1931

*Nov. 10.
*Nov. 16.

FRANCOIS BOUVIER (DEFENDANT).....APPELLANT;

AND

ALEXANDER FEE ÈS-QUAL. (PLAINTIFF)..RESPONDENT.

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

Negligence—Accident—Cement mixer in public lane—Small child injured while playing—Machine unattended and unguarded—Liability—Common fault.

The respondent, as father and tutor of his minor son, brought an action in damages against the appellant for injuries sustained by his son, then 7 years of age, resulting from a serious accident due to the alleged fault of the appellant. The respondent's son was playing with a small tricycle in a lane behind his father's house; in that lane, facing the house, the appellant had placed a cement mixer at a short distance from a garage which he was constructing. The respondent's son, on his tricycle, approached the mixer and put his hand on the machine while in motion, with the result that his hand was caught and drawn into the machine, where it remained until he was extricated. The evidence shows that the machine had been left unattended and unguarded at the moment of the accident.

Held that, according to the circumstances of this case, the appellant was liable.

Per Anglin C.J.C. and Lamont and Cannon JJ.—The allurement of a piece of machinery in motion for a small child is notorious, and anybody, operating such machinery upon, or so accessible from, a highway or public place as to make it dangerous to children lawfully about the neighbourhood, assumes the burden of so guarding the same as to make it practically inaccessible to them.

Anglin C.J.C., Lamont and Cannon JJ.—An issue of contributory negligence or common fault cannot be raised as a ground of appeal in the case of a child under eight years of age, such an issue being eminently for determination by the trial judge, who, in the present case, has found in favour of the respondent.

*PRESENT:—Anglin C.J.C. and Newcombe, Lamont, Smith and Cannon JJ.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the trial judge, Désaulniers J., and maintaining the respondent's action in damages for $5,000.

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

L. E. Beaulieu K.C. and *R. Genest K.C.* for the appellant.

A. Théberge K.C. for the respondent.

The judgment of Anglin C.J.C. and Lamont and Cannon JJ. was delivered by

ANGLIN C.J.C.—In our opinion this appeal must be dismissed with costs. The reasons given by Mr. Justice Guerin, in dismissing the appeal to the Court of King's Bench, are quite convincing; and the facts on which he bases his conclusions find ample support in the evidence.

The allurement of a piece of machinery in motion for a small child is notorious, and anybody, operating such machinery upon, or so accessible from, a highway or public place as to make it dangerous to children lawfully about the neighbourhood, assumes the burden of so guarding the same as to make it practically inaccessible to them. (Beven on Negligence, 4th ed., 189; *Cooke* v. *Midland G.W. Rly.* (1); *Canadian Pacific Railway Co.* v. *Coley* (2). To fence the machine here (as was suggested) was, probably, not practicable. But, Mr. Justice Guerin points out, there was no reason why the defendant should not have it so guarded and looked after by some one of his employees that children, who were known to be in the neighbourhood, and in the habit of playing there, should be kept away from it. This duty the defendant failed to discharge, the machine in motion having been left unattended and unguarded at the moment of the accident. Of this fact there is abundant evidence, and, upon it alone, we are satisfied that the provincial courts were justified in holding the defendant liable.

As to contributory negligence or common fault, it is, in our opinion, almost out of the question to raise such an

(1) [1909] A.C. 229.

(2) (1907) Q.R. 16 K.B. 404.

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issue as a ground of appeal in the case of a child under eight years of age, i.e., barely above the age under which all responsibility must be denied. Eminently an issue for determination by a trial judge, an appeal from his finding upon it is almost hopeless. The trial judge, in the present instance, found in favour of the plaintiff; and his finding is conclusive. (*Delage* v. *Delisle* (1); 1 Sourdat, "Responsabilité," no. 17).

The judgment of Newcombe and Smith JJ. was delivered by

NEWCOMBE J.—The boy was nearly eight years of age and his home was in the immediate vicinity of the work, and it is conceded for the purposes of the case that the machine was partly upon the lane, contiguous to which the work was in progress. Each case must, I think, be decided upon its own facts, and I agree that this appeal should be dismissed; but I am not satisfied to assent to the general proposition that in all cases there is an absolute duty.

Appeal dismissed with costs.

Solicitors for the appellant: *Genest, Gélinas & Renaud.*
Solicitors for the respondent: *Théberge & Théberge.*