GILLESPIE GRAIN COMPANY LIMITED (DEFENDANT) ..... APPELLANT;

1934

*Oct. 9, 10.
*Nov. 20.

AND

ALBINA KUPROSKI (PLAINTIFF)..... RESPONDENT;

AND

NORTH STAR OIL LIMITED, R. L. M. HART, GEORGE COLBY AND ALEX WILKIE (DEFENDANTS).

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Negligence—Master and servant—Motor vehicles—Servant disobeying orders in allowing another person to drive car—Duty of servant to keep proper look-out and exercise control over person driving for him—Collision—Liability of master—Quantum of damages.

The respondent's action arose out of a collision between two motor vehicles on a public highway running easterly from the city of Edmonton through Mundare and Vegreville. The collision occurred about five and one-half miles west of Mundare at a place distant about 72 feet from the common crest of an incline of the highway going westerly and a shorter and steeper incline going easterly. A spreader had gone over the road sometime before the collision and had pushed considerable loose gravel to the northerly half of the road. Apparently both eastbound and westbound traffic had been using the southerly half of the road considerably, and on this half there were two well defined wheel tracks, the southerly one of which was 2½ or 3 feet from the southerly edge of the travelled part of the highway. The appellant company had in its employ as driver the defendant Colby. Sometime before the day of the collision, Colby had, contrary to the instructions of his employer, arranged with the defendant Wilkie, a licensed driver of many years experience and of good record, to come on the truck with him and to help by occasional driving and other work, Colby paying Wilkie from time to time small sums for these services. Both Colby and Wilkie drove alternately from Edmonton, through Mundare, to Vegreville and back to Mundare; and Wilkie drove westerly towards Edmonton after leaving Mundare, the wife of Wilkie also occupying the driving seat. As the truck came towards the incline on which the collision occurred, it was proceeding on the southerly half of the road in the wheel tracks, and after passing a horse drawn vehicle, continued up the hill in the southerly wheel tracks. Wilkie testified that, when his truck was approximately 65 feet from the place of the collision, he saw an eastbound car coming very fast and decided to swing the wheels towards the north ditch and had the right front wheel at the north edge of the road and the truck pointing northwesterly when it was struck at the left front by the eastbound motor vehicle which

*PRESENT:—Duff C.J. and Cannon, Crocket and Hughes JJ. and Maclean J. *ad hoc*.

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was heading northeasterly and out of control. Colby, in his evidence, stated that it was only when Wilkie pulled the truck towards the ditch at the north side that he, Colby, had the first intimation that a motor vehicle was approaching from the west and that he then shouted to Wilkie to "look out." The eastbound car was owned by the defendant North Star Oil Company and driven by the defendant Hart; in it was one Kuproski as a passenger, who was killed by the force of the collision. The action was brought by the widow of Kuproski against both employers and drivers and against Colby as employee in charge. The trial judge gave judgment against all the defendants in favour of the respondent and her three children for a total sum of $24,100, which judgment was affirmed by the Appellate Division. The appellant company was the only defendant who appealed to this Court.

Held, affirming the judgment of the Appellate Division ([1934] 2 W.W.R. 7), that the appellant company was liable. The defendant Colby, in his capacity of employee of the appellant, was present in the front seat of the cab of the motor truck while the defendant Wilkie was driving. It was within the scope of his employment and it was his plain duty to see that the truck was driven with reasonable care; to that end to keep a proper look out and to exercise such control as might be necessary for the purpose of preventing mistakes or faults on the part of Wilkie. His failure to do so constituted negligence in his capacity of servant of the appellant, negligence for which the appellant company is therefore responsible.

Per Cannon and Hughes JJ. and Maclean J. *ad hoc.*—As to the contention of the appellant that, assuming there was negligence on the part of Wilkie, it should have been held that Colby's act in permitting Wilkie to drive was outside the scope of Colby's employment, an unauthorized act to effect a purpose of Colby for which the appellant employer was not liable, *held* that Colby was in charge and in legal control of the truck although the actual driving had been temporarily turned over to Wilkie, and that Colby continued to have, within the scope of his employment, a duty to keep a proper look out and a duty to see that the truck was in the proper side of the road, considering the rights of other traffic; Colby, when he gave the actual driving to Wilkie, did not divest himself of the above duties, which were not outside the scope of his authority merely because it was outside the scope of his authority to permit Wilkie to drive the motor truck.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming the judgment of the trial judge, Ewing J. and maintaining the respondent's action for damages.

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

(1) [1934] 2 W.W.R. 7.

Thomas N. Phelan K.C. and *Sydney Wood* for the appellant.

N. D. Maclean K.C. for the respondent Kuproski.

A. M. Sinclair K.C. for the North Star Oil Company.

The judgment of Duff C.J. and Crocket J. was delivered by

DUFF C.J.—I concur with my brother Hughes. I prefer to rest my concurrence on the ground upon which Mr. Maclean based his argument on behalf of the respondent Albina Kuproski.

Colby was present in the front seat of the cab of the motor truck while Wilkie was driving. He was there in his capacity of employee of the appellant. It was within the scope of his employment and it was his plain duty to see that the truck was driven with reasonable care; to that end to keep a proper look-out and to exercise such control as might be necessary for the purpose of preventing mistakes or faults on the part of Wilkie. His failure to do so constituted negligence in his capacity of servant of the appellant; negligence for which it is, therefore, responsible. That he failed to keep a look-out, that he failed to exercise anything like proper control over the driving is plain from his own evidence, and it was, moreover, so found by Mr. Justice Ewing, the trial judge; who also found in effect that this negligence was a direct cause of the collision.

I quote textually from the judgment of the learned judge:

> In the case at bar Colby not only permitted Wilkie to drive but he sat in the front seat of the cab with Wilkie and Mrs. Wilkie without making any effort to see that Wilkie drove properly. Wilkie approached the crest of the hill on the wrong side of the road, but Colby apparently not only did not interfere but he did not even keep any lookout to see that driving in this manner did not result in a collision. His own evidence is that he did not see the approaching car until the impact owing to the fact that he was looking at Mrs. Wilkie and the driver. Had Colby been looking he could have seen the approaching car in time to have so directed Wilkie that the collision would have been avoided.

This finding, with which the Appellate Division concurred, and with which I fully agree, is conclusive upon the issue in dispute between the appellant and the respondent Albina Kuproski.

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Duff C.J.

The following observations by Lord Justice Pickford in the course of his judgment in *Ricketts* v. *Thos. Tilling, Ltd.* (1) are precisely in point:

> It was admitted that the driver of this motor omnibus was alongside the man who was driving, and it is admitted that he was negligent. I entirely accept, of course, the proposition that, in order to make the owner liable, there must be negligence on the part of the person for whose acts the owner is responsible—his servant, either regularly or for that occasion only. * * * In this case I say it is admitted that the driving was negligent. It is admitted that the driver was sitting by the man who was driving and he could see all that was going on—he could control what was going on. It seems to me that the fact that he allowed somebody else to drive does not divest him of the responsibility and duty he has towards his masters to see that the omnibus is carefully, and not negligently, driven.

As to the matter of damages, I have nothing to add to what has been said by the judges of the Appellate Division and by my brother Hughes.

The judgment of Cannon and Hughes J.J. and Maclean J. *ad hoc* was delivered by

HUGHES J.—This action arose out of a collision between two motor vehicles which occurred on the afternoon of July 25, 1933, on a public highway running easterly from the city of Edmonton through Mundare and Vegreville. The collision occurred about five and one-half miles west of Mundare at a place distant about 72 feet from the common crest of an incline of the highway going westerly and a shorter and steeper incline going easterly. A spreader had gone over the road some time before the collision and had pushed considerable loose gravel to the northerly half of the road. Apparently both eastbound and westbound traffic had been using the southerly half of the road considerably, and on this half there were two well defined wheel tracks, the southerly one of which was 2½ or 3 feet from the southerly edge of the travelled part of the highway.

The appellant Gillespie Grain Company Limited had in its employ as a driver the defendant George Colby. Sometime before the day of the collision, Colby had, contrary to the instructions of his employer, arranged with the defendant George Wilkie to come on the truck with him and to help by occasional driving and other work.

(1) [1915] 1 K.B. 644, at 650.

Colby paid Wilkie from time to time small sums for these services. The reason underlying the arrangement was that Colby drank considerably and was out frequently late at night and as a result was, with his advancing years, at times too tired to do the work alone. On several occasions, Mrs. Wilkie also went along.

On the morning of the accident, Colby drove the truck from the appellant's warehouse at Edmonton and picked up Wilkie and Mrs. Wilkie at their home. Colby drove from Edmonton to Mundare where each person had a glass of beer. Wilkie testified that he drove from Mundare to the Vegreville elevator of the company. Each person had one or two glasses of beer at Vegreville. Colby testified that he drove back to Mundare but Wilkie said that he drove. At Mundare each person had another glass of beer. It should here be mentioned that Wilkie was a licensed driver of ten or twelve years' experience who owned a motor vehicle and who had had, according to the evidence, no motor vehicle accident previous to the one in question in this action. Wilkie drove the truck westerly towards Edmonton after leaving Mundare. All three occupied the driving seat on which there were two cushions. Wilkie sat behind the wheel at the left and occupied one cushion. Mrs. Wilkie and Colby, according to Colby, sat on the other cushion. As the truck came towards the incline on which the collision occurred, it was proceeding on the southerly half of the road in the wheel tracks. I am not at all suggesting that Wilkie was not entitled, where the vision ahead was clear, to use the southerly half of the road as long as he did not interfere with the rights of other traffic. Some distance east of the place of the collision, the truck turned farther to the south, passed a horse-drawn vehicle and then turned into the wheel tracks again. The truck continued up the hill on the southerly half of the road. Colby said that the crest would then be "only two hundred and fifty feet or so away." Colby said that he was "kind of sitting sideways," "sort of talking to Mrs. Wilkie with one eye on her and one on Alex." He said: "I was kind of sitting sideways, looking at them. I wasn't watching ahead." He added in another place in the record that he was "looking with kind of one eye out," that the truck moved over to the north side of the road and that later Wilkie pulled the truck towards the ditch on the

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north side, shouted " Look out, George," and that this was the first intimation that he, Colby, had that a motor vehicle was approaching from the west. Wilkie said that after he passed the horse-drawn vehicle, he swung the truck back to the wheel tracks, continued up the incline and began gradually to edge over to the right side of the road. He noticed a " dust cloud a long way off " and turned a little more to his right. Then he noticed the top of a motor vehicle dip out of sight on the west side of the crest and he pulled over to his right side. Then the car came into sight again. At this time the truck was, according to Wilkie, on the north side of the road. The truck was then approximately 65 feet from the place of the collision. He saw that the eastbound car was coming very fast; he decided to swing the wheels towards the north ditch and had the right front wheel at the north edge of the road and the truck pointing northwesterly when it was struck at the left front by the eastbound motor vehicle which was heading northeasterly and out of control.

The eastbound car was owned by North Star Oil Company Limited, driven by the defendant Ronald L. M. Hart, and in it the late Anton J. Kuproski was a passenger. The latter was killed by the force of the collision. The driver, L. M. Hart, suffered a loss of memory as a result of concussion and was not able to testify as to the happenings immediately before the collision.

The action was brought by the administratrix of the estate of the deceased against the employer and driver of the eastbound car and against the employer and driver of the truck and against Colby, as employee in charge.

The action was tried before Mr. Justice Ewing without a jury. The learned trial judge gave judgment against all the defendants. He found that Hart, an employee of North Star Oil Limited, was negligent in approaching the crest of the hill at a very high rate of speed " to the extent at least that his car was not under reasonable control"; and further that he was negligent in not keeping a proper look-out. He found that Wilkie was negligent in approaching the top of the hill on the " wrong " side of the road and in not keeping a look-out for approaching vehicles " to the extent that it was possible to see vehicles." He found as a fact that Wilkie continued on the south side of the road without materially slackening speed until the truck

was within 60 feet of the scene of the accident. Speaking of Colby, the learned trial judge said:

> Colby not only permitted Wilkie to drive but he sat in the front seat of the cab with Wilkie without making any effort to see that Wilkie drove properly. Wilkie approached the crest of the hill on the wrong side of the road, but Colby apparently not only did not interfere but he did not even keep any look-out to see that driving in this manner did not result in a collision. * * * Had Colby been looking he could have seen the approaching car in time to have so directed Wilkie that the collision would have been avoided.
>
> I think that Colby's negligence in permitting Wilkie to drive and taking no steps to see that he drove properly was an effective cause of the accident.

The learned trial judge fixed the damages as follows:

To the plaintiff in her own right	$13,000
To the plaintiff in the right of Ernest Kuproski	1,800
To the plaintiff in the right of Bernard Kuproski	3,800
To the plaintiff in the right of Gladys Kuproski	5,500

All defendants appealed to the Appellate Division of the Supreme Court of Alberta, both as to liability and as to quantum of damages. The appeals were dismissed with costs.

From the judgment of the Appellate Division, Gillespie Grain Company Limited, now appeals to this Court.

The appellant contended before us that the judgment of the learned trial judge as affirmed by the Appellate Division was erroneous in the following respects.

(1) It should have been held that the sole cause of the collision was the negligence of Hart.

(2) It should have been held that there was no negligence on the part of Wilkie.

(3) It should not have been held that Colby was negligent or that his negligence was an effective cause of the collision.

(4) Assuming there was negligence on the part of Wilkie, it should have been held that Colby's act in permitting Wilkie to drive was outside the scope of Colby's employment, an unauthorized act, to effect a purpose of Colby for which the appellant employer was not liable.

(5) The assessment of damages was unreasonable and extravagant.

It will be convenient to discuss these contentions in the above order, taking the first two contentions together. During the course of the argument before us, counsel were

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advised that this Court could not in view of the evidence interfere with the findings of the learned trial judge, affirmed by the Appellate Division, that both drivers Hart and Wilkie were negligent. It is true that the Chief Justice, in whose judgment Mr. Justice Mitchell concurred, was of opinion that the onus was not on the plaintiff to prove negligence, he having apparently overlooked the fact that the case was one of collision; but the remaining three judges in appeal confirmed the findings of negligence made by the trial judge and it does not appear that in any of these judgments in appeal or in the judgment of the learned trial judge, there was any misplacing of the onus of proof.

We now proceed to consider the contention of the appellant that Colby was not negligent. It was argued by the appellant that the negligence found against Colby by the learned trial judge was founded upon the fusion of two essential and indispensable elements, the one being the permitting of Wilkie to drive, and the other being the failure of Colby to take steps to see that he drove properly; and that accordingly the whole finding must fall if either of the essential elements failed. The appellant then proceeded to argue that it was not negligence on the part of Colby to permit Wilkie to drive as Wilkie was to the knowledge of Colby an experienced, licensed driver of good record and that therefore the finding of negligence against Colby could not be supported because of the failure of one of the essential elements. It is not necessary to decide whether it was or was not, in the circumstances of this case, negligence on the part of Colby in permitting Wilkie to drive contrary to the instructions of his employer, and whether such act, if negligent, was an effective cause of the collision, because we are of opinion that we must look at all that the learned trial judge had to say about Colby's conduct and not confine ourselves to the more specific finding urged by the appellant. In addition to the latter finding, the learned trial judge said, as above stated, that as the truck approached the crest of the hill on the "wrong" side of the road, Colby did not keep any look-out to see that driving in this manner did not result in a collision and that, if Colby had been looking, he could have seen the approaching car in time to have so directed Wilkie that the collision would have been avoided. The conclusions of the

learned trial judge as to the negligence of Colby were affirmed by at least three judges of the Appellate Division and, in our opinion, there was ample evidence to support them.

We now come to the fourth contention of the appellant that, assuming there was negligence on the part of Wilkie, it should have been held that Colby's act in permitting Wilkie to drive was outside the scope of Colby's employment, an unauthorized act, to effect a purpose of Colby for which the appellant employer was not liable. It should here be mentioned that in the province of Alberta there was not any statutory liability for damages imposed on the owner of the truck qua owner. Rupert Settle, an officer of the appellant, testified at the trial that one condition of Colby's employment was that he should see that nobody else should have "anything to do with that truck," that Colby was to be the sole driver and that Colby understood that clearly. Colby testified at the trial that he was in charge of the truck and Wilkie testified that every time they came back to the elevator, Colby resumed the actual driving. It must be clear, therefore, that Colby was in charge and in legal control of the truck although the actual manipulations of the steering wheel and the gears had been temporarily turned over to Wilkie. It cannot be said that Colby had thereby freed himself, as employee of the appellant, of his ordinary duties of keeping a proper look-out, or seeing that the truck was on the proper side of the road, considering the rights of other traffic, although it may very well be that when Wilkie assumed the driving, he also assumed duties of keeping a proper look-out and keeping the truck on the proper side of the road, considering the rights of other traffic. In other words, it may be said that as the truck approached the place of the collision, Wilkie had a duty to keep a proper look-out also and a duty to drive the truck on the proper side of the road, considering the rights of other traffic; and that Colby continued to have, within the scope of his employment, a duty to keep a proper look-out and a duty to see that the truck was on the proper side of the road, considering the rights of other traffic. We are not of opinion that Colby when he gave over the actual driving to Wilkie divested himself of the above duties or that the above duties were outside of Colby's authority merely because it was outside the scope

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of his authority to permit Wilkie to drive at all. Now the learned trial judge said that Wilkie approached the crest of the hill on the "wrong" side of the road and that Colby not only did not interfere but he did not even keep any look-out to see that driving in this manner did not result in a collision. Earlier in his judgment the learned trial judge found that the truck continued on the left side of the road until within 60 feet of the scene of the accident, which would be within 132 feet of the crest of the hill. On this finding, Colby had had ample time and opportunity, as the person in charge of the truck, to have directed Wilkie earlier and farther back on the hill or, if necessary, before he reached the hill, to get the truck to the north side of the road.

Many cases were cited by counsel for the appellant in support of the appellant's contention that the instructions of the employer to Colby not to permit any other person to drive the truck constituted a delimitation of the employee's authority, and that the employee was acting wholly outside the scope of his authority at the time of the collision. Counsel for the respondent contended on the other hand (*a*) that Colby's conduct was merely improper conduct within the scope of his employment or (*b*) that Colby was in charge of the truck at all times and retained a duty to keep a proper look-out and to see that the truck was on the proper side of the road, considering other traffic.

Beard v. *London General Omnibus Company* (1). The facts in this case were that at the end of a journey the conductor of an omnibus belonging to the defendants, in the absence of the driver and apparently with the purpose of turning the omnibus in the right direction for the next journey, drove it through some side streets, and while so doing negligently ran down the plaintiff. At the trial the plaintiff gave no evidence that the conductor was authorized by the defendants to drive the omnibus in the absence of the driver. At the close of the plaintiff's case judgment was entered for the defendants. In the Court of Appeal, judgment in favour of the defendants was affirmed.

Reichardt v. *Shard* (2). The defendant was the owner of a motor car which was being driven by his son. The defendant was not in the car, but his driver was sitting

(1) (1900) 2 Q.B.D. 530. (2) 31 T.L.R. 24.

beside the son. A collision occurred between the defendant's car and a car belonging to the plaintiff, owing to the negligent driving of the defendant's son. In an action for damages caused by the collision, the defendant stated that he allowed the son to use the car, but never allowed him to go out with it without the driver. A County Court judge, after a verdict of a jury, gave judgment against the defendant. The defendant appealed to the Divisional Court, which dismissed the appeal. The Court of Appeal likewise dismissed an appeal to it. Lord Justice Buckley, with whose conclusion Lord Justice Phillimore and Lord Justice Pickford agreed, said that it appeared to him to be a reasonable view to take that the learned County Court judge was entitled to say that, having regard to the person who accompanied the son, there was no evidence to go to the jury that the defendant had given up control of the car.

Ricketts v. *Thos. Tilling, Ltd.* (1). The facts, shortly, in this case were that at the end of a journey, the conductor on an omnibus belonging to the defendants, in the presence of the driver, who was seated beside him, for the purpose of turning the omnibus in the right direction for the next journey, drove it through some side streets so negligently that it ran down the plaintiff. At the trial the judge, upon what he considered the authority of *Beard* v. *London General Omnibus Co.* (2), held that there was no evidence that the conductor had authority from the defendants to drive the omnibus and entered judgment for the defendants. It was held in the Court of Appeal that there was evidence of negligence on the part of the driver in allowing the omnibus to be negligently driven by the conductor and that there should be a new trial. The case was unlike the case at bar in that the conductor was an inexperienced driver, but the case was like the case at bar in that the proper driver was also sitting on the box. Buckley, Lord Justice, page 646, said:

> It seems to me that the driver, who was authorized to drive, had the duty to prevent another person from driving, or, if he allowed another person to drive, to see that he drove properly. He was sitting beside the conductor and the driving by the conductor was conducted in his presence. He could not delegate his authority. It is a question for the jury whether the effective cause of the accident was that the driver committed a breach

(1) [1915] 1 K.B. 644. (2) (1900) 2 Q.B.D. 530.

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of his duty (which was either to prevent another person from driving or, if he allowed him to drive, to see that he drove properly), or whether the driver had discharged that duty.

He distinguished *Gwilliam* v. *Twist* (1), and stated that the question in the latter case was not the question in *Ricketts* v. *Thos. Tilling Ltd.* (2) and added,

> It is not here said that there is a liability in the master because the driver delegated to the conductor. The question is whether the driver had properly discharged his duty of not letting that other person drive while he sat by, or, if he did let him drive while he sat by, then of seeing that he drove properly. It was a question for the jury whether the accident arose from a breach by the driver of the duty which he owed to his master as driver.

Phillimore L.J. stated, page 649, that the questions really were whether the driver was still in charge of the omnibus and whether the accident happened because he neglected his duty. Pickford L.J. also wrote a judgment and some of his words are so applicable to the present case that it is proper that they should be quoted verbatim:

> It is admitted that the driver was sitting by the man who was driving and he could see all that was going on—he could control what was going on. It seems to me that the fact that he allowed somebody else to drive does not divest him of the responsibility and duty he has towards his masters to see that the omnibus is carefully, and not negligently, driven. But it seems to me that, where a man is entrusted with the duty of driving and controlling the driving of a motor omnibus, and is sitting alongside a person who is wrongfully driving and the motor omnibus is negligently driven and thereby an accident happens, there is evidence at any rate of negligence on the part of that driver in having allowed that negligent driving. I do not at all say that on an investigation of the facts it might not appear that the act of negligence was so sudden and unexpected that he had no reason to see it; and therefore it would come back to the question of whether he was responsible for allowing the other man to drive. It seems to me at any rate that there is evidence of negligence on his part, he being there and still having the duty of the controlling and the driving of the omnibus, in allowing the omnibus to be negligently driven whereby the accident happened.

Of course, the actual driver may oust and keep ousted the regular driver from charge or control by fraud, force or duress, and the employer may not be liable although the regular driver is sitting beside the actual driver and the car is operated so negligently that an accident occurs. *Kuhmo* v. *Laakso* (3).

Coogan v. *Dublin Motor Co.* (4). The facts in this case were that the defendants had hired a motor car to T. The chauffeur in charge of the car, in violation of his

(1) (1895) 2 Q.B.D. 84.
(2) [1915] 1 K.B. 644.
(3) [1931] O.R. 630.
(4) 49 Ir. L.T. 24.

instructions, permitted T. to drive. While T. was driving, the plaintiff was run down and injured. The chauffeur stated that he was forbidden to allow passengers to drive, that when passing along Monk street he saw the plaintiff step out in front of a tram, that he told T. to pass the tram on the right hand and that he put on the emergency brake, but he was too late to avoid a collision. It was held by the Divisional Court that in allowing T. to drive the chauffeur was acting outside the scope of his authority, and that the defendants were not liable. Gibson J. said that the owner of the car gave control to an expert, who had no power to abandon his trust. Kenny J. concurred with Gibson J. This case is not very helpful to us as the report does not indicate that the regular driver, as in the case at bar, failed to keep a proper look-out or to direct the actual driver where to go. In fact it rather indicates the contrary.

We are therefore of opinion that the appellant is liable.

We now come to the fifth point, namely the quantum of damages. The learned trial judge in his reasons for judgment referred to the life expectancy of the deceased as 39·072 years instead of the correct figures, 31·072, but Mr. Justice McGillivray stated in his reasons that the learned trial judge had on request informed the Appellate Division that in fact he had used the correct figures of 31·072 in arriving at his conclusions. It was pointed out by counsel for the appellant that the learned trial judge had not before him the figures for joint expectancies and that, moreover, he had made excessive use of the life expectancy figures and had allowed in the aggregate sums exceeding the present value over the life expectancy period of $100 per month the largest sum which the widow said the deceased had been giving to the family shortly before his death. *Rowley* v. *London and North Western Railway Co.* (1); *Phillips* v. *London and Southern Railway Co.* (2). There was, however, considerable evidence that the deceased was a good salesman and that in more normal times he had earned much larger sums than he was earning just before his death and we cannot say that the trial judge did not take these facts also into consideration or that he was not entitled so to do. There is no doubt that the amount awarded by

(1) (1873) L.R. 8 Ex. 241.

(2) (1879) 4 Q.B.D. 406; 5 Q.B.D. 78.

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the learned trial judge was generous, to say the least, but the amount has been affirmed by the Appellate Division. Under all the circumstances, it is not a case in which we can properly interfere. *Cossette* v. *Dunn* (3), *Smith* v. *C.N.R.* (4). An appeal from the latter judgment was dismissed by this Court on May 15, 1924.

The present appeal must, therefore, be dismissed with costs to the respondent, Albina Kuproski.

North Star Oil, Limited, which was added as a party respondent by Order dated September 11, 1934, is not entitled to costs either of that Order or on this appeal. This defendant appealed to the Appellate Division of the Supreme Court of Alberta, but did not appeal to this Court, and was not entitled to intervene under Supreme Court Rule 60.

Appeal dismissed with costs.

Solicitors for the appellant: *Wood, Buchanan & Macdonald.*

Solicitors for the respondent: *Maclean, Short & Kane.*