1947
*Oct. 22, 23, 24, 27, 28
1948
*Feb. 3

DAME MARIE LEONTINE THERIAULT, ES QUAL (PLAINTIFF)..... APPELLANT;

AND

H. HUCTWITH, ET AL (DEFENDANTS)....RESPONDENT.

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

Motor vehicle—Negligence—Collision—Intersection of public highways—Right of way—Liability—Duties of both drivers—Joint negligence—Quebec Motor Vehicles Act, R.S.Q. 1941, c. 142, s. 36, ss. 7—Notice of appeal—Continuance of suits—Joint and several obligations—Payment by one of the joint and several debtors—Subrogation—Intervention—Arts. 1117, 1118, 1156 cc.—Arts. 269, 271, 273 C.C.P.—Supreme Court Rule 60.

A ten ton truck driven by one of the respondents, Brandon, and belonging to the other respondent, Huctwith, collided with an automobile driven by the appellant, Miss Thériault. A passenger in the automobile, Alphonse Jongers, was injured and sued Miss Thériault and the two respondents jointly and severally. The trial judge held the three defendants to be jointly and severally liable and awarded the sum of $8,500. The two respondents appealed to the Court of King's Bench, but did not serve the notice of appeal upon Miss Thériault who did not appeal. Before the case was heard by the

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

Court of Appeal, Miss Thériault paid to Jongers the full amount of the judgment, namely $8,500. Jongers died subsequently, but still before the hearing of the case by the Court of Appeal, and in his will appointed Miss Thériault as his testamentary executrix and universal legatee, with the result that Miss Thériault continued the suit as respondent es-qual in the Court of Appeal and as appellant es-qual before this court, but is not personally before this court. The Court of Appeal maintained the appeal and dismissed the action in toto.

The accident occurred in the evening and both vehicles had their lights on. Miss Thériault was driving northerly on a road known as "Montée des Sources". She was in the act of crossing the concrete strip, some 22 feet in width, occupying the northerly section, (which alone was in use) of the Metropolitain Boulevard, a highway running east and west, and her car had reached the asphalt shoulder to the north with only the rear wheels remaining on the concrete when she was struck on the right rear by the right front of the respondent's truck, then travelling west. There was on the Boulevard a warning sign located some 560 feet east of the intersection requiring the speed of vehicles at that point to be reduced to 20 miles an hour and also another sign indicating the intersection itself. Respondent's truck covered a distance of 200 feet after the impact with his brakes on before coming to a stop. The appellant stopped before entering the Boulevard.

Held: The appeal should be allowed with costs and the judgment of the trial judge restored.

Per The Chief Justice and Taschereau J.: The accident was the result of the common fault of the three defendants. Subsection 7 of section 36 of the Quebec Motor Vehicles Act does not exempt the driver of the dominant car from exercising proper care and attention.

After the payment made by Miss Thériault, which payment also benefited to those who were with her jointly and severally liable, Jongers was entirely disinterested from the case and could not further exercise any claim against the three defendants, but Miss Thériault could recover from the other defendants the share and portion of each of them, though she was specially subrogated to the rights of Jongers. As her cause of action against the other two resides in the judgment of the trial judge, and as a party cannot be deprived of its rights without being called properly in the case, the notice of appeal should have been served upon her. She only continued the suit as testamentary executrix and universal legatee to protect and defend the rights of the original plaintiff Jongers.

The appeal here is merely to find if there is a joint and several liability between the tort feasors. Miss Thériault is the only person with sufficient interest, who may claim that the Court of Appeal erred when it deprived her of her rights, without her being present in the case as a party, to ask that the judgment of the trial judge be upheld. As the English doctrine of equitable title and trustee with legal title is unknown in the law of the Province of Quebec, Miss Thériault should be made a party in this case.

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Per Kellock and Locke JJ.: The respondents ought to have served Miss Thériault with the notice of appeal, as she was the only person interested in maintaining the judgment. It is therefore proper that she should now be added.

The fact that Brandon had the statutory right of way, as provided for in ss. 7 of s. 36 of the Quebec Motor Vehicles Act, does not, in the circumstances, absolve him from his failure to act as he could and should, had his inattention and probably also his excessive speed not prevented his so doing.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), reversing the judgment of the Superior Court, Loranger J., and dismissing the appellant's action in toto.

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

Philippe Brais, K.C. and *Angus Ogilvie, K.C.* for the appellant.

Gustave Monette, K.C. and *A. M. Watt* for the respondents.

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

TASCHEREAU, J.:—On the 15th of October, 1941, Alphonse Jongers, a widely known artist of the city of Montreal, was a gratuitous passenger in an automobile of which Miss Léontine Thériault was the registered owner. Both were driving in a south-northerly direction on a road called "La Montée des Sources", and which is the dividing line between the towns of Pointe-Claire and Dorval. At the intersection of the Metropolitain Boulevard, near the station of the Canadian National Railways at Strathmore, a heavy truck with semi-trailer, driven by one of the defendants Brandon, and belonging to the other defendant Huctwith, collided with Miss Thériault's automobile. As a result of this accident Mr. Jongers was severely injured, and claimed from Miss Thériault, Brandon and Huctwith jointly and severally a sum of $15,998.02.

Mr. Justice Loranger of the Superior Court of Montreal held that the accident was due to the common fault of

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Miss Thériault and of the two other defendants, and condemned them jointly and severally to pay the sum of $8,500 plus interest and costs. Although his statement was a mere obiter dictum, the learned judge expressed the opinion that Miss Thériault was responsible for this accident in a proportion of 20 per cent, and that 80 per cent should be borne by the two other defendants.

Dissatisfied with this judgment, the defendants Brandon and Huctwith appealed to the Court of Appeal of the Province of Quebec, but did not serve the notice of appeal upon the other defendant Miss Thériault, who had filed a separate defence. Before the case was heard by the Court of Appeal, Miss Thériault paid to Mr. Jongers the amount of the judgment, namely $8,500 plus interest and costs, and obtained from Mr. Jongers a subrogation of his rights against Brandon and Huctwith. Later, but also before the hearing of the case, Mr. Jongers died appointing by his Will Miss Thériault as his *testamentary executrix* and universal legatee, with the extraordinary result that Miss Thériault who was the defendant before the Superior Court, but who was not personally a party before the Court of Appeal, having merely continued the suit, is now plaintiff-appellant es-qual. before this Court.

The Court of Appeal (1) maintained Brandon's and Huctwith's appeal and dismissed the action in toto. The Court came to the conclusion that only Miss Thériault was to be blamed for this accident, and absolved completely Brandon and Huctwith. Mr. Justice St-Jacques, dissenting, would have dismissed the appeal confirming the judgment of Mr. Justice Loranger, and Mr. Justice Marchand who is also dissenting, would have allowed the appeal, but merely in order to reduce the amount of the judgment a quo from $8,500 to $6,036.02. He expressed the opinion that Miss Thériault was not negligent, and that the accident was entirely due to the fault, negligence and imprudence of the driver of the truck.

I had the advantage of reading the reasons of my brother Kellock and I fully agree with him in his conclusions on the merits of the case. As he does, I think that this unfortunate accident is the result of the common fault of the three defendants. I also believe that he has

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given the proper interpretation to subsection 7 of section 36 of the Motor Vehicles Act, which to my mind, does not exempt the driver of the dominant car from exercising proper care and attention. I would like however to add the following considerations on another aspect of the case.

As I have already stated, Mr. Justice Loranger maintained the action for $8,500 against the three defendants Miss Thériault, Brandon and Huctwith, jointly and severally.

It happened, however, for a reason of which we are not aware, that when Brandon and Huctwith appealed to the Court of King's Bench of the Province of Quebec, they did not serve their notice of appeal upon Miss Thériault, serving it only upon Mr. Jongers' solicitors. It was some time after the case had been brought before the Court of Appeal that Miss Thériault, personally or through her insurers, paid to Mr. Jongers the full amount of $8,500 plus interest and costs. This payment to my mind benefited not only to Miss Thériault, but also to those who were with her jointly and severally liable. Section 1103 c.c. is clear:—

> 1103. There is a joint and several obligation on the part of the codebtors when they are obliged to the same thing, in such manner that each of them singly may be compelled to the performance of the whole obligation, and that *the performance by one discharges the others toward the creditor.*

It necessarily followed that Mr. Jongers who was paid, was entirely disinterested from the case, and that he could not further exercise any claim against Miss Thériault nor against Brandon and Huctwith. Mazeaud says in his "Traité de la responsabilité civile, délictuelle et contractuelle", Vol. 2 p. 753:—

> Mais il va de soi qu'elle (la victime) ne saurait se faire payer le tout par chacun; on sait que la victime ne peut obtenir autre chose que la réparation du dommage qu'elle a subi; une fois qu'elle est indemnisée par l'un *son action se trouve donc éteinte contre les autres.*

By the payment that she made, Miss Thériault in view of section 1118 C.C. could recover from the others the share and portion of each of them, though she was specially subrogated in the rights of Mr. Jongers. She, therefore, instituted proceedings before the Superior Court of Montreal, claiming from Brandon and Huctwith an amount proportionate to their liability which she, following Mr.

Justice Loranger's suggestion, estimated to be 80 per cent. Her *cause of action* in this second action taken by her against Brandon and Huctwith, resides in the judgment given by Mr. Justice Loranger. This is clear under section 1118 C.C., and she was obviously the main interested party in the Court of Appeal (1), and I have no doubt that the notice of appeal should have been served upon her. She had acquired the right to recover against Huctwith and Brandon as a result of the judgment of Mr. Justice Loranger, and I fail to see how she can lose this right, which is the basis of her action, by this judgment of the Court of Appeal (1), when she had ceased to be a party in the case. The Court of Appeal (1), having allowed the appeal, made this cause of action disappear, and Miss Thériault's second action will necessarily fail, there being no more debt to be apportioned between her and Brandon and Huctwith. It is a rule of law universally admitted by the courts of the Province of Quebec, and reaffirmed by this Court on many occasions, that a party cannot be deprived of its rights without being called properly in the case. *Vide Burland* v. *Moffatt* (2); *La Corporation de la Paroisse de St-Gervais* v. *Goulet* (3); *Christin* v. *Piette* (4).

It has been submitted that Miss Thériault, having been allowed, after Mr. Jongers' death, to continue the suit "en reprise d'instance" in the Court of Appeal, was properly in the case, not solely for the purpose of asserting the rights of the original plaintiff Jongers, but also to assert her own personal rights. With this proposition, I cannot agree, and I am of opinion that when she continued the suit as *testamentary executrix and universal legatee,* it was merely to protect and defend the rights of the original plaintiff Jongers. Under Mr. Jongers' Will she was made *testamentary executrix,* and it is in that *quality* that for the purpose of the execution of the Will, she was seized as legal depositary of the moveable property of the estate.

It follows that the Court of Appeal could not deprive her of her personal rights because she was not a proper party in the case, but it follows equally that, as representing Mr. Jongers, she has no more interest in the present appeal

(1) Q.R. [1946] K.B. 564.
(2) 11 S.C.R. 76 at 89.
(3) [1931] S.C.R. 437.
(4) [1944] S.C.R. 308.

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than Mr. Jongers would, to ask this Court to set aside a judgment of the Court of Appeal, which declares that she has lost her *cause of action* in her suit against Brandon and Huctwith. Her only interest es-qual. is that Jongers was ordered by the Court of Appeal to pay the costs in both courts.

The litigation here is merely to find if there is a joint and several liability between the tort feasors, and when this has been determined, it may not be raised again in the second action between Miss Thériault and Brandon and Huctwith, where only the apportionment of the liability will have to be established. Miss Thériault is the only person with sufficient interest, who may claim that the Court of Appeal erred when it deprived her of her rights, without her being present in the case as a party, to ask that the judgment of the trial judge be upheld.

Under the English system, a similar situation would not arise because Jongers, having subrogated Miss Thériault in all his rights would be a trustee having the legal title, while Miss Thériault would have the equitable title. He would, therefore, represent her before the Court as a party and she would be properly in the case. But, this conception is unknown in the law of the Province of Quebec. This is a case, I believe, where in view of our rules giving us wide powers, Miss Thériault's application to be made a party should be allowed. Her interest is surely sufficient to permit her to intervene in this appeal between other parties, and to pray that the judgment of the Court of Appeal be set aside. As the matter has been fully argued by all parties, it seems quite unnecessary to hear any further argument on the point.

I would allow the appeal and restore the original judgment with costs. But in view of the special circumstances of the case, there should be no costs in the Court of Appeal to either party, and no costs of the application to be added in this Court.

RAND J.:—I would allow the appeal and restore the judgment at trial with costs to go as proposed by my brother Taschereau.

The judgment of Kellock J. and Locke J. was delivered by

KELLOCK, J.:—This is an appeal from a judgment of the Court of King's Bench, Appeal Side, of the Province of Quebec, dated the 26th of June, 1946 (1), reversing a judgment of the Superior Court. The action was brought by one, Jongers, against both the appellant and the respondents for damages for personal injuries sustained by Jongers on the evening of October 15, 1941, in a collision between a truck owned by the respondent Huctwith and driven by the respondent Brandon and an automobile owned and driven by the appellant in which the plaintiff was a passenger, the plaintiff alleging negligence on the part of both drivers. Judgment was given against the defendants jointly and severally for $8,500 and costs. Although the learned trial judge did not expressly so find, for the reason that there was no issue on the point between the defendants, he expressed the opinion that the degrees of negligence as between Brandon and Miss Thériault were 80 per cent and 20 per cent respectively.

The respondents appealed to the Court of King's Bench and pending the appeal the plaintiff Jongers died, leaving Miss Thériault his executor and universal legatee. This had the effect, under Article 269 of the Code of Civil Procedure, of a stay. The respondents, who had not served their notice of appeal upon Miss Thériault, their co-defendant in the action, thereupon took the necessary proceeding in pursuance of Article 273, and in answer thereto Miss Thériault, upon petition pursuant to Article 271, obtained an order permitting her to continue.

Pending the appeal also, and prior to the death of the plaintiff, Miss Thériault, or her insurers, paid the judgment and costs in full and obtained an assignment. She also commenced a new action in the Superior Court against the respondents for the recovery of 80 per cent of the judgment debt. Following upon the judgment of the Court of Appeal in this action the respondents moved in the second action to be allowed to amend their defence by alleging that the judgment of the Court of King's Bench constituted chose jugée as against the appellant. When the present appeal was opened before this

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court the question arose as to the effect of the payment of the judgment upon the rights of the parties to this appeal and I proceed to consider that matter first.

It is common ground between the parties that the obligation of the defendants toward Jongers under the judgment at trial was joint and several. Accordingly, by reason of Article 1107 of the Civil Code Jongers had the right to enforce the judgment in full against any of the judgment debtors, but by reason of Article 1117 each of the defendants as between themselves was liable for his proper share which, in the circumstances here present, would be governed by the respective degrees of negligence. Under Article 1118 provision is made entitling one of a number of joint and several debtors who has paid in full to recover the proper shares of the others.

Miss Thériault having paid the judgment in full became entitled under Article 1155 to a conventional subrogation which she in fact obtained and she also became subrogated to the position of Jongers by operation of law under Article 1156, paragraph 3. Accordingly, had there been no appeal Miss Thériault, having paid, could have relied upon the judgment as establishing the amount of the judgment debt as between herself and her co-defendants and also as a basis for recovery, in another proceeding of course, of contribution pursuant to Article 1118. In that state of affairs the present respondents appealed but did not make her a party.

In my opinion the respondents ought to have served the appellant with notice of the inscription in appeal. She was an "opposite" party within the meaning of Article 1213 of the Code of Procedure and entitled, even before payment of the judgment, to be heard in opposition to the appeal. On payment, she would still, in my opinion, having acquired the rights given her by Article 1118 of the Civil Code, have been entitled to oppose the appeal, for the reason that she, and she alone, was then interested in maintaining the judgment. The rights acquired by the appellant, however, merely by reason of the death of Jongers, were no higher than those of the deceased himself with respect to the judgment. Her testator had ceased to be interested in the judgment prior to his death and had no interest to pass on to her under the judgment then.

I take the law to be, as stated by my brother Taschereau, that the appellant did not acquire status to rely on her rights under Article 1118 by the continuance of the suit. It was therefore necessary for the appellant to become a party to the appeal in her personal capacity in order to assert those rights. As the respondents should have made her a party in the first instance, it is proper that she should now be added under the provisions of Rule 60.

Turning to the merits, the accident out of which this litigation arises took place on the evening of the 15th of October, 1941, at a time when it was sufficiently dark to require the use of lights by both the automobiles involved. The appellant was driving northerly on a road known as Montée des Sources. She was in the act of crossing the concrete strip, some 22 feet in width, occupying the northerly section, (which alone was in use) of the Metropolitain Boulevard, a highway running east and west, and her car had reached the asphalt shoulder to the north with only the rear wheels remaining on the concrete when it was struck on the right rear by the right front of the respondent's truck, then travelling west.

In the Superior Court the learned trial judge was of opinion that the appellant was negligent in that without knowing the exact speed of the approaching truck she ventured across, miscalculating both the distance which the truck was away and its speed. He was also of opinion that the respondent, Brandon, driver of the truck, was negligent in failing to pay any attention to a warning sign located some 560 feet east of the intersection requiring the speed of vehicles at that point to be reduced to 20 miles an hour and also in disregarding another sign indicating the intersection itself. He held that the fact that Brandon was approaching from the appellant's right did not relieve him from all obligation with respect to other drivers, such as the appellant, who might require to cross the boulevard at the intersection and that he had proceeded without regard to such obligation and the signs, at such a great speed that, upon observing the appellant's automobile 90 feet in front, he was unable to avoid a collision. The learned judge found that Brandon lost control of his truck on seeing the appellant's car and that he had travelled a distance of 200 feet after the impact with his brakes on

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before coming to a stop. He concluded that had Brandon been driving at the rate of speed permitted by law and required by prudence in the circumstances he would have had time to stop or to slow up sufficiently to pass behind the appellant's car which had in fact nearly completed its crossing.

The Court of Appeal by a majority allowed the appeal, being of opinion that the negligence of the appellant was the sole cause of the collision, Brandon having the right-of-way. The formal judgment proceeds upon the basis of an assumed admission of the appellant that she did not stop before entering upon the cement strip as required by law but had stopped at a point some 120 feet to the south and that she did not look to her right from that point at any time before entering on the concrete.

The appellant has, in my opinion, clearly established that the judgment is founded upon a misconception of the evidence with respect to the place where she stopped. In fact Gibsone J., who with McDougall and Barclay, JJ., compose the majority, finds as one of the admitted facts that the appellant stopped at the cement strip. This misconception has apparently arisen due to the fact that the Metropolitain Boulevard, when completed, will consist of two cement strips with a substantial intervening space and that entry to the boulevard will be protected by a stop sign to be located south of the southerly strip. At the time of the accident however, as already stated, the northerly strip alone had been constructed and the stop sign was located a few feet to the south of its south edge. It was at this stop sign that the appellant in fact stopped.

The respondents' truck consisted of a tractor and a semi-trailer weighing, with load, approximately ten tons. According to Brandon his truck was about 90 to 100 feet from the intersection when he first saw the appellant who was then, he said, about 100 feet south of the concrete. At that time he sounded his horn. Seeing that the appellant was not going to stop he swerved to the left, striking the appellant's car on the right rear with the righ front of his truck. He says that he got over on to the soft shoulder on the south side of the highway and ultimately got back on the cement, coming to a stop at the point where his truck was found by the police some 200 feet west of the

intersection. He stated that he was approximately 50 feet from the intersection when he applied his brakes, his speed being about 30 miles per hour. He has no idea of the speed at which the appellant was travelling. He would only say that her car was in motion.

Evidence accepted by the learned trial judge establishes that the respondents' truck left skid marks commencing approximately at the point of impact and continuing some 200 feet to the truck in the position which it ultimately came to a stop. The learned judge does not accept Brandon's evidence that he went off on the south shoulder nor his evidence as to the speed at which he was travelling. I find it impossible to reconcile the evidence of Brandon that the appellant's automobile was approximately 100 feet south of the pavement when he first saw it, his own truck being at that time an equal distance from the intersection, with the evidence that the appellant's car subsequently and immediately before entering upon the pavement came to a stop but was nonetheless almost across the pavement when struck by Brandon. Leaving aside for the moment the effect of the statute to which I shall refer, there was ample evidence in my opinion upon which the learned trial judge could reach the conclusion that Brandon was negligent in the respects found and that such negligence was a contributing cause of the accident. The finding of negligence against the appellant by the learned trial judge has not been appealed against.

There remains for consideration the effect upon the facts of this case of subsection 7 of section 36 of the *Motor Vehicles Act*, R.S.Q., 1941, c. 142. So far as material it provides that:

> At bifurcations and at crossings of public highways, the driver of a vehicle on one of the roads shall give the right-of-way to the driver of a vehicle coming to his right on the other road.

It is contended on behalf of the respondents that the effect of the subsection is to place a duty upon the driver of the servient car to yield the right-of-way which is "absolute" and from which "nothing in the conduct of the dominant car can possibly excuse it". The decision of this court in *Swartz* v. *Wills* (1), is relied upon as establishing this proposition. In that case the court had to consider

(1) [1935] S.C.R. 628.

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in relation to the facts of the case there under consideration, a section of the Highway Act of British Columbia to somewhat the same effect but which included a provision, not in the Quebec legislation, that the provisions of the section should not excuse any person from the exercise of proper care at all times.

In *Carter* v. *Van Camp and Anderson* (1), the motor car of the respondent Anderson proceeding south came into collision at a street intersection with an automobile driven by the appellant, proceeding west.

In delivering the judgment of himself and the present Chief Justice, Anglin J., as he then was, said at page 161:

> An outstanding fact is that the defendant Carter was to blame for an admitted violation of s. 35 (1) of the Highway Traffic Act (R.S.O. 1927 c. 251) and was, therefore, guilty of fault causing the collision, either solely or *jointly with his co-defendant.*

The subsection in question provided that where two people in charge of vehicles approach a cross-road or intersection at the same time, the person to the right hand of the other vehicle should have the right-of-way.

It will be observed that in the passage to which I have referred Anglin J. is dealing with negligence causing "the collision". This passage is quite inconsistent with the view that the statutory right-of-way was "absolute" in the sense contended for by the present respondents.

Duff J., as he then was, whose judgment in the *Swartz* case (2) is chiefly relied upon by the respondents in the case at bar, said also in the same case (1) at page 165:

> Moreover, the considerations advanced by Grant, J. A., seem quite adequate to support the conclusion that Anderson, if he had been driving with proper circumspection, must have realized that, in proceeding as he did, he was incurring grave risk of a collision, if one accepts the testimony of the witnesses who speak to the facts mentioned by Grant, J. A., as the learned trial judge did. I cannot perceive any ground upon which this finding of the learned trial judge, whose province it was to evaluate the testimony of the witnesses, can be set aside or disregarded.

This also is quite inconsistent with the respondents' contention. Therefore when the court in the *Swartz* case (2), proceeded to inquire "whether the defendant, although he had the right-of-way, exercised proper care", cannot be taken to have done so merely because of the presence in the British Columbia statute of the words already referred to.

(1) [1930] S.C.R. 156. (2) [1935] S.C.R. 628.

Further, in *Royal Trust Company* v. *Toronto Transportation Commission* (1), Davis, J., delivering the judgment of himself, Duff, C.J.C., and Cannon, J. (who had delivered the judgments in the *Swartz* case, Davis J. himself having concurred with Cannon J.) said at page 674:

> But the existence of a (statutory) right-of-way does not entitle the motorman on the street-car to disregard an apparent danger that confronts him.

This was said with reference to a right-of-way in favour of a street-car but that does not in my opinion affect the point under consideration. In that case the operator of the street-car and the driver of the automobile which collided with each other were both held guilty of negligence contributing to the accident, a result which could not have been reached had the right-of-way of the street-car been regarded as of the nature for which the respondents here contend. Davis J. applied to the circumstances of the case before him the test laid down by Lord Dunedin in *Fardon* v. *Harcourt-Rivington* (2):

> The root of this liability is negligence, and what is negligence depends on the facts with which you have to deal. If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.

He then concluded:

> In my view, had either the motorman on the street-car or the driver of the automobile used due care or caution, the collision would not have taken place; and that was substantially the view taken by the learned trial judge.

Applying the above to the case at bar, it is evident that Brandon was oblivious to other traffic, such as the appellant, whom, notwithstanding what he says, he did not see as he ought to have seen, and whom had he been paying proper attention, he could have avoided, if by no other means, by the slightest deviation of his vehicle to the south. This in effect is the finding of the learned trial judge, and therefore the fact that he had the statutory right-of-way does not, in the circumstances, absolve him from his failure to act as he could and should, had his inattention and probably also his excessive speed not pre-

(1) [1935] S.C.R. 671.

(2) 48 T.L.R. 215 at 216.

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vented his so doing. I am therefore of opinion that the learned trial judge was right in the conclusion to which he came.

The respondent pleaded that there existed at the time of the accident the relation of master and servant as between Jongers and the appellant, and that Jongers was entitled to judgment for an amount proportionate only to the negligence of Brandon. The learned trial judge was of the opinion that the question was concluded by the ownership of the automobile being in Miss Thériault and therefore gave judgment for the whole amount. I do not think, with respect, that the fact of ownership concluded the inquiry, but as a determination of the issue will affect the amount of recovery only and as that is now the subject of the second action now pending, I think it will be more satisfactory to leave the matter to be there determined.

With respect to the damages awarded I do not think it is possible to question the amount awarded, even if I were of the view that I should not have been disposed to allow as much.

I would therefore allow the appeal with costs, set aside the judgment of the court below and restore the judgment at trial. There should be no costs in the Court of Appeal or of the application of the appellant to be added in this Court.

Appeal allowed with costs and judgment of the trial judge restored.

Solicitors for the appellant: *Brais & DeGrandpré.*

Solicitors for the respondents: *Foster, Hannen, Watt & Stikeman.*