WALTER O'CONNOR (PLAINTIFF).....APPELLANT; 1929

AND *Nov. 20.

WILLIAM WRAY (DEFENDANT).....RESPONDENT. 1930

*Feb. 4.

DAME GERTRUDE BOYD (PLAINTIFF)....APPELLANT;

AND

WILLIAM WRAY (DEFENDANT).....RESPONDENT.

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

Automobile—Negligence—Accident in Ontario.—Owner resident in Quebec —Action brought in Quebec—Liability of owner—Whether liable on both Ontario and Quebec Statutes—Highway Traffic Act (Ont.) 1923, c. 48, ss. 42, 43—Motor Vehicle Act, R.S.Q., 1925, c. 35.

The respondent, who was living and doing business in the city of Montreal, in the province of Quebec, loaned a motor car owned by him to his manager, one Cochrane, for the purpose of enabling the latter to

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

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visit his mother at Arnprior, in the province of Ontario. On July 11, 1926, the wife of the appellant O'Connor and the appellant Boyd, while walking on a highway called Montreal Road, near the city of Ottawa, in the province of Ontario, were both struck by the motor car driven by Cochrane in a reckless manner and at an excessive rate of speed. Mrs. O'Connor was instantly killed and the other appellant suffered permanent injuries. Actions in damages were brought against the respondent, owner of the car, in the Superior Court of the province of Quebec.

Held, that, in accordance with the provisions of the *Motor Vehicle Act* of Quebec as well as with the weight of judicial opinion in the courts of that province, the respondent cannot be held responsible for loss or damage sustained by the appellants by reason of his motor vehicle, negligence or improper conduct imputable to the respondent having been disproven. Anglin C.J.C. dissenting.

Per Newcombe, Rinfret, Lamont and Smith JJ.—Article 53 (1) of the Quebec *Motor Vehicle Act,* R.S.Q., 1925, c. 35, respecting the liability of the owner of a motor vehicle, now reads: "53 (1) The owner of a motor vehicle shall be held responsible for any violation of this Act committed with such motor vehicle, or of any regulation made thereunder by the Lieutenant-Governor in Council." But a similar clause, when enacted by the Revised Statutes of Quebec, 1909, Art. 1406, contained at the end the following words "*and shall be responsible for all accidents or damages caused by his motor vehicle upon a highway or public square.*" These words disappeared when the article was replaced by the amending Act, chapter 19, of 1912. By the article as formerly enacted, the liability which is imposed to compensate for accidents or damages, as distinguished from that incurred for any violation of the statute or regulations, was founded upon the concluding sentence. Of these two clauses the first did not expressly, or with any degree of certainty, declare liability for damages; the second did. The charging clause having been repealed, there remains no provision upon which to hold that the owner is bound to compensate when he has committed no fault. Moreover, this interpretation is made conclusive by the implication of subsection 2 of article 53, which establishes the materiality of negligence or improper conduct by the owner. Anglin C.J.C. *contra.*

Quaere, per Newcombe, Rinfret, Lamont and Smith JJ., whether the respondent ever became subject to the *Highway Traffic Act* of Ontario.

Per Newcombe and Rinfret JJ.—Under the provisions of the *Highway Traffic Act of Ontario* (1923), the respondent would not have been liable, as the loss or damage claimed was sustained "by reason of a motor vehicle on a highway" and not "in case of a collision between motor vehicles." Section 42 of that statute does not apply; and the present cases fall within the purview of the special case described by section 43, which section must be considered as a modification of section 42.

Per Anglin C.J.C., Lamont and Smith JJ.—The respondent, had he been resident in the province of Ontario, would have been liable under the Ontario statute as it stood at the time the damages were sustained.

Per Anglin C.J.C. (dissenting).—The accident occurred because of Cochrane having driven at an excessive rate of speed and while under the influence of intoxication; and these were violations both of the On-

tario and Quebec statutes. The respondent, in lending his car to Cochrane with the intention that it should be used by him in Ontario, subjected himself to the *Highway Traffic Act* of that province and he was so subject when the accident occurred. That fact also establishes that the driving of the car by Cochrane was with the consent of the respondent within the meaning of the Ontario statute, and of the Quebec statute if, under that Act, consent be material. Under section 42 (1) of the Ontario statute of 1923, where any violation of the Act has been shown and an accident resulting in damage to another has ensued, unless the motor vehicle which caused the accident was at the time in the possession of some person, other than the owner or his chauffeur, without the owner's consent, the latter is "responsible" for the acts of the driver, just as he would have been had the car been driven by himself. The respondent must therefore be held liable under the Ontario law for the consequences of Cochrane's violations of the statute. Section 53 (1) of the *Motor Vehicle Act* of Quebec must receive the same construction as that already given to section 42 (1) of the Ontario statute of 1923 and it carries with it the civil responsibility which the latter has been held to impose. (*Curley* v. *Latreille* (60 Can. S.C.R. 131) discussed.) Therefore the respondent must be held to have incurred civil liability under the Ontario statute, and he would have incurred a like liability under the Quebec Act had the *situs* of the accident been in that province.

Per Anglin C.J.C. (dissenting).—As a matter of international law, in order to establish liability of the respondent, it would seem necessary that he be answerable under the law of Quebec, as well as under that of Ontario, because, while the *locus delicti commissi* was in Ontario, the actions were brought in Quebec. But it is not essential that the remedy for the tort in question should be identical in both provinces, i.e., that, in this case, it should be civilly actionable in each. It will suffice if the tort actually committed was actionable against the respondent, or if he was punishable therefore as a delict in Ontario, and if a like tort committed in Quebec would be civilly actionable there. *Canadian Pacific Ry. Co.* v. *Parent* ([1917] A.C. 195) discussed.

Judgment of the Court of King's Bench (Q.R. 46 K.B. 199) affirmed, Anglin C.J.C. dissenting.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1) affirming the judgment of the Superior Court, Boyer J. and dismissing appellants' actions in damages.

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

Eug. Lafleur K.C. for the appellant.

W. N. Tilley K.C. and *P. Brais K.C.* for the respondent.

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ANGLIN C.J.C.—(dissenting) A motor car, owned by the respondent and used in his undertaker's business in Montreal, was loaned by him to his manager, one Cochrane, for the express purpose of enabling the latter to visit his mother at Arnprior, Ont. With one Tedley, likewise in the employ of the respondent, Cochrane took the car on this trip. Cochrane's wife also accompanied him. The car was in perfect order.

Cochrane, who was driving the car at the time of the accident, was reputed to be "a sober, industrious, careful and prudent man," and was familiar with motor cars and their mechanism; he held a driver's licence. The respondent has been acquitted of any fault in lending the car to Cochrane; and I accept the correctness of this finding.

The accident, out of which these actions arose, happened, however, because Cochrane was, on the occasion of it, neither sober, careful nor prudent; it occurred on July 11, 1926, in Ontario, near the city of Ottawa. Cochrane, as has been properly found, was intoxicated at the time and was driving in a reckless manner and at an excessive rate of speed, and it was through his negligence and violation of the provisions of *The Highway Traffic Act,* 1923 (O.) that the respondent's car struck and killed Margaret Butler, wife of the appellant, Walter O'Connor, and severely injured the other appellant, Gertrude Boyd.

Cochrane's personal liability for damages seems to be admitted; but he is in the penitentiary and appears to have little or no property. The respondent Wray, in lending the car to Cochrane with the intention that it should be used by him in Ontario, subjected himself to *The Highway Traffic Act,* 1923 (O.); and he was so subject when the accident occurred. The fact that the car was loaned by Wray to Cochrane for the purpose of the visit to his mother in Ontario, also establishes that the driving of the car, at the time of the accident, by Cochrane, was with the consent of Wray, the owner, within the meaning of s. 42 (1) of *The Highway Traffic Act,* 1923, (O), and also of s. 53 (1) of the *Motor Vehicle Act* R.S.Q., 1925, c. 35, if under the latter Act such consent be material.

The application of the original Acts, both of Ontario and Quebec, respectively, was restricted to motor vehicles "for which a permit is issued under the provisions of the

Act"; (6 Edw. VIII, (O.), c. 46, s. 13) and "for which a certificate is issued under this section," (art. 1406, s. XXI, R.S.Q., 1909). Both in Ontario and Quebec this restriction has been done away with and the Acts, as they now stand in both provinces, apply equally to all motor vehicles, wherever registered and wherever owned, while being driven upon the highways of the respective provinces, *Hess* v. *Pawlosk* (1); *Stapleton* v. *Independent Brewing Co.* (2); *Kane* v. *New Jersey* (3); *Pizzati* v. *Wuchter* (4).

As a matter of private international law, in order to establish liability of the respondent in these actions, it would seem necessary that he be answerable under the law of Quebec, as well as under that of Ontario, because, while the *locus delicti comissi* was in Ontario, the actions were brought in the Superior Court of Quebec, in which province the defendant resides: But it is not essential that the remedy for the tort in question should be identical in both provinces, i.e., that, in this case, it should be civilly actionable in each. It will suffice if the tort actually committed was actionable against the defendant, or if he was punishable therefore as a delict in Ontario, and if a tort committed in Quebec would be civilly actionable there. *Phillips* v. *Eyre* (5); *Liverpool, Brazil and River Plate Steam Navigation Co., Ltd.* v. *Henry Benham et al* (*The Hadley*) (6); *The Moxham* (7); *Livesley* v. *Horst Co.* (8); *Carr* v. *Fracis, Times & Co.* (9); *Isaacs & Sons, Ltd.* v. *Cook* (10).

If the implication in the language used at p. 205 of the judgment of the Privy Council, delivered by Haldane L.C., in *Canadian Pacific Ry. Co.* v. *Parent* (11), be that, because liability of the defendant in the jurisdiction where the wrong was committed is vicarious only (whether it arise, as in the case of master and servant, by an application of the common law maxim, *respondeat superior,* or, as in the case at bar, by virtue of a statutory provision, viz., s. 42 (1) of *The Highway Traffic Act,* 1923), the principles of private international law preclude its enforcement in the

(1) (1926) 274 U.S. 352.
(2) (1917) L.R.A. 916.
(3) (1916) 242 U.S. 160.
(4) (1926) 134 Atl. Rep. 727.
(5) L.R. 6 Q.B. 1, at pp. 28-30.
(6) (1868) L.R. 2 P.C. 193, at pp. 203-4.
(7) (1876) 1 P.D. 107, at p. 111.
(8) [1924] S.C.R. 605, at pp. 611-12.
(9) [1902] A.C. 176, at p. 182.
(10) [1925] 2 K.B. 391, at p. 400.
(11) [1917] A.C. 195.

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courts of another country—I cannot accept that suggestion. But, on the other hand, if, as I think, all that was meant in *Canadian Pacific Ry. Co.* v. *Parent* (1) was that, in the absence of some statutory provision such as that found in ss. 3 of s. 53 of the Quebec *Motor Vehicle Act* (R.S.Q., 1925, c. 35), a purely vicarious, civil liability does not *per se* entail penal or criminal responsibility, there can be no doubt as to the accuracy of that statement. Nor do I know of any reason for thinking that the law enforced by the courts of Quebec in these matters differs from that which obtains where the English common law prevails. (*Canadian Pacific Ry. Co.* v. *Parent* (2). Of course, I agree with the contention of the respondent, that, "according to the general principles applicable under the title of private international law," liability imposed by the law of Ontario will be enforced in the province of Quebec only in so far as it may not conflict with the policy of the law as administered in that local forum.

By *The Highway Traffic Act,* 1923 (O.), which was in force in 1926, it was enacted that,

42. (1) The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council, unless at the time of such violation the motor vehicle was in the possession of some person other than the owner or his chauffeur, without the owner's consent, and the driver of a motor vehicle not being the owner shall also be responsible for any such violation.

(2) If the employer of a chauffeur is present in the motor vehicle at the time of the committing of any offence against this Act, such employer as well as the driver, shall be liable to conviction for such offence.

These provisions are to be found in the R.S.O. (1927), c. 251, s. 41 (1) and (2). (S.v.n. 19 Geo. V. (1929) (0) c. 68, s. 8) (*a*).

Noteworthy features of s. 42 (1) are that it applies only to violations of the statute itself, or of any regulation prescribed by the Lieutenant-Governor in Council; but that,

(1) [1917] A.C. 195. (2) [1917] A.C. 195, at p. 205.

(*a*) Section 42 of the Highway Traffic Act (Ontario) of 1923 was re-enacted as section 41 in R.S.O., 1927, c. 251; and this last section was repealed by 19 Geo. V (1929) c. 68, s. 9, and the following substituted therefor:—

41. The owner of a motor vehicle shall incur the penalties provided for any violation of this Act or of any regulation made by the Lieutenant-Governor in Council, unless at the time of such violation the motor vehicle was in the possession of some person other than the owner or his chauffeur, without the owner's consent, and the driver of a motor vehicle not being the owner shall also incur the penalties provided for any such such violation.

where any such violation has been shewn and an accident resulting in damage to another has ensued, unless the motor vehicle which caused the accident was at the time in the possession of some person, other than the owner or his chauffeur, without the owner's consent, the latter is "responsible" for the acts of the driver, just as he would have been had the car been driven by himself. That it was intended by this provision to create a new civil liability on the part of the owner in the interest of the victim of a violation of the statute by the driver or person in possession of the car, wherever such driver or person in possession was acting with the owner's consent, is, I think, manifest. The owner would be liable at common law had he, or his *praepositus,* been driving when the violation which caused the accident occurred. The provision of ss. 2 making the employer of a chauffeur, when present in the motor vehicle at the time of the committing of the offence, liable to conviction for such offence as well as the driver, in the opinion of Boyd C., and Latchford and Middleton JJ., and *Verral* v. *Dominion Automobile Co.* (1), made this certain. It is not improbable that in 1914 (c. 36, s. 3), 1917 (c. 49, s. 14) and 1918 (c. 37, s. 8), the legislature of Ontario, aware of the decision of a Divisional Court in 1911 (1), thought that, in most instances, civil responsibility of the driver alone would be illusory and that, in the public interest, it was essential that the owner of such a dangerous thing as an automobile should be made vicariously responsible for the civil consequences of any violation of the statute committed with his motor car, whenever possession of the car by the driver (not being the owner's chauffeur) was had with the owner's consent. *Hirshman* v. *Beal* (2); *Driscoll* v. *Colletti* (3); *Gray* v. *Peterborough Radial Ry. Co.* (4).

Under the Ontario law, therefore, there is, in my opinion, no room for doubt that the respondent became civilly liable for the consequences of Cochran's violations of *The Highway Traffic Act,* 1923, which resulted in the death of the plaintiff O'Connor's wife and in personal injury to the plaintiff Boyd. Indeed, it is not open in this court to

(1) (1911) 24 O.L.R. 551, at p. 553.
(2) (1916) 38 O.L.R. 40.
(3) (1926) 58 O.L.R. 444, at p. 448.
(4) (1920) 47 O.L.R. 541 at p. 546.

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contend otherwise since the decision in *Hall* v. *Toronto, Guelph Express Co.* (1).

But it is said that while that may be so, a delict committed under like circumstances in Quebec, although it entails penal consequences for the owner, is not civilly actionable against him, and, in support of this position, reference is made to the construction to that effect, placed by the Quebec courts in several cases upon s. 53 (1) of the Quebec *Motor Vehicle Act* (R.S.Q., 1925, c. 35), which reads,

> The owner of a motor vehicle shall be held responsible for any violation of this Act committed with such motor vehicle, or of any regulation made thereunder by the Lieutenant-Governor in Council.

The earlier part of s. 53 (3) contains a provision similar in import to s. 42 (2) of the Ontario Act above quoted.

Formerly, the provision, now set forth in s. 53 (1) was found in Section XXI, art. 1406, of the revision of 1909, and read as follows:

> The owner of a motor vehicle for which a certificate is issued under this section, shall be held responsible for any violation thereof or of any regulation provided thereunder by order of the Lieutenant-Governor in Council; and shall be responsible for all accidents or damages caused by his motor vehicle upon a highway or public square.

The latter words, "and shall be responsible, etc.," were struck out in 1912 (3 Geo. V. c. 19, s. 3). Under the former article (1406), while the liability imposed by the concluding part of it (now struck out) extended to all accidents or damages caused by motor vehicles on the highway, etc., whether they were or were not due to violations of the statute, "responsibility" under the earlier portion (which still remains) was confined (as it now is) to "violations of this section," i.e., of the statute as it then stood, or "of any regulation provided thereunder."

Although it may have been quite arguable, as the article formerly stood, that, because civil liability was completely covered by its concluding clause, the application of the earlier part of the article might be restricted to responsibility for penalties imposed by the statute itself, we have now to deal with a different situation; and, unless there be some inherent ambiguity in the language of s. 53 (1) as it now stands, we cannot look to the past history of that provision in order to determine its present scope and effect. Finding no ambiguity in the language of the

(1) [1929] Can. S.C.R. 92, at pp. 106-7.

subsection itself, the fact that the words, "and shall be responsible for all accidents, etc.," formerly appended to it, were struck out by the legislature, in 1912, may not be taken into account in construing it.

Such appears to be the result of the decision of the Privy Council in *Ouellette* v. *Canadian Pacific Ry. Co.* (1). Their Lordships intimated that a reference to previous legislation can properly be made only where it

* * * may be forced upon a court by reason of the ambiguity employed in the use of terms which the mind could not readily grasp without a previous preliminary interpretation.

It may well be that the change was made in 1912 because the Quebec legislature thought it desirable to restrict civil liability of the owner of a motor vehicle, not driven by himself or his *praepositus,* but by another person, to cases where damages had been caused by a violation of some provision of the statute itself. This would sufficiently account for the striking out of the concluding clause of the section as it formerly stood. It is also quite probable that the legislature knew of the construction that had already been placed by the courts upon the corresponding provision of the Ontario statute in 1906 (6 Edw. VII, c. 46, s. 13), later embodied in s. 42 (1) of *The Highway Traffic Act,* 1923, (O.), viz., that its terms imposed civil responsibility as well as subjecting the owner to the penalties provided by the statute (*Verral* v. *Dominion Automobile Co.* (2), and, therefore, regarded the concluding clause of article 1406 (s. XXI of the R.S.Q., 1909) as superfluous in cases of damages caused by violations of the statute.

Lord Shaw, writing on behalf of the Judicial Committee of the Privy Council in the *Ouellette case* (3), quotes with approval, at p. 575, the following observation of the late Mr. Justice Idington:

And, a remarkable feature of the contention is that the plain meaning of the words are to be given another meaning because some words used in an old Act were dropped out, when such changes as made were obviously part of a revision of the entire legislation * * * and intended to make clearer the law and improve in many respects by eliminating useless verbiage.

His Lordship proceeds to say:

* * * The danger of error would become acute if once presumption were to be made that because there was a difference of expression, therefore it must necessarily follow that there was meant to be a difference of

(1) [1925] A.C. 569, at p. 574. (2) (1911) 24 O.L.R. 551.
(3) [1925] A.C. 569.

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the law. The words actually employed must stand for interpretation as they are found unaffected by any such presumption. In the present case their Lordships' reference to previous legislation was not required, there being no confusion or ambiguity to remove.

He had observed earlier:

It is important that the results of the labours in Canada of bringing the law compendiously up to date, whether these be characterized by the term "revision" or "codification," should be not impaired by the danger alluded to,

i.e., the danger of a reference to previous legislation. The following words of Malouin J., are also quoted approvingly, (p. 575),

Le législateur est présumé avoir voulu dire ce qu'il exprime et le juge ne peut chercher en dehors du texte de la loi son intention quand le texte est clair et ne prête à aucun doute.

The terms of s. 53 (1) of the R.S.Q., c. 35, are, I think, quite free from ambiguity. "Responsibility" *prima facie* includes civil liability as well as penal consequences. Notwithstanding the inclusion of s. 53 in a fasciculus headed, "Offences and Penalties" (compare the location in the revision of 1909 under the heading "Offences" of former art. 1406, which admittedly bore upon civil liability) and the absence from the present subsection (1) of any provision expressly restricting its application to cases where the motor vehicle causing damage was possessed and driven with the consent of the owner, such as has been in the present Ontario statute since 1917, I am unable to distinguish s. 53 (1) of the Quebec Act, in substance or in principle, from the early part of s. 42 (1) of *The Highway Traffic Act,* 1923, (O.), which comes down from the original enactment. Both must bear the same construction. Moreover, the presence in s. 53 of ss. 2, the application of which to civil liability is undoubted, *Marcus* v. *Browman* (1); *Robillard* v. *Bélanger* (2), in immediate collocation with ss. 1 and followed by ss. 3, which *ex facie* deals with penal consequences, affords practically conclusive proof that the "responsibility" dealt with in ss. 1 is civil as well as penal. Again, if penal responsibility alone is contemplated by s. 53 (1), s. 54 would seem to be impertinent.

Having regard to the decision of this court in *Curley* v. *Latreille* (3), and other Quebec cases, I think some restriction, such as that expressed in the latter part of s. 42

(1) (1921) 27 Rev. Leg. N.S. 256. (2) (1916) Q.R. 50 S.C. 260.
(3) (1919) 60 Can. S.C.R. 131.

(1) of the Ontario statute, must be implied, whether upon a proper construction s. 53 (1) extends to civil liability or merely covers penal responsibility, since otherwise the owner would be " responsible " for any violation of the Act, although his motor vehicle was being used by a stranger—even by a thief—entirely without his knowledge or consent. There can be no doubt that common law liability of the owner is restricted to cases where the motor vehicle is being driven by himself or by his préposé " *au cours de l'exécution des fonctions auxquelles ce dernier est employé.*" An extension of such liability by the statute to cases where the motor vehicle was being used neither by the owner nor by his *préposé,* but, without his knowledge or consent, by some stranger, would appear to be so contrary to the principles of responsibility underlying the common law, on which exclusively *Curley* v. *Latreille* (1) was decided, that it may be presumed not to have been intended. In that case the motor car had been driven by the owner's chauffeur, but without his knowledge or consent. Hence the statute (3 Geo. V, c. 14, s. 3) was treated *en passant* as inapplicable (2). The liability asserted was based on art. 1054 C.C., the statute being invoked merely in aid thereof. On the other hand, where the owner consents to, or acquiesces in, the use of his automobile by a person to whom he lends it, it can at least be said that he had the option of granting or refusing such use, as well as the choice of the person to whom he entrusted the car; and it may well be that this would, in the view of the legislature, afford a sufficient basis for making him civilly responsible, not generally, but for violations of the statute itself—just as the master is civilly responsible for his servant's acts in the course of employment, even though done in violation of his master's orders, partly because he selected the servant. (Smith on Master and Servant, 7th ed. 208). Indeed, s. 11 imposes a similar vicarious civil liability on the owner of a registered car who has sold it, but has neglected to have the transfer recorded. The principle underlying the responsibility of the owner, as such, is the same in both cases. It depends on his own voluntary action or inaction. Vicarious liability of the owner of a car, *qua owner,* imposed by s.

(1) (1919) 60 Can. S.C.R. 131.

(2) 60 Can. S.C.R. 131, at pp. 133, 141.

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53 (1) would not seem at all extraordinary to the legislature which had enacted a like liability by section 11.

Accordingly I think s. 53 (1) of the Quebec Act must receive the construction already given to s. 42 (1) of the Ontario statute and that it carries with it the civil responsibility which the latter has been held to impose. Indeed, its terms are not distinguishable from those of the original Ontario provision, 6 Edw. VII, c. 46, s. 13, except for the omission, above referred to, of the restriction to motor vehicles "for which a certificate is issued under this section."

The accident in question occurred because of Cochrane having driven at an excessive rate of speed and while under the influence of intoxication. No suggestion has been advanced that it happened through any other cause. These were both violations of the statute which, in my opinion, would have entailed civil responsibility of the owner, as well as of the driver, had the accident occurred in the province of Quebec. I am, therefore, of the view that civil liability was actually imposed on the respondent by the Ontario statute and that he would have incurred a like liability under the Quebec Act had the *situs* of the accident been in that province. Subject to the question of the sufficiency of the pleadings, now to be considered, this conclusion involves allowing this appeal.

The accident complained of in these actions happened on the 26th of July, 1926. The plaintiffs' original declarations were delivered on the 9th of November, 1926, i.e., within six months after the accident, and alleged, amongst other things, that Margaret Butler and Gertrude Boyd, had been, the former killed, and the latter injured, "by a motor car belonging to the defendant" (par. 3); that the driver, Cochrane, was in the employ of the defendant, (par 5); that the accident occurred in the province of Ontario near the city of Ottawa, (par. 4); that it was due to the fault of Cochrane who was driving at an excessive speed, and while intoxicated, and had lost control of his car, (pars. 7, 8, 12, 13); that the defendant is liable and responsible *as being the owner of the said car* and the registered owner of the licence issued for the said car, (par. 18). There is no allegation that Cochrane was driving for the defendant or in the course of his employment, and the

declarations would probably have been demurrable had vicarious liability of the defendant been rested solely on the common law either of Ontario or Quebec. Paragraph 14 of the original declaration in each action is as follows:

That the law of the province of Ontario is substantially the same as the law of the province of Quebec, regarding the manner of driving motor vehicles on the public roads, and that the car in question on the occasion in question was driven contrary to the laws and rules of the said provinces of Quebec and Ontario, to wit, in the manner above mentioned, and that moreover the maximum rate of speed allowed by the law of Ontario at the place in question was 25 miles per hour, with stipulation of lower speed when necessary to avoid accidents and according to circumstances, and that more particularly before reaching the place of the accident, the said car met with a curve in the road, which should have called the attention of the driver to reduce the speed of his car, instead of maintaining it or accelerating it, in such manner as to drive the said car over the edge of the ditch for a long distance as the said Cochrane did before the said car struck the two women (after which the said car was violently overturned).

I regard this paragraph, read with par. 18, as not intended to do aught else than to assert civil liability of the defendant under the statutory laws both of Ontario and Quebec.

By paragraph 22 of the defendant's amended plea in the O'Connor case (paragraph 24 in the Boyd case) to plaintiff's amended declaration, it is stated that Ronald Cochrane intending to visit his parents in Ontario,

borrowed the Cadillac car of the defendant and on the day in question left with his wife and friend on the projected visit.

By paragraph 2, in each case, of the answer to the amended plea of the defendant, the plaintiff

prays *acte* of the admission that the said Ronald Cochrane was using the car in question with the permission and consent of the defendant * * *.

On the 3rd of November, 1927, more than one year after the date of the accident, Mr. Justice Bruneau made an order allowing the plaintiffs to amend their declarations by adding to each the following paragraph, which appears as par 18a in the declaration in O'Connor v. Wray, and as par. 22 in that in Boyd v. Wray:

That the law of the province of Ontario which concerns the manner of driving motor vehicles on the public roads in the province of Ontario is *The Highway Traffic Act*, 13-14 Geo. V, 1923, c. 38, statutes of Ontario and more particularly sections 42 and 43 of the said Act, which have their application in the present case, read as follows: "Section 42. The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council unless at the time of such violation the motor vehicle was in the possession of some person other than the owner or his chauffeur, without the owner's consent, and the driver of a motor vehicle not being the owner shall also be responsible for any such violation. Sec. 43. When loss or

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damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver;"

Section 54 of *The Highway Traffic Act*, 1923, (O.), requires that an action for the recovery of damages occasioned by a motor vehicle shall be brought within six months from the time the damage was sustained (in Quebec within one year under art. 2262 (2) C. C.) and section 6 of the *Fatal Accidents Act* (O.) requires that an action to recover damages where the death of a person has been caused by wrongful act, neglect or default of the defendant, shall be brought within one year of such death: (See art. 1056 C. C.). If, therefore, the amendment, made in November, 1927, (a year and a half after the accident occurred) should be regarded as asserting, for the first time, a cause of action under the Ontario statute, the allowance of such amendment would probably have been refused, as the statutory claim would then have been barred. (*Naud* v. *Marcotte* (1); *Croysdill* v. *Crescent Turkish Bath Co.* (2); *Weldon* v. *Neal* (3); *Hudson* v. *Fernyhough* (4); *Lancaster* v. *Moss et all* (5). But, having regard to the terms of paragraphs 14 and 18 in each of the declarations, I think the view must have been taken (and, in my opinion, properly taken) by the learned judge who allowed the amendments in the Practice Court, that they did not amount to the preferring of new causes of action, but were tantamount to the giving of particulars under ss. 14 and 18 of the original declarations, and that, so regarded, they might be allowed to be added thereto without in any way prejudicing the rights of the defendant. *Barone* v. *Grand Trunk Ry. Co.* (6). No appeal was taken from the allowance of these amendments and there is no adverse comment upon them in the judgment of the Court of King's Bench, such as would have been expected had they been open to exception. Under all the circumstances, therefore, I think the declarations should be regarded as having been originally (i.e. on the 9th of November, 1926, and, therefore, within the prescribed delay) based upon the statutory liability imposed by s. 42 (1) of the *Highway Traffic Act*, 1923, of Ontario.

(1) (1898) 1 Q.P.R. 196.
(2) (1910) Q.R. 38 S.C. 207.
(3) (1887) 19 Q.B.D. 394.
(4) (1889) 61 L.T.R. 722.
(5) (1899) 15 T.L.R. 476.
(6) (1920) Q.R. 22 P.R. 277.

I am accordingly of the opinion that these appeals should be allowed and that judgment should be entered declaring the defendant liable to the plaintiff in each action for the damages caused by his motor vehicle through the fault of the driver Cochrane. The appellant in each case is entitled to costs throughout to be paid by the respondent. As, however, the quanta of the damages have not been determined, the proper course would seem to be to remit the actions to the Superior Court—merely to have the damages assessed by that court in each case.

NEWCOMBE J.—The wife of the plaintiff, Walter O'Connor, and Mrs. Gertrude Boyd, the plaintiff of that name, were on Sunday afternoon, 11th July, 1926, walking together on the Montreal Road, in the province of Ontario, when they were both struck by an overtaking automobile, belonging to the defendant, and negligently driven by Ronald Cochrane. Mrs. O'Connor was instantly killed and Mrs. Boyd suffered painful and permanent injuries.

The defendant lives and carries on business at Montreal, in the province of Quebec; and, at the time of the accident, Cochrane, was and has been for about three years, in the defendant's employ in the capacity of manager. I extract the following from the defendant's evidence:

Q. As your manager, what kind of work was he called upon to perform?

A. Well, he had complete authority over everything and had all my interest to look after. When I was not there myself he acted just the same as I would myself if I was not there during my business time.

Cochrane had been granted a few holidays, and the use of one of the defendant's automobiles, in order to visit his mother who lived at Arnprior, in the province of Ontario; and, when the accident occurred, he was on his way thither, driving the car, and accompanied by his wife and one Tedley, an employee in the defendant's establishment, who had been permitted also to have leave of absence for the occasion. Both Cochrane and Tedley were qualified and experienced chauffeurs, though neither one of them, it appears, was employed exclusively in that capacity.

The actions were brought in the province of Quebec, not against Cochrane, who was at the time in charge of and driving the car, but against the defendant as the owner, though not in possession, who was alleged to be responsible for the damages by the law of Ontario.

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It was established by the proof, and found at the trial and upon appeal, that the defendant was not guilty of any negligence. The evidence in support of that seems to be perfectly clear, and the findings cannot, I think, be brought successfully into question. But the plaintiffs rely upon the *Highway Traffic Act*, 1923, of Ontario, chapter 48, and especially sections 42 and 43, which make the following provisions:

42. (1) The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council, unless at the time of such violation the motor vehicle was in the possession of some person other than the owner or his chauffeur, without the owner's consent, and the driver of a motor vehicle not being the owner shall also be responsible for any such violation.

(2) If the employer of a chauffeur is present in the motor vehicle at the time of the committing of any offence against this Act, such employer as well as the driver shall be liable to conviction for such offence.

43. (1) When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver.

(2) This section shall not apply in case of a collision between motor vehicles on the highway.

Now it will be perceived that if it were intended that the owner, although not authorizing or participating in any violation of the Act, should, in cases to which section 43 applies, incur responsibility for damages caused by wilful or negligent conduct which constituted a violation, there would be no apparent reason for enacting, as it is enacted by section 43 for the cases to which it applies, that the onus of proof should be upon the owner to establish that the damage did not arise through his negligence or improper conduct. If it be meant that the owner, whether negligent or not, shall be responsible for the damages in all cases not within the exceptions, why should it be supposed that the legislature thought it worth while to make an utterly immaterial provision to affect the owner with relation to the burden of proof? Section 43 is evidently a modification of section 42 for the special case which section 43 describes, subject to the exception stated in the subsection. The cases now in question are within the purview of the latter section, and in my view it is difficult to find liability of the owner when it is realized that the loss or damage claimed was sustained by reason of a motor vehicle on a highway, and not "in case of a collision between motor vehicles," and when it is abundantly proved

that there was no negligence or improper conduct on the part of the owner.

Moreover I am not satisfied that the defendant ever became subject to the *Highway Traffic Act* of Ontario. According to the plaintiff's contention, that Act imposes upon the defendant a liability unknown to the common law of either province, although he was neither personally nor by his agent within the province of Ontario; and it is not easy to perceive that he had any point of contact with the Ontario law, unless it be by the lending of his car to Cochrane for a journey to Ontario; and, for myself, I confess it is difficult to understand why the defendant, by consenting to lend his motor vehicle to Cochrane for the latter's journey to Arnprior thereby became subject to the local legislation of Ontario, and personally responsible for the offences and faults of the borrower in Ontario. In this connection it may be useful to contrast the judgment of the House of Lords in the leading case of *Castrique* v. *Imrie* (1), as to the jurisdiction which a state may exercise over property within its lawful control, and Lord Selborne's judgment in the Privy Council in *Sirdar Gurdal Sing* v. *Rajah of Faridkote* (2), in which effect is given, as to personal actions, to the maxim *extra territoriam jus dicenti non paretur.* Professor Westlake says, in his book on Private International Law, 7th edition, page 281,

> The truth is that by entering a country or acting in it you submit yourself to its special laws only so far as legal science selects them as the rule of decision in each case. Or more truly still, you give to its special laws the opportunity of working on you to that extent. The operation of the law depends on the conditions, and where the conditions exist the law operates as well on its born subjects as on those who have brought themselves under it.

It is, I think, questionable that the conditions ever existed to bring the local law into operation with respect to the defendant; that question was not, however, fully discussed at the hearing, and I do not find it necessary to decide it.

But whatever be the interpretation of the *Highway Traffic Act* of Ontario, if it affects the case at all, it will not, according to the principles known as appertaining to private international law, be enforced by the courts of Que-

(1) (1869) 6 E. & I. Ap. 414. (2) [1894] A.C. 670.

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bec, except in so far as it does not conflict with the policy of the local forum.

In the Liverpool Brazil and River Plate Steam Navigation Co. Ltd. v. *Henry Benham, et al. (The Halley)*, (1), Selwyn, L.J., pronouncing the judgment of the Judicial Committee of the Privy Council, said:

> It is true that in many cases the Courts of England inquire into and act upon the law of Foreign countries, as in the case of a contract entered into in a Foreign country, where, by express reference or by necessary implication, the Foreign law is incorporated with the contract, and proof and consideration of the Foreign law therefore become necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a Foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English Court admits the proof of the foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is, in their Lordships' opinion, alike contrary to principle and to authority to hold, that an English Court of Justice will enforce a Foreign Municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.

See also the famous judgment of Willes, J., in *Phillips* v. *Eyre* (2); *The Moxham* (3), where, at page 111, Mellish, L.J., says:

> A great many cases were cited in the argument, but they almost all relate to actions respecting either wrongs to personal property or actual personal injuries. Now the law respecting personal injuries and respecting wrongs to personal property appears to me to be perfectly settled that no action can be maintained in the courts of this country on account of a wrongful act either to a person or to personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed and also wrongful by the law of this country. The cases of *The Halley* (4), and *Phillips* v. *Eyre* (5), together with the other cases in conformity with them, seem to be conclusive upon the subject.

Machado v. *Fontes* (6); *Carr* v. *Fracias, Times & Co.* (7); *Isaacs & Sons Ltd. v. Cook* (8); *Livesley v. Horst Co.* (9).

The law of England and of the Canadian provinces, where the common law of England prevails, is thus clearly

(1) (1868) L.R. 2 P.C. 193, at pp. 203, 204.
(2) L.R. 6 P.D. 1, at pp. 28-30.
(3) (1876) 1 P.D. 107.
(4) L.R. 2 P.C. 193.
(5) Q.R. 6 Q.B. 1.
(6) (1897) 2 Q.B.D. 231.
(7) [1902] A.C. 176.
(8) [1925] 2 K.B. 391, at p. 400.
(9) [1924] S.C.R. 605, at pp. 611, 612.

established, and rests upon the highest authority, and Willes J. made the remark in his judgment in *Phillips* v. *Eyre* (1), that

> Our courts are said to be more open to admit actions founded upon foreign transactions than those of any other European country.

No sufficient authority has been cited for the proposition that a more generous rule prevails in the province of Quebec than that sanctioned by the common law of England, and a decision that the courts of that province are to administer the *lex loci delicti commissi*, irrespective of the law of the forum, would introduce a distinction which might be attended with inconvenient results.

Upon the question as to whether the *lex fori* and *lex loci delicti commissi* must concur in order that an act or an omission may be deemed tortious, it is said in Westlake's Private International Law, 7th edition, at page 28.

> On the continent there is no general agreement. Savigny maintains the exclusive authority of the *lex fori* "both positively and negatively, that is, for and against the application of a law which recognizes an obligation arising out of a delit." His reason is that all laws relating to delits have such a close connection with public order as to be entitled to the benefit of what I have called the reservation in favour of a stringent domestic policy. Mr. Charles Brocher, on the contrary, maintains the authority of the *lex loci delicti commissi* in terms which would appear to be exclusive, were it not that he goes on to claim for the judge the right of taking considerations of public order into account; and the result at which he would practically arrive would probably not be very different from that which prevails in England.

The judgments below proceed upon a view from which it may be inferred that the Quebec rule and the English rule, as expounded above, are in accord, and this, I think, may be accepted as a reasonable and just conclusion.

Turning now to the Quebec legislation, it will be found, in the last revision, R.S.Q. 1925, c. 35, articles 53 and 54, which provide as follows:

> 53. 1. The owner of a motor vehicle shall be held responsible for any violation of this Act committed with such motor vehicle, or of any regulation made thereunder by the Lieutenant-Governor in Council.
>
> 2. Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver.
>
> 3. If the employer of a person, driving a motor vehicle for hire, pay or gain, is present in the motor vehicle at the time of the commission of any offence against this Act or any regulation made thereunder, such em-

(1) Q.R. 6 Q.B. 28.

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ployer, as well as the operator or chauffeur, shall be liable to conviction for such offence, and it shall be in the discretion of the court to impose the penalty either upon the one or the other, or upon both, according to the circumstances of the case; but if the vehicle is being driven by the chauffeur, and not by the owner, at the time of the offence, then,—whether the owner be present in the vehicle or not at the time,—both the chauffeur and the owner shall be personally liable to conviction for the offence, and it shall be in the discretion of the court to impose the penalty either upon the one or the other or upon both, according to the circumstances of the case.

54. Nothing contained in this Act shall be interpreted as limiting or diminishing the right of any person to take civil proceedings for damages.

Now it is in accordance with the natural interpretation, as well as with the weight of judicial opinion in the local courts, that where there is no negligence or improper conduct imputable to the owner, he is not responsible for loss or damage sustained by any person by reason of his motor vehicle. This seems to be clearly the intention of the Legislature, having regard to the text and the history of the legislation. The respondent points out that formerly, by section XXI, article 1406, of the Revision of 1909, it was enacted, among the clauses regulating motor vehicles, that

> The owner of a motor vehicle for which a certificate is issued under this section, shall be held responsible for any violation thereof or of any regulation provided thereunder by order of the Lieutenant-Governor in Council; *and shall be responsible for all accidents or damages caused by his motor vehicle upon a highway or public square.*

The last clause, which I have underlined above, disappeared when the article was replaced by the amending Act, chapter 19, of 1912. And, by the article as formerly enacted, it is clear that the liability which is imposed to compensate for accidents or damages, as distinguished from that incurred for any violation of the statute or regulations, was founded upon the concluding sentence, which was repealed by the Act of 1912, and not upon the earlier provision of the article, which still remains. Of these two clauses comprised in the article, the first did not expressly, or with any degree of certainty, declare liability for damages; the second did. The latter was therefore the effective provision for the purpose which it expressed, and this seems to result from the proper appreciation of the maxim *expressio unius est exclusio alterius,* or *expressum facit cessare tacitum.* And so, the charging clause having been repealed, there remains no provision upon which to base a reasonable pretension that the owner is bound to compensate when he has com-

mitted no fault; and, if any possible question could otherwise have been raised about it, that is concluded by the implication of subsection 2 of article 53, which establishes the materiality of negligence or improper conduct by the owner.

For these reasons I would dismiss the appeal with costs.

RINFRET J.—I concur with Mr. Justice Newcombe.

LAMONT, J.—I concur with Mr. Justice Smith.

SMITH J.— I agree with my brother Newcombe, for the reasons stated by him, that the respondent Wray was not liable for the damages sustained by the plaintiffs under the law of Quebec. The case of *Latreille* v. *Curley* (1), seems to me to be decisive on this point so far as this Court is concerned.

On this view it is not really necessary to determine whether or not the respondent would have been liable in an action in Ontario, but in view of the decisions, I am of opinion that, had he been resident in Ontario, he would have been liable under the Ontario statute as it stood at the time the damages were sustained.

The respondent was not, however, a resident of Ontario, and, with my brother Newcombe, I doubt if the Ontario legislation is effective to impose personal liability, under the circumstances, on the respondent, in view of the authorities cited in my brother Newcombe's reasons. This important point is raised in the respondent's factum, but my brother Newcombe says it was not fully argued before us, and therefore refrains from expressing a final opinion on it. There being no necessity for doing so, in view of the opinion expressed above as to the Quebec law, I also express no final opinion with regard to it, though, if well taken, this point sustains the judgment below.

I concur in dismissing these appeals with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Dorais & Dorais.*

Solicitors for the respondent: *Brais & Garneau.*

(1) 60 Can. S.C.R. 131.