1924
*June 4.
*Oct. 14.

THE QUEBEC LIQUOR COMMISSION (DEFENDANT) ..... } APPELLANT;

AND

W. H. MOORE (PLAINTIFF) ..... RESPONDENT.

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

Negligence—Contract—Work ordered by owner of building to employees of contractor—Accident—Temporary control—Absence of warning as to possible danger—Liability of Quebec Liquor Commission for tort, Arts. 1053, 1054 C.C.—The Alcoholic Liquor Act (1921) (Q.) 11 Geo. V, c. 24.

The appellant was owner of a building used as a warehouse and had let through its manager A. a contract to H. for repairing the water spouts of the roof, including the erecting and demolition of the necessary scaffolding. The work being nearly done, A. notified directly some employees of H. then on the premises that the windows must be closed for the protection of the stores against a possible fall in temperature during some coming holidays. Although forbidden to do so except by the orders of their immediate employer, the employees of H. started to remove the scaffolding in order to fulfil the request of A. who had no knowledge of the above prohibition. The respondent while entering the building on business with the commission was injured through the fall of a plank and sued the appellant to recover damages.

Held, Idington J. dissenting, that the appellant was not liable.

Per Anglin and Mignault JJ.—Under the circumstances of this case the employees of H., in dismantling the scaffolding, did not pass under the temporary control of the appellant and the latter did not become their *patron momentané.* Idington and Duff JJ. *contra.*

Per Duff J.—Upon the facts the appellant would have been liable owing to its default in neglecting to give warning of a possible danger to wayfarers in the street and particularly to persons entering and leaving the premises on business with the commission; but

Per Duff J.—The Quebec Liquor Commission, being an instrumentality of the Crown in right of the province of Quebec, is not answerable in an action for a delict committed by its servants. Idington J. *contra* and Anglin and Mignault JJ. expressing no opinion.

Judgment of the Court of King's Bench (Q.R. 36 K.B. 494) reversed, Idington J. dissenting.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the trial judge, Duclos J., with a jury and maintaining the respondent's action for damages.

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*PRESENT:—Idington, Duff, Anglin, Mignault and Malouin JJ.

Reporter's Note.—Mr. Justice Malouin resigned before the date of the judgment.

(1) [1924] Q.R. 36 K.B. 494.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

Geoffrion K.C. and *De Serres K.C.* for the appellant.

Holden K.C. for the respondent.

IDINGTON *J.* (dissenting).—This appeal arises out of an action brought by the respondent against the appellant for damages suffered by reason of the negligence and improper conduct of the appellant's manager, and others employed by it in and about the building in Montreal wherein its business at said branch was being carried on, resulting in a plank falling upon the respondent.

The building needed some repairs for which the appellant let the contract to a firm, Hickey & Aubut, who sub-let the needed work of erecting the scaffolding necessary to enable the repairs to be done to a carpenter who was to do also the work of tearing it down, when the repairs were finished.

Aubut forbade any one to take it down without his instructions and never gave an order or assent thereto.

Notwithstanding all that, the appellant's managers induced, by their and others of appellant's employees' instructions, one Simard, a tinsmith working there, to take it down because the appellant's manager and his assistants wanted to shut out the cool air lest it should injure the liquor inside during some coming holidays.

Simard had no more right to do so than any one on the street requested by said manager, or others of appellant's employees, to do so.

Such improper conduct on the part of said manager, and others for whom appellant is responsible, it seems to have been surmised, may have been traceable to Aubut who was made a party defendant along with the appellant.

The respondent as a messenger in the service of an express company had occasion to go into the building to receive something in way of packages addressed by the appellant to customers, and pursued his errand there quite properly, and yet no one took the precaution to warn him against the possible danger of entering under such circumstances.

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A plank fell down on him from said scaffold as the result of Simard doing above part of what the said manager had requested.

The case was tried before Acting Chief Justice Martin with a jury.

There were a number of questions submitted to the jury who found in answer to the second question as follows:

> The answer to No. 2 is: We find the Quebec Liquor Commission at fault and solely responsible because of taking temporary control of the employees of Hickey & Aubut, and ordering them to close the windows necessitating the removal of some scaffolding, due to which the accident occurred and by reason of the negligence of the defendant, Quebec Liquor Commission, in handling the plank that caused the damage. Unanimous.

And to my mind there was ample evidence for such finding. Aubut was found in no way to blame. The jury rendered a verdict in favour of the respondent and assessed his damages at $8,121.25, for which the learned trial judge entered judgment.

From that the appellant appealed to the Court of King's Bench at Montreal.

That court unanimously, and I think quite correctly, dismissed the appeal with costs.

From that judgment this appeal is brought.

Three grounds are taken in the appellant's factum for holding that the appellant is not responsible, and are stated as follows:—

> 1. Because the accident occurred by the fault of a workman in the employ of the contractor to whom the appellant had entrusted certain works of repair and in the course of this work.
>
> 2. Because the workman who committed the fault never ceased to be under the control of his employer, the defendant Aubut, and to act for him and, particularly at the moment of the accident, he was not acting for the appellant and had not passed under its control.
>
> 3. No fact was proven establishing a contractual relation of such a nature that this workman could be held to have passed from the control of his employer to that of the appellant.

I respectfully submit that as the said workman, or assistants, had never been entrusted by the contractor with regard to the building or removing said scaffold, and never got the slightest right from any one excepting appellant's taking control by its manager and employees and unwarrantably directing its removal, these contentions are entirely without foundation in law or fact.

The appellant's agents pretended that in order to avoid injury to its goods it was deemed by them to be necessary

to have that done, the doing of which resulted in the accident in question, and took the necessary control without the necessary precaution.

It is possible that a proprietor as, for example, in case of fire, may be driven to such an exercise of authority to protect his property, but he cannot shift the incidental risks attendant thereon on to others.

The said factum proceeds to suggest some other things quite true, and some not so apparent, and indirectly thus to shelter the appellant from liability by reason of acting for the Crown.

I cannot see any pleading of the appellant setting up such a defence in law upon such facts as in question, and submit such a defence is not now open to it.

Moreover the appellant is incorporated by "The Alcoholic Liquor Act" for the express purpose of carrying on the business of buying and selling liquor and reaping a profit therefrom and doing all such things as are found necessary for the success of said business.

Section 12 of said Act of incorporation provides as follows:—

> 12. No member of the Commission may be prosecuted for doing or omitting to do any act in the performance of his duties as prescribed by this Act, unless by the Provincial Government.
>
> The Commission itself may be prosecuted only with the consent of the Attorney General.

I submit that whilst the first part of this section protects and is intended to protect from litigation those carrying on the business of the corporate respondent, the second part is given as substitute therefor and subject to only one condition, the consent of the Attorney-General.

That consent is indorsed on the declaration and signed by his assistant, Mr. Lanctot, whose authority to do so has not been questioned.

This form of procedure is clearly designed for the purpose of avoiding the circuitous necessities, adopted by many English Acts to give effect to the English Petition of Right in its manifold applications and needs of giving relief, has so long given rise to.

The Parliament of the Dominion with the like object in view constituted the Exchequer Court of Canada to try such like cases.

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And in the course of its administration that court has decided many cases which came to this court by way of appeal.

The jurisprudence that has arisen as the result thereof has not been uniformly consistent, or such as always to meet with my concurrence.

I might be permitted to refer to the authorities I cited in my dissenting judgment in the case of *Ryder* v. *The King* (1), and especially the quotation from the judgment of the late Chief Justice Strong, in the case of the *City of Quebec* v. *The Queen* (2).

I submit that the view of said Chief Justice that

> the Act (there in question) was intended to impose a liability and confer a jurisdiction by which a remedy for such liability might be administered

may well be taken of the said section 12, especially when read in light of the decision of the Judicial Committee of the Privy Council in the case he cites of *The Attorney-General of the Straits Settlement* v. *Wemyss* (3).

Then we have the decision of this court in the case of *The King* v. *Desrosiers* (4), unanimously holding that the law of Quebec where an accident happened on the Intercolonial Railway in that province, must be allowed full effect and govern the rights of the parties though the Intercolonial was a corporate company created by the Parliament of Canada and managed by those appointed by its Government, and the Exchequer Court had tried the case under petition of right provisions of the Act creating said court.

The judgment of the learned Chief Justice which was assented to by the then other members of the court, expressly held that all there in question had been decided in the case of *The King* v. *Armstrong* (5).

One of the points so treated was the fact that a tort was the basis of the action.

The mere suggestion in *Ryder* v. *The King* (6), and many other cases previously, that tort was the basis in fact on which the action founded seemed fatal by reason of the

(1) [1905] 36 Can. S.C.R. 462 at pp. 466 *et seq.*
(2) [1894] 24 Can. S.C.R. 420
(3) [1888] 13 App. Cas. 192.
(4) [1908] 41 Can. S.C.R. 71.
(5) [1908] 40 Can. S.C.R. 229.

maxim that " The King can do wrong ". I submit that the judgment in said case has been decisively overruled by these later decisions.

The very early case of *Lane* v. *Cotton* (1), holding that the Postmaster-General could not be held responsible for the torts of those under him, is the basis of the doctrine so long maintained. And that was followed in the late case of *Bainbridge* v. *The Postmaster-General* (2), although he had long before and meantime been created as such a corporation.

The modern commercial development of many branches of business carried on under the supervision of some Minister of State tended to impair the general recognition of the doctrine.

As already pointed out the Dominion Parliament passed an Act to remedy such a state of the law and that found its latest judicial interpretation in the cases I have just cited.

The article 1011 of the Quebec Code of Civil Procedure is much more comprehensive in regard to the liability of the Provincial Government than the said Dominion Act in expressly creating a liability, and though that article is followed by provisions indicating, as matter of procedure, that a formal petition should be first presented for leave, yet, by the jurisprudence of that province, unless objection is taken, the ordinary procedure as between private individuals cannot be objected to after trial and judgment.

That question of procedure is all, I submit, substituted by said section 12 of the Alcoholic Act quoted above.

And the whole basis of this appeal resolves itself, so far as procedure is or can be relied upon, into one with which this court has uniformly refused to interfere, and such appeals have accordingly been dismissed.

And in the case of *Graham et al* v. *His Majesty's Commissioners of Public Works and Building* (3), where, on the facts stated, it appeared that the respondents were (as here in question the appellant is) shewn to have been incorporated, it was held on appeal that the doctrine could not be longer observed as it had been.

(1) [1701] 1 Ld. Raymond 646; 12 Mod. 472.
(2) [1906] 1 K.B. 178.
(3) [1901] 2 K.B. 781.

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The action arose out of a contract between the parties plaintiffs and respondent, to build a post-office, and plaintiffs proceeded with the work, and whilst it was in progress the defendant respondent wrongfully determining and repudiating it was sued for damages.

Surely that was pretty close to this in its facts and principle, yet damages were held recoverable despite the talk about torts.

In that as in all other cases I have seen, if my memory serves me, the objection was taken by way of pleading or motion before trial.

I have not discovered a case where the defendant failed to move or plead the objection before the trial was finished, and yet had the temerity of appellant herein to remain silent until coming to this court.

The factum does not even state it in the three grounds taken, but merely incidentally in the course of the argument therein, though its counsel enlarged it somewhat in their argument before us yet failed to cite any Quebec case, or elsewhere, justifying the consideration of the point stated for the first time by said argument in the factum.

I cannot maintain such an appeal or entertain the contention.

Then subsidiarily as it is put in factum and argument, appellant complains of the damages allowed being excessive.

I can see no ground for departing herein from our usual practice of refusing to review the assessment of damages.

For the foregoing reasons I am of the opinion that this appeal should be dismissed with costs.

DUFF J.—Moore was a driver in the employ of the Canadian National Express Company, and on the afternoon of the 12th of April, 1922, he drove his wagon to the premises of the appellants to collect some parcels. He backed his wagon up to the delivery platform, and entered the premises, and after receiving his parcels, carried an armful across this platform to the rear of his wagon. As he was stooping down to place them in the wagon, he was struck by a heavy plank dropped from the top of the building, where workmen were employed in dismantling some scaffolding. His back was broken by the blow, he was totally incapacitated

for over a year, and suffers a very serious permanent disablement. The appellants were tenants of the premises.

In the month preceding the accident, March, 1922, the appellants' manager, Archambault, had let a contract to Hickey & Aubut for repairing the water spouts on the roof, including the erection and demolition of the necessary scaffolding. The contractors entrusted this latter part of the work to a sub-contractor, Ryan. On the 12th of April, the day of the accident, the work on the Commissioners street side of the building had been finished. As that day was Wednesday of Holy Week, and the warehouse would be closed from the ensuing Good Friday to Easter Monday, it was considered desirable that the scaffolding should be removed so that the windows, through which the joists of the scaffolding passed, might be closed, for the protection of the stores against a possible fall in temperature. Without going into details, it is sufficient to say that there was evidence warranting the jury in concluding that with Archambault's authority the roofers employed by Hickey & Aubut in executing the repairs were informed that the windows must be closed, and that it was quite well understood by all parties that this necessarily involved taking down the scaffolding. These workmen, the roofers, had nothing to do with the scaffolding, and indeed had been specifically instructed not to interfere with it Ryan, the sub-contractor having assumed all responsibility, both for its erection and its removal. Archambault having given orders direct to workmen in the employ of his contractor without communicating with the contractor, the jury, I think, in the circumstances, might properly find that these workmen, as they were directed to do something which by the orders of their immediate employer they were not permitted to do, would naturally assume that the orders were given by Archambault under his own responsibility: indeed, I think the proper inference is that that is precisely the view upon which they acted. In such circumstances the jury were entitled to find, as they did, that there was such an interference in the execution of the contract by Archambault as to make him and his principals responsible for the consequences; in other words, to constitute the negligent workmen the servants of the Commission for the time being. It

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was on this ground that the case proceeded at the trial. I think the case, in this aspect of it, was rightly left to the jury by Martin J., and that, subject to a question of law to be discussed, the verdict is sufficiently supported by the evidence.

But there is another ground upon which subject to the question of law I think it would have been improper for the Court of King's Bench to set aside the judgment of the trial judge. The operation of dismantling the scaffolding was one obviously attended with risk to wayfarers in the street below, and particularly to persons entering and leaving the premises of the Liquor Commission at its delivery platform. This fact is undisputed; indeed, it is in evidence that nearly an hour before Moore was injured, one of the employees of the Commission warned an automobile driver in the same employ to remove his automobile to the other side of the street. There is also evidence, uncontradicted, that another employee of the Commission sent a similar warning to another automobile driver. On the facts in evidence it seems undeniable that the risk, though real and patent to those aware of what was going on, was not necessarily perceptible by persons entering or leaving the premises of the Liquor Commission at the delivery platform without warning. In these circumstances, the duty of the Liquor Commission to warn persons who might be at the delivery platform on business with them, impliedly by their invitation, would seem to be a self-evident one. I should be sorry indeed to think that the scope of Art. 1053 C. C. could be so restricted as to exclude the responsibility of occupiers of business premises for failure to give warning of traps known by them to exist, exposing persons invited by them to enter the premises for the purposes of their business to injury in consequence thereof.

The Roman law recognized the responsibility of occupiers of property in respect of the condition of the property or acts done on the property constituting a public danger; wild animals kept near a public thoroughfare; beams placed in such a position as to endanger the travellers on a public way; things thrown from the premises, even by strangers. The absolute responsibility enforced in the *actio de dejectis et effusis* is not recognized in the modern law, but the com-

mon law recognizes the responsibility of the occupant for a dangerous condition exposing the travellers on an adjoining highway or persons on the frequented part of a neighbour's property to unreasonable risks, such as an unfenced excavation in close proximity to the line of the street or the line of the neighbour's property, as well as responsibility generally for works executed by an independent contractor when of such a character as in themselves to expose the public to risk of injury. It is not in every case that a person who creates a dangerous situation is at the common law responsible for injuries which ensue; as a rule trespassers take the risk of the situation as it is. But persons invited by the occupier in the ordinary course of business are entitled to assume that they will not encounter perils not apparent to persons exercising such care as in the circumstances would be reasonable; and the actual ignorance of the occupier is immaterial if he or his servants ought to have known of the danger. I am not suggesting that these rules of the common law should be regarded as furnishing the principle for the determination of a controversy governed by the law of Quebec, but the existence of such rules is certainly not a ground for assuming that the principle of them finds no analogy in the law of Quebec. In the present case, not only was the dangerous situation created at the request of the appellants, and for their profit; not only was it known to the appellants' servants; it was a situation imperiling the public, as well as persons invited by the Commission to their premises to do business with them. I have the greatest difficulty in assuming that Art. 1053 C. C. does not contemplate as an act of negligence involving fault an invitation to customers by a shopkeeper who is aware that on entering his shop they will, if not warned, be exposed to serious risk of grave injury, without a suspicion of the existence of it, and who presents this invitation without any warning as to the existence of the risk. I cannot but think that to state the proposition is sufficient.

The responsibility of a contractor not in exclusive occupation of the premises where he is executing his contract for a dangerous situation amounting to a trap, created by his employees, his responsibility, that is to say, to strangers visiting the premises on business, was recognized in *The*

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W. J. McGuire Co. v. *Bridger* (1) . One finds it difficult to distinguish between the position of the author of the trap and the responsibility of the author of the invitation, who is the occupant of the premises and knows of the trap and gives no warning of it. I have seen no express decision to this effect in the Quebec courts, but, as a great judge once said,

> the plainer a proposition, the harder it often is to find judicial authority for it;

and the principle seems to be recognized by La Cour de Cassation in D. 1879-1-254.

Responsibility on this principle is not a responsibility for the act of the workman who carelessly dropped the plank. It does not rest upon McCarthy's act or default. It rests upon the default of the Commission and the Commission's servants in their neglect to give warning; and would arise although the fall of the plank had been a mere accident involving no legal responsibility on the part of the workman or his immediate employers.

It is quite true that the jury was not asked to pass upon the negligence of the appellants under this head. On the facts in evidence, however, the respondent's claim, when presented in this way, cannot be said to have been met by any serious defence. The existence of the facts constituting the elements of responsibility is really not disputed, and I assume that the Commission would not desire in such a case as this to have a new trial with the vain object of investigating the obvious. In any case, assuming a legal responsibility of the Commission for the faults of its servants, the action could not be properly dismissed, in view of the evidence to which I have referred.

But a much more serious question is raised by the appellants now for the first time, and that is, whether the Commission is answerable in an action for a delict committed by its servants. That question may be conveniently considered in two ways: First, is the Liquor Commission, in the relevant sense, an organ of the Quebec Government? And, secondly, does the statute by which the Commission is constituted (11 Geo. V, c. 24), manifest a legislative intention that the commission shall be responsible for such delicts?

(1) [1914] 49 Can. S.C.R. 632.

That the Commission is an instrumentality of government is clear from the circumstances that the members of the Commission are appointed by the Governor in Council and are removable at pleasure (s. 6); that all property in the possession of or under the control of the Commission is expressly declared to be the property of the Crown; and that all moneys received by the Commission at the discretion of the Provincial Treasurer are remissible to him, and, on receipt by him, become part of the consolidated funds of the province (s. 18); that the Commission is accountable to the Treasurer in the manner and at the times indicated by the latter (s. 19). The Commission, moreover, exercises authority respecting the sale of liquor in the province, and infractions of the law dealing with that subject are prosecuted in the name of the Commission or of the municipality where the infraction occured. By s. 13, the employees of the Commission are declared to be public officers, and they are required to take the oath of public service as such.

The broad principle, of course, is that the liability of a body created by statute must be determined by the true interpretation of the statute. It is desirable, perhaps, to advert first of all to a discussion of the subject in *The Mersey Docks and Harbour Board Trustees* v. *Gibbs* (1). Mr. Justice Blackburn, delivering the opinion of the judges in that case, proceeded upon the principle stated by him in these words (p. 107):

> It is well observed by Mr. Justice Mellor in *Coe* v. *Wise* (2), of corporations like the present, formed for trading and other profitable purposes, that though such corporations may act without reward to themselves, yet in their very nature they are substitutions on a large scale for individual enterprise. And we think that in the absence of anything in the statutes (which create such corporations) showing a contrary intention in the legislature, the true rule of construction is, that the legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works.

An exception is recognized, however, in the judgment of Mr. Justice Blackburn, as well as in the speeches of the Lords in the case of public officers who are servants of the Government; that is to say, officers fulfilling a public duty, appointed directly by the Crown and acting as officers of

(1) [1864] L. R. 1 H.L. 93.

(2) [1864] 5 B. & S. 440; 4 New Rep. 352.

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the Crown. Such a public officer is not responsible for the acts of inferior servants or officials merely because the superior officer has the right of the selection and appointment, as well as the right of removal at pleasure. *Canterbury* v. *The Attorney-General* (1). It is now recognized also that there is nothing to prevent the Crown being served by a corporation, and nothing to prevent such a corporation claiming the same immunity as an individual. *Bainbridge* v. *The Postmaster General* (2), and *Roper* v. *The Commissioners of His Majesty's Works and Public Buildings* (3).

Much can certainly be said in favour of the view that by s. 9 of the Act there is implied authority to incur contractual responsibility in the ordinary way and, consequently, liability to suit for the enforcement of contracts entered into. But it does not follow that there is responsibilicts for delicts. *Roper* v. *The Commissioners of His Majesty's Works and Public Buildings* (4) at p. 52.

A judgment against the Commission, if it is to be effective, must be satisfied out of Crown funds; funds, that is to say, which are explicitly declared by the statute to be the funds of the Crown and which are under the control of the Provincial Treasurer. Responsibility of the Commission must, moreover, arise, if it arise at all, from the act of an employee who by the statute is explicitly declared to be a public servant. The responsibility, then, if it exists, is a responsibility of the Commission in its official capacity as manager of a branch of the Government business, and is a responsibility for a wrong committed by a subordinate public official. Such is not a class of cases contemplated by the judgment of Blackburn, J., or by the speeches of the Lords in *The Mersey Docks Case* (5). To affirm the responsibility of the Commission is in effect to affirm the responsibility of the Crown for a tort. Not only does the statute fail to disclose any expression of an intention that the Commission shall be subject to such a principle of responsibility, but the explicit affirmations as to the property in possession of the Commission being the property of

(1) [1842] 1 Ph. 306 at p. 324.
(2) [1906] 1 K.B. 178 at pp. 191-192.
(3) [1915] 1 K.B. 45.
(4) [1915] 1 K.B. 45 at p. 52.
(5) L.R. 1 H.L. 93.

the Crown, as to the accountability of the Commission to the Provincial Treasurer and the Provincial Treasurer's control over its funds, and especially the explicit declaration as to the status of the employees of the Commission as public officers, would appear to indicate with not much uncertainty an intention to the contrary.

The appeal should, in my opinion, be allowed and the action dismissed, but without costs.

ANGLIN J.—The plaintiff (respondent), a servant of the Canadian National Express Company, sues to recover damages for injuries sustained by him while calling for parcels at the appellant's warehouse through the fall of a plank in the course of removing a scaffolding erected in front of the building upon which it was having some repairs done by the firm of Hickey & Aubut. The plank fell through the negligence of one Simard, an employee of Hickey & Aubut, and the appellant has been held liable solely on the ground that it had taken temporary control of the workmen of Hickey & Aubut engaged on the building by ordering them to close certain windows, which necessitated removal of the scaffolding. With profound respect I am of the opinion that there was no evidence to warrant this finding of assumption of control.

Hickey & Aubut were independent contractors. It was a part of their contractual undertaking with the appellant to remove the scaffolding in question. The time for such removal had arrived. The defendant was entirely within its rights in insisting on the closing of the windows in its building and on having the scaffolding removed to permit of that being done. The only direction given by its officers was that the windows must be closed. There is nothing to indicate that in communicating that direction to the workmen of Hickey & Aubut who were on the premises the officers of the appellant were doing more than merely intimating to the representatives of that firm that it was called upon to carry out its contractual obligation. There is nothing to warrant an inference that they dealt with Hickey & Aubut's employees in anywise as persons over whom they had, or professed, or intended to exercise, any control. It was fully competent for those employees to

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decline to do anything towards removing the scaffolding until and unless instructed by their employers. That they understood that they were addressed as employees of, and representing, Hickey & Aubut, and not as persons asked to do something for and on behalf of the appellant commission, is indicated by the telephone communication they had with McGovern, Hickey & Aubut's superintendent, and by his abortive attempt to communicate with the sub-contractor Ryan, to whom Hickey & Aubut had entrusted the work of erecting and removing the scaffolding. The proper inference from the evidence, in my opinion, is that when Simard and his companions proceeded to remove the scaffolding they acted not as persons under the control of the defendant, but as employees of Hickey & Aubut doing what the latter were bound by their contract to do, or have done, and presumably because they conceived that they were acting in their employers' interest and that the urgency of the circumstances justified their disregarding the instructions not to do anything in connection with the scaffolding. It is trite law that, although a workman may act in direct contravention of his master's orders, the latter is not necessarily relieved from responsibilty for the consequence of his acts if done in the course of his employment. Moreover, it does not at all follow that if Hickey & Aubut were not liable, the appellant must be so. Under the circumstances Simard alone may be answerable for his negligent act. But, in any event, I can discover nothing in the record to support the finding that Simard and his associates, who were on the building as employees of Hickey & Aubut, in handling the scaffolding passed under the control of the appellant so that it became their *patron momentané*.

Other possible bases of liability were suggested in argument and may be sufficiently covered by facts alleged in the declaration. But they were not submitted to the jury and the plaintiff has not secured a finding upon them.

The appeal, in my opinion, must be allowed and the action against the appellant dismissed—with costs throughout, if insisted upon.

MIGNAULT J.—Bien qu'en principe on ne soit responsable que de sa propre faute, dans quelques cas la loi veut que

l'on réponde de la faute d'autrui, et c'est par sa volonté expresse que les maîtres et commettants sont responsables du dommage causé par leurs domestiques et ouvriers dans l'exécution des fonctions auxquelles ces derniers sont employés (art. 1054 C.C.). Cette responsabilité a pour motif d'abord le choix du préposé et ensuite et surtout l'autorité et le droit de surveillance que le maître a sur lui. D'une manière générale, elle pèse sur le patron, mais si un tiers prend momentanément la direction du préposé, soit en vertu d'une entente avec le patron, soit par sa propre ingérence dans la conduite d'une entreprise, il devient responsable de la faute du préposé tout comme s'il en était le patron. C'est la distinction entre le *patron habituel* et le *patron momentané* qui souvent permet au patron habituel d'échapper à toute responsabilité, comme dans la cause de *The Central Vermont Railway Company* v. *Bain* (1). Voy. aussi Sirey, 1923-1-115, et la note.

L'appelante, The Quebec Liquor Commission, avait loué pour les fins de son commerce un immeuble ayant front sur la rue des Commissaires et sur la rue Saint-Paul en la cité de Montréal. Elle voulait faire faire certaines réparations à la toiture de cet immeuble; et, ayant demandé des soumissions pour les travaux, elle accepta celle du nommé Aubut, entrepreneur plombier et ferblantier, faisant affaires sous la raison de Hickey et Aubut, lequel s'engagea à faire les travaux pour la somme de $450. La soumission disait:

> In order to carry out this work, it will be necessary to erect scaffolding which is included in this tender.

Aubut s'arrangea avec un autre entrepreneur, le nommé Ryan, pour la confection des échafaudages sur paiement de $120, ce qui comprenait, dit Ryan, leur démolition, mais ce sous-contrat ne paraît pas avoir été à la connaissance de l'appelante. Ryan posa l'échafaudage sur le côté de la rue des Commissaires et il devait l'enlever de là quand les travaux y seraient terminés pour l'installer sur le côté de la rue Saint-Paul.

Les travaux se faisaient au mois d'avril 1922, dans la semaine précédant Pâques, et la partie des travaux sur le front de la rue des Commissaires se trouvait terminée le 12 avril, le mercredi de la semaine sainte. Comme l'édifice,

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qui n'était pas chauffé, devait être fermé le vendredi-saint et le lundi de Pâques, les employés de l'appelante, pour prévenir tout dommage à leurs vins par le froid, demandèrent aux ouvriers d'Aubut de fermer les fenêtres. Pour cela, vu que les poutres sur lesquelles l'échafaudage s'appuyait entraient dans l'étage supérieur par les fenêtres, il fallait que l'échafaudage fût démoli, et les ouvriers d'Aubut y procédèrent. Pendant la démolition, l'un des ouvriers laissa tomber une planche qui blessa grièvement l'intimé, et celui-ci a poursuivi la Commission appelante ainsi qu'Aubut, les tenant conjointement et solidairement responsables des dommages qu'il avait éprouvés.

Par sa déclaration, l'intimé fait reposer la responsabilité d'Aubut sur le fait qu'il était le patron de l'ouvrier négligent et celle de la Commission des liqueurs sur le motif qu'elle était, dit-il, propriétaire de l'édifice et que la planche qui le frappa était sous sa garde. Au procès, cependant, cela est évident par les instructions du juge au jury, c'est la responsabilité du patron pour la faute de son préposé que l'intimé a invoquée, et c'est comme patron momentané que le jury a répondu que l'appelante était responsable de l'accident, alors qu'il a déchargé le patron habituel, Aubut, de toute responsabilité.

Je vais citer textuellement la réponse du jury à la deuxième question qui demandait si l'accident était dû à la faute de l'un ou de l'autre des défendeurs ou de tous les deux. Le jury répond:

> The answer to no. 2 is: we find the Quebec Liquor Commission at fault and solely responsible because of taking temporary control of the employees of Hickey & Aubut and ordering them to close the windows necessitating the removal of some scaffolding due to which the accident occurred and by reason of the negligence of the defendant Quebec Liquor Commission in handling the plank that caused the damage. Unanimous.

Il n'y a aucune preuve de négligence de la part de la Commission ni de ses employés et elle ne peut être tenue responsable de l'accident que si elle s'est constituée le patron momentané des ouvriers d'Aubut selon la doctrine exposée plus haut.

Tout ce qui est prouvé contre l'appelante, c'est qu'elle a demandé, avec insistance même, que les fenêtres fussent fermées, ce qui, il est vrai, nécessitait l'enlèvement des poutres qu'on avait placées dans les fenêtres; elle n'a pas pris la

direction des travaux de démolition, et n'avait aucun droit de donner des ordres aux ouvriers quant à l'exécution des travaux. Du reste, nous avons vu qu'Aubut avait assumé, dans son contrat avec l'appelante, l'obligation de construire l'échafaudage. Quand l'ouvrage était terminé, et il l'était sur la rue des Commissaires, l'appelante pouvait exiger qu'Aubut enlevât cet échafaudage, et elle n'avait pas d'affaire à Ryan dont le sous-contrat ne lui avait pas été dénoncé. Dans les relations entre l'appelante et Aubut, l'enlèvement des échafaudages était l'obligation contractuelle de ce dernier, et l'appelante n'aurait pas engagé sa responsabilité en l'exigeant des ouvriers qui représentaient l'entrepreneur.

D'autre part, Aubut étant un entrepreneur indépendant, et l'appelante n'ayant pas la direction des travaux, celle-ci n'est pas responsable de la faute d'Aubut ou de ses ouvriers (Carpentier et du Saint, Répertoire, Vo. Responsabilité civile, nº 593 et suiv.) On objecte qu'Aubut avait défendu à ses hommes de toucher à l'échafaudage, mais il n'est pas en preuve que cette défense fût à la connaissance de l'appelante, et on ne peut dire, comme l'un des honorables juges de la cour d'appel paraît l'avoir cru, que l'appelante ait induit les ouvriers à manquer à leur devoir envers leur patron.

Posant donc la question comme elle l'a été au procès, je ne vois rien dans la preuve qui pût justifier le jury à dire que l'appelante s'est constituée le patron momentané des ouvriers d'Aubut, ou qu'elle en a pris la direction et le contrôle. C'est comme préposés de l'entrepreneur que ces ouvriers ont démoli l'échafaudage, et Aubut ne pouvait opposer à l'intimé la défense qu'il avait faite à ses ouvriers d'y toucher. Cette cause ne ressemble en rien à la cause de *The Central Vermont Railway Company* v. *Bain* (1), où par une convention expresse entre deux compagnies de chemins de fer les employés de l'une des compagnies devenaient sujets aux ordres de l'autre dès qu'ils entraient sur la ligne de celle-ci. C'est cette circonstance que le tiers acquiert le droit de donner des ordres au préposé d'un patron, et qu'il a, lors de l'accident, une autorité exclusive

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sur lui, qui déplace la responsabilité du patron habituel et crée celle du patron momentané (Sirey, 1903-1-104). Il n'y a rien de tel dans l'espèce.

J'ajoute que si le jugement était maintenu il deviendrait très dangereux pour un propriétaire d'adresser une demande aux ouvriers de son entrepreneur, même si, comme dans l'espèce, cette demande consistait à exiger l'accomplissement des obligations de l'entrepreneur.

Il est malheureux que l'intimé n'ait pas appelé de la partie du jugement qui a renvoyé son action quant à l'entrepreneur Aubut, car celui-ci seul devait être condamné à l'indemniser. Avec beaucoup de déférence pour les honorables juges de la cour d'appel, je suis d'opinion que le verdict ne peut être soutenu. Il me paraît clair que les jurés n'ont pas compris ce qui, en droit, fait déplacer la responsabilité du patron habituel et crée celle du patron momentané.

Je suis donc d'avis d'accorder l'appel et de renvoyer l'action de l'intimé avec dépens de toutes les cours si l'appelante veut les exiger de l'intimé. Je n'exprime aucune opinion sur la prétention de l'appelante qu'à raison des dispositions de la loi qui la régit elle n'est pas responsable de la faute de ses employés.

Appeal allowed.

Solicitor for the appellant: *Jules Desmarais.*

Solicitors for the respondent: *Meredith, Holden, Hague, Shaughnessy & Heward.*