1948
*Nov. 18
1948
*Mar. 22

LEONARD JONES (DEFENDANT).....APPELLANT;

AND

JOHN MERLIN SHAFER, ADMINISTRATOR ESTATE JOHN SHAFER, DECEASED (PLAINTIFF)..... } RESPONDENT.

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

Negligence—Motor vehicle—Reasonable user of highway—Lighted flares set out on highway to mark broken down truck—Flares stolen after driver left for help—Police turned on marker lights—On coming motor car collided head-on in fog—Whether truck driver negligent—Whether nuisance created—Standard of care—Proximate cause of accident act of third party—Public Service Vehicles Act, R.S.A. 1942, c. 276, Reg. 1-10-2.

Held: reversing the judgment of the Appellate Division (1947 2 W.W.R. 49; 1947 4 D.L.R. 294) (Rand J. dissenting) that the appeal should be allowed.

*PRESENT:—Rinfret C.J. and Taschereau, Rand, Estey and Locke JJ.

Per the Chief Justice and Estey J.: the appellant was properly using the highway when his truck broke down and he did not act contrary to law in leaving it with sufficient warning of its presence to the public. His duty was to exercise the care of a reasonable man under all the circumstances. He put out what upon the evidence was reasonable protection for those using the highway; that protection was deliberately removed by some person who had no regard whatsoever for the safety of the public. No duty is imposed upon a person to anticipate such contemptible conduct unless the circumstances justify that conclusion. They do not in this case.

Per Taschereau and Locke JJ.: It was not the failure of the appellant to take reasonable care which was the direct or proximate cause of the accident, rather was it (subject to what there is to be said as to the negligence of Shafer) the act of the thief "the conscious act of another volition" of the nature referred to by Lord Dunedin in *Dominion Natural Gas Co.* v. *Collins,* 1909 A.C. 640 at 646.

Per the Chief Justice, Taschereau, Estey and Locke JJ.: If a nuisance was created and existed at the time of the accident it was created by the act of the unknown third party.

Per Rand J. (dissenting) The individual user of a highway is limited by what can be accorded all persons in similar circumstances and by the reconciliation of convenience in private and public interests. The truck, at the time of the accident was a nuisance dangerous to persons using the highway in the ordinary manner. If instead of removing it, means were taken to guard against the danger, they must be maintained at all events and be as effective as removal itself. When the exigencies of modern traffic bring about an unavoidable but exceptional use of the highway, the risk of potential danger becoming actual which it creates must be circumscribed in time and a duty arises to act reasonably, with modern aids, to prevent its realization. The duty here, was shown not to have been discharged.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming (O'Connor J. A. dissenting) the judgment of the trial judge (2) in favour of the plaintiff.

The material facts of the case are fully stated in the judgments now reported.

R. L. Fenerty for the appellant.

J. V. H. Milvain K.C. for the respondent.

The judgment of the Chief Justice and Estey J. was delivered by:

ESTEY J.:—On the evening of December 7, 1945, the appellant was driving his truck, loaded with gasoline, northerly along the Calgary-Edmonton highway. Near

(1) [1947] 2 W.W.R. 49; [1947] 4 D.L.R. 294.

(2) [1947] 2 D.L.R. 449.

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the hamlet of Netook north of Olds he suddenly realized his left wheel was coming off. He directed his truck toward the east and came to a stop in about 75 to 100 feet and some 3 or 4 feet from the east shoulder of the road. Upon examining his truck he found the outer bearing of his left wheel gone, the brakes could not be operated and the truck could not be moved under its own power. Then with respect to the possibility of its being otherwise moved the learned trial Judge found:

> . . . I do not think under the circumstances here that the defendant could have secured the necessary equipment to do so (that is to move the truck), at least until the next morning.

The road at this point was about 27 feet from shoulder to shoulder and the truck as stopped left about 15 to 17 feet for the passage of vehicles on the westerly side thereof. Under these circumstances the appellant decided to go back to Calgary, procure the necessary parts and return the next morning. He put out two flares, one to the north and the other to the south of the truck, as required by *The Public Service Vehicles Act* and Regulations thereunder (1942 R.S.A., c. 276, Reg. 1-10-2). The evidence indicates that so long as these flares were burning they provided adequate warning. There is no suggestion that they were unsuitable for the purpose nor carelessly placed upon the highway. The learned trial Judge stated:

> With regard to the flares put out by the defendant, no doubt so long as they burned they provided a warning to motorists.

These flares were removed some time between 10 and 11 o'clock that night (between 2 and 3 hours after they had been put out) by some unknown person. The policeman and the appellant made a careful search to find any trace of these flares but none could be found. There is no question upon the evidence but that these flares were put out. They were seen burning by others after the appellant left the truck until some time around 10 o'clock. It was this contemptible act by one who had no regard for the safety of persons upon the highway that made the truck a dangerous hazard.

Sergeant Dunlop, a member of the R.C.M.P. from Olds who had been notified of the presence of this truck upon the highway without flares or lights, examined it at 11.30 p.m. He turned on the marker lights and left it that way

as he believed this provided sufficient protection to the travelling public. They were still burning when Sergeant Dunlop returned the next morning after the accident. Many persons had during the night passed the truck in question assisted by these marker lights.

The accident occurred on the morning of December 8th, as the learned trial Judge stated "before sunrise * * * in very foggy and frosty weather when visibility was poor." The deceased Shafer, driving alone, collided with the truck and was found dead in his automobile as a result of this collision.

It has been suggested the appellant might have done more than put out the flares. Something to like effect may often be said. The test, however, is not what might have been done, looking back after the event, but what a reasonable man would have done under the same circumstances as that in which Jones found himself. It was a cold clear night when Jones left the truck, and upon the evidence these flares had they remained in the position in which Jones placed them were, as found by the learned trial Judge, an adequate warning. The removal of the flares by the unknown person created a dangerous condition upon the highway and that act was the direct cause of this unfortunate accident.

The majority of the Appellate Court held that the appellant should have anticipated that these flares might have become ineffective either by accident or design. The appellant used due care in placing these flares upon the highway. He had heard of their being struck by vehicles "if they were left out too far" and he provided against that possibility by placing them "roughly two or three feet in from the centre line". There is no finding of fact, nor does a perusal of the evidence support such a finding, to the effect that a reasonable man in the circumstances would have anticipated the removal of these flares by either accident or by some person acting in complete disregard of human safety.

In *Rickards* v. *Lothian* (1), a tenant on the second floor sued the landlord for damage to his stock in trade caused by the plugging of a lavatory waste pipe on the fourth floor. The waste pipe had been maliciously plugged by

(1) [1913] A.C. 263.

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some unknown person. It was contended that "the defendant ought to have foreseen the probability of such a malicious act and to have taken precautions against it, and that he was liable in damages for not having done so." The Privy Council held that such was a question of fact in which there was no finding and that in any event the record disclosed no evidence to support such a finding.

In *Toronto Hydro-Electric Commission* v. *Toronto R.W. Co.* (1), a street car left by the defendant's servants standing upon a track was set in motion by some unknown person. Mr. Justice Middleton, with whom Riddell, J. agreed, stated at p. 472:

> Here the action of the trespasser who entered the car and set it in motion was "a fresh independent cause," which, under the circumstances, the defendants had no reason to contemplate.

In *Doughty et al* v. *Twp. of Dungannon* (2), the plaintiff's action against the municipality was founded upon his truck being injured when he attempted to cross a culvert on a slightly used and unimproved road. The day before the accident a driver, whose truck became mired in the mud near this bridge, took certain poles from the culvert to assist him in releasing his truck and did not replace them in the culvert. Middleton, J., after pointing out that the trial Judge had dealt with the case as turning upon the negligence of the defendant and the contributory negligence of the plaintiffs, at p. 685 stated:

> In the view I take of this case it is not necessary to consider either of these questions. The accident complained of by the plaintiffs was caused solely by the misconduct of the truck driver. It broke the chain of causation between the defendant's negligence, if there was negligence, and the accident to the plaintiffs, and so affords a defence to this action.

In *Geall* v. *Dominion Creosoting Co.* (3), the finding of the jury was to the effect that the employees of the Dominion Creosoting Company had negligently left four cars of the B.C. Electric Railway in such a position that they either anticipated or should have anticipated that the boys from a nearby school might do just what they did, release these cars and thereby cause damage. Under these circumstances the company was held liable.

The foregoing authorities emphasize again the principle that the intervening conscious act of a third party will

(1) (1919) 45 O.L.R. 470.
(2) [1938] O.R. 684.
(3) (1917) 555 C.R. 587.

break the line of causation and relieve the party who may be otherwise negligent of liability, unless to a reasonable man in the same circumstances that conscious act would have been foreseeable.

The case is distinguishable from *Clarke* v. *Chambers* (1), in that there the defendant acted without authority in wrongfully erecting a barrier across the road. This was removed by an unknown third person who left it in a position where the plaintiff passing along at night was injured. Cockburn, C.J., at p. 338 stated:

> For a man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction, by some one entitled to use the way, as a thing likely to happen * * * If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of damage, from which, should injury to an innocent party occur, the original author of the mischief should be held responsible.

The appellant Jones was properly using the highway when his truck broke down and he did not act contrary to law in leaving it as above indicated with sufficient warning of its presence to the public.

It is not suggested that there is an absolute liability resting upon the appellant. His duty was to exercise the care of a reasonable man under all the circumstances. He put out what upon the evidence was reasonable protection to those using the highway; that protection was deliberately removed by some person who had no regard whatsoever for the safety of the public. The foregoing cases do not impose a duty upon a person to anticipate such contemptible conduct unless the circumstances justify that conclusion. The circumstances do not do so in this case.

Whether due care has been exercised remains in every case a question of fact, and compliance with the statutory requirement may or may not be sufficient. In this case the finding of fact, supported by the evidence, is to the effect that what the appellant did was sufficient at the time, but that it was later interfered with by a contemptible act of an unknown person which created the dangerous situation.

Nuisance is not pleaded nor was it dealt with at the trial. However, in the Appellate Division and in this Court the respondent contended that the appellant's truck upon the

(1) (1878) 3 Q.B.D. 327.

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highway constituted a nuisance. I do not think the law justifies the conclusion that one whose truck suddenly breaks down, as that of the appellant upon the night in question, and because it cannot be removed is left guarded by flares sufficient to warn a person exercising due care in the use of the highway, and which would have continued to burn throughout the night, creates a nuisance.

In *Moore* v. *Lambeth Waterworks Co.* (1), a fire-plug was lawfully placed about level with the asphalt. In the course of time by the wearing down of the asphalt the fire-plug protruded to a point that it caused the plaintiff to fall. Lord Esher, M.R. at p. 465 stated:

> Now the argument for the plaintiff really amounted to this, that whoever puts into a highway that which becomes from any cause a nuisance or dangerous to persons going along the highway, is liable to make compensation if it occasions injury to any person. But, to my mind, that doctrine has always been applied only where a thing has been put without authority in the highway.

See also *Maitland* v. *Raisbeck* (2).

It cannot be contended that the appellant acted contrary to law. He was lawfully using the highway when his truck broke down. He, with reason, concluded that it could not be moved and placed the flares as above described. These were removed. If a nuisance was created and existed at the time of the accident it was created by the act of the unknown third party.

The appeal should be allowed and the plaintiff's claim dismissed, with costs throughout.

The judgment of Taschereau and Locke JJ. was delivered by:

LOCKE J.:—There is but little dispute as to the facts in this case. On the evening of December 7, 1945, at about 7 o'clock the appellant was driving a Diamond T. oil truck heavily laden with gasoline and oil in a northerly direction on the public highway en route from Calgary to Innisfail: the weather was cold and clear: when he reached a point some 5½ miles north of Olds he discovered that the left rear wheel of his truck was coming off and brought the truck to a stop after endeavouring to place it as far as possible to the right of the centre of the highway: upon examination it was disclosed that the difficulty was

(1) (1886) L.R. 17 Q.B.D. 462. (2) [1944] 1 K.B. 689.

caused by the crushing of an outer bearing and other damage consequent upon this. It was impossible to move the truck further under its own power and the appellant proceeded to jack up the axle and place on the roadway two flares of the kind required to be used upon such occasions by regulations passed under *The Public Service Vehicles Act, cap.* 276, R.S.A. 1942. The flares used were of heavy 22 gauge metal having a capacity of 34 fluid ounces of oil and being 5 inches in diameter and of the same height and designed to burn from 13 to 16 hours; these were placed on the highway, one of them 100 feet to the rear of the truck and some 2 or 3 feet in from the centre line of the road, and one at the same distance in front of the truck and both were filled with kerosene taken from the load by the appellant before being placed there. While there was an elevator operator's house situate some 250 yards away, the appellant did not communicate with the people living there nor did he notify the police at Olds or take any other steps to warn traffic of the position of the truck upon the road: having obtained a lift he left the scene shortly before 8 o'clock and arrived in Calgary about 10 o'clock that night. There is ample corroboratory evidence of the placing of the flares: in addition to the evidence of other witnesses the wife of the elevator operator at Netook who was at her home observed them burning at 8 o'clock and again at 10 o'clock: at 11 o'clock, however, they had disappeared. On this point the learned trial Judge made the following finding:—

> The evidence satisfies me that Jones did put out flares as the Statute requires in such cases, but I am also satisfied that at the time Dench arrived on the scene at 11 p.m. the flares were not burning, and furthermore when the police officer arrived on the morning of the 8th no trace of the flares could be found, the presumption being that some person removed them from the highway before 11 o'clock. I think the evidence is clear that the flares disappeared before 11 o'clock on the night of the 7th.

And again:—

> With regard to the flares put out by the defendant, no doubt so long as they burned they provided a warning to motorists.

The witness Dench said that he had passed the truck at about 11 o'clock and at that time the flares were not there, the truck standing unlighted upon the roadway: he thereupon notified the R.C.M.P. at Olds, telephoned to the branch of his company at Red Deer in an endeavour to warn other traffic on the highway, and also left word

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at a coffee shop south of Olds where truckers were apparently in the habit of stopping. The evidence shows further that the police officer proceeded to the scene arriving there about 11.30 p.m. and found the position of the truck to be with its wheels straddling the most easterly of the shallow ruts which were on the most easterly half of the highway, the wheels on the right side of the truck being some 3 or 4 feet from the east shoulder of the road which was 27 feet in width. The officer broke into the truck and turned on the marker lights, these consisting of two red lights on the back, two on the front and three green ones over the cab, and in this condition the truck remained upon the highway until some time after the accident. While, according to the appellant, the night was clear when he left the scene it later became foggy and at the time Sgt. Dunlop of the R.C.M.P. arrived at the scene that night it was very foggy and the visibility was poor. At about 9.30 o'clock of the following morning one Rindall driving south came to the scene and found a Chevrolet coupe facing south upon the highway a short distance in front of the truck and in it the body of John Shafer. He reported the matter to Sgt. Dunlop who returned to the scene and found that the front of the coupe was approximately 8 feet distant from the front of the truck, the front end of the former vehicle was driven in, the radiator broken, two fenders smashed and there was other damage: apparently there had been a straight head-on collision of the car and the truck and the impact had driven the latter back from its former position a distance of some 8 feet: there were no skid marks but, from the fact that the wheels of the coupe were straddling the most easterly of the ruts on the easterly half of the highway, the officer inferred that Shafer had been driving on that side of the road and had pulled slightly to the left immediately before the collision. He, it appears, had stopped overnight at a hotel in Red Deer which lies some distance to the north but there was no evidence available either as to the time he left that place or as to the exact time of the accident. From the fact, however, that when Sgt. Dunlop arrived at the scene at 9.30 o'clock he found the body to be quite warm, it may be inferred that it was not long prior to this that the accident had occurred. The fog had apparently continued during

the night and when the officer arrived at the scene on the following morning it was still foggy but the marker lights were burning and he could see the truck at a distance of from 200 to 300 feet. The officer thought there had been more fog earlier in the morning: however, the distance at which the truck with its marker lights would have been visible to Shafer at the time of the accident is left to conjecture.

The learned trial Judge in finding that the appellant had been guilty of negligence causing the accident said that he was satisfied that "the defendant could have done more than he did" but, with respect, this is hardly the true test in deciding the question of his liability: it was the duty of the defendant to take reasonable care under the circumstances to avoid acts or omissions which he could reasonably foresee would be likely to cause injury to persons driving upon the highway. The dangers which the defendant was required to take steps to avert were those which, in the language of Lord Wright in *Hay* v. *Young,* 1943 A.C. (1) at p. 111, "the reasonable hypothetical observer could reasonably have foreseen": or, as expressed by Blackburn, J. in *Smith* v. *London & South Western Ry. Co.* (2) at p. 21, what the defendant ought to have anticipated as a reasonable man. The question is not whether the appellant did everything that was possible but rather whether he omitted to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would have done or did something which a prudent and reasonable man would not do (*Blyth* v. *Birmingham Water Works* (3), at 764, Alderson, B.). There is no suggestion here that the breakdown of the truck was due to any fault of the appellant: when it occurred he succeeded in guiding the vehicle into a position where the most easterly wheels were some 3 or 4 feet from the easterly extremity of the roadway: the hard surface of the road was 27 feet wide and the west side of the truck was some 15 or 17 feet distant from the westerly side of the roadway, so that there was ample room for other vehicles to pass. The surface of the road was covered with snow but this was

(1) [1943] A.C. 92.
(2) (1870) L.R. 6 C.P. 14.
(3) (1856) 11 Ex. 781.

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hard-packed and was only one or two inches in depth. In these circumstances the appellant placed the flares in a position where they would give adequate warning to traffic in either direction. It was clear at the time and he says that he did not encounter any fog while en route to Calgary: however, the flares were admittedly effective as a warning to persons driving on the highway during a fog. They were freshly filled with oil and would have burned for from 15 to 16 hours and, assuming that the accident occurred around 8 o'clock on the following morning, would have been burning at that time had they not been removed in the meantime. In fact the flares were stolen at some time between 10 o'clock that evening, when they were seen to be burning by Mrs. Brownell, and 11 o'clock, when Dench arrived at the scene. It is not suggested by the evidence that there was any reason why the appellant should have anticipated the theft. It was foggy between 10 and 11 o'clock of the night in question and at that time the marker lights on the truck were not burning, so that it would be apparent to a thief that the act of removing the flares would endanger the safety of any person driving north upon the highway. The cost of the flares was apparently $4.00 when purchased new. That anyone would jeopardize the lives of people upon the highway by stealing articles of such slight intrinsic value is a contingency which, in my opinion, the appellant could not reasonably have foreseen. It was not the failure of the appellant to take reasonable care which was the direct or proximate cause of the accident, rather was it (subject to what there is to be said as to the negligence of Shafer) the act of the thief, "the conscious act of another volition" of the nature referred to by Lord Dunedin in *Dominion Natural Gas Co.* v. *Collins* (1) at 646.

It is contended for the respondent that the appellant could have taken other steps such as moving the truck further to the right side of the road, notifying the mounted police officer at Olds and leaving word as to the position of the truck at the coffee shop south of Olds so that other travellers might be warned. As to the former, the loaded truck was some 12 tons in weight and slightly in excess of 7 feet wide and there was no equipment available to remove

(1) [1909]) A.C. 640.

it from the highway. The evidence does not disclose the distance from the easterly boundary of the travelled portion of the roadway to the ditch, but I would infer that to have removed the truck completely from the travelled portion would have involved running it in to the easterly ditch and that anything short of this would have left a substantial portion of the vehicle upon the travelled roadway, so that the accident would not have been thus averted. As to the failure to notify the police officer, this was done by Dench at about 11.30 p.m.: he also notified the people at the coffee shop and telephoned a warning to Red Deer: nothing, therefore, resulted in consequence of the appellant's failure to do any of these things.

I think that the damages occasioned by the criminal act of a third person under the circumstances of this case are too remote for recovery.

As pleaded the action is one for damages for negligence and it was dealt with by the learned trial Judge in this manner. However, when the matter came before the Appellate Division the respondent as an alternative to the claim in negligence contended that in any event there was liability in nuisance. This issue, in my opinion, is not raised by the Statement of Claim: the allegation is that the defendant "unlawfully, negligently and recklessly" parked and abandoned the truck. The essence of a claim in nuisance such as is now sought to be asserted is a wrongful obstructing of the highway, thereby depriving the plaintiff of some right of passage which he is entitled to assert. An allegation that the defendant "unlawfully" parked and abandoned the truck does not properly raise the issue and the course of the trial, during which no mention was made of a claim in nuisance, confirms my view that it was not intended to assert such a claim. The matter was, however, raised before the Appellate Division: Harvey, C. J. A. mentions it but as he agreed with the trial Judge that the defendant was liable in negligence found it unnecessary to deal with the question. If I were of the opinion that the defendant would have tendered further evidence had the issue of nuisance been raised by the pleadings I would not consider that I was at liberty to deal with it: as it is I think nothing further could be added to the evidence which would assist in determining the issue.

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In determining whether there was here an actionable nuisance, it is necessary to determine whether the use to which the highway was put by the defendant was reasonable under the circumstances, and this question is to be distinguished from the question as to whether the defendant took reasonable care which must be determined on the count for negligence. As pointed out by Lord Greene, M. R. in *Maitland* v. *Raisbeck* (1) at 693, if the case of *Ware* v. *Garston Haulage Co.* (2) decided that when a vehicle broke down on a public highway a nuisance was ipso facto created it cannot be supported. In *Herring* v. *Metropolitan Board of Works* (3) at 525, Byles J. said in part:—

> As a general rule, all the Queen's subjects have a right to the free and uninterrupted use of a public way: but, nevertheless, all persons have an equally undoubted right for a proper purpose to impede and obstruct the convenient access of the public through and along the same. Instances of this interruption arise at every moment of the day. Carts and waggons stop at the doors of shops and warehouses for the purpose of loading and unloading goods. Coal-shoots are opened on the public footways for the purpose of letting in necessary supplies of fuel. So, for the purpose of building, re-building, or repairing houses abutting on the public way in populous places, hoardings are frequently erected inclosing a part of the way. Houses must be built and repaired; and hoarding is necessary in such cases to shield persons passing from danger from falling substances.

This statement of the law was criticized by Fletcher-Moulton, L.J. in *Lingké* v. *Christchurch Corporation* (4) at 608, but in *Harper* v. *Haden* (5) Romer, L.J. at 318 expressed the view that the statement quoted was an accurate statement of the law and at p. 319 he expresses his agreement with the statement of Vaughan Williams, L.J. in *Lingké's* case at p. 602, to this effect:—

> But if the user that you are making is of such a character that the people generally who use that road will find it necessary to do this, that, and the other, whether it is to stop for a time on the highway, or any of the other matters which are mentioned by Byles J. in his judgment, this is no legal obstruction. You must remember these instances begin with carts and waggons stopping at the doors of shops and warehouses. Then he takes coal-shoots; then he takes what to my mind is a very much wider instance but equally true: "So, for the purpose of building, rebuilding, or repairing houses abutting on the public way in populous places, hoardings are frequently erected enclosing a part of the way." These are the sort of things that it is recognized people may do in

(1) [1944] 1 K.B. 689.
(2) [1944] 1 K.B. 30.
(3) (1865) 19 C.B. (N.S.) 510.
(4) [1912] 3 K.B. 595.
(5) [1933] 1 Ch. 298.

respect of the highway which, although they physically obstruct, do not constitute an obstruction of the King's highway either for the purpose of indictment or for the purpose of civil action.

In *Harper's case* at p. 317 Romer L.J. points out that no member of the public has an exclusive right to use the highway: he has merely a right to use it subject to the reasonable user of others and if that reasonable user causes him to be obstructed he has no legal cause of complaint. It was, in my opinion, a reasonable user of the highway on the part of the appellant in the circumstances to leave his truck drawn up on the easterly side of the road amply protected by warning lights while he went for the necessary repairs, even if this entailed leaving it there overnight. It cannot, I think, be suggested that in these circumstances if the driver of another vehicle had collided with the standing truck at any time prior to the time at which the flares were stolen he could have recovered in nuisance against this appellant. The truck so protected was not a danger to anyone nor was the use of the highway obstructed, except to the extent that vehicles travelling north would require to draw to the left of the truck in passing. It was again the act of the thief in stealing the flares that rendered the truck dangerous to persons lawfully using the highway. In *Salmond on Torts,* 10th Ed. p. 234, commenting on the decision in *Ware's* case, the learned author says:—

> It may be doubted, however, whether a man who lawfully brings his vehicle on to the highway in a roadworthy condition can be properly said to have created a nuisance by a positive act of misfeasance if through no fault of his the vehicle breaks down and after he has parked it by the roadside the lights go out without fault on his part. Such a case would seem analogous rather to those cases with which we shall deal later which come under the head of continuance of a nuisance.

A case of the nature referred to is *Barker* v. *Herbert* (1). In *Sedleigh-Denfield* v. *O'Callaghan* (2) at 904, Lord Wright said in part:

> Though the rule has not been laid down by this House, it has I think been rightly established in the Court of Appeal that an occupier is not prima facie responsible for a nuisance created without his knowledge and consent. If he is to be liable a further condition is necessary, namely, that he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it and obviate its mischievous effects. The liability for a nuisance is not, at least in modern law, a strict or absolute liability. If the defendant by himself or those for whom he is responsible has created what constitutes a nuisance and if it causes damage, the difficulty now being considered does not arise.

(1) [1911] 2 K.B. 633. (2) [1940] A.C. 880.

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But he may have taken over the nuisance, ready made as it were, when he acquired the property, or the nuisance may be due to a latent defect or to the act of a trespasser, or stranger. Then he is not liable unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it.

The appellant did not become aware that a thief had made away with the flares until after the accident had occurred on the following morning and as he could not, in my opinion, reasonably foresee in the circumstances of this case that they would be stolen, it cannot be said that he should have become aware of it in time to abate the nuisance (if indeed the truck with its numerous marker lights could be so classified) before the accident occurred.

The appeal should be allowed and the action dismissed; if the appellant asks for costs they should follow the event.

RAND J. (dissenting):—The question raised in this appeal is two-fold: had the truck, left on the highway overnight from 7 p.m. until 11 a.m. the next morning, become a nuisance at the time of the collision; and if not, had the owner exercised the care he should have during that period?

The highway is primarily for the purpose of passing and re-passing; for automobiles it is neither a storage place nor a garage. The individual user is limited by what can be accorded all persons in similar circumstances and by the reconciliation of convenience in private and public interests.

It must then be within the standard of reasonableness. As Lord Greene in *Maitland* v. *Raisbeck* (1) at p. 691 put it:

> Every person who uses the highway must exercise due care, but he has a right to use the highway, and, if something happens to him which, in fact, causes an obstruction to the highway, but is in no way referable to his fault, it is wrong to suppose that ipso facto and immediately a nuisance is created. A nuisance will obviously be created if he allows the obstruction to continue for an unreasonable time or in unreasonable circumstances, but the mere fact that an obstruction has come into existence cannot turn it into a nuisance. It must depend on the facts of each case whether or not a nuisance is created.

In the circumstances here, the owner of the truck should, I think, have shown clearly that the fifteen hours during

which this large vehicle occupied the narrow travelled portion of an icy roadway was not an unreasonable length of time to enable him either to remove it or to get it back into ordinary use on the highway. But so far from that, the facts prove the contrary. There was a telephone within 300 yards, the parts needed for the wheel were small and available in Calgary, they could have been brought to the truck, at the most, in three or four hours, and they could have been put in place and the wheel made fit for service as was done the next morning in the course of minutes. This, no doubt, would have taken a bit of effort and trouble outside the ordinary course. But is reasonableness in such conditions to be measured in terms of the ordinary rhythm and schedule of things? The driver would have had to walk 250 yards and endure probably the slower tempo of a rural telephone connection; instead of that he hailed a truck and was driven to Calgary; he would have been at a cold job out of doors and awake possibly for the greater part of the night before reaching a parking place, a garage or his destination; instead of that, he went home and took his ordinary sleep: there would have been some scurrying around in Calgary to get the stock room, where such parts were sold, opened, perhaps even some persuasion of the supply man to do that, but the latter too was left to follow his nightly habit without disturbance: and there would have been the expense of sending the parts out by automobile at night, perhaps greater than in the morning: all these and other equivalent deviations were avoided. But reasonable people meet emergencies by resorting to just such practical and homemade means and where the public danger of these days from obstructions in highways is balanced against such relatively paltry inconvenience of the individual, I cannot doubt that the individual must give way.

The truck, then, at the time of the accident constituted a nuisance dangerous to persons using the highway in the ordinary manner. It was the duty of the owner to have it removed, but if instead of that, means were taken to guard against its danger, then those means must be main-

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tained at all events, and it is no answer that a third person removed them; they must be kept as effective as the removal itself would be.

Viewing the question in the second aspect, the concept nuisance as here used embodies the ideas of both an unwarranted interference with the exercise of rights of passage on a highway and an unwarranted condition of danger to that exercise. In the latter sense, time is a material ingredient in the original situation out of which the danger arises: the longer it continues the greater the number of persons exposed, and the greater the possibility that a harmful characteristic will emerge or be aggravated, as exemplified here. When, therefore, the exigencies of modern traffic bring about an unavoidable but exceptional use of the highway, the risk of potential danger becoming actual which it creates must be circumscribed in time and a duty arises to act reasonably, with the aids which the same modernity has brought into existence, to prevent its realization. Apart from the steps already mentioned, the driver, for instance, could either by himself or by a person in the neighbourhood have kept an indoor watch on the flares and have set up substitute warnings on the roadway when they had disappeared. All night driving is ordinary and usual in these days and the enhanced danger of obstructions especially in winter road conditions cannot be offset by a tender regard for the amenities of regularity in personal habits. The duty, therefore, resting upon the driver, was shown not to have been discharged.

I would dismiss the appeal with costs.

Appeal allowed and action dismissed with costs throughout.

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