MODERN MOTOR SALES LIMITED (*Defendant*) ..... APPELLANT;

AND

SAM MASOUD AND MONTREAL CANDY MANUFACTURING LIMITED (*Plaintiffs*) ..... RESPONDENTS.

1952

*May 28, 29

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*Jan. 27

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

Motor vehicles—Warranty—Collision—Defective brakes—Negligence of driver—Liability of owner—Action in warranty against used car dealer —Action by purchaser and third party—Latent defects—Arts. 1053, 1054, 1520, 1522, 1527 C.C.

By a judgment from which no appeal was taken, the respondents and the driver of a truck, owned by the respondent Masoud and lent by him to the respondent corporation of which he was the president, were jointly and severally condemned to pay damages as the result of a collision between the truck and a horse drawn vehicle. The judgment held that the accident was mainly due to the defective condition of the brakes on the truck. The driver was found liable because he had been negligent; the respondent corporation, because it was the employer of the driver; and the respondent Masoud, because he was paying the driver's salary and had allowed the use by the corporation of the defective truck. The respondent Masoud had only a few days previous to the accident purchased the truck from the appellant.

Contemporaneously with the filing of their plea in the action, the respondents, but not the driver, took action in warranty with the customary conclusions against the appellant who did not intervene in the principal action but denied liability in warranty. The judgment in the warranty action dismissed the corporation's action and maintained Masoud's

*PRESENT: Rinfret C.J. and Taschereau, Rand, Cartwright and Fauteux JJ.

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for one half. Appeals were entered by all the parties of the warranty action, and the majority in the Court of Queen's Bench for Quebec maintained the appeals of the respondents.

Held, that the appeal as against the respondent Masoud should be dismissed, in view of the legal warranty against latent defects which arose on the sale of the truck (1527 C.C.).

Held also (Rinfret C.J. and Rand J. dissenting), that the appeal as to the respondent corporation should be dismissed.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), maintaining, St. Germain J.A. dissenting, the appeals of the respondents in an action in warranty against a used car dealer.

A. Laurendeau, Q.C., for the appellant.

A. J. Campbell, Q.C., for the respondents.

The CHIEF JUSTICE (dissenting): In this case, a truck driver, Picard, employed by the Montreal Candy Manufacturing Co. Limited, was found liable on account of his personal negligence, for an accident, as a result of which he was sued together with his employer, the Candy Company, and one Sam Masoud, the owner of the truck.

The trial judge, in his judgment, held that the degree of responsibility of Picard amounted to ten per cent of the damages incurred; that the Candy Company was responsible under Art. 1054 of the *Code,* as the employer of Picard; and that Masoud, as owner of the truck, was responsible because he had put into circulation a vehicle with defective brakes. The learned judge attributed to this defect the main cause of the accident.

There was no appeal from that judgment and, therefore, it is from those findings at the trial that we must proceed to determine the decision which has to be rendered in the matter now submitted to this Court.

This matter is an action in warranty brought by both the Candy Company and Masoud against Modern Motor Sales Co. Limited, the present appellant, which sold the truck to Masoud.

Both the Courts below found the appellant guilty in having sold the defective truck, but the question on the appeal is whether, on that ground, it should be held responsible in warranty towards both Masoud, the purchaser of the truck, and the Candy Company.

(1) Q.R. [1951] K.B. 154.

No doubt can be expressed as to the responsibility in warranty of the appellant towards Masoud on account of the contractual relation which resulted from the sale to him.

But, a different consideration arises with regard to the action in warranty of the Candy Company. No contractual relationship existed or exists betwen the appellant and the Candy Company.

Moreover, the Candy Company was not found responsible for the damages caused on the ground that they were making use of a defective truck; the ground of their responsibility was exclusively the fact that they were the employer of the driver Picard. It is, therefore, on account of the personal negligence of their employee. With that point, the appellant is in no way concerned and there exists no connection between that ground of liability and the fact that they sold a defective truck to Masoud.

It is significant that the trial judge himself, when disposing at the same time of the principal action and of the actions in warranty dismissed the action in warranty of the Candy Company against the appellant.

I agree with Rand J. that while the appeal of Modern Motor Sales Co. Limited fails as against Masoud, it is well founded as against the Candy Company and to that extent the judgment appealed from should be reversed.

The quotation made by my Brother Rand, in his reasons for judgment, and taken from "Les Pandectes Françaises, Nouveau Répertoire, Tome 34, p. 36 et seq., n^{os} 49 et 54" seems to me to be absolutely in point. The appellant, to my mind, cannot be called upon to warrant either Picard or the Candy Company against their liability resulting from the negligence of Picard. The action in warranty of the Candy Company should, therefore, be dismissed.

It strikes me, however, that from the practical point of view such a result is really not very material.

Masoud was condemned to pay the full amount of the damages (less ten per cent attributable to the negligence of the driver Picard). As the warrantor of Masoud, the appellant will, therefore, be called upon to pay all the damages, less ten per cent, and in turn, of course, Masoud will hand over to the plaintiff in the main action the sum of money thus received from the appellant.

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If the Candy Company had succeeded in its action in warranty against the appellant, the latter would not have been obliged to pay any more. The sum which it will pay to Masoud is exactly the same as that it would have paid to the company. It would be one and the same amount; and when the plaintiff in the main action receives that amount from Masoud, he will become completely disinterested. The Candy Company will only have to pay to the main plaintiff the ten per cent for which Picard was found responsible on account of his personal negligence.

The whole matter, so far as the Candy Company is concerned, resolves itself into a question of costs. Its action in warranty against the appellant being dismissed by the present judgment, it will have, of course, to pay the costs of the appellant in this Court; but, as the appellant fails so far as Masoud is concerned, I would agree with my Brother Rand that the appellant should be entitled to recover only one-third of its costs in this Court as against the Candy Company, and that there should be no costs as between the Candy Company and the appellant in the Court of King's Bench.

The judgment of Taschereau and Fauteux JJ. was delivered by

TASCHEREAU, J.:—Le 29 octobre 1940, M. Rosenthal, conduisant une voiture à traction animale, a été frappé au coin des rues Cherrier et St-Hubert, dans les limites de la Cité de Montréal, par un camion, propriété de Sam Masoud, et conduit par Édouard Picard. Ledit Édouard Picard était employé de la Montreal Candy Manufacturing Co. Ltd., qui se servait de ce camion pour transporter sa marchandise.

Masoud avait acheté ce camion de la Modern Motor Sales Ltd., et l'avait prêté à la Montreal Candy, compagnie dont il était le principal actionnaire. C'est lui qui payait Picard dans le temps où l'accident est arrivé. Les trois défendeurs, poursuivis conjointement et solidairement, ont prétendu qu'ils n'étaient pas responsables de cet accident qui serait attribuable au fait que les freins du camion n'ont pas fonctionné quand le chauffeur Picard a voulu les appliquer.

Le 4 avril 1941, Masoud et la Montreal Candy Manufacturing Co. Ltd, mais non Picard, ont institué une action en garantie contre la Modern Motor Sales Ltd, disant en substance qu'ils ont contesté l'action principale, qu'ils ont nié toute responsabilité, que le camion avait été acheté par Masoud de Modern Motor Sales Ltd, et que l'accident dont la faute ne peut être imputée aux défendeurs, est entièrement dû au fait que les freins du camion vendu étaient dans une condition défectueuse, un fait qui aurait dû être connu par la Modern Motor Sales Ltd, et que cet état des freins constituait un défaut caché. La conclusion de cette action en garantie est que la Modern Motor Sales Ltd, soit condamnée à indemniser les demandeurs en garantie, Masoud et la Montreal Candy Manufacturing Co. Ltd, de toute condamnation qui pourrait être prononcée contre eux.

L'honorable Juge Surveyer de la Cour Supérieure, devant qui se sont instruites en même temps, et l'action principale et l'action en garantie, a condamné sur l'action principale les trois défendeurs Masoud, Montreal Candy Manufacturing Co. Ltd. et Picard, conjointement et solidairement, à la somme de $3,893.00 avec intérêts et dépens. Il en est arrivé à la conclusion que Picard avait été négligent dans la conduite de l'automobile, que la Montreal Candy Manufacturing Co. Ltd. était l'employeur de Picard, et que Masoud devait également être tenu responsable parce qu'il payait Picard, et aussi parce qu'il avait remis à la Montreal Candy Manufacturing Co. Ltd. un camion dont les freins étaient dans un état défectueux.

Sur l'action en garantie, l'honorabe Juge de première instance a rejeté la réclamation de Montreal Candy sans frais, et il a condamné la Modern Motor Sales Ltd. à payer à Masoud la somme de $1,946.50 étant la moitié des dommages accordés à Rosenthal, le tout avec dépens.

Les motifs de ce jugement sont que la défenderesse en garantie, Modern Motor Sales Ltd., étant un commerçant habituel d'automobiles usagés, doit être présumée connaître les défauts de la chose qu'elle vend. L'accident serait presque complètement sinon exclusivement dû au fait que les freins étaient dans une condition défectueuse, et comme le Juge arrive à la conclusion que Masoud et la Modern Motor Sales Ltd. sont en faute, le défendeur en

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garantie doit conséquemment rembourser à Masoud, demandeur en garantie, la moitié de la condamnation sur l'action principale, soit $1,946.50.

Personne n'a interjeté appel du jugement sur l'action principale, mais Masoud et Montreal Candy ont tous deux appelé du jugement sur l'action en garantie. Modern Motor Sales a également logé un contre-appel. La Cour du Banc de la Reine (1), M. le Juge St-Germain étant dissident, a rejeté l'appel de Modern Motor Sales Ltd., mais, les appels de Masoud et de Montreal Candy ont été maintenus parce que la condition défectueuse des freins constituait au moment de la livraison du camion un défaut caché suivant les dispositions de l'article 1522 C.C. pour laquelle la Modern Motor Sales Ltd. doit être tenue responsable en vertu des dispositions de l'article 1527 C.C. Masoud avait le droit de s'attendre à ce que le camion ait été examiné d'une façon prudente et, suivant la preuve, la Modern Motor Sales Ltd. n'a pas rempli ce devoir qui lui était imposé. Il a été également décidé que cette faute donnait ouverture à une réclamation en garantie de la part de Montreal Candy.

La signification du jugement de la Cour du Banc de la Reine est donc à l'effet que la seule partie responsable de cet accident est la Modern Motor Sales comme conséquence de la condition défectueuse des freins, et que l'action principale ayant été maintenue, l'action en garantie doit l'être également, parce que le défendeur en garantie, n'étant pas intervenu à l'action principale, ne peut contester le jugement rendu sur icelle.

L'appelant soumet en premier lieu que l'action en garantie contre la Modern Motor Sales ne peut réussir, que cette Compagnie soit responsable ou non de cet accident. Si elle n'est pas responsable, il ne peut y avoir de condamnation prononcée contre elle; si, d'autre part, elle est seule responsable, elle aurait dû être poursuivie directement par la victime, et comme il n'existait aucun recours contre les défendeurs principaux, l'action instituée contre eux aurait dû être rejetée. Ceci aurait également disposé de l'action en garantie.

Ce raisonnement ne manque pas de logique, mais il pèche en ce sens que l'action de Rosenthal, demandeur principal,

(1) Q.R. [1951] K.B. 154.

a été maintenue contre les trois défendeurs principaux, Picard, Masoud et Montreal Candy, conjointement et solidairement, pour la somme de $3,893.00 et de ce jugement *il n'y a pas eu d'appel.* Comme le fait remarquer la Cour du Banc de la Reine, la Modern Motor Sales n'est pas intervenue pour contester l'action principale, après avoir été appelée en garantie, et il en résulte qu'elle ne peut aujourd'hui soulever devant les tribunaux la validité de ce premier jugement, et prétendre qu'il est erroné. Entre l'appelante et les défendeurs principaux, le jugement sur l'action principale est inattaquable. Le seul droit du défendeur en garantie qui n'est pas intervenu est d'essayer d'établir qu'il n'y a pas lieu à garantie de sa part.

Dans *Meilleur* v. *Montreal Light Heat & Power Company et la Cité de Montréal* (1), M. le Juge Martineau siégeant en revision, s'exprimait de la façon suivante:

> Lorsque le garant a été assigné, que l'action principale comme l'action en garantie ont été réunies, *que l'action principale a été maintenue ainsi que l'action en garantie, le garant ne peut, sur le seul appel du jugement qui le condamne à indemniser le défendeur principal, le faire infirmer, parce que le jugement sur l'action principale serait erroné.*

Dans *Archibald* v. *Delisle* (2), le Juge Taschereau parlant pour la Cour dit:

> By the judgment against which the appellants, defendants in warranty, now appeal, they have been declared to be the warrantors of the plaintiffs in warranty. And as the plaintiffs on the principal action have appealed from the judgment dismissing their action, they might have obtained here a reversal of that judgment and obtained a condemnation against the defendants Delisle, plaintiffs in warranty. That condemnation would then have reflected on the appellants, defendants in warranty, as it is *res judicata between them and the plaintiffs in warranty,* so long as that judgment stands, that they are their warrantors against the condemnations on the principal action. (In what form, and by what means, the plaintiffs in warranty could then have obtained a judgment against the defendants in warranty we are here not concerned with.) It follows clearly that the appellants Baker et al., have an interest upon this appeal distinct and separate altogether from the condemnation to costs.

Ce sont ces principes que la Cour du Banc de la Reine a acceptés dans la présente cause, et je m'accorde avec ses conclusions.

Il résulte donc comme conséquence du jugement de première instance que Picard, Masoud et Montreal Candy sont conjointement et solidairement responsables de l'accident dont Rosenthal a été la victime. J'entretiens des doutes

(1) Q.R. (1917) 52 S.C. 366. (2) (1895) 25 Can. S.C.R. 1 at 16.

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sérieux sur l'existence de cette solidarité entre les trois défendeurs. En effet, elle ne pourrait exister que par l'application de l'article 1106 C.C. qui veut que l'obligation résultant d'un délit ou quasi-délit commis par deux personnes ou plus, soit solidaire. Encore faut-il que les débiteurs aient commis un quasi-délit et que ce soit le même quasi-délit. C'est à cette seule condition qu'il y aura solidarité. Dans le cas qui nous occupe, l'obligation de Picard, conducteur du véhicule, de réparer le dommage causé, procède bien d'un quasi-délit, mais les sources qui font naître les obligations de Masoud et de Montreal Candy sont entièrement différentes. La responsabilité de Montreal Candy, suivant le jugement du Juge de première instance, naîtrait de la relation d'employeur et d'employé (1054 C.C.). Elle aurait son fondement sur un texte de loi, et ne présenterait aucun caractère quasi-délictuel. Masoud, qui payait Picard, serait responsable également comme conséquence de l'application de l'article 1054, et il aurait aussi commis le quasi-délit de donner la possession d'un camion défectueux à la Montreal Candy, ce qui l'obligerait à réparer le dommage en vertu de 1053. Quasi-délit bien différent de celui de Picard.

Mais il semble inutile d'approfondir davantage cette question, car le premier jugement prononce la solidarité et vu le défaut d'appel, il ne peut être attaqué. C'est tel qu'il a été rendu qu'il faut le considérer, et c'est de cette condamnation solidaire que l'appelante doit indemniser les intimés, à moins qu'elle n'en soit dispensée pour quelque autre motif.

Il faut donc prendre pour acquit, comme l'a trouvé le Juge au procès, que la cause de cet accident est la défectuosité des freins du camion acheté par Masoud de l'appelante. Cette dernière est commerçante en automobiles et camions usagés, et comme telle, elle est présumée connaître les défauts de la chose qu'elle vend; dans le cas de dommages subis comme résultat de ces vices, elle est tenue d'indemniser l'acheteur (C.C. 1527). La preuve démontre surabondamment que le défaut aux freins, cause de l'accident, était un vice caché et la responsabilité de l'appelante vis-à-vis de Masoud se trouve conséquemment engagée. Elle résulte de sa "faute professionnelle". "Spondet peritiam artis", et on peut ajouter avec Ulpien, "Imperitia

culpae annumeratur". Vide: *Ross* v. *Dunstall et al* (1); *Samson* v. *Davie Shipbuilding & Repairing Co.* (2); *Guillouard, Vente, No. 463; Lajoie* v. *Robert* (3); *Touchette* v. *Pizzagalli* (4).

La responsabilité de l'appelante vis-à-vis de Montreal Candy se présente sous un aspect différent. Il n'existe pas entre les deux parties, comme dans le cas de Masoud, de relation d'acheteur et de vendeur, et c'est exclusivement sur l'article 1053 que doit reposer la réclamation de la Compagnie. Par la faute de Modern Motor, la Montreal Candy a été tenue responsable d'un accident qui à son tour lui a causé un préjudice, pour lequel elle a droit à une indemnité. Le vendeur d'un objet qui cause un dommage, engage sa responsabilité, non seulement vis-à-vis l'acheteur, mais aussi vis-à-vis les usagers de cette chose, même s'il n'existe aucune relation contractuelle. La faute est délictuelle, et c'est ce qui a été décidé par la Cour du Banc de la Reine dans *Drolet* v. *London Lancashire* (5), jugement confirmé par cette Cour, (6) et dans *Ross* v. *Dunstall et al* (7). Dans cette dernière cause, Ross, manufacturier d'armes à feu, a été tenu responsable d'accidents survenus non seulement à l'acheteur immédiat de la carabine, mais aussi à celui qui en avait fait l'acquisition chez un marchand détaillant aux États-Unis.

L'appel doit être rejeté avec dépens, mais le jugement à être enregistré devra être modifié et réduit à $3,503.70 vu le désistement partiel produit par les intimés.

RAND J. (dissenting): I think it clear that by the law of Quebec a person who is rendered liable in civil responsibility, as, for example, under article 1054 of the *Code,* by reason of damage caused by things, through an act, cause or condition which can be directly traced back to the fault of another, has a right against the latter to be indemnified against the consequences of that intermediate liability; and that that indemnity may be invoked by the procedure known as warranty. For this proposition it is sufficient to cite three authorities: *McFarlane* v. *Dewey* (8); *Gosselin* v. *Martel* (9); and *Archibald* v. *Delisle* (10).

(1) (1921) 62 Can. S.C.R. 393 at 419.
(2) [1925] S.C.R. 202.
(3) Q.R. (1916) 50 S.C. 395.
(4) [1938] S.C.R. 433.
(5) Q.R. [1943] K.B. 511.
(6) [1944] S.C.R. 82.
(7) (1921) 62 Can. S.C.R. 393.
(8) (1870) 15 L.C.J. 85.
(9) (1904) 27 R.J. 364.
(10) (1895) 25 Can. S.C.R. 1.

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In the present case the owner of the truck, Masoud, the driver, Picard, and his employer, the Candy Company, have jointly and severally been found to be responsible for the damages caused. The liability of the driver arose from his personal negligence; but both courts agree that there was present also, as an operative cause, the dangerous condition of the truck resulting from a latent defect in its braking gear. Since that judgment has not been appealed, it stands as res judicata between the principal plaintiff and defendants.

Both courts agree also that the ultimate responsibility for the condition of the truck is that of the Motor Company, the defendant in warranty, and that a legal warranty against latent defects arose on the sale of the car. There seems to be some uncertainty in the judgments as to the precise basis of liability of the owner to the principal plaintiff, but that must be taken, I think, to arise from the presumption of article 1054 in relation to damage caused by a thing in his care. It is the owner, then, who, under the judgment as between the principal defendants, represents the fault ultimately traceable to the Motor Company. Of the total liability attributable to these two causes, that portion of it chargeable against the driver and vicariously to the Candy Company as his employer, results from the personal negligence of the driver and not from any act or default of the Motor Company.

The owner, so liable, has, under the rule stated, a right in the nature of indemnity against the Motor Company; but in view of the source of the judgment against the Candy Company, that principle cannot be invoked by the latter in the warranty action. The Candy Company as a principal defendant has a right of recourse against the owner for the percentage of responsibility attributable to the latter, but this is a matter of ultimate distribution of the loss, and it arises from the rule of contribution between persons found jointly liable for delictual conduct.

It is said that since the judgment against the Candy Company is for the total amount of the damages, it necessarily includes that portion ultimately chargeable against the Motor Company; and as establishing liability on the part of the Motor Company towards the Candy Company, that quantum is assimilated to damage caused the Candy

Company by the Motor Company through a fault within article 1053. It is the fact that the Candy Company has been adjudged liable to the principal plaintiff in the total sum: and if the Motor Company has been a defendant in the main action, on the findings made, it, likewise, would have been held to that amount. But to treat the judgment against the Candy Company as damage resulting from fault under article 1053 of the Motor Company is, I think, to confuse the liability of the Candy Company to the principal plaintiff with its consequences.

For instance, the driver is bound for the total damage because he participated in causing it; it is his act and that alone that has given rise to the judgment against him as well as to the civil responsibility of his employer for the total amount. The ultimate responsibility of the Motor Company has nothing whatever to do with creating either liability.

The distribution, not of liability, but of the ultimate loss as between the culpable joint actors themselves, is a different legal function and is effected by exacting from each according to the degree of participation in causing the damage. If the driver had been sued alone, any action thereafter brought by him against the Motor Company would be by way of enforcing that contribution and not the prosecution of a delict against himself within article 1053. If the Motor Company were brought into the principal action as a co-defendant, the judgment in solidarity would preclude any question of the right to contribution. But there are conditions to the pursuit of that relief, one of which is that the party claiming has in fact paid another's share of the joint judgment or liability; and it would seem undoubted that where there is no judgment in solidarity, all defences available in the original action would be open to the defendant in the subsequent action.

The proceeding in warranty here by the Candy Company is in reality of that nature, the assertion of a claim to contribution, and the question is whether it is properly brought in warranty. As the decisions cited show, there are different categories of contractual and delictual responsibility which can be enforced in that procedure, but they all partake in some degree of a quality which constitutes the essence of the obligation of guaranty: a duty to defend

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another in respect of a certain act, or as the English law states one mode of it, "to save harmless" from certain consequences. Indemnity does not go quite so far, but its effects are in large measure the same; and I should say that indemnity or such an equivalent is a minimal prerequisite to receivability in warranty. If I interpreted the judgment below to mean, as I do not, that the appeal Court intended to add a new class of claim to those determinable under warranty, I should be obliged to take other considerations into account. On the other hand, and with the greatest respect for that Court, I cannot find in the reasons an appreciation of the distinction between guaranty or indemnity and contribution, including the conditions of the prosecution of each.

The respondents in the appeal, sensing the difficulty presented by these circumstances, have made a partial desistement of 10% of the judgment which is intended to represent the degree of responsibility of the driver and the Candy Company, and the question is whether that can affect the result at which I have otherwise arrived. I do not think so. That act impliedly admits, in fact, the view expressed, that the claim is one for contribution.

The law of France on this matter is laid down in Pandectes Françaises, Nouveau Répertoire, T. 34, p. 36 et seq.:

> 49. C'est, toutefois, à la condition que le fait qui sert de base à la demande en garantie ou en responsabilité, soit le même que celui sur lequel est fondée la demande principale. Un des motifs qui ont poussé le législateur à édicter les dispositions dont s'agit, a été, en effet, ainsi qui a été dit supra, n. 44, d'éviter la contrariété de jugements susceptibles de se produire devant des tribunaux successivement saisis. Cette considération indique que, pour bénéficier de ces dispositions de faveur, la demande en garantie ne doit pas être une simple action récursoire, tendant, de la part de celui qui la forme, à être rendu indemne, par un tiers, des condamnations dont, finalement, les conséquences doivent lui incomber. Elle doit être connexe à la demande principale, s'y rattacher par un lien de dépendance intime et nécessaire, en être l'accessoire.
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> 54. ...Que, si toute action en garantie peut, pour être recevable, prendre sa source dans un fait quelconque, ou dans une faute commise par celui qui est appelé en garantie, c'est à la condition que ce fait ou cette faute ait été la cause de l'action principale.

The judgment of the Court of Revision in *Thérien* v. *City of Montreal and Montreal Street Railway Company* (1) is a special application of the rule. There the plaintiff was injured through the dangerous condition of a street brought about by the joint negligence of the City and the Company but the City was liable in two aspects: one for its personal fault in allowing the steep side slope of the street to exist, and the other proceeding from the delict of the Company in maintaining its pole in a dangerous position. The City was sued alone and in warranty claimed indemnity against the Company. By the judgment the latter was condemned to "pay and reimburse" the City for one-half of the damages recovered. The damages were divided according to the independent responsibility of each as between themselves; but the claim in warranty was in fact for quasi-indemnity in relation to the second basis of liability.

If distribution of the loss could be effected in warranty, since one of two defendants jointly liable can implead the other in that proceeding, *O'Connor* v. *Flynn* (2), it would mean that that step could become the accompaniment of every action involving a joint delict. That result might be not only unobjectionable but highly convenient as a means of determining the whole controversy; and no one would willingly add another item to the intricacies of Quebec procedure; but that it would be a departure from the civil law as enunciated by the commentators and the decisions seems to me to be unquestionable, and procedural confusion can easily involve substantive matters such as the nature of the judgment here. In English common law jurisdictions under modern legislation governing negligence, such a division is made as part of the adjudication of the action; but the law of Quebec does not authorize it. In *Cormier* v. *Delisle* (3), in which Duranleau J. has clearly indicated the distinction made here between guaranty and contribution, he speaks, at p. 482, of "sa part contributive", and of its determination "soit par une action en garantie dans l'action principale soit par une action principale". The reference to the action in guaranty is, of course, a dictum, but it points the consequences of confirming the judgment in this case.

(1) Q.R. (1899) 15 S.C. 380. (2) Q.R. (1898) 13 S.C. 435.
(3) Q.R. [1942] S.C. 480.

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A further consideration remains. Mr. Laurendeau argues that the claim of Masoud, likewise, is struck with a fatal flaw. It is, he says, an action récursoire in responsibility, and being so, he is entitled to challenge not only his liability in warranty but also the liability of Masoud in the main action; from the judgment in the latter there was no appeal, but because the claim in the accessory proceeding is not true guaranty, it is the same as an independent action in which all defences would be open.

Quasi-indemnity arising in law from a delictual act for which another incurs civil responsibility is distinguishable in character from a contract to guarantee or defend agaisnt a certain act or obligation. The obliger in the latter is directly interested, through the implications of the contract, in the determination of the original issue. He becomes the obligee's defender and the *Code* contemplates not only his participation in the defence but in formal guaranty, that he make the defence his own.

In the present case there is no such implication from either the implied warranty of fitness or the fault in setting a dangerous agency in action. The breach of warranty in reality sounds in damages. In such a case, however, the law either implies a quasi-indemnity or assimilates the delictual liability to that of contractual indemnity so far, at least, as to permit a claim in récursoire under warranty procedure.

But it is unnecessary to pursue the examination of this feature further: I will assume in Mr. Laurendeau's favour that he is entitled to challenge the judgment against Masoud, but that does not, in my opinion, serve him to any purpose.

The courts below have concurred in holding that the defect of the machine was a participating cause of the damages and either Masoud or the Candy Company was chargeable with the legal care of the truck. In either case there would be a resulting liability under article 1054, against which neither could successfully invoke the exculpatory provision of that article. The person charged with the care of a thing cannot avail himself of that provision if the vice has arisen from the fault or negligence of the manufacturer or repairer with whom he deals. Here the defect was patent to professional skill, and the owner was

entitled, at the time of the accident, in respect of personal care, to rely upon the exercise of that skill by the Motor Company: but for the purposes of the exculpation, it is the same as if the Motor Company had been his agent in making the inspection or reconditioning: Juris-Classeur Civil, Art. 1382-83 fin. 1384, Responsabilité du Fait des Choses, paragraphe N° 450. From this it follows that the Motor Company would be liable either through Masoud or the Candy Company, and I see no reason, on the evidence, to place it on the Company rather than the owner.

I would therefore allow the appeal against the judgment in favour of the Candy Company, but dismiss it with costs in respect of Masoud. The appellant will be entitled to recover one-third of its costs in this Court against the Candy Company. There will be no costs as between the Candy Company and the Motor Company in the Appeal Court.

CARTWRIGHT J.: The facts of this case are set out in the reasons for judgment of other members of the Court. The learned trial judge has found that the injuries suffered by the plaintiff were due "mainly if not exclusively" to the defective condition of the brakes of the automobile of the appellant Masoud. In the Court of King's Bench (Appeal Side) (1) the majority were of the opinion, with which I respectfully agree, that such defective condition of the brakes was the sole cause of the accident. Pratte J., with whom Gagné J., agrees, says:

> A ce sujet, il faut dire d'abord que, d'après la preuve, c'est la défaillance du frein qui a été la seule cause génératrice de l'accident.

Hyde J., with whom McDougall J. agrees, says:

> I am of the opinion that the accident and the resulting damages were exclusively due to the defective hydraulic braking system on the truck.

All of these learned judges and, as I understand, all of the members of this Court are of opinion that it was rightly held that the existence of this defective condition was due to the fault of the appellant. Under these circumstances it is apparent that the effect of the judgment of the Court of King's Bench is to require that the damages suffered by the plaintiff be paid by the party by whose fault they were caused. *Prima facie* this result would

(1) Q.R. [1951] K.B. 154.

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appear to be in accordance with the law. The able argument of counsel for the appellant has raised doubts in my mind as to whether there are not difficulties, of, as I respectfully think, a technical and procedural nature, in the way of affirming the judgment of the Court of King's Bench but before we interfere with that judgment it is necessary that we should be satisfied that it is in error and I am not satisfied of this. To doubt is to affirm.

I would dispose of the appeal as proposed by my brother Taschereau.

Appeal dismissed with costs.

Solicitors for the appellant: Beauregard, Bock, Beauregard & Taschereau.

Solicitors for the respondents: Brais, Campbell & Mercier.