of Civil Procedure specially decrees, in accordance with the English practice, that, whenever the judge is of the opinion that the plaintiff has given no evidence upon which the jury could find a verdict, he may dismiss the action. Now, by the fact that the learned judge did not dismiss the action, but

(1) 29 Can. S. C. R. 201. (2) 30 Can. S. C. R. 256.
(3) 30 Can. S. C. R. 285.

left the case to the jury, he necessarily must be assumed to have been of the opinion that there was a case made out by the respondent for them. The appellants themselves do not appear to have contended before the learned judge, at the close of the respondent's case, that there was room for his interference. And, if there was a case for the jury, upon the authority of *Lambkin* v. *The South Eastern Railway Co.* (1), this appeal must be dismissed. There, as here, though the verdict of the jury had been upheld by two provincial courts, yet the defendants impugned it before the Privy Council as being against the evidence. But, said their lordships:

> With respect to the verdict being against evidence, it appears to their lordships * * * that the question of negligence, being one of fact for the jury, and the finding of the jury having been upheld or at all events not set aside by two courts, it is not open under the ordinary practice to the defendants.

The cases cited by the appellant of *The Montreal Rolling Mills Co.* v. *Corcoran* (2); *The Canada Paint Paint Co.* v. *Trainor* (3); *The Dominion Cartridge Co.* v. *Cairns* (4); had not been tried by a jury. In the cases of *Tooke* v. *Bergeron* (5); and *Burland* v. *Lee* (6); (also non-jury cases,) the actions were dismissed upon the ground that the injuries complained of had been caused by the negligence of the plaintiffs themselves. In *Cowans* v. *Marshall* (7) a new trial was ordered upon the ground that the answers of the jury were unsatisfactory. The case of *Wakelin* v. *The London and South Western Railway Co.* (8), and that class of cases have no application. There, as in *The Canadian Coloured Cotton Mills Co.* v. *Kervin* (9) in this court, it

(1) 5 App. Cas. 352.
(2) 26 Can. S. C. R. 595.
(3) 28 Can. S. C. R. 352.
(4) 28 Can. S. C. R. 361.
(5) 27 Can. S. C. R. 567.
(6) 28 Can. S. C. R. 348.
(7) 28 Can. S. C. R. 161.
(8) 12 App. Cas. 41.
(9) 29 Can. S. C. R. 478.

1901

THE DOMINION CARTRIDGE COMPANY v. MCARTHUR

Taschereau J.

was consistent with the evidence that the accident was due to the injured party's own carelessness. Here, there is no room for such a contention; the jury has found conclusively that the plaintiff has not been guilty of negligence. Moreover, contributory negligence, had any been found, does not, in the Province of Quebec, defeat the action. *Price* v. *Roy* (1).

Appeal allowed with costs.

Solicitors for the appellant: *Fleet, Falconer & Cook.*

Solicitors for the respondent: *A. E. Harvey & H. A. Hutchins.*