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*Feb. 20, 21. 22, 23, 24.
*Jun. 23

HIS MAJESTY THE KING (DEFENDANT) .. APPELLANT,

AND

CANADA STEAMSHIP LINES LIMITED (SUPPLIANT) ..... } RESPONDENT,

HIS MAJESTY THE KING (DEFENDANT) .. APPELLANT,

AND

H. J. HEINZ COMPANY OF CANADA LIMITED,
CUNNINGHAM & WELLS LIMITED,
RAYMOND COPPING,
W. H. TAYLOR LIMITED,
CANADA AND DOMINION SUGAR COMPANY LIMITED (SUPPLIANTS) } RESPONDENTS,

AND

CANADA STEAMSHIP LINES LIMITED ..... } THIRD PARTY RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Lease of shed by Crown to water carrier—Damage caused to lessee and to third parties by negligence of servants of Crown—Whether lease exempts from liability by negligence—Whether gross negligence—Third party proceedings—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c)—Water Carriage of Goods Act, 1 Ed. VIII, c. 49.

*PRESENT: Rinfret C.J. and Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

A shed, leased by appellant to respondent C.S.L. and in which were stored respondent's and third parties' goods, caught fire while appellant's employees, acting within the scope of their duties, were doing repairs to it in compliance with appellant's obligation to maintain the shed under clause 8 of the lease.

Clause 7 provided that "the lessee shall not have any claim or demand against the lessor for detriment, damage or injury of any nature . . . to the said shed . . . or materials . . . goods . . . placed, made or being . . . in the said shed".

By clause 17 it was provided that "the lessee shall . . . indemnify . . . the lessor . . . against all claims and demands . . . based upon, occasioned by or attributable to the execution of these presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder".

The trial judge held that appellant's employees had been negligent and that clause 7 could not be invoked as their negligence amounted to "faute lourde". For the same reason, he dismissed the third party proceedings instituted by appellant under clause 17. At the hearing, this Court declared that the finding of negligence by the trial judge could not be disturbed.

Held: The intention of the parties to be gathered from the whole of the document was that, as between the lessor and the lessee, the lessor should be exempt under both clauses 7 and 17 from liability founded on negligence (Locke J. contra as to clause 7).

Held also: The conduct of appellant's employees did not amount to "faute lourde".

Per Locke J. (dissenting in part): As there was here a double liability—the contractual obligation on the part of the Crown to maintain the shed under clause 8 and the liability of the Crown under s. 19 of the Exchequer Court Act—the liability in negligence not having been expressly or by implication excluded, remains and therefore clause 7 does not afford an answer to respondent's claim.

Glengoil Steamship Co. v. *Pilkington* (1897) 28 S.C.R. 146; *Phillips* v. *Clark* [1857] 2 C.B. (N.S.) 156; *Price* v. *Union Lighterage Co.* [1904] 1 K.B. 412; *Rutter* v. *Palmer* [1922] 2 K.B. 87; *McCawley* v. *Furness Ry. Co.* (1872) L.R. 8 Q.B. 57; *Reynolds* v. *Boston Deep Sea Fishing Co.* (1921) 38 T.L.R. 22; *Beaumont-Thomas* v. *Blue Star Line Ltd.* [1939] 3 All E.R. 127 and *Alderslade* v. *Hendon Laundry Ltd.* [1945] 1 All E.R. 244 referred to.

APPEALS by the Crown against the judgments of the Exchequer Court of Canada, Angers J. (1), holding that the lease did not exempt the Crown from liability for damage done by the gross negligence of its servants and allowing respondent's petition of right.

A. J. Campbell K.C. and *J. Desrochers* for the appellant.

H. Hansard K.C. and *R. E. Morrow* for Canada Steamship Lines and H. J. Heinz Company.

(1) [1948] Ex. C.R. 635.

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John Bumbray K.C. for Cunningham & Wells, for Copping and for W. H. Taylor Ltd.

John L. O'Brien K.C. and *John Nolan* for Canada and Dominion Sugar Co. Ltd.

THE CHIEF JUSTICE: These are appeals from judgments of the Exchequer Court of Canada rendered by Angers J. in November, 1948 (1).

By the first judgment, the Court below maintained with costs the Petition of Right of the Respondent Canada Steamship Lines, Limited, for the sum of $40,713.72.

By the second judgment, the Court below maintained with costs the Petition of Right of the Respondent H. J. Heinz Company of Canada, Limited, for the sum of $38,430.88.

By the third judgment, the Court below maintained with costs the Petition of Right of the Respondent Cunningham and Wells, Limited, for the sum of $15,159.83.

By the fourth judgment, the Court below maintained with costs the Petition of Right of the Respondent Raymond Copping, for the sum of $1,662.37.

By the fifth judgment, the Court below maintained with costs the Petition of Right of the Respondent W. H. Taylor, Limited, for the sum of $3,670.25.

By the sixth judgment, the Court below maintained with costs the Petition of Right of the Respondent Canada and Dominion Sugar Co., Limited, for the sum of $108,310.83.

Third Party proceedings were instituted by the Appellant against the Respondent Canada Steamship Lines, Limited, in each of the above cases, except, of course, the petition directly made by Canada Steamship Lines, Limited, itself.

These six cases were tried together and all arise out of a fire which, on May 5, 1944, completely destroyed the Canada Steamship Lines Ottawa street freight shed located on the Lachine Canal in the inner harbour of Montreal.

The damages awarded to each of the Petitioners were established by admissions filed in each case and, therefore, the only question remaining to be decided was as to the responsibility of the Appellant, which the learned trial judge found against the latter.

(1) [1948] Ex. C.R. 635.

At the hearing in this Court, after the conclusion of the argument of the Appellant's counsel, the Court declared that the findings of negligence on the part of the Appellant's employees, as made in the judgments appealed from, could not be disturbed. It follows that the judgments in favour of the Respondents H. J. Heinz Company of Canada, Limited; Cunningham and Wells, Limited; Raymond Copping; W. H. Taylor, Limited; and Canada and Dominion Sugar Co., Limited, must be confirmed with costs of the appeal against the Appellant.

With regard, however, to the petition of Canada Steamship Lines, Limited, and the Third Party proceedings, other considerations apply, in view of the existence between the Appellant and Canada Steamship Lines, Limited, of a lease whereby the latter was put in possession of the freight shed owned by the Appellant. It is the effect of that lease with regard to the respective claims of Canada Steamship Lines, Limited, and His Majesty which stands to be discussed.

The lease in question, dated the 18th of November, 1940, gave to Canada Steamship Lines, Limited, the right and privilege to occupy, use and enjoy the shed for the purpose of receiving and storing therein freight and goods loaded into or unloaded from vessels owned and operated by them. It was there agreed between the parties that the lease was made and executed upon and subject to the covenants, provisoes, conditions and reservations thereafter set forth and contained, "and that the same and every of them, representing and expressing the exact intention of the parties, are to be strictly observed, performed and complied with". One of these covenants, provisoes, conditions and reservations is contained in Clauses 7 and 8 of the lease; and another is contained in Clause 17, which it is convenient to reproduce here:

7. That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.

8. That the Lessor will, at all times during the currency of this lease, at his own cost and expense, maintain the said shed, exclusive of the said platform and the said canopy.

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17. That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

It is apparent that Clauses 7 and 8 have to do with the direct claim of Canada Steamship Lines, Limited, and Clause 17 is invoked by the Appellant in connection with the Third Party proceedings.

Taking first Clauses 7 and 8, the contention of the Appellant is that they relieved him of any claim or demand by the Canadian Steamship Lines, Limited, for the damage suffered by the latter in the circumstances.

The fire was caused by the employees of the Appellant, while they were repairing the shed, and it is clear that, when carrying out those repairs, the Appellant was complying with his obligation to maintain the shed by force of Clause 8. It could not be disputed that the employees were then acting within the scope of their duties or employment, thus bringing into play Section 19(*c*) of *The Exchequer Court Act* (R.S.C. 1927, c. 34), by force of which this claim for injury to the property of the petitioners resulting from the negligence of the servants of the Crown could be determined against the Appellant.

I have already said that the finding of the learned trial judge to the effect that there was in this matter negligence of the employees acting within the scope of their duties or employment could not be disturbed, and it follows that the Appellant was rightly condemned to pay the damages claimed by the Canada Steamship Lines, Limited, unless Clause 7 of the lease comes to the rescue of the Appellant.

The learned trial judge decided that it did not so operate. The ground for so deciding was that, in the opinion of the learned judge, the evidence has established that the fire, which destroyed the shed or warehouse in question and its contents, was caused by the gross negligence of the officers and servants of the Crown and that, in such a case, the Appellant could not invoke Clause 7.

It was common ground that the gross negligence referred to in the judgment appealed from is the equivalent of what is called "faute lourde" in the French Civil Code, and it

was not disputed either that the lease must be interpreted and applied according to the law of the Province of Quebec.

The learned judge devoted almost the whole of his judgment to a discussion of what constituted "faute lourde". But, of course, the question whether "faute lourde" exists is not merely a question of fact; it is also a question of law. The facts found must be brought within the proper legal definition of "faute lourde".

On that point, it does not seem to me that one can be on safer grounds than to adopt the definition of POTHIER. This learned author, who might truly be looked upon as being in most respects the basis of the Civil Code of Quebec, says that the "faute lourde consiste à ne pas apporter aux affaires d'autrui le soin que les personnes les moins soigneuses et les plus stupides ne manquent pas d'apporter à leurs affaires".

Here, the so-called "faute lourde", in the mind of the learned judge, would have resulted from the fact that, in order to enlarge a hole in a steel beam—an operation which admittedly would not require more than three or four minutes at most—the employees used an oxyacetylene torch and two experts testified that, instead of the torch, they should have used a drill or a reamer.

As the operation of the torch on the metal was expected to cause sparks to be emitted, the employees had installed a wooden beam or board, seven to eight feet long, nine to ten inches wide and one inch thick. The board started from the roof of the shed and came down to about three feet from the floor. The object of it was to prevent any spark flying from the spot of the operation unto bales of cotton waste stored in the shed. The bales incidentally caught fire and from there the fire spread all over the shed and destroyed all its contents. How the spark found its way to the bales of cotton waste, notwithstanding the board placed by the employees for the very purpose of preventing such an event, remained unexplained, as the whole occurrence happened so quickly that one of the employees, who had been placed inside the shed in order to guard against a possible mishap, had to escape hurriedly and did not even have time to use a pail of water which had been put at his disposal as an additional precaution.

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It should be stated, however, that in cross-examination, Newill, one of the experts heard, admitted that blow torches are used currently in many industries, in repairs to buildings and for the purpose of burning holes.

The judgments appealed from proceed to examine whether the Appellant could invoke any relief, under Clause 7 of the lease, and conclude as follows:

> After carefully perusing the doctrine set forth by the authors, French and Canadian, and adopted by the Courts of the Province of Quebec and the Supreme Court of Canada, with respect to the bearing of the exculpatory clause in the lease Exhibit A in the case of gross negligence, I have reached the conclusion that this clause does not exempt the respondent from his responsibility in connection with the damages suffered by the suppliant as a consequence of the fire.

The learned judge accordingly gave judgment in favour of the Suppliant against the Appellant.

It will be seen, therefore, that although recognizing that in the case of simple negligence ("faute ordinaire", "faute légère"), Clause 7 would have operated as relieving the Appellant from any claim or demand for "detriment, damage or injury of any nature" to the "materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed"—and that is to say, for the damages claimed in the Petition of Right of Canada Steamship Lines, Limited—the Petitioner is entitled to recover in this particular case, because the employees of the Crown, in this instance, were guilty of gross negligence or of "faute lourde"; and that, in the premises, this circumstance prevented the Crown from obtaining relief under Clause 7.

No other ground can be found in the judgment for maintaining the Petition of Right against the Appellant in favour of the Respondent Canada Steamship Lines, Limited.

This calls, therefore, for the examination of two points: (1) Whether the facts justify a finding of "faute lourde" in the circumstances in this case; and (2) whether, in law, the existence of "faute lourde" would operate as an exception to the bearing of Clause 7 in the lease.

Applying to the facts the definition of POTHIER above recited, I do not think, with respect, that it can be said that there was a "faute lourde" committed by the employees

of the Crown. That definition goes extremely far; the words used by POTHIER are: ". . . le soin que les personnes les moins soigneuses et les plus stupides ne manquent pas d'apporter à leurs affaires". Upon the evidence, I do not find it possible to state that the employees here can be placed in the category of "les personnes les moins soigneuses et les plus stupides".

As already stated, the evidence shows that the use of blow torches for the purpose of burning holes is made currently in many industries and by men of construction and demolition companies. The operation was to last only a few minutes. The men had no drill or reamer with them at the time. Stopping the work to go and get a drill or reamer might have meant a long delay and much inconvenience. It was only natural that for this extremely short work they should use the instruments or tools which they had immediately at hand. They were only doing what admittedly is being done currently in works of that kind. Moreover, they had taken the precautions which ordinarily and in their own mind would be adequate: the board installed between the place where they were burning the hole and the goods inside the shed; the pail of water; and the man placed on the bales of cotton waste, so that he could at once see a possible spark flying towards the bales and act on the spur of the moment to extinguish any beginning of a fire. It seems that it would be very exacting indeed to ask for any further precaution. It was both improbable and very nearly impossible to expect that a spark would reach the bales. It is enough to say that, under those circumstances, the finding that the employees were negligent and have caused the fire through such negligence should not be reversed by an Appellate Court, as was decided by this Court at the close of the Appellant's argument. With respect, I am unable to agree that what the men did was the act of "les personnes les moins soigneuses et les plus stupides". It is unnecessary, of course, to add that there can be here found neither "faute intentionnelle" nor "faute volontaire". And if, as many authors and commentators on the Civil Code think that, with very slight "nuance", the notion of "faute lourde" should be taken as the equivalent of "dol", it would be stressing the definition

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of "faute lourde" to its extreme limit to decide that the negligence of the Crown's employees amounted here to gross negligence or "faute lourde".

This would be sufficient to dispose of the ground upon which the learned trial judge refused to give to the Crown-Appellant the benefit of Clause 7 of the lease.

But it is not amiss to add that on the authorities and true interpretation of a clause, such as Clause 7, I could not either come to the conclusion that gross negligence or "faute lourde" should render Clause 7 inoperative. Since the decision of this Court in the case of *The Glengoil Steamship Company* v. *Pilkington* (1) the matter, in the Province of Quebec, must be taken to have been settled that a clause of that character is neither illegal nor void, and that the jurisprudence, both in France and in the Province of Quebec, now sanctions the validity of such a contract (*Glengoil* Case, Pages 156 and 157). It is generally admitted that such a stipulation of non-responsibility is not contrary to public order. This principle was reaffirmed by this Court in *Vipond* v. *Furness, Withy and Company* (2).

The leading case on that subject in the Province of Quebec is *Canadian National Railway Company* v. *La Cité de Montréal* (3). This judgment was delivered for the Court of King's Bench (Appeal Side) by Surveyer J. It was there decided that

> La clause d'un contrat stipulant immunité en faveur d'une partie, pour le cas de dommages susceptibles d'être causes par sa propre faute, sans distinguer entre la faute contractuelle et la faute délictuelle, telle distinction n'existant pas dans notre loi,—n'est pas contraire à l'ordre public, —est légale et valide. —En conséquence, dans l'espèce, une compagnie de chemin de fer dont la voie traverse à niveau la rue d'une municipalité, peut s'immuniser et se garantir par contrat avec la dite municipalité contre la responsabilité lui résultant d'accidents pouvant survenir à la traverse, même par la faute de ses propres employés.

The judgment relies on LAURENT, Vol. 16, No. 230; MARCADE, Vol. 4, Nos. 506-7; and a former judgment of the Court of King's Bench (Appeal Side) in *Canadian Northern Quebec Railway Co.* v. *Argenteuil Lumber Company* (4), where the Court of Appeal decided:

> A party to a contract may legally stipulate that he will not be responsible for the negligence of his employees. Therefore a clause in an agreement between a Railway Company and a private individual for

(1) (1897) 28 S.C.R. 146.
(2) (1916) 54 S.C.R. 521.
(3) (1927) Q.R. 43 K.B. 409.
(4) (1919) Q.R. 28 K.B. 408.

the building of a siding, connecting with the company's railways, which purports to exempt the company from liability for injury or loss caused by its negligence or that of its servants in use of said siding, is not as being against public order, as far as the fault of the company's employees is concerned.

The same judgment cites SIREY, 1882-2-24, to the effect that the definition of "faute lourde" in France is: "La faute commise à dessein et en pleine connaissance de cause". This clearly cannot be applied to the negligence of the Crown's employees in the present case, and we should add that, if such be the law as between private litigants, a fortiori should the Crown be given the benefit of such law in view of the limited responsibility of the Crown in these matters.

Clause 7 itself provides for no exception whatever. It covers "any claim or demand . . . for detriment, damage or injury of any nature . . . to materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed".

It is obvious that the clause covers the goods, articles, effects or things, the damage or injury to which is claimed for by the Petitioner-Respondent in the premises. There could be no possible exception to the non-liability of the Appellant under the clause.

Applying Articles 1013 and following of the Civil Code dealing with the interpretation of contracts, I must say that, here, the meaning of the parties is not doubtful, it is not susceptible of two meanings, and, although the terms are quite general and all-embracing, I cannot see how they could be said not to extend to the goods destroyed by the fire in the present case, nor is it evident that the parties did not intend to contract to cover those goods (C.C. 1020).

Both on the interpretation of the clause in accordance with the Civil Code, as well as in law and on the facts, I am of opinion that Clause 7 of the lease between His Majesty and Canada Steamship Lines, Limited, should receive its application and the Petition of Right of Canada Steamship Lines, Limited, should be dismissed with costs, in this Court and in the Exchequer Court.

Dealing now with the Third Party proceedings, they were all dismissed by the learned trial judge again on the

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ground that the existence of "faute lourde", as he found, should exclude the right of the Appellant to be indemnified by the Respondent Canada Steamship Lines, Limited. This calls for a discussion of the effect of Clause 17 of the lease.

In that connection, I need not repeat what is already said above on whether the negligence of the Crown's employees can be styled gross negligence or "faute lourde". My conclusion on the facts leads to a decision that none could be found in the circumstances of this case. It would follow that the ground of the learned trial judge for excluding Clause 17 is not well founded.

There remains, however, to interpret Clause 17 and to see whether, upon its true construction, the Appellant was entitled to call upon the Respondent Canada Steamship Lines, Limited, to indemnify Him and save Him harmless from the claims of the other Petitioners.

For that purpose, Clause 17 may be divided into two parts: the first part reads:

> That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted . . .

It does not seem doubtful that this first part upholds the contention of the Appellant.

> actions . . . brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

Here, the enquiry must be whether the actions brought by H. J. Heinz Company of Canada, Limited; Cunningham and Wells, Limited; Raymond Copping; W. H. Taylor, Limited, and Canada and Dominion Sugar Company, Limited, are included within the actions, suits or proceedings enumerated and specified in that last part.

Undoubtedly, unless it were so, it would be difficult to attribute a meaning to that clause, although the rule of interpretation contained in Article 1014 of the Code states that:

> When a clause is susceptible of two meanings, it must be understood in that in which it may have some effect rather than in that in which it can produce none.

It would not follow, therefore, that the mere fact of coming to the conclusion that the clause might produce

no effect would be sufficient to dispose of the present discussion. Article 1014 contemplates that there may be clauses in contracts which are susceptible of producing no effect, if no meaning can be attributed to them. It is only when a clause is susceptible of two meanings that preference must be given to the meaning having some effect rather than to the meaning which produces none.

Here, however, after the most careful consideration, I cannot find two meanings in Clause 17.

The Crown is seeking to be indemnified by Canada Steamship Lines, Limited, and to be saved harmless from and against claims and demands, suits or proceedings brought against it for loss, costs and damages based upon, occasioned by or attributable to the execution of the lease.

As we have seen, Clause 8 thereof compelled the Crown "at all times during the currency of the lease, at its own cost and expense, to maintain the shed" in which the goods destroyed by the fire had been placed and were then in the shed. Maintaining the shed was one of the obligations of the Crown arising under the lease and attributable to the performance or execution of the lease. The loss, cost or damages to the other claimants or Petitioners, which form the basis for the Third Party proceedings against the Respondent Canada Steamship Lines, Limited, are certain claims and demands for their loss, cost and damages in actions, suits or proceedings brought or prosecuted in a manner attributable to the execution and performance of the lease by the Crown; and, accordingly, they are brought strictly within the application of Clause 17. This, to my mind, was exactly the intention of the parties to the lease when the latter was agreed to between them. The result, of course, is unfortunate because it has the effect of placing upon the shoulders of the Canada Steamship Lines, Limited, the full burden of the damages which resulted from the fire caused by the negligence of the employees of the Appellant; but the law of the contract is the law of the parties; and this result is brought about only as a consequence of the stipulations to which the Lessee submitted itself when it signed the lease. And it is not unnatural that, having rented the shed to Canada Steamship Lines, Limited, the Crown should have insisted that, if any loss

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occurred during the currency of the lease and such loss was claimed against the Crown, it, in turn, would be entitled to be indemnified and saved harmless by the Lessee. Canada Steamship Lines, Limited, agreed to that, and, in deciding that the Third Party proceedings must be maintained against it, the Court is only applying the inevitable result and consequence of what it agreed to.

I am, for all these reasons, of opinion that the judgments must be confirmed in so far as are concerned the petitions of H. J. Heinz Company of Canada, Limited; Cunningham and Wells, Limited; Raymond Copping; W. H. Taylor, Limited, and Canada and Dominion Sugar Co., Limited, and the appeals from these judgments should be dismissed with costs; but the appeal should be maintained as against Canada Steamship Lines, Limited, both in respect to its own petition against His Majesty and also with regard to the Third Party proceedings, which ought to be maintained against it in each case of H. J. Heinz Company of Canada, Limited; Cunningham and Wells, Limited; Raymond Copping; W. H. Taylor, Limited, and Canada and Dominion Sugar Co., Limited. The judgments rendered in favour of Canada Steamship Lines, Limited, on its own petition and on the Third Party proceedings should, therefore, be set aside; its petition should be dismissed and the Third Party proceedings maintained against it, together with all costs in each instance in favour of the Appellant both in this Court and in the Exchequer Court.

RAND J.:—On the argument, the Court intimated that, notwithstanding Mr. Campbell's able argument, the finding of Angers, J. (1) on the facts could not be disturbed. There remain, therefore, three questions: first, whether under paragraph 7 of the lease, the Crown is exempt from liability for the loss suffered by the respondent; whether, under paragraph 17, the Crown is entitled to call upon the respondent for indemnity against the claims of the third parties; and whether the negligence was "faute lourde" against which, it is contended, an indemnity would be contrary to public order.

Paragraph 7 is as follows:—

That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land,

(1) [1948] Ex. C.R. 635.

the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.

As can be seen, this language is broad enough to embrace every claim against the Crown for damage to any property of the respondent in or on the land leased. For example, an aeroplane of the Air Force might, through negligence, get out of control and crash through the building, or sparks from a locomotive on the government railway might set fire to it. But they are claims against the "Lessor" and this means that they must arise within some scope of action under the lease. Are they, on the one hand, to be limited to damage resulting from breaches of covenant? The only express obligation on the Crown is that to maintain the "said shed exclusive of the said platform and the said canopy". Under the law of Quebec, which the parties take as governing, the duty to repair would arise after notification by the lessee. The Crown might deliberately or negligently delay such work in circumstances that might lead to damage, as, say, from rain or other inclemency of weather. The mere breach of the covenant, without damage to property, would be outside the paragraph. Or, on the other hand, are the parties to be presumed to have had in mind consequences incidental to any act arising out of the relation of lessor and lessee? Before coming to a conclusion on this question, I think it advisable to examine paragraph 17.

That paragraph reads:—

That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

The question here is this: what claims of third parties could arise against the Crown within the scope of matters bounded by the lease? There could be no contractual rights or duties: at most only delicts or quasi-delicts. But the non-liability of the Crown for wrongs done to the subject is a basic constitutional rule which was the law of Lower Canada in 1867 and remains the constitutional position of

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the Crown except so far as it has been changed by statute: *Quebec* v. *The King* (1). *The Exchequer Court Act,* by section 19(*c*), has created a right in the subject where he has been injured or his property damaged by the negligence of an employee of the Crown in the course of his duty and any liability within the Province of Quebec must arise out of such a delinquency. The only possible claims, then, within paragraph 17, are those founded in negligence.

The rule striking negligence from exceptions of liability arose out of the interpretation of contracts of carriage both by sea and by land. The nature of those undertakings as well as the early conditions under which they were performed dictated an insurer's responsibility against loss or damage unless caused by an Act of God, the King's enemies or inherent vice, to which there was added by law the obligation to use care, and in the case of ships, that they be seaworthy. But although the rule is not now confined to carriers, the researches of counsel have turned up no case of property which has not involved a bailment. The common factor in all has been the commitment of personal property by one person to another, a relationship in many instances of which duties by law and obligations by contract have not been wholly and satisfactorily integrated. But there is no such relation here and the rule must be examined anew.

The first question for a court is the rational consideration upon which the rule is based. In examining that, I disregard both the fact that the Crown is landlord and the ordinary rule of interpretation in the case of Crown grants. Since the matter is primarily in contract, the exception should appear as the presumed intention of the parties. In sea carriage there were obvious perils to be encountered, and if the ship owner stipulated for freedom from them, without more, it would be reasonable to assume that misconduct on his part was not contemplated. In some, at least, of the exceptions, the result could be explained in terms of causation. Although a peril was the immediate cause, yet as it was engaged with negligence, on the ordinary reasoning the loss would be attributed to the latter. But it was not only against negligence that the rule struck. The warranty of seaworthiness was in substance absolute,

(1) (1894) 24 S.C.R. 420.

and yet, its breach, regardless of the nature or cause of it, was excluded from general exceptions or from exceptions of specific causes with which it co-operated.

One test would seem to be whether the words of exemption can be given a reasonable application short of negligence, as was suggested by Atkin, L.J. (as he was) in *Rutter* v. *Palmer* (1). In the lease before us, the Crown has undertaken only one obligation, to maintain the building, and the only sources of liability are, failure to maintain and negligent performance. It is said that the former is within section 7 and the latter not. But what, in reasonableness, is the difference between a culpable refusal to carry out an obligation, which involves either an intentional or negligent disregard of it, and the performance in good faith but accompanied by less than reasonable care? If, for instance, the electric wiring of this building had, through deterioration, become dangerous, precisely the same results might have followed the neglect to repair as in this case; and if it goes to the reasonableness or even morality of the default, how can it be said that either one is more reasonable or more unreasonable than the other? I am unable to appreciate any jural distinction between them. As in the cases where unseaworthiness has overridden exceptions, it is irrelevant that there might be liability which did not involve culpability, although I should add that I do not see how there could be here.

Reverting, then, to paragraph 7 and considering it in the light of paragraph 17, it would seem rather absurd to say that the fire, so far as it damaged the goods of a third party, gave rise to a right in the Crown against the Steamship Company for indemnity, which, in my opinion, it would; but that claims for damage to like property of the Steamship Company were not within the broad language of paragraph 7.

It will be noticed that, although the duty to repair does not extend to the canopy or the platform, additions to the building made by the lessee, these are enumerated in paragraph 7. Damage to them arising out of a failure to repair the main part of the building can perhaps be imagined, but it would be very remote in cause and beyond any likely contemplation of the parties. It would seem

(1) [1922] 2 K.B. 87 at 94.

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much more probable that direct damage to them was in mind, a claim for which could be only from a negligent act.

The last question is whether the negligence in the work done was of such an outrageous character as to bring it within the principle of faute lourde. In view of the development of the law of insurance in the province and its radical departure from the Coutume de Paris, it would seem to be very questionable that the principle could now be invoked at all; but assuming it could, the scope would not in these days extend beyond the bounds laid down by Pothier in his definition:—

dans le fait de ne pas apporter aux affaires d'autrui le soin que les personnes les moins soigneuses et les plus stupides ne manquent pas d'apporter à leurs affaires.

It cannot seriously be contended that the conduct of these employees was of the character so described. They were doing their work in the ordinary manner; they had anticipated the possibility of sparks and had taken some considerable, and what they thought to be adequate, precautions against them. To say of their conduct that it was more indifferent than the most careless and the most stupid of men would exercise towards their own interests is either to disregard what they did or to misconceive the standard laid down.

The result is simply this: the Crown leases on terms that under no circumstances will it be responsible for damage to any property on the land: to the lessee it is said: you must bear that entire risk, against which you may, of course, insure yourself. As the respondent is a carrier, in custody of all the goods as such or as warehouseman, that risk is part at least of its ordinary responsibility: and in the work of repair, it is as if the persons doing it were employees of the respondent but at the cost of the Crown.

I would, therefore, allow the appeal, dismiss the petition of right and allow judgment on the counterclaim for indemnity, with costs in this Court and in the Court below.

KELLOCK J.:—This is an appeal by His Majesty from a judgment of the Exchequer Court (1) in proceedings arising out of the destruction by fire of certain goods, the property of the respondent and certain third parties. The respondent, Canada Steamship Lines, was the tenant of

(1) [1948] Ex. C.R. 635.

certain dock property under lease from the appellant upon part of which property was situate a freight shed which the Steamship Company used in connection with its business of transporting freight. The lease is dated the 18th of November, 1940, and is for a term of twelve years. Under its provisions the lessee had the right to construct, at its own expense, a loading platform along the southerly face of the freight shed and a canopy above. It also provided that the appellant would, during the currency of the lease, maintain the shed but not the platform or canopy.

Five or six days prior to the fire, the Steamship Company had complained to the appellant's superintendent as to the state of repair of the various doors in the shed and it was in the course of the repair of these doors on the 5th of May, 1944, by servants of the appellant that the fire occurred, completely destroying the shed and its contents.

The learned trial judge held that the fire was due to the negligence of the appellant's servants and we affirmed this finding on the hearing, subject to the question as to whether the negligence amounted to gross negligence, and the effect, if any, of such a finding. Judgment was given in favour of the Steamship Company against the appellant and also judgment in favour of the third parties. The learned judge further held that clause 7 of the lease, to be hereinafter referred to, could not be availed of by the appellant as a defence to the Steamship Company's claim, as he considered that under the law of Quebec such a clause was no answer where there had been gross negligence or "faute lourde". He also refused relief to the appellant against the Steamship Company in third party proceedings taken for the purpose of indemnification against the claims of the third parties. The learned judge held that clause 17 of the lease upon which the appellant relied for this purpose could not be made available for the same reason.

In my opinion the judgment in appeal cannot be sustained upon the ground upon which the learned trial judge proceeded. The definition of faute lourde most favourable to the respondent Steamship Company, namely, that of Pothier, is:

dans le fait de ne pas apporter aux affaires d'autrui le soin que les personnes les moins soigneuses et les plus stupides ne manquent pas d'apporter à leurs affaires.

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Even accepting this definition for the purposes of the present case, the evidence does not make out such a case.

Clause 7, relied upon by the appellant as a defence to the claim of the respondent company, reads as follows:

That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.

Prior to the decision of this court in *Glengoil* v. *Pilkington* (1), all such clauses were considered invalid by the courts of the Province of Quebec, but as stated by Taschereau J. in *Grand Trunk Railway* v. *Miller* (2):

The legality of such clauses was concluded by that decision.

In the course of his judgment in the *Glengoil* case, Taschereau J. said at 159:

Then conditions of this nature limiting the carrier's liability or relieving him from any, are to be construed strictly and must not be extended to any cases but those expressly specified; *Phillips* v. *Clark*, 2 C.B. N.S. 156; *Trainor* v. *the Black Diamond Steamship Co.*, 16 S.C.R. 156.

It is well settled that a clause of this nature is not to be construed as extending to protect the person in whose favour it is made from the consequences of the negligence of his own servants unless there is express language to that effect or unless the clause can have no operation except as applied to such a case. In *Alderslade* v. *Hendon Laundry* (3), Lord Greene M.R. expressed the principle as follows at page 245:

. . . where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because if it were not so construed it would lack subject-matter. Where, on the other hand, the head of damage may be based on some ground other than that of negligence, the *general principle* is that the clause must be confined to loss occurring . . . through that other cause to the exclusion of loss arising through negligence. The reason for that is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms, and in the absence of such clear terms the clause is to be construed as relating to a different kind of liability and not to liability based on negligence.

It is therefore argued for the respondent in the case at bar that the provisions of paragraph 7 do not extend to

(1) (1897) 28 S.C.R. 146.
(2) (1903) 34 S.C.R. 45 at 56.
(3) [1945] 1 All E.R. 244.

exonerate the Crown from its liability under the provisions of section 19(c) of the *Exchequer Court Act* for the reason that negligence is not expressly mentioned and need not of necessity be implied as, under the provisions of the lease itself, circumstances could have arisen entailing liability upon the Crown apart altogether from negligence.

Under the provisions of paragraph 8 of the lease, the Crown had covenanted to maintain the freight shed during the currency of the lease. It is said that goods in the shed might well be damaged because of non-repair occasioned by mere delay or non-availability of materials or labour, altogether apart from negligence. The Crown is liable for breach of contract whether the breach lie in omission or commission: *Windsor* v. *The Queen* (1). The argument, therefore, is that in such case, clause 7 would operate to bar any relief by the appellant in respect of damage to its goods and therefore its provisions should not be construed as including claims for damage arising from negligence in the execution of repairs.

Before dealing with this argument, it will be convenient to refer to the appellant's claim against the respondent for indemnity in respect of the claims of the third parties. The appellant invokes against the respondent in this connection the provisions of paragraph 17 of the lease, which reads as follows:

> That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

The principle already discussed in considering the terms of paragraph 7 is equally pertinent as to the construction of paragraph 17, but in my opinion the terms of paragraph 17 protect the Crown in respect of claims of third parties against it for damages occasioned by the negligence of its servants. No such person could have any claim against the Crown in circumstances which would ensue upon the granting of the lease except on a basis other than contract. That being so, I think the clause must be taken to extend to claims for damages by reason of negligent acts of Crown

(1) (1886) 11 A.C. 607.

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servants such as that here in question. Such claim would be a claim "occasioned by or attributable to" an "action taken or thing done by virtue hereof", namely, the action of the Crown's employees in carrying out the obligation to repair imposed upon the Crown by the lease to repair the shed. "By virtue" of the lease is equivalent to "as a consequence of" or "because of."

With respect to paragraph 7, it may well be that if that paragraph stood alone, the respondent's argument would be valid. I do not need to decide that question, however, but will assume its soundness for the purposes of the present case. Paragraph 7 does not stand alone, and in my opinion the presence in the lease of paragraph 17 affects the proper interpretation to be given to paragraph 7.

The respondent is a water carrier subject to the provisions of the *Water Carriage of Goods Act,* 1 Edward VIII c. 49, and to the rules relating to bills of lading set out in the schedule to that Act. By Article IV para. 2, the carrier is not liable for loss or damage arising from fire unless caused by its actual fault or privity. Accordingly, the respondent would not, under the terms of the article just mentioned, be liable to the owner of goods lost by reason of the fire here in question, even though the goods were in the possession of the respondent as carrier and not as warehouseman. However, it is provided by Article V that

> A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the Rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

At all times since the passage of this statute, then, it was open to the carrier to waive the benefit of Article IV para. 2 and to accept goods for carriage on terms involving it in liability, even though a loss took place without any negligence on the part of the carrier or its servants or agents.

This being an express provision in the law at the time of the execution of the lease here in question, I think it must be taken that the lease was executed in the light of the possibility of the respondent having goods from time to time in its possession in the demised premises for the loss of which, arising from circumstances such as are here in

question, it would be liable to the shipper as insurer and therefore entitled itself to recover against a wrong-doer for such loss.

In my opinion, the respondent, under such circumstances, would have sufficient interest within the meaning of Article 77 of the Code of Civil Procedure to maintain such an action. It would be illogical that an action for revendication at the suit of a depositary should lie under Article 946 where the article is still in existence, and at the same time that the depositary would have no right of action against a wrong-doer for damages if the article had been destroyed. I think the principle is correctly stated in Fuzier-Herman, Répertoire vo Action en justice, no. 95, referred to by Guerin J. in *Bélisle* v. *Labranche* (1) as follows:

> L'intérêt pour agir doit être un intérêt immédiat, dit à cette égard M. Garsonnet et, suivant la formule, né et actuel; mais il n'est pas nécessaire que le préjudice à raison duquel on agit soit encore réalisé ni que l'exercice du droit qu'on veut défendre soit dès maintenant entravé, car il peut-être utile de prévenir un dommage imminent, ou de se mettre un droit à l'abri d'une contestation ultérieure.

This being so, it would be an anomaly if, upon claim being made by the shipper upon the appellant, the respondent would be liable to indemnify the appellant under the provisions of paragraph 17, and yet that the respondent, if called upon to pay directly by the shipper, could recover from the appellant on the ground of the negligence of its servants, and paragraph 7 of the lease would not be the answer. I therefore think it must be held that paragraph 7 would be an answer to such a claim and that it must be read as applying to causes of action founded upon negligence. The appeal should therefore be allowed with costs here and below.

ESTEY J.:—At the hearing of this appeal the Court affirmed the finding of the learned trial Judge (2) that the fire here in question was caused by the negligence of the appellant's agents and servants acting in the course of their employment. The Court, however, did not affirm the learned trial Judge's view that the negligence was such as to constitute "faute lourde" or "gross negligence." "Faute lourde" is discussed by a number of French authors and the definition more generally accepted is that of

(1) (1916) Q.R. 51 S.C. 289 at 292. (2) [1948] Ex. C.R. 635.

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Pothier: "dans le fait de ne pas apporter aux affaires d'autrui le soin que les personnes les moins soigneuses et les plus stupides ne manquent pas d'apporter à leurs affaires." In this case the servants and agents did take some precautions and, with respect, I do not think their conduct was so wanton or reckless as to constitute "faute lourde."

The appellant, therefore, by virtue of sec. 19(*c*) of the *Exchequer Court Act* is liable for the damage suffered by respondent Canada Steamship Lines Limited unless it is protected therefrom by virtue of the provisions of clause 7 of the lease:

> 7. That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform, or in the said shed.

The language of this paragraph is sufficiently comprehensive to include claims and demands founded in negligence, but it is submitted by respondent that it should not be so construed. In this submission it is emphasized that the word "negligence" does not appear throughout the paragraph and while its absence is not conclusive, without it the language must be such as to admit of no other reasonable construction. That this clause 7 should be construed as to limit its application to breach of covenant in the lease and as there is no breach the clause has no application.

This type of clause first appeared in contracts with respect to the carriage of goods. The common carrier who defaulted in his obligations to carry goods at common law was liable irrespective of the cause, except it was the King's enemies, acts of God or inherent vice of the goods. The common carrier in order to protect himself from such liability began inserting protective clauses in the contract for carriage. These have, apart from clear language to the contrary, been construed to reduce his liability but not to the extent of excluding that due to his own negligence or that of his servants or agents, unless there was an express provision to that effect or language that permitted of no other reasonable construction.

The agreement here is a lease and not a contract with a common carrier. MacKinnon, L. J., in *Alderslade* v. *Hendon Laundry Ltd.* (1), in a case where articles were lost by a laundry and where a clause limiting liability had to be construed, stated at p. 247:

> Reliance upon cases between shipowners and owners of goods is illusory.

Similar clauses in contracts other than those with common carriers for the carriage of goods are discussed in *Reynolds* v. *Boston Deep Sea Co.* (2); *Rutter* v. *Palmer* (3); *Beaumont-Thomas* v. *Blue Star Line Ltd.* (4); *Alderslade* v. *Hendon Laundry Ltd., supra.*

That which determines the matter is the intention of the parties as expressed in the language of the clause as construed in association with the contract as a whole. In cases of difficulty or doubt in the construction of these clauses in contracts other than those with common carriers the authorities suggest two rules. Where liability exists in addition to that founded in negligence, the Courts have, as stated by Lord Greene, followed the general principle and restricted the exemption of liability to that other than that founded upon negligence. *Alderslade* v. *Hendon Laundry Ltd., supra,* at p. 245. If, however, negligence be the only basis for liability the clause will, as Lord Justice Scrutton stated, "more readily operate to exempt" liability based upon negligence: *Rutter* v. *Palmer, supra,* at p. 92.

In this case the appellant as lessor under clause 5 reserved "at all times full and free access" to any part of the land, shed and platform, and under clause 8 undertook to "maintain said shed." This at least included the obligation to keep the shed in repair. Clause 7, notwithstanding its comprehensive terms, has been so drafted that it does not exempt the appellant from damages incurred when the appellant makes default in his obligation to repair and the respondent, as tenant, in that event makes the same and claims the cost thereof by way of damages from the lessor. In that event there is no "claim or demand . . . for detriment, damage or injury . . ." to the objects specified in clause 7 and therefore its provisions would not exempt the lessor. This is significant, and particularly so

(1) [1945] 1 All E.R. 244.
(2) (1922) 38 T.L.R. 429.
(3) [1922] 2 K.B. 87.
(4) [1939] 3 All E.R. 127.

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in relation to the respondent's contention that the clause should be restricted in its application to a breach of covenant in the lease. The clause has obviously been drafted with care and the non-exemption of the aforementioned liability cannot be regarded as accidental. That a clause drafted not to include one form of liability but otherwise in such general all-inclusive terms should be given such a restricted meaning as here contended for would appear to be contrary to the intent of the parties.

Then it must be assumed that clause 7 was drafted with reference to detriment, damage or injury to the premises, property or freight. In the preparation thereof the parties would have in mind at least the more likely sources or causes of liability on the part of the lessor. It would therefore be liability for damages arising out of the exercise of the privilege of access or duty to maintain that would be uppermost in their minds. In respect to the former any liability arising therefrom would almost invariably be founded on negligent conduct. As to the latter the lessee being in possession would notify the landlord of the need for repair. If any detriment, damage or injury should occur to the premises, goods or freight after the notice and prior to the completion of the repairs, it would more likely arise from neglect on the part of the lessor, his servants and agents. It must be assumed, therefore, that the parties in drafting that clause would fully appreciate that the most probable source of liability upon the lessor would be negligent conduct.

At the hearing it was suggested that detriment, damage or injury to the goods and property might result from the collapse of a shed or breaking of a water main or some other source quite apart from any question of negligence and that clauses 7 and 17 should apply only to such liability. These possibilities of detriment, damage or injury to the goods and property are, in comparison to the possibility of such from negligence, so remote as to make it unreasonable to conclude that the parties, having regard to the language of clauses 7 and 17, intended to so restrict the exemption therein provided for.

Clause 17 of the lease reads as follows:

17. That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages,

actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

These clauses 7 and 17 must be read and construed together and as part of the lease as a whole. Clause 17 is drafted in language of the widest import. The respondent, Canada Steamship Lines Ltd., apart from emphasizing the fact that "negligence" is not used in the paragraph, refers particularly to the words "any action taken or things done or maintained by virtue hereof" and "the exercise in any manner of rights arising hereunder." These statements, it was submitted, limit the clause to where the action taken or the things done or the exercise of the right would be done in a legal and proper manner and therefore to the exclusion of the negligent doing or taking of the steps contemplated. The inclusion of such phrases as "any action" and the words "in any manner" would appear not to support the contention made on behalf of the Canada Steamship Lines Ltd. However, when these portions are read with the other parts of clause 17 one is led to the conclusion that the parties are here providing for liability not in a restricted but rather in a general sense including liability founded in negligence. Indeed, unless liability for negligence be included in this clause 17 it lacks subject-matter or content.

It is conceded that liability may under clause 7 arise apart from that founded on negligence, but the authorities already mentioned make it clear that such a fact is significant as an aid in determining intention but is not conclusive. It is the expressed intention of the parties that concludes the issue. This intention is made rather clear in clause 17 and when these clauses are read together, as they must be, with due regard to the relationship between the parties (landlord and tenant) and their respective positions, rights and obligations under the lease, they do not support the view that in respect to liability founded upon negligence there should be any difference in the effect of the two clauses. It, therefore, follows that the lessor is exempt under both clauses for liability founded on negligence.

The appeal should be allowed with costs.

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LOCKE J. (dissenting in part):—The petition of right filed by the respondent, Canada Steamship Lines, Limited, alleges a cause of action for negligence on the part of the employees and servants of the Crown. There was ample evidence, in my opinion, to support the finding of the learned trial judge (1) that the fire resulted from such negligence and it was intimated before the conclusion of the argument that we would not disturb this finding. If, however, Pothier's definition of faute lourde be accepted, it is, in my opinion, clear that the actions of the servants of the Crown could not be so classified. They took precautions to avoid damage from sparks but these proved inadequate. Difficult as it is to attempt to define what constitutes gross negligence, I see no justification for a finding that there was any such here, or faute lourde within the above mentioned definition.

By the lease of November 18, 1940, between His Majesty and this respondent it was recited that the lessor demised and leased unto the lessee the property in question, together with the right to use and occupy it for the purpose of receiving and storing therein freight and goods loaded into or unloaded from vessels owned or operated by the lessee, and the term of the lease was expressed to be 12 years from May 1, 1940. By paragraph 8 it was agreed that the lessor would at all times during the currency of the lease, at his own cost and expense, maintain the shed erected upon the premises leased. It was in pursuance of the obligation thus assumed that the servants of the Crown went upon the premises to carry out the repairs to the door of the shed and it was their negligence in performing the work which forms the basis of the action. It is to be noted that the claim pleaded sounds in tort and not in contract. This was, in my opinion, the true nature of the plaintiff's claim. In Pollock on Torts, 14th Ed. at 427, the learned author says:—

> If a man will set about actions attended with risk to others, the law casts on him the duty of care and competence. It is equally immaterial that the defendant may have bound himself to do the act or to do it competently. The undertaking, if undertaking there was in that sense, is but the occasion and inducement of the wrong. From this root we have as a direct growth the whole modern doctrine of negligence.

(1) [1948] Ex. C.R. 635.

The point is of importance in construing paragraph 7 of the lease which reads:—

That the lessee shall not have any claim or demand against the lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.

Claims for damage or injury to property caused by negligence are not specifically excepted, but the words "any claim or demand against the lessor" however, if given an unrestricted meaning, affords a complete answer to the claim of this respondent.

In the case of a common carrier it is, in my opinion, clear that a clause similar to paragraph 7 would not relieve him of liability for negligence. In *Phillips* v. *Clark* (1), a shipowner who had stipulated in the bill of lading that he was "not to be accountable for leakage or breakage" was found liable for a loss by these means arising from negligence. Cockburn, C.J. said in part (p. 162):—

Admitting that a carrier may protect himself from liability for loss or damage to goods intrusted to him to carry, even if occasioned by negligence on the part of himself or his servants, provided any one is willing to contract with him on such terms; yet it seems to me that we ought not to put such a construction upon the contract as is here contended for, when it is susceptible of another and a more reasonable one. It is not to be supposed that the plaintiff intended that the defendant should be exempted from the duty of taking ordinary care of the goods that were intrusted to him. When it is borne in mind what is the ordinary duty of a carrier, it is plain what the parties intended here. So long ago as in the case of *Dale* v. *Hall*, 1 Wils. 201, it is laid down (by Lee, C.J.) that "everything is a negligence in a carrier or hoyman that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, except they happen to be damaged by the act of God or the King's enemies; and a promise to carry safely, is a promise to keep safely." Amongst the events which the carrier here would under ordinary circumstances be responsible for, are, leakage and breakage. He stipulates to be exempted from the liability which the law would otherwise cast upon him in these respects. But there is no reason why, because he is by the terms of the contract relieved from that liability, we should hold that the plaintiff intended also to exempt him from any of the consequences arising from his negligence. The contract being susceptible of two constructions, I think we are bound to put that construction upon it which is the more consonant to reason and common sense; and to hold that it was only intended to exempt him from his ordinary common law liability, and not from responsibility for damage resulting from negligence.

(1) [1857] 2 C.B. (N.S.) 156.

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Cresswell, J. said (p. 163):—

> Ordinarily, the master undertakes to take due and proper care of goods intrusted to him for conveyance, and to stow them properly; and he is responsible for leakage and breakage. Here he expressly stipulates not to be accountable for leakage or breakage, leaving the rest as before.

In *Price* v. *Union Lighterage Company* (1), goods were loaded on a barge under a contract for carriage whereby the barge owner was exempted from liability "for any loss or damage to goods which can be covered by insurance." The barge was sunk owing to the negligence of the servants of the barge owner and the goods were lost. It was held that the exemption being in general terms not expressly relating to negligence the barge owner was not relieved of liability for loss or damage caused by the negligence of his servants.

The risk of loss was clearly one against which insurance might have been obtained but Lord Alverstone, C.J. after pointing this out said (416):—

> The question, however, is not whether these words could be made to cover such a loss, but whether in a contract for carriage they include on a reasonable construction, an exemption from negligence on the part of the carrier. We have only to look at the case to which I have referred, and in particular to *Sutton* v. *Ciceri,* 15 A.C. 144, to see that the words of this contract can receive a contractual and business like construction and have effect without including in the exemption the consequences of the negligence of the carrier. That being so, the principle that to exempt the carrier from liability for the consequences of his negligence there must be words that make it clear that the parties intended that there should be such an exemption is applicable to this case and the learned judge was right in holding that the contract does not exempt the defendants from liability for their own negligence.

In *Rutter* v. *Palmer* (2), the defendant, a garage owner, was sued by a customer who had delivered a car into his possession for the purpose of sale. In holding that the terms of the contract there made protected the defendant from a claim based upon negligence, Atkin, L.J. explained the principle upon which the common carrier cases were decided in these terms (p. 94):—

> There is a class of contracts in which words purporting in general terms to exempt a party from "any loss" or to provide that "any loss" shall be borne by the other party, have been held insufficient to exempt from liability for negligence. Those are contracts of carriage by sea or land. The liability of the carrier is not confined to his acts of negligence or those of his servants; it extends beyond liability for negligence; therefore when a clause in the contract exempts the carrier from any loss it may have a reasonable meaning even though the exemption falls

(1) [1904] 1 K.B. 412. (2) [1922] 2 K.B. 87.

short of conferring immunity for acts of negligence. That is the reason at the root of the shipping cases. The same reason does not so often apply to the railway cases because, when acting as carriers, railways generally come under special legislation. But where in the circumstances a railway company is exposed to one kind of liability only, and that is a liability for negligence, there if the parties agree that the risk of loss or damage is to be borne by the passenger or the owner of goods they must intend to exempt the company from liability in the only event which is likely to expose them to liability; that is the negligence of their servants.

As opposed to the decisions in the common carrier cases are those where what may be called clauses providing exemption from liability in general terms have been found effective on the ground that, since the only possible claim would be for negligence, the parties must be held to have intended to exclude such liability. In *McCawley* v. *Furness Railway Company* (1), a passenger on the defendant railway claimed damages for personal injuries caused by the negligent management of the train. The defendant pleaded that the plaintiff had been received to be carried under a free pass as the drover accompanying cattle, one of the terms of which was that he should travel at his own risk. By replication, the plaintiff alleged that it was by reason of the negligence of the defendant that the accident had happened and on demurrer it was held that the replication was bad. Cockburn, C.J. said that the terms of the agreement under which the plaintiff became a passenger excluded everything for which the company would have been otherwise liable: they would have been liable for nothing but negligence and he considered that of necessity any such liability was excluded. Blackburn, Mellor and Quain, JJ. agreed. In *Reynolds* v. *Boston Deep Sea Fishing Company* (2), a claim was made by the owner of a steam trawler against ship repairers for damage sustained by the trawler while in the defendant's slip which, it was contended, was caused by negligence. By the contract between the parties it was provided in part that: "all persons using the slip must do so at their own risk and no liability whatever shall attach to the company for any accident or damage done to or by any vessel, either in taking it to the slip or when on it or when launching from it." For the plaintiff it was contended that a clause so worded did not protect the defendant against the consequences of its own negligence and *Price* v. *Union Lighterage Company,* above

(1) (1872) L.R. 8 Q.B. 57.
(2) (1921) 38 T.L.R. 22.

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referred to, was cited in support of this proposition. Greer, J. considered that under the circumstances there was a presumption of negligence which the defendant had not rebutted but that, since the real obligation of the defendants as the operators of the slip was only to use reasonable care in the circumstances, it must be held that liability for negligence was excluded. *Orchard* v. *Connaught Club Ltd.* (1) and *Calico Printers' Association* v. *Barclay's Bank* (2) were decided upon similar grounds. In *Beaumont-Thomas* v. *Blue Star Line Ltd.* (3), where a passenger who had been injured by falling upon the deck of a vessel claimed damages for negligence and where by the terms of the ticket sold the passengers took upon themselves "all risks whatsoever of the passage," Scott, L.J. in allowing an appeal from a judgment of Lord Hewart, L.C.J. at the trial said in part:—

> In order to construe any exception of liability for events happening in the performance of the contract, where the words of the exception are not so clear as to leave no doubt as to their meaning, it is essential first to ascertain what the contractual duty would be if there were no exception. In the contract of a common carrier by land, or of a shipowner for the carriage of goods by sea, broadly speaking, the carrier is an insurer of the safe delivery of the goods. If they are damaged on the way, he is liable. That is his primary duty. There is also a secondary duty, however—namely, the duty to use skill and care. That duty comes into play in case of the carrier invoking some term of an exception clause as a protection against liability. In such a case, if the excepted peril has been occasioned by the negligence of the carrier's servants, the failure to perform the secondary duty debars him from reliance upon his exception. In the case of a carrier of passengers, no such double liability attaches. He is under a duty to use due skill and care, and no more. The absolute duty of the goods carrier to keep and deliver safely does not apply. This fundamental difference in the basic contract caused the common law courts of England during the last 100 years to make a difference in the interpretation of general works of exception from liability according as the contract to be construed was one imposing the double duty or only the one duty. In each interpretation they had two principles to guide them, (i) the rule of construction contra proferentem, and (ii) their natural reluctance to read into a contract a release from the duty of skill and care, unless quite unambiguous language made that construction unavoidable . . .
>
> In the case of double duty, the courts have treated the exception as *prima facie* directed to the absolute undertaking of safe delivery, but as not applying to the performance of the duty of skill and care. On the other hand, in a contract where there was no duty except the duty of skill and care, the courts have construed the same words of exception in the opposite sense—namely, as directed to the duty of skill and care—

(1) (1930) 46 T.L.R. 214.
(2) (1931) 145 L.T. 51.
(3) [1939] 3 All E.R. 127.

for the two simple reasons (i) that some meaning must be given, and (ii) that no other meaning than an exception of liability for negligence was left. This principle of interpretation runs through a long line of cases, of which *Price & Co.* v. *Union Lighterage Co.* 1904, 1 K.B. 412; *Pyman S.S. Co.* v. *Hull & Barnsley Ry. Co.*, 1915 2 K.B. 729, and *Rutter* v. *Palmer*, 1922, 2 K.B. 87 are the chief. In the last case, Scrutton, L.J., after referring to the above rule of construction, speaks of a garage proprietor taking charge of cars and selling them on commission after demonstrating their performance to prospective customers, and says, at pp. 92, 93:

"What is his liability (the garage proprietor's liability for a servant driving a car) in these circumstances? He is only liable for his own negligence and the negligence of his servants. If an accident happened without his negligence or that of his servants he would not be liable; but if it happened through his or his servants' negligence he would be liable. In these circumstances he introduces this clause into the contract of his customer: "Customers' cars are driven by your staff at customers' sole risk." There are two obvious limitations to be imposed upon the meaning of those words: First "staff" must mean "driving staff"; secondly, "driven" must mean driven for the purposes of the bailment, namely, the purpose of selling the car. The clause does not mean that the garage keeper is to be free from liability if a member of his clerical staff takes the car out for pleasure. So limited, the clause, which is regularly inserted in all contracts by garage keepers to sell cars for customers and to run them for that purpose, can have only one meaning, and that is that the owner of the car must protect himself by insurance against accidents for which without the clause the garage keeper would be liable, that is against accidents due to the negligence of the garage keeper's servants." In the same case, Atkin, L.J., at p. 94, states the reasons with which I began in terms of convincing logic, and his reasoning, in my view, applies directly to, and governs, the present case.

The distinction between cases such as these and the common carrier cases is clearly stated by Lord Greene, M.R. in *Alderslade* v. *Hendon Laundry Ltd.* (1).

In my opinion, the principle of law governing the construction of contracts which was applied in these cases is applicable here. Under the provisions of section 19(*c*) of the *Exchequer Court Act* the Crown might be held liable for damage to property resulting from the negligence of its servants in the discharge of their duties, a liability quite distinct and not in any way dependent on the contractual obligation to maintain the shed during the currency of the lease. As stated by Pollock, the fact that the work was done pursuant to the lessor's obligations under the contract is merely irrelevant. The Crown reserved the right of access to the property by the terms of the lease and would equally be liable for the negligence of its servants in exercising this right in the course of their duties if damage

(1) [1945] 1 All E.R. 244.

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to property resulted. Yet, if the argument for the Crown be accepted, there would be no liability for such damage by virtue of paragraph 7 or for any other damage caused in any other manner by servants of the Crown while acting within the scope of their duties or employment. Under the contract to maintain the shed, which I think is properly to be construed as a covenant to keep the demised premises in a fit state of repair, the Crown might be held liable in damages if, by way of illustration, the foundation of the shed gave way, due to lack of repair, causing the collapse of the building and injuring goods of the plaintiff on the premises, or if, assuming there were a metal roof, this was allowed to be eaten away by rust permitting the entrance of rain and damaging the respondent's property. Whether notice of the lack of repair to be given by the lessee would or would not be a necessary element in establishing the Crown's liability for any such damage appears to me to be a matter of indifference. Such liability would be in contract and not in tort. That the legal liability to repair was imposed by contract rather than by the common law or by the terms of Art. 1675 of the Civil Code, as in the case of the carrier, does not appear to me to differentiate the position of the appellant and I see no logical reason for making any distinction. The liability of the Crown, as in the case of the common carrier was not confined to that for the negligence of its servants: there was here, as with the carrier, a double liability and, in my opinion, the liability in negligence not having been expressly or by necessary implication excluded remains.

Under paragraph 17 of the lease the respondent agreed to:

> indemnify and save harmless the lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

The work being done by the servants of the Crown was done "by virtue hereof" in that it was in the discharge of the obligation to maintain the shed. I am unable to see how there could be any liability on the part of the Crown towards third persons for anything done falling within the ambit of this clause, other than for the negli-

gence of the Crown's officers or servants within subsection (*c*) of section 19 of the *Exchequer Court Act*. This being so, these general words must be construed as obligating the respondent to indemnify the Crown against the claims of the other respondents, all of which are founded upon negligence of that nature. Harsh as it may seem that the respondent should be found liable to indemnify the Crown against the consequences of the negligence of its own servants, I see no escape from the conclusion that the principle above referred to applies here.

In the result the appeal of the Crown against the judgment in favour of the respondent, Canada Steamship Lines, should be dismissed with costs and the appeal upon the third party proceedings in the cases of H. J. Heinz Company of Canada, Ltd., Cunningham and Wells Ltd., Raymond Copping, W. H. Taylor, Ltd., and Canada and Dominion Sugar Co. Ltd. allowed with costs.

CARTWRIGHT J.:—This appeal raises questions as to the true construction of two paragraphs in a lease dated the 18th day of November 1940, whereby His Majesty the King leased to Canada Steamship Lines Limited certain lands on the west side of St. Gabriel Basin No. 1 of the Lachine Canal in the city of Montreal together with the right to "occupy, use and enjoy, for the purpose of receiving and storing therein freight and goods loaded onto and/or unloaded from vessels owned and operated by the Lessee, the whole of St. Gabriel Shed No. 1, so called (hereinafter referred to as "the said shed") . . . erected on the said land". The term of the lease was twelve years from the 1st of May 1940 and the rent reserved was $12,866.62 per annum.

Paragraph 8 of the lease provided that the Lessor would, at all times during the currency of the Lease, at his own cost and expense, maintain the said shed.

A few days before the 5th day of May 1944, the Respondent, Canada Steamship Lines Limited, requested the Appellant to make certain repairs to the doors of the shed in question. On the 5th day of May 1944, while the employees of the Appellant were at work repairing the said doors, for which purpose they were using an oxy-acetylene torch, a fire was caused which totally destroyed

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the shed and all of its contents, including large quantities of goods owned respectively by Canada Steamship Lines Limited and the other Respondents.

Canada Steamship Lines Limited and the other Respondents presented Petitions of Right seeking payment from the Appellant for the loss of their goods, on the ground that such loss had been caused by the negligence of the servants of the Appellant while acting within the scope of their employment. The Appellant by his defence denied negligence and pleaded that in any event he was relieved from liability by the terms of paragraph 7 of the lease. In each action other than that instituted by Canada Steamship Lines Limited steps were taken by the Appellant to add Canada Steamship Lines Limited as a third party from which indemnity was claimed, pursuant to paragraph 17 of the lease, as to any amounts which the Appellant might be ordered to pay to the Suppliants in such proceedings.

The petitions were tried together before Angers, J. (1) who gave judgment in favour of Canada Steamship Lines Limited and all the other Suppliants against the Appellant and dismissed the Appellant's claims for indemnity. From these judgments His Majesty appealed to this Court.

The appeals as against the Respondents, other than Canada Steamship Lines Limited, were all dismissed at the hearing, the Court being unanimously of opinion that the fire was caused by the negligence of the employees of the Appellant while acting in the scope of their employment. There remain for determination the appeal against the judgment awarded to Canada Steamship Lines Limited and the appeals against the dismissal of the claims for indemnity.

Counsel were in agreement that the matters in question are governed by the law of Quebec.

The learned trial Judge was of opinion that the conduct of the employees of the appellant which caused the fire amounted not merely to negligence but to faute lourde. I am in agreement with what I understand to be the opinion of all the other members of the Court that the conduct of such employees, while clearly negligent, did not amount to faute lourde. It therefore becomes unnecessary

(1) [1948] Ex. C.R. 635.

to consider the question, which was fully argued before us, as to whether, under the law of Quebec, a party can validly provide by contract that he shall not be liable for his own faute lourde or that of his employees.

The decision of this Court in *Glengoil Steamship Company* v. *Pilkington* (1) makes it clear that there is no rule of law in Quebec that renders invalid a stipulation in a contract that a party shall not be liable for the negligence of his employees.

This leaves for determination the question whether, properly construed, clauses 7 and 17 of the lease contemplate damage caused by the negligence of the employees of the Lessor. These clauses read as follows:—

7. That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.

17. That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

We were referred to the following articles of the Civil Code as laying down the general rules of construction which should be applied:—

1013. When the meaning of the parties in a contract is doubtful, their common intention must be determined by interpretation rather than by an adherence to the literal meaning of the words of the contract.

1018. All the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire act.

1019. In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation.

1020. However general the terms may be in which a contract is expressed, they extend only to the things concerning which it appears that the parties intended to contract.

In my view these rules of interpretation do not differ from the rules of construction which guide the Courts of common law. Counsel for the appellant submitted that the following provision in the lease should also be borne in mind when construing the paragraphs quoted above:—

AND FURTHER AGREED by and between the said parties hereto that these Presents are made and executed upon and subject to the

(1) (1897) 28 S.C.R. 146.

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covenants, provisoes, conditions and reservations hereinafter set forth and contained, and that the same and every of them, representing and expressing the exact intention of the parties, are to be strictly observed, performed and complied with namely:—

This clause seems to me to be an added reason for observing the rule stated by Lord Wensleydale in *Thellusson* v. *Rendlesham* (1):

> In construing all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or to some repugnance, or to some inconsistency with the rest of the instrument, in which case the grammatical or ordinary sense of the words may be modified, so as to avoid that absurdity, repugnance, or inconsistency, but no farther.

Dealing first with paragraph 7 of the lease, it is clear that the claim of the Respondent, Canada Steamship Lines Limited against the Appellant is a claim for damage to goods in the said shed, and giving to the words used their ordinary and grammatical meaning, they are wide enough to bar the lessee's claim. The Respondent argues, however, that the line of cases commencing with *Phillips* v. *Clark* (2), and of which *Price & Company* v. *Union Lighterage Company* (3), *Rutter* v. *Palmer* (4), *Beaumont-Thomas* v. *Blue Star Line* (5) and *Alderslade* v. *Hendon Laundry Limited* (6) are examples, have established a rule that a clause of this nature shall be so construed as not to exempt from liability for damage caused by negligence unless either words are used expressly referring to negligence or the circumstances are such that the only possible liability for damage which could fall upon the party for whose benefit the clause is inserted is one arising from negligence.

The Respondent contends that while this rule has been formulated in England it is equally applicable to the construction of contracts governed by the law of Quebec. I do not find it necessary to decide whether this is so. I shall assume, without deciding, that the rule to be found in the line of cases referred to is applicable to the construction of the lease in question.

A careful consideration of all the cases to which Counsel made reference on this point has led me to the conclusion that the rule for which the Respondent contends is too widely stated. The rule had its origin in *Phillips* v. *Clark*

(1) (1858) 7 H.L. Cas. 429 at 51.
(2) (1857) 2 C.B. (N.S.) 156.
(3) [1904] 1 K.B. 412.
(4) [1922] 2 K.B. 87.
(5) [1939] 3 All E.R. 127.
(6) [1945] 1 K.B. 189.

cited above. The words of exemption there relied on were "Not accountable for leakage or breakage". Cockburn, C.J. points out that the Defendant being a carrier would be responsible for leakage or breakage occurring without any negligence on his part and that the words used were susceptible of the construction that this absolute liability was all that the parties intended to exclude. He continues at page 162:—

> The contract being susceptible of two constructions, I think we are bound to put that construction upon it which is the more consonant to reason and common sense; and to hold that it was only intended to exempt him from his ordinary common law liability, and not from responsibility for damage resulting from negligence.

Crowder, J. at page 163 deals with the matter as follows:

> The construction put upon the contract by my Lord, is evidently the most just and reasonable,—as absolving the defendant from liability for leakage and breakage the result of mere accident, where no blame was imputable to the master, and for which but for the stipulation in question he would still have been liable. It clearly was not intended to relieve him from responsibility for leakage or breakage the result of his negligence and want of care. The construction contended for on the part of the defendant would be giving the contract a sense not necessarily involved in the words as they stand.

In my opinion the test to be applied is found in this passage. If there is a potential, and indeed probable, source of liability to which a party is exposed although he be free from any blame, then the meaning of general words of exemption may be restricted to liability arising from such source. I see no good ground for holding, and I find nothing in the numerous authorities cited to us that appears to me to decide, that general words of exemption wide enough in their ordinary sense to cover every sort of liability should be held not to cover liability arising from negligence merely because some other equally blameworthy source of liability can be imagined. In the case at bar the source of possible liability other than negligence to which it is suggested paragraph 7 of the lease would apply is liability for damage to the goods in the shed resulting from a breach by the Appellant of the covenant to maintain the shed. It is said that goods might be damaged, for example by rain, as a result of the lessor failing, after due notice, to repair the roof of the shed and that as this is a ground of liability other than negligence upon which the words of paragraph 7 can operate they should be interpreted not to cover a claim for damage caused by negligence.

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Such a construction does not appear to me—to use the words of Cockburn C.J.—"consonant to reason and common sense". It would bring about the surprising result that a person who had covenanted to do work would escape liability for damage resulting from his failure or refusal to fulfil his covenant at all but would be liable for similar damage resulting from negligence of his employees in doing the work which he had agreed to do. It seems to me that to fail or refuse to perform a contractual obligation is at least as blameworthy as to be guilty of some negligent act or omission in the course of its performance.

The construction of paragraph 7 is, I think, aided by a consideration of paragraph 17. Counsel for the Respondent has not been able to suggest any damages for which the Lessor could be held liable to persons other than the lessee except damages caused by the negligence of the Lessor's servants. In my opinion the words of Section 17 are apt to describe the claims in respect of which the Appellant seeks indemnity in these proceedings. I think that such claims are based upon, occasioned by, or attributable to an action taken or thing done by virtue of the lease, that is the action or deed of the Lessor's employees in repairing the doors of the shed pursuant to the obligation so to do cast upon the Lessor by paragraph 8 of the lease.

Under the Civil Code, Section 1018, quoted above, as under the common law, the lease must be construed as a whole. I can find no reason in the words of the document, and I can think of none, why the parties should agree that the lessee must indemnify the lessor against claims of third parties arising against the lessor by reason of the negligence of his servants while the lessee should remain free to claim damages from the lessor for the loss of its own goods from the same cause. I think the construction to be gathered from the whole document and which is the more consonant to reason and common sense is that the intention of the parties was that all the risks of liability for damages to goods on the demised premises was to fall upon the Lessee.

For the above reasons it is my opinion that the appeals should be disposed of as proposed by my Lord, the Chief Justice.

FAUTEUX J.:—By indenture of lease, His Majesty the King, therein represented by the Minister of Transport, leased to Canada Steamship Lines, the respondent hereinafter referred to as C.S.L., St. Gabriel shed No. 1 on the waterfront, in Montreal, for the purpose of receiving and storing freight and goods loaded into or unloaded from vessels owned and operated by them. The lessee took possession and the occupation was continued at all times material to the present litigation.

On May 5, 1944, the employees of the Department of Transport, pursuant to a request of the lessee and in compliance with the lessor's obligation under the lease, were effecting certain minor repairs to the premises, including doors of the shed. Upon removal of the hinges of a door, it was found necessary to enlarge one of the holes in the steel upright to which the hinges were attached. Before proceeding into such a work of short duration with an oxy-acetylene cutting torch, certain precautions against the danger of fire relating to such operation were taken. To contain and deflect towards the floor any sparks coming from the torch, a wooden plank was wired against the flanges of the steel H beam, inside the shed in a position extending from the roof to within three feet of the cement floor, and an employee with a pail of water was stationed inside to watch for sparks. In the result, a spark fell on some bales of cotton waste and almost immediately the shed was aflame, with the result that it, and its contents, were nearly completely destroyed.

The petition of right of C.S.L., lessee of the premises, as well as petitions of five other suppliants—also respondents herein,—having stored property therein, were presented, all claiming damages and alleging fault and negligence of the employees and servants of the lessor while acting in the performance of the work for which they were employed.

In all the cases, the appellant entered a plea denying negligence. Further and with respect to the petition of right of C.S.L., the appellant pleaded that any rights the former might have were barred by clause 7 of the lease, which excludes claims of the lessee against the lessor for damages. With respect to the petitions of right of the five

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other suppliants, the appellant filed third party notices directed to C.S.L. claiming, on the basis of clause 17 of the lease, a right to be indemnified and saved harmless by the lessee against any liability.

On the evidence common to all cases, which were heard together, the trial judge (1) found that the fire was due to "faute lourde" of the employees of the Department of Transport. Further deciding as a matter of law that one cannot stipulate against the consequences of such fault, the trial judge, by separate judgments, dismissed the contentions of the appellant based on clauses 7 and 17.

The present appeal is against all these judgments. This case is governed by ss. (*c*) of section 19 of the *Exchequer Court Act* R.S.C. 1927 ch. 34 as amended, worded as follows:

> The Exchequer Court shall have the exclusive jurisdiction to hear and determine the following matters:—
>
> (*a*) . . .
>
> (*b*) . . .
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or property resulting from negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

The above statutory provision imposes a liability on the Crown in respect of claims arising *ex delicto* and such liability is to be determined by the laws of the province where the cause of action arose. *The Queen* v. *Filion* (2); *The Queen* v. *Grenier* (3); *The King* v. *Armstrong* (4); *The King* v. *Desrosiers* (5).

The evidence adduced clearly establishes that the fact alleged in support of these claims for tort is, as required by the law of the province of Quebec to be successful, illicit, imputable to the appellant, and tortious. Negligence, even if not to the extent found by the trial judge, is proven. The measure of damages suffered in each case is covered by admissions of the appellant. And it is conceded that the damage was caused by servants of the Crown while acting within the scope of their duties and employment.

Were there nothing else to be considered in the litigation, the cases of all the suppliants would then be successfully

(1) [1948] Ex. C.R. 635.
(2) (1894) 24 S.C.R. 482.
(3) (1899) 30 S.C.R. 42.
(4) (1908) 40 S.C.R. 229.
(5) (1908) 41 S.C.R. 71.

established against the appellant on the basis of the above principles of law and findings of fact. And this is the result so far as the cases of the five suppliants are concerned, for their claim rests exclusively on the above legal principles. It was consequently indicated, at the hearing of the argument, that the judgments of the trial judge with respect to them would be maintained.

With respect to the appellant and the respondent, C.S.L., there is to be considered, in addition to the principles of law of general application, the agreement between them, —more especially clauses 7 and 17,—which, within limits of validity and applicability in the matter, constitutes the law of the parties.

As to the validity of a stipulation excluding liability for negligence of one's own employees, there cannot be any doubt. *The Glengoil Steamship Company* v. *Pilkington* (1); *Vipond v. Furness, Withy and Company* (2); *Canadian National Railway Company* v. *La Cité de Montréal* (3); *Canadian Northern Quebec Railway Company* v. *Argenteuil Lumber Company* (4). There is no need here to go further and deal with the validity of such clause with respect to a fault amounting to "faute lourde". On this I say nothing.

But the real point to be considered is the applicability of clauses 7 and 17 in order to decide whether the provisions of the former constitute here a bar to the claim of C.S.L. against the appellant and whether those of the latter clause oblige C.S.L. to indemnify and save harmless the appellant with respect to the judgments obtained by the five other suppliants.

It is convenient here to reproduce the text of clause 7:—

7. That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.

The language of clause 7 is adequate to bar effectively "any claim or demand" of the lessee against the lessor for any "detriment, damage or injury",—to things therein enumerated,—resulting from the breach of one or several obligations created by the sole will of the parties under

(1) (1897) 28 S.C.R. 146.
(2) (1916) 54 S.C.R. 521.
(3) (1927) Q.R. 43 K.B. 409.
(4) (1918) Q.R. 28 K.B. 408.

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the contract. And it is not difficult to conceive cases where such breaches would bring the clause into full operation. Thus, damage is done by rain to goods placed in the shed, consequential upon the failure of the lessor to repair the roof of the same. Without this clause of non-responsibility, the lessee, owner of the goods damaged, would have a right of action against the lessor. Equally, if the goods damaged belong to a third party, the lessee would have a right of action in warranty against the lessor, if this third party should sue him for damages. But resting exclusively on the contractual obligation of the lessor to repair, these rights of action of the lessee against the lessor are, in the present instance, nullified equally by another contractual provision as to non-responsibility.

The contract, however, is not the only source of obligation. For such "detriment, damage or injury" may equally result from the breach of the legal duty, imposed upon all, not to cause damage to others. Such legal duty pre-exists and persists quite independently of the contract. The right of action resulting from its breach is *prima facie* maintained. It is the law. If a party to a contract wants to make an exception to a legal principle of general application and be relieved of the obligation to compensate for damage arising out of his employees' negligence, he must so stipulate in the contract. The maxim "Reus in exipiendo fit actor" applies. The burden is on him to show that the exception was made and is applicable to the case under consideration. And the stipulation will be strictly interpreted. (Mazeaud, Traité de la responsabilité civile, délictuelle et contractuelle, tome 3, page 724, no 2578). In brief, the intention of the parties must be manifested. The law exacts no more. Such intention may at times be implied in a relevant contractual obligation. Thus if the covenant is to make repairs in the most prudent manner, the legal duty is absorbed in the contractual obligation. Savatier (Traité de la responsabilité civile en droit français, tome 1, no 153):

. . . il n'en est pas moins vrai que le contrat peut être construit de telle manière qu'il ne laisse pas concevoir, dans certains compartiments, l'usage d'une responsabilité délictuelle, parce qu'il l'absorberait dans la responsabilité contractuelle.

The clause of non-responsibility for damages would then embrace damages *ex contractu* and *ex delicto* as well.

The covenant to repair, agreed by the parties herein is worded as follows:

> 8. That the Lessor will, at all times during the currency of this Lease, at his own cost and expense, maintain the said shed, exclusive of the said platform and the said canopy.

The appellant's contention is that the legal duty not to do damage to others is absorbed in this clause, and he then concludes that the responsibility flowing from the breach of this all embracing covenant is thus excluded by clause 7. He rests his contention on the following test given by Savatier, a leading writer on the matter (Traité de la responsabilité civile en droit français, tome 1, no 153):

> . . . le simple devoir de ne pas nuire à autrui, bien qu'il puisse, en l'absence de tout contrat, fonder une responsabilité délictuelle, est recouvert et absorbé par le contrat, toutes les fois que la cause du dommage réside exclusivement dans l'inexécution d'un engagement contractuel.

I am unable, I must say, to accede to the views of the appellant, that in this case the "cause of damage is to be found *exclusively* in the inexecution of the obligation" to repair. On the contrary, the damage was caused by an act of negligence arising while the contractual obligation to repair was being,—and in point of fact was nearly completely,—executed. An opposite view I would have, had damage in this case been done to goods by rain as a result of the default of the lessor to repair the roof of the shed.

Can this intention to exclude responsibility for damage *ex delicto* be found in the very clause of non-responsibility, clause 7? This clause is clearly comprehensive with respect to the varieties of damages, "detriment, damage or injury", and definite as to things covered by it. And for this reason, one could reasonably gather from its wording that the minds of the parties were directed much more to the result of a breach of obligation than to the nature of the breached obligation itself. In the latter respect, there is nothing said except what could be inferred from the opening words "any claim or demand". These words are strictly general. Had the parties intended to cover only damages *ex contractu* or only damages *ex delicto* or both kinds of damages, the expressions used "any claim or demand" would in each of these three alternatives have been apt to convey any

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one of such different intentions. The same words are equally capable of referring to the procedural nature of the recourse: principal action or action in warranty. Isolated from the contract, I could not, for the reasons above indicated, obtain from the reading of this clause, the satisfaction that the appellant has discharged the burden of showing that the parties definitely considered, in addition to the contractual obligation the legal duty existing beyond their contract and that they thus intended to exclude "claims or demands" arising out of the breach of such legal duty by the lessor's employees.

The meaning of the parties in clause 7 being open to question, their common intention must be ascertained by interpretation rather than by adhering to the literal meaning of the words of the clause. To that end, the following rule of the Civil Code may be resorted to.

1018. All clauses of the contract are interpreted the one by the other giving to each the meaning derived from the entire act.

It is particularly relevant to consider at first the allied provision: clause 17 of the contract:—

17. That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

This clause refers to claims and demands of third parties against the lessor for damages. There being no contractual relations between the former and the latter, such claims and demands for damages must, of necessity, be for damages *ex delicto*. Thus clause 17 affords manifest evidence that the minds of the parties were directed to other obligations than those flowing simply from the contract, that the legal duty not to do damage to others was considered and dealt with and this precisely in terms all embracing and thus consistent with the generality of the terms of clause 7 as they can be and are, in fact, interpreted by the appellant. The general intention and the will of the lessor to be effectively relieved of all responsibility in this respect as well as with respect to contractual obligations, cannot be

better manifested, implemented in a greater measure and in a more efficient manner than they are by the terms of clause 17.

The governing provision of the lease as to interpretation reads:

> AND FURTHER AGREED by and between the said parties hereto that these Presents are made and executed upon and subject to the covenants, provisoes, conditions and reservations hereinafter set forth and contained, and that the same and every of them, representing and expressing the exact intention of the parties, are to be strictly observed, performed and complied with namely:

Thus to obtain the lease, the lessee agreed, by clause 7, to waive all rights to any claim or demand for damages against the lessor. Moreover, and by clause 17, the lessee went further by assuming obligations which it did not have under the law and thus accepted such unpredictable and immeasurable risks.

In my view, clause 17 is not only adequate to maintain the third party notices directed to C.S.L. by the appellant, but, read with the above covenants, quite indicative that the parties really meant all that they said by the generality of the opening words of section 7 "any claims or demands". On the whole, I am satisfied that the lease was granted on the condition that all the risks relating to breaches of obligation, contractual and legal, were to be borne exclusively by the lessee.

For all these reasons, I concur in the conclusions reached by my Lord the Chief Justice as to the disposal of these appeals.

Appeals against C.S.L. allowed with costs.

Appeals against the other respondents dismissed with costs.

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Solicitors for Cunningham & Wells, for Copping and for Taylor Ltd.: *Bumbray & Carroll.*

Solicitors for Canada & Dominion Sugar Co.: *O'Brien, Stewart, Hall & Nolan.*