1946
*Jun. 19, 20, 21.
*Oct. 1.

PARMELIA LESSARD (PLAINTIFF) ..... APPELLANT;

AND

HULL ELECTRIC COMPANY (DEFENDANT) ..... RESPONDENT.

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

Negligence—Workman killed by electric wire while painting railway bridge —Defendant (railway) company held not responsible—Light and power system sold by it years before date of accident—Questions as to ownership of wire and as to its care, control, supervision or maintenance—Whether wire, even if sold, still remained in charge or care of defendant in relation to deceased—Liability of company either under article 1053 C.C. or article 1054 C.C.—Jury trial—Whether interpretation of deed of sale question of law or question of fact.

The appellant's husband was engaged in painting a railway bridge, when, while preparing to move a plank upon which he had been sitting at a considerable height above the floor of the bridge, he came in contact with an electric wire carrying 2,200 volts and his death ensued immediately. Action was brought by the appellant, personally and as tutrix to her minor children, for $50,000 damages against the respondent company. At the trial by a judge with a jury, judgment was entered for $18,064. The jury, to the question whether the death had been caused by a thing under the control or care of the respondent company, answered: "Yes, due to the Company, the electric wire", and later the jury, after having answered in the affirmative that the death had been caused by the "fault" of the respondent company, added that the latter was "liable for negligence and carelessness in keeping its

*PRESENT:—Rinfret C.J. and Kerwin, Hudson and Rand J.J. and St. Jacques J. *ad hoc*.

wire too close to the bridge". The appellate court dismissed the action, holding that the respondent company did not own, or have under its care, the electric wire and that there was no fault on its part.

Held, Rand J. and St. Jacques J. *ad hoc* dissenting, that the appeal should be dismissed.—Upon the evidence and the proper construction of a deed of sale by the respondent company of its light and power system to another electric company, not only was it established that the respondent company, at the time of the accident, was neither the owner of the wire nor had it under its care, control or supervision, but that, on the contrary, the ownership was proved to have been transferred to that other company.—The respondent company, having disposed of the ownership of the wire and not having afterwards assumed or undertaken any supervision or control over it, cannot be held liable.

The interpretation of the provisions of the deed of sale is a question of law to be decided by the courts and not a question of fact within the province of the jury. Rand J. expressing no opinion and St. Jacques J. *ad hoc contra.*

Per Rand J. and St. Jacques J. *ad hoc* (dissenting):—The ownership of the wire must not necessarily be determined in this case: even if it was sold to another company, the right to maintain, in the sense of continuing it as it then was, remained in the respondent company. The latter then must be looked upon as a party to the continuing existence of the wire on the bridge in the position in which it was at the time of the fatality; it was thus in charge or care of the wire in relation to the deceased and is brought within the liability of article 1054 C.C.—Whether the death was caused by the wire or whether the deceased himself was negligent, are questions of fact to be found by the jury under proper direction from the Court. The directions given at the trial were not proper: they were to the effect that the respondent company was liable as a matter of law and this withdrew from the jury these essential questions of fact. There should be a new trial.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the trial judge, Surveyer J. with a jury, and dismissing the appellant's action for damages.

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

Auguste Lemieux K.C. and *Alexandre Taché K.C.* for the appellant.

John L. O'Brien K.C. and *A. J. Campbell* for the respondent.

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The judgment of The Chief Justice and of Hudson J. was delivered by

THE CHIEF JUSTICE: Je partage entièrement l'opinion exprimée en cette affaire par Sa Seigneurie le Juge en Chef de la province de Québec, dans les notes qu'il a fournies lors du jugement rendu par la Cour du Banc du Roi (en Appel), et qui a été subséquemment soumis à la Cour Suprême du Canada.

Comme lui, je crois qu'il n'y a pas à examiner de questions autres que celle de savoir si, à l'époque de l'accident dont le mari et le père des appelants a été la malheureuse victime, l'intimée avait la garde du fil conduisant l'électricité qui a causé la mort de Joseph Emile Napoléon Marcoux.

Marcoux était occupé à peinturer le pont qui relie Ottawa à Hull et connu sous le nom de "Pont Interprovincial"; dans un mouvement qu'il fit en se déplaçant, il vint en contact avec le fil dont il s'agit et il fut électrocuté.

Sa veuve et ses enfants poursuivirent l'intimée et le jury rendit un verdict tenant l'intimée responsable de l'accident.

La réponse du jury à la question qui lui était posée si

la mort dudit Joseph Emile Napoléon Marcoux était due à ou avait été causée par aucune chose appartenant à la défenderesse, ou était sous sa garde, son contrôle, sa surveillance ou son entretien,

et, dans l'affirmative, lui demandant de dire quelle était cette chose, se lit comme suit:

R:—Oui, dûe à la Compagnie Hull Electric, le fil électrique.

Et, ayant répondu affirmativement à une autre question lui demandant de dire si la mort de Marcoux avait été causée par la faute, négligence, imprudence ou incurie de l'intimée ou de ses officiers, employés ou préposés, le jury précisa que l'intimée était

responsable pour négligence et imprévoyance en tenant leur fil "D" trop près du pont.

Il accorda à la veuve personnellement une somme de $10,000 et, aux enfants, des indemnités individuelles dont le total s'élève à $8,064.00.

Il ne faut pas, je le sais, analyser trop minutieusement les verdicts de jury en matière civile. Cette Cour l'a affirmé à maintes reprises; mais il faut tout de même en

dégager le sens afin de savoir si le verdict a pour effet de tenir légalement responsable celui que le jury a entendu viser.

Or, à mon humble avis, il résulte des réponses données par le jury, qu'il a tenu l'intimée responsable pour négligence et imprévoyance, en vertu de l'article 1053 du code civil, et non pas à raison des dommages causés par une chose qu'elle avait sous sa garde, en vertu de l'article 1054 C.C.

Le sens du verdict est manifestement que la mort de Marcoux a été causée par la

négligence et imprévoyance, en tenant leur fil "D" trop près du pont.

Il a bien dit que ce fil électrique appartenait à l'intimée et qu'elle en avait la garde, le contrôle, la surveillance ou l'entretien, mais il faut lier cette réponse avec celle où le jury précise la raison de la responsabilité pour la mort de Marcoux, et cette raison est clairement définie comme ayant été la négligence et l'imprévoyance en tenant son fil "D" trop près du pont. Il était évidemment nécessaire que le jury déclarât d'abord que, à son point de vue, ce fil appartenait à l'intimée ou qu'il était sous sa garde car, autrement, l'intimée n'eut pu être responsable "en tenant son fil "D" trop près du pont".

Pour tenir son fil "D" trop près du pont, il fallait nécessairement que l'intimée ou bien fut propriétaire du fil, ou bien l'ait eu sous sa garde au moment de l'accident.

Devant la Cour du Banc du Roi (en Appel), comme devant notre Cour, la discussion a évidemment dévié du véritable sens du verdict. Et si l'on en juge par les notes des membres de la Cour du Banc du Roi, ainsi que par l'argumentation devant nous, les appelants ont plutôt laissé dans l'ombre la question de la responsabilité, résultant de l'article 1053 C.C., pour s'arrêter plutôt à la responsabilité en vertu de l'article 1054 C.C.

Je me permets d'exprimer un doute sérieux sur la question de savoir si, à raison de la preuve faite devant lui, le jury pouvait réellement être justifiable de considérer comme une faute en soi, ou, pour employer ses propres expressions, "négligence et imprévoyance", la distance qui séparait le fil de l'un des portants du pont. L'accident a eu lieu le 5 juin 1941. Ce fil, en autant que le dossier

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le révèle, était là depuis au moins l'année 1915. J'éprouve beaucoup de difficultés à penser qu'il pouvait y avoir eu une faute ou une négligence dans le seul fait d'avoir placé le fil où il était.

Il me semble que le nombre d'années qui s'est écoulé depuis que le fil avait été posé est suffisant pour démontrer que la position qui lui avait été donnée ne pouvait en soi constituer une imprudence ou une imprévoyance.

Mais la réponse du jury ne tend pas à dire qu'il y a eu négligence au moment où le fil a été posé. Il dit bien que cette négligence ou cette imprudence aurait consisté dans le fait de tenir le fil trop près du pont ("en tenant leur fil "D" trop près du pont"). Il en résulte que, pour que le verdict puisse s'appuyer sur la preuve faite devant lui, il est nécessaire de trouver dans le dossier quelque chose qui établisse que c'était bien l'intimée qui "tenait" ce fil trop près du pont; et pour que l'intimée ait pu en agir ainsi, il fallait de toute nécessité qu'il fut prouvé que l'intimée était ou bien la propriétaire du fil, ou bien qu'elle l'ait eu sous sa garde, son contrôle, sa surveillance, ou encore qu'elle en ait eu l'entretien. C'est précisément, à mon avis, non seulement ce qui manque au dossier d'une façon absolue, mais c'est le contraire qui est prouvé.

Sur la question de propriété du fil, il faut absolument s'en rapporter aux documents écrits ou aux contrats qui ont été produits. C'est au moyen de l'interprétation de ces contrats que l'on peut arriver à décider qui, lors de l'accident, était propriétaire du fil. Il ne saurait être permis, sur ce point, de recourir à la preuve verbale, à moins que l'on arrive à la conclusion que les contrats comportent une telle ambiguïté qu'il faille absolument chercher à les éclaircir au moyen de témoignages.

Or, je dois dire que je n'éprouve aucune difficulté à interpréter les contrats. Cette question d'interprétation est une question de droit, et ce n'est pas au jury mais aux tribunaux qu'il appartenait de se prononcer là-dessus.

En l'espèce, de même que la majorité des juges de la Cour du Banc du Roi (en Appel), je crois qu'il faut s'en rapporter au contrat du 11 janvier 1928.

Il n'y a pas de doute que, jusqu'à cette date, l'intimée était propriétaire du fil "D". Il s'agit donc de savoir si,

lors de la vente de l'intimée à The Gatineau Electric Light Co. (Ltd.), le fil "D" est devenu la propriété de cette dernière compagnie.

Jusque là, l'intimée exploitait à la fois un service d'éclairage par l'électricité et un service de transport de passagers.

Le but de la vente de 1928 était de transférer à la Compagnie Gatineau le service d'éclairage avec tous ses accessoires, et de réserver à l'intimée le service de transport des passagers.

Dans ce contrat, l'on a appelé le service d'éclairage "electric lighting and distributing system", et l'on a désigné le service de transport sous le nom de "traction system".

Or, voici comment le contrat définit ce qui a été vendu à la compagnie Gatineau:

All the electric lighting and distributing system of the city of Hull, municipalities of South Hull and East Hull, town of Aylmer and village of Deschenes, as it existed on the first day of June last, including poles, wires, transformers, service connections, meters and all other accessories used for purposes of domestic or municipal lighting apart from purposes connected with the traction system of the vendor * * *

Que trouve-t-on dans cette description? Tout d'abord, le mot "all" par lequel le paragraphe débute. C'est tout le système d'éclairage ("lighting and distributing system") qui est vendu. Mais, pour plus de précision, la description ajoute:

* * * including poles, wires, transformers, service connections, meters and all other accessories used for purpose of domestic or municipal lighting * * *

Le mot "including" ne peut évidemment pas limiter le sens des mots "all the electric lighting and distributing system". Le contrat déclare que cela inclut les "poles, wires", etc., mais ce ne peut être que pour suivre les prescriptions de l'article 1021 du code civil:

Lorsque les parties, pour écarter le doute si un cas particulier serait compris dans le contrat, ont fait des dispositions pour tel cas, les termes généraux du contrat ne sont pas pour cette raison restreints au seul cas ainsi exprimé.

Les mots par lequel le paragraphe 6 du contrat débute, "all the electric lighting and distributing system" conservent toute leur ampleur et ne sont en rien diminués par le fait que l'on indique en plus que cela comprend les "poles, wires, etc."

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Les termes généraux du contrat comprenaient déjà les fils qui faisaient partie du "lighting and distributing system". Le fait que l'on ajoute plus loin les "wires," etc., loin de restreindre le sens, vient au contraire le compléter, en autant que besoin est pour les fins de la présente cause, par l'addition du mot "wires".

Au moment même de la vente, le fil "D" servait à fournir l'éclairage au terminus de l'intimée à Ottawa.

En vendant à la Compagnie Gatineau les fils qui faisaient partie du système d'éclairage, l'intimée a donc vendu entre autres, le fil "D". Ce fil n'a jamais servi pour fins de transport; il n'a jamais été employé à ces fins et ne peut, sous aucun rapport, être compris comme faisant partie du "traction system".

Mais, comme pour y insister, les parties reviennent sur le sujet dans un paragraphe subséquent:

> It is the intention of the vendor to convey and of the purchaser to accept all the property moveable and immoveable, the rights, privileges, servitudes, franchises and any and all other properties owned by the vendor and used solely in connection with the business of domestic or municipal lighting or furnishing of power apart from traction purposes; and should it be hereafter discovered that any property, rights, privileges, servitudes, franchises or any other properties owned by the vendor and used for the purposes above indicated apart from traction purposes be hereafter vested in its name the vendor will on demand execute such other and further deeds, documents and assurances in writing as may be necessary to vest the same in the purchaser.

Si un doute avait subsisté à la lecture du paragraphe 6 du contrat—et pour ma part je n'en ai aucun—je ne vois pas comment on pourrait encore en avoir à la lecture de ce paragraphe où les parties ont pris la peine de spécifier d'abondance leur intention. Et, dans le paragraphe que je viens de citer, elles déclarent très clairement que cette intention est de transférer à la Compagnie Gatineau

> all the properties * * * owned by the vendor and used solely in connection with the business of domestic or municipal lighting or furnishing of power apart from traction purposes.

Même si les mots "domestic lighting" présentaient la moindre ambiguïté dans les circonstances, il reste cette précision supplémentaire que l'intimée transférait à la Compagnie Gatineau son titre de propriété, ses droits, privilèges, servitudes, franchises et autres, "furnishing of power apart from traction purposes", à savoir: tout ce qui servait à fournir le pouvoir pour toutes fins, excepté

celle destinée aux fins de transport. De toute évidence, cela comprend les fils qui servaient exclusivement à l'éclairage au terminus, et cela n'excluait que les fils qui transmettaient le pouvoir nécessaire pour les fins de transport.

Il m'est impossible de voir comment on pouvait encore avoir un doute sur le sujet.

Ce contrat établit donc que le fil "D" était depuis 1928 la propriété de la Compagnie Gatineau ou de son acheteur subséquent, la Gatineau Power Company, mais, en tous cas, n'était certainement pas la propriété de l'intimée.

Puis, comme le fait très justement remarquer le juge en chef de Québec, c'est d'ailleurs ainsi que, depuis 1928, l'intimée et la Gatineau Electric Light Company ont exécuté ce contrat. L'exécution par les parties sert également à aider à l'interprétation d'un contrat. Voir *Garneau* v. *Diotte* (1).

La preuve tout entière est à l'effet qu'à partir de la date de ce contrat, la Compagnie Gatineau s'est considérée comme propriétaire du fil "D" et l'intimée s'est comportée comme ne l'étant plus. Dès la venue en vigueur du contrat, la Compagnie Gatineau a assumé la garde, le contrôle, la surveillance et l'entretien du fil "D". Bien entendu, quand je mentionne ce fait, je veux parler de cette partie du fil "D" qui se trouve dans la cité de Hull jusqu'au point de rencontre à la ligne de démarcation entre la province de Québec et celle d'Ontario.

Non seulement il n'y a aucune preuve que l'intimée à partir de cette date de 1928 avait la garde ou l'entretien du fil "D" dans la cité susmentionnée, mais la preuve toute entière est à l'effet que cette garde, ce contrôle, cette surveillance et cet entretien ont été subséquemment maintenus par la Gatineau Electric Light Co. (Ltd.) et, plus tard, par son successeur, la Gatineau Power Company.

Il est impossible de trouver au dossier même une seule allusion à la garde de ce fil qui eût pu justifier le jury d'en venir à la conclusion que l'intimée, depuis 1928, avait ce fil sous sa garde. Et là il ne s'agit plus seulement de l'interprétation du contrat, mais il s'agit de faits prouvés par les témoins. Si le verdict du jury veut dire que l'inti-

(1) [1927] S.C.R. 261.

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mée avait la garde de ce fil, ce verdict ne peut tenir parce qu'il n'est basé sur absolument le moindre iota de preuve. Tous les témoins ont dit le contraire.

Il n'y a donc aucun fondement à la prétention que le fil "D" ou bien appartenait à l'intimée, ou bien était sous sa garde, son contrôle, sa surveillance ou son entretien. Il s'ensuit également que la réponse du jury à l'effet que l'intimée a "tenu" le fil "D" trop près du pont ne peut s'appuyer sur aucune preuve.

Je ne m'arrête pas un instant à l'objection soulevée par les appelants que le contrat du 12 août 1926 entre la Canadian Pacific Railway Company et l'intimée contenait une clause en vertu de laquelle cette dernière

will not assign or underlet the rights hereby granted without the consent of the Pacific Company in writing first had and obtained.

On remarque d'abord dans cette clause qu'il ne s'agit pas d'une prohibition absolue, mais simplement de la stipulation que, pour transférer ce contrat, l'intimée devait préalablement obtenir le consentement de la Compagnie du Pacifique. Cette compagnie n'était pas en cause et il n'y a donc eu aucune recherche au cours du procès pour s'informer du consentement que la compagnie a pu donner à la cession par l'intimée de ses droits à la Compagnie Gatineau. Je serais porté à dire que la Compagnie Gatineau, ayant exercé ces droits depuis 1928 jusqu'à la date de l'accident, soit une période de treize années, s'est crue parfaitement justifiée de penser que le consentement requis avait été donné. Si la cause s'était instruite entre l'intimée et la Compagnie du Pacifique, il y a toutes les chances du monde que les tribunaux en seraient venus à la conclusion qu'il y a eu au moins un consentement tacite et que la Compagnie du Pacifique eût pu difficilement prétendre que ce consentement n'existait pas, en arguant seulement de la prétention définitive qu'il n'avait pas été donné par écrit.

Mais la cession des droits par l'intimée à la Compagnie Gatineau était parfaitement légale et efficace sous tous les rapports, sauf à vérifier si le consentement requis avait été donné par la Compagnie du Pacifique.

Cette réserve était faite exclusivement dans l'intérêt de cette dernière compagnie. Aucun autre ne pouvait s'en prévaloir. C'est uniquement la Compagnie du Pacifique qui pouvait faire valoir cette absence de consentement à son égard. Elle n'intéresse absolument personne autre. Il n'appartenait certainement pas aux tribunaux de soulever cette question lorsque la Compagnie du Pacifique n'est pas partie en cause. Même à l'égard de cette dernière, il ne s'agirait là que d'un bris de contrat dont seule la Compagnie du Pacifique peut se prévaloir, et que les tribunaux peuvent apprécier uniquement dans une cause entre l'intimée et la Compagnie du Pacifique.

Pour le moment, le contrat entre l'intimée et la Compagnie de la Gatineau est en vigueur depuis 1928; personne n'en demande l'annulation.

Il reste le fait que ce contrat de 1928 a eu lieu, que la Compagnie Gatineau a pris possession de ce qui faisait l'objet de cette vente, y compris le fil "D" et les droits et franchises s'y référant, et que l'on n'est pas appelé, dans l'instance actuelle, à regarder au delà.

Comme conséquence de tout ce qui vient d'être dit, le contrat ou le document écrit établit au dossier sans conteste que ce n'était pas l'intimée qui était propriétaire, au moment de l'accident, du fil "D" et de la franchise y afférant, et que c'était de plus, même indépendamment de la question de propriété, la Compagnie Gatineau qui, en fait, avait la garde, le contrôle, la surveillance et l'entretien de ce fil.

Toute la preuve est à cet effet. Il n'y a pas l'ombre d'une preuve au contraire. Le verdict est donc évidemment contraire à la preuve qui a été faite, et le jury ne pouvait être justifié à rendre un verdict autre qu'en faveur de la partie intimée.

Dans les circonstances, d'après l'article 508, paragraphe 3, du Code de Procédure Civile, la Cour du Banc du Roi (en Appel) a été justifiée de rendre un jugement différent de celui qui a été rendu par le juge présidant au procès.

Peut-être avant de conclure dois-je ajouter que, du moment que la preuve établissait que la garde du fil "D" était, au moment de l'accident, à la charge de la Compagnie

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Gatineau et qu'elle était évidemment exercée par cette Compagnie, cela disposait de la solution de la cause en faveur de l'intimée, en vertu de l'article 1054 du Code Civil.

Il n'est pas nécessaire, en effet, de faire remarquer que l'article impose la responsabilité du fait des choses à celui qui en a la "garde", et, comme je l'ai dit il y a un instant, indépendamment de sa propriété. Sa responsabilité provient de la "garde" qu'il peut en avoir. Et si l'objet ou la chose était alors sous la "garde" d'un autre que le propriétaire, c'est celui qui a la "garde" qui est responsable à l'exclusion du propriétaire.

Le juge de première instance dans l'espèce actuelle, le dit lui-même dans son jugement formel.

> Au surplus, la responsabilité du fait d'une chose inanimée * * * retombe non pas sur le propriétaire comme tel, mais sur le gardien de la chose.

Et il cite Pandectes belges, Vo Responsabilité civile, n. 628, 1852; *Shawinigan Carbide Company* v. *Doucet* (1); Dalloz, 1900-2-289, note de M. Josserand à la p. 290.

Il semble inutile d'insister là-dessus lorsque le texte de l'article 1054 C.C. est si clair; mais ici même, dans cette Cour, nous avons à plusieurs reprises décidé la chose dans le même sens, et nous pourrions invoquer *Canada and Gulf Terminal Railway Co.* v. *Lévesque* (2) (qui d'ailleurs eut constitué un obstacle au succès des appelants sous plusieurs autres rapports, si nous n'en étions pas venus à la conclusion que ni la propriété ni la garde de la chose n'avait été établie à l'encontre de l'intimée); *Quebec Railway Light, Heat and Power Company Limited* v. *Vandry* (3); *Lacombe* v. *Power* (4); *McLean* v. *Pettigrew* (5), toutes des décisions qui lient cette Cour et qui ont tranché cette question définitivement en autant que cette Cour est concernée.

On pourrait profitablement consulter également un jugement très étudié re *La Sécurité Compagnie d'Assurances Générales du Canada* v. *Canadian Pacific Express* (6).

Je suis donc d'avis de confirmer le jugement dont est appel, avec dépens.

(1) (1909) 42 Can. S.C.R. 281, at 284.
(2) [1928] S.C.R. 340.
(3) [1920] A.C. 662.
(4) [1928] S.C.R. 409.
(5) [1945] S.C.R. 62.
(6) Q.R. [1946] S.C. 52.

KERWIN J.:—On July 5, 1941, Joseph Emile Napoléon Marcoux, as an employee of the Canadian Pacific Railway Company, was engaged in painting the Interprovincial Bridge between Hull and Ottawa. The painting had been commenced on the Quebec end of the bridge and Marcoux was still working within the limits of the city of Hull, when, while preparing to move a plank upon which he had been sitting at a considerable height above the floor of the bridge, he came in contact with an electric wire carrying 2,200 volts, and his death ensued immediately.

Under the appropriate statute, the Quebec Workmen's Compensation Board directed the Canadian Pacific Railway Company to pay a special sum of $100, and $125 towards its employee's funeral expenses. It also directed the employer to pay Parmelia Lessard, the widow of Marcoux, for herself and her eight minor children, the sum of $66.47 per month,—subject to the revision, in the future, of this monthly payment. The widow had already reserved her rights and those of her children to claim at common law from Hull Electric Company an additional sum which would constitute, with this compensation, an indemnification proportionate to the loss actually sustained. In pursuance of that reservation this action was thereupon brought by the widow personally and as tutrix to her minor children against Hull Electric Company, based upon articles 1053 and 1054 of the Quebec Civil Code.

The action was tried by Mr. Justice Surveyer with a jury and upon the latter's answers to questions put to them, judgment was entered against the Company for $10,000 for the widow personally and $8,064 in her quality as tutrix. In the Court of King's Bench, the three judges comprising the majority decided that the Company did not own or have under its care the electric wire in question and that there was no fault on its part, and for those reasons and without expressing any opinion upon the other matters raised, set aside the judgment and dismissed the action. Mr. Justice St. Germain concluded that there was evidence to permit the case to go to the jury but that because of errors in the trial judge's charge, there should be a new trial. The plaintiff now appeals.

Whatever may be the fact as to who built the Interprovincial Bridge, it appears from an agreement dated

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August 12, 1926, that the Canadian Pacific Railway Company granted to the respondent the right to use, for its electric railway, two lines of tracks on the bridge for east and west bound traffic, respectively, and the right to maintain the shelters, ticket office, waiting room, platforms and stairways at the respondent's terminal in Ottawa. The grantor was to maintain the rails but the grantee was to construct and maintain, among other things, the necessary trolley wires. The respondent agreed to pay $6,000 per annum for these privileges. We are concerned only with what has been called in the case the south side of the bridge, on which are situate the tracks running from Hull to Ottawa with a trolley wire (*b*) above them, carrying power for the electric cars, a wire (*a*) to the south of the trolley wire, for the purpose of furnishing power for lighting the bridge, and wires (*c*) and (*d*) to the north of the trolley wire. These wires, (*c*) and (*d*), furnished power to light the terminal. In the trolley wire was direct current while in (*c*) and (*d*) the current was alternating. It was the current in wire (*d*) that electrocuted Marcoux.

Notwithstanding the date of the agreement with the Canadian Pacific Railway, it is clear from the evidence that the respondent commenced to use the tracks and facilities as early as 1915 because in that year it strung across the bridge the two wires (*c*) and (*d*). At that time the respondent not only operated the trolley system but also produced and supplied electricity for domestic and municipal use and for power to consumers in the city of Hull and elsewhere. However, by transfer dated January 11, 1928, it conveyed to Gatineau Electric Light Company Limited a number of parcels of land, including that upon which was erected substation no. 4, situated at 70 Main St., Hull, but reserved

> as being used for purposes connected with the operation of its traction lines and not required for domestic or municipal lighting purposes certain generating equipment with accessories thereto

which were located in that substation. By clause 6 of this transfer of January 11, 1928, the respondent also conveyed

> All the electric lighting and distributing system of the city of Hull, municipalities of South Hull and East Hull, town of Aylmer and village of Deschenes, as it existed on the first day of June last, including poles, wires, transformers, service connections, meters and all other accessories used for purposes of domestic or municipal lighting apart from purposes connected with the traction system of the vendor.

It is agreed that the limits of the city of Hull extend to the boundary line between the provinces of Quebec and Ontario. By clause 7 it is stated:—

> It is the intention of the vendor to convey and of the purchaser to accept all the property moveable and immoveable, the rights, privileges, servitudes, franchises and any and all other properties owned by the vendor and used solely in connection with the business of domestic or municipal lighting or furnishing of power apart from traction purposes.

The Court of King's Bench concluded that, upon the proper construction of these provisions, the respondent thereby transferred the ownership of wires (*c*) and (*d*) within the limits of the city of Hull. The matter does not lend itself to extended discussion but upon a full consideration of all that has been said by counsel, I have had no difficulty in coming to the same conclusion. Any ambiguity in clause 6 is, in my opinion, made clear by the terms of clause 7 but, if there should still be any doubt about the matter, it is removed by the subsequent actions of both parties to the sale of January 11, 1928, or their successors. Mr. Gale, the respondent's manager, testified that from January 11, 1928, forward, the respondent attended to the repair and maintenance of wires (*c*) and (*d*) from the Interprovincial Boundary to the Ottawa terminal but that it exercised no supervision or control over them on the Quebec side. The Chief Engineer of Gatineau Power Company, whose position in the matter will be explained shortly, undertook, on behalf of his company, the supervision of wires (*c*) and (*d*) on the Quebec side. Mr. Gale further stated that these wires leave the Gatineau Power Company Substation, 70 Main street, Hull, and follow Main street, Hotel de Ville street, Laurier avenue and Youville street to the Ontario border, and that the respondent uses power from the Gatineau Power Company at 117 Main street as well as at the Ottawa terminal, in both of which places it is but a customer of the Gatineau Power Company.

The reference to the Gatineau Power Company is explained by another document dated April 6, 1931, by which Gatineau Electric Light Company Limited transferred to Gatineau Power Company its undertaking in the province of Quebec and its system for the transmission and

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distribution of electrical power or energy in that province, owned by it, comprising among other transmission and distribution lines:—

City of Hull.

Lines in the city of Hull, county of Hull, located as follows and including service extensions along their routes:

Laurier Avenue.

East side of Laurier ave. from Hotel de Ville street to Ste. Foye street.

* * *

Main street.

North side of Main street from Hotel de Ville street to Bridge street the said line being located in part upon and over lot number seven hundred and twenty-nine (729) of ward three on the Official Plan and in the Book of Reference of the city of Hull (According to the transfer from the Hull Electric Company to Gatineau Electric Light Company Limited, lot 729 is the lot upon which is erected substation 4).

* * *

Hotel de Ville street.

North side of Hotel de Ville street from Laurier avenue to Main street.

Youville street.

South side of Youville street from Laurier avenue to the Provincial Boundary on the Interprovincial Bridge between the cities of Hull and Ottawa.

This list of streets upon which the transfer from Gatineau Electric Light Company Limited to Gatineau Power Company states there are transmission and distribution lines agrees with Mr. Gale's evidence as to the location of wires (*c*) and (*d*) from substation 4 to the Ontario boundary.

It is argued that even if wires (*c*) and (*d*) at the date of the accident were not owned by the respondent, they were under the latter's care within the meaning of article 1054 of the Civil Code. It is said that they are continuous wires from Youville street across the bridge and to the respondent's terminal in Ottawa, and that their only purpose is to conduct electric power for the purpose of lighting the terminal. The fact that they are continuous does not prevent the ownership changing at the Interprovincial Boundary and to say that their only purpose is to furnish power to light the Ottawa terminal is correct only in this sense,—that from the time they reach the Quebec end of the bridge the only user of energy is the respondent at its terminal. It is further said that while the agreement with the Canadian Pacific Railway of August, 1926, does not refer to wires (*c*) and (*d*), once it is admitted

that they were erected on the bridge by the respondent, it should be taken that the Canadian Pacific Railway Company by the agreement of August 12, 1926, gave a licence to the respondent only; particularly in view of clause 4 of that agreement by which the respondent agrees that it will not assign or underlet the rights thereby granted without the consent in writing of the Canadian Pacific Railway Company; that it was shown that there was no agreement between the latter and Gatineau Power Company or Gatineau Electric Light Company Limited; and that the respondent has continued to pay the full amount of $6,000 per annum.

We are not concerned with the rights *inter se* of the Canadian Pacific Railway Company and the respondent, or of it and Gatineau Power Company. Whatever they may be, they cannot alter the fact that the ownership of wires (*c*) and (*d*) to the Provincial Boundary line had been transferred by the respondent and that since then it had not exercised any control or supervision over them and therefore it cannot be said that at the place at which the unfortunate accident occurred, the wires were under the respondent's care within the meaning of article 1054 C.C. Having disposed of the ownership and not having assumed or undertaken any supervision or control, the respondent cannot be held liable for any fault. There was therefore no case against the respondent to submit to the jury and the appeal should be dismissed with costs.

RAND J. (dissenting):—The husband of the appellant lost his life by electrocution while at work painting the Interprovincial Bridge between Ottawa and Hull. He was found to have come into contact with one of two wires carrying electricity of 2,200 voltage from a sub-station in Hull to the terminal of the respondent, Hull Electric Company, in Ottawa, and used only for lighting that terminal. The wires were fastened to brackets affixed to the bridge structure and the nearer to the side of the column or girder the deceased was painting had a clearance of about 15½ inches. They had been erected by the Hull Company in 1915 under permission from the Canadian Pacific Railway Company, the owner apparently of the bridge.

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In 1926 the Pacific Company granted the respondent a long term right to operate its tramway system over the bridge. There is no reference in the contract to any previous use of the bridge for that service, but admittedly it was a continuation of a use that had been going on for many years before. Nor is there any reference to the two lighting wires, and whether they were intended to be covered by it or to be continued under the original licence is not clear. It seems to have been assumed in both the lower courts that they were within the language of the 1926 agreement; but on the argument before us this was challenged by counsel for the respondent. He contended that the right to place the wires on the bridge was to be found in an agreement made in 1914 not placed in evidence, but mentioned in the 1926 document. However this may be, admittedly they were in place only by virtue of a licence from the Pacific Company and on the records of that company the licensee remained the Hull Company. In 1928 the latter sold to the Gatineau Light and Electric Company its light and power system for both domestic and public services, but reserved all plant and property used for or in connection with the traction or tramway purposes, and the controversy has been decided by the Court of King's Bench on the ground that this sale carried the two wires as far as the interprovincial boundary which is the middle of the Ottawa River.

I should have thought the language of the 1928 agreement:

> All the electric lighting and distributing system * * * as it existed on the 1st day of June last * * * used for purposes of domestic or municipal lighting apart from purposes connected with the traction system of the vendor

would mean domestic or municipal *vis à vis* the then owner, the Hull Company; both words look rather to services to third persons than to the parties themselves; and the use then made by the owner, the respondent, for its own purposes would not in that sense be domestic. It could be "domestic" only from the point of view of the purchaser after the system had been acquired. The later language

> used solely in connection with the business of domestic or municipal lighting or furnishing of power apart from traction purposes

seems to confirm that. Certainly "traction purposes" must include some lighting as that of the tramcars and con-

ceivably of right of way, and the lighting of terminals is in the same category. In a subsequent sale of the system to the Gatineau Power Company reference is made to lines on Youville street from Laurier avenue to the interprovincial boundary on the bridge, and this item is said by the respondent to designate the two wires in question. That may be so: but it is a contract between third parties and would not bind the respondent.

But I do not find it necessary to determine this question of title. The wires were on the bridge only under a licence granted the respondent. If they were sold to the Gatineau Electric, the right to maintain, in the sense of continuing them as they then were, remained in the Hull Company; and in relation to the Pacific Company and its employees the responsibility for that continued likewise with the respondent as if it remained the owner. The Gatineau Power cannot be heard to say that it is a trespasser on the bridge and it is not a trespasser only by the continued maintenance of the wires by the respondent as its own.

The respondent then must be looked upon as a party to the continuing existence of these wires on the bridge in the position in which they were at the time of the fatality. It was in charge or care of them in relation to the deceased, and is brought within the liability of article 1054 of the Civil Code if it is shown that the death was caused in a legal sense by the wires, unless it is able to avail itself of the exculpatory provision of the article.

It is said that we are governed by the judgment of this Court in *Canada and Gulf Terminal Railway Co.* v *Lévesque* (1), and that that rules out liability on the part of the respondent. This proceeds on the footing that the legal cause of death here was the electricity and not the wire and that only the person in control of the former could be said to be within article 1054 C.C. In that case, however, death was brought about by a sudden flow of excessive current. What was being supplied to the machine shop was a current of 110 volts, but what killed the employee was a current of 2,200 volts, and obviously it was in a causal sense the flow of current which effectively brought about the fatal result. The dissents of Duff J. (as he then was) and Lamont J. were on the ground that there was

(1) [1928] S.C.R. 340.

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evidence of negligence on the part of the employer in what should have been safe working conditions in the shop. Here the act of the respondent is in erecting and maintaining, through the continuance only of its sole authority to do so, a wire which is intended to be a channel for a fatal current in a place within reach of workmen engaged in their ordinary duties. The leave is to maintain on the bridge a live wire; it is the position in space that is governing, and this lies within the control of the licensee. That is not to say that the company either controlling the current or responsible *vis à vis* the Hull Company for the wires as its own property, including their position on the bridge, might not also in the circumstances be within the application of article 1054 C.C.

But whether the death was caused by the wire, or whether the deceased himself played a part in bringing it about, are questions of fact to be found by the jury under proper directions from the Court, and I am forced to agree with St. Germain J. of the Court of King's Bench that the directions given at the trial were not proper. They were to the effect that the respondent was liable as a matter of law. This withdrew from them these essential questions of fact. I am unable to treat the circumstances as admitting of only the conclusion of liability on the part of the respondent; it cannot in my opinion be said as a matter of law that, regardless of the circumstances, the wire was the sole cause of the death.

I am disposed to the view also that, having regard to the provisions of *The Workmen's Compensation Act*, the damages found are excessive, but as the case should go back for a re-trial of the issue of liability, no more need be said on that point.

I would, therefore, allow the appeal, and direct a new trial. The appellant should have her costs in this Court, the respondent costs in the appeal below, and the costs of the first trial should abide the result of the second.

ST. JACQUES J. *ad hoc* (dissenting):—On the 5th of June, 1941, Joseph Emile Napoléon Marcoux, plaintiff's husband, was working for the Canadian Pacific Railway at the painting of the Interprovincial Bridge between Hull and Ottawa, and during the course of his work, he came in contact with an electric wire carrying a load of 2,200 volts and was

instantly killed. He had then nine minor children to whom his wife was appointed tutrix. The accident having occurred on the part of the bridge which is in the province of Quebec, the family of the deceased had the benefit of the Quebec *Workmen's Compensation Act* and was granted by the Commission a certain sum for funeral expenses, plus a rent of $66.47 per month payable by the employer and susceptible to be revised according to the change of state of the wife and children. When she made her application to the Commission, the widow had reserved whatever rights she might have, for herself and her children, against the Hull Electric Company as a result of the death of her husband, and she instituted an action in the amount of $50,000, viz: $20,000 for her personally and $30,000 for her nine children.

She alleged that the death of Marcoux was due to his contact with electric wires belonging to defendant, or being under its control, which wires were then defective, in bad condition, not properly insulated and maintained for the carrying of electricity necessary for the exploitation of defendant's tramways.

The Company thus sued denied the facts alleged by plaintiff and specially pleaded that the accident causing the death of Marcoux was not due to its fault, negligence or imprudence, nor to anything of which it had the control.

Plaintiff having made the option of a trial before jury, the assignment of facts to be submitted to the jury was made by consent of both parties and a judgment rendered accordingly. As it was then apparent that the main issue was whether the wires having caused the death of Marcoux were under the control of Hull Electric Company the following questions among others were submitted to the jury and the answers were:

2nd question:

Quelle a été la cause de la mort de Joseph-Emile Marcoux?

Answer:

La cause de la mort de Joseph-Emile Marcoux est due au choc du fil "D" de la Cie Hull Electric.

5th question:

La mort dudit Joseph-Emile Marcoux est-elle due à ou a-t-elle été causée par aucune chose appartenant à la défenderesse ou étant sous la garde, le contrôle, la surveillance ou l'entretien de la défenderesse, et si oui, quelle est cette chose?

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Answer:
Oui, due à la Cie Hull Electric, le fil électrique.

6th question:
La mort dudit Marcoux a-t-elle été causée par la faute, négligence, imprudence ou incurie de la défenderesse ou de ses officiers, employés et préposés?

Answer:
Oui.

6a question:
Si vous répondez oui à la question précédente (no 6), dites en quoi la défenderesse est coupable de faute, négligence, imprudence ou incurie ou celle de ses officiers, employés et préposés.

Answer:
La réponse est que la Cie Hull Electric est responsable pour négligence et imprévoyance, en tenant leur fil "D" trop près du pont.

The answers to questions 9 and 10 concerning the damages were $10,000 for plaintiff personally and a total amount of $8,064 for eight children (one being now 21 years of age) to be divided among themselves, according to their age on a basis of $12.00 per month until they reach the age of 21.

Defendant's attorneys moved that the verdict be quashed and the action be dismissed or alternatively that a new trial be ordered, alleging that it appears clearly from the evidence that no jury could render such a verdict which is against the law. The presiding judge dismissed the motion; he granted plaintiff's demand and confirmed the verdict by a judgment based on the grounds that the electric wire, which was the cause of the death, had been installed and used by defendant until the sale made on the 11th of January, 1928, to Gatineau Electric Company and that the facts invoked by defendant to show a transfer of the property of the wire are of the province of the jury whose verdict should not be disturbed by the Court. As to the amount of damages, although the presiding judge declared that he would not have granted such an amount, he, however, confirmed the verdict.

This judgment was quashed by a majority of the judges of the Court of King's Bench dismissing the action, Francoeur J., taking no part in the judgment and St. Germain J., dissenting, being of the opinion that defendant still

had the control of the wire at the time of the accident, but ordering a new trial on the ground that the trial judge did not properly instruct the jury.

Plaintiff appeals from this judgment and contends that Hull Electric Company was properly condemned by the first court.

There is no doubt that the death of Marcoux was due to his contact with an electric wire running along the bridge for the purpose of lighting defendant's station at the Ottawa end of the bridge. The jury found that the wire was too close to the girder of the bridge; and there is satisfactory evidence to justify such a finding. The main issue is whether defendant still had the control of the wire when Marcoux was killed. It is proven, and in fact admitted, that the wire was installed by defendant as its property and was used, before 1928 and after, for the purpose of carrying electricity to the Ottawa station. The Company did not clearly allege it in its plea, but contends that, by the sale made to Gatineau Electric Company on the 11th of January, 1928, the wire was included among the things sold, and since then was the property of Gatineau Electric Company and under its control, and consequently the responsibility of the accident cannot rest upon defendant.

In my opinion, the control of the wire and its maintenance, as well before 1928 as after, is a pure question of fact which must be decided by the jury, properly instructed. The assignment of facts, to which no objections were made by defendant before and during the trial, contains the very question of the ownership and control of the wire which was the cause of the death of Marcoux. The issue rested upon the answer to be given to that question; the fyling of deeds of sale, as well as the hearing of witnesses, were for the purpose of proving who had the control of the wire. The deeds of sale invoked by defendant were read to and by the jury; the reading of such deeds to find whether the wire was included among the things sold is a question of fact and not one of law. If the juridical character of a deed is in issue, viz., whether it is a deed of sale, or a deed of donation, or a deed of hypothec, is a question of law, the solution of which belongs to legal minds; but such is not the case here. The jury as well as

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the judges are called upon to read the deeds solely to find out whether the wire was included among the things enumerated in the clauses reading as follows:

All the electric lighting and distributing system of the city of Hull, municipalities of South Hull and East Hull, town of Aylmer and village of Deschenes, as it existed on the first day of June last, including poles, wires, transformers, service connections, meters and all other accessories used for purposes of domestic or municipal lighting apart from purposes connected with the traction system of the vendor * * *

It is the intention of the vendor to convey and of the purchaser to accept all the property moveable and immoveable, the rights, privileges, servitudes, franchises and any and all other properties owned by the vendor and used *solely* in connection with the business of domestic or municipal lighting or furnishing of power *apart* from traction purposes and should it be hereafter discovered that any property, rights, privileges, servitudes, franchises or any other properties owned by the vendor and used for the purposes above indicated apart from traction purposes be hereafter found vested in its name the vendor will on demand execute such other and further deeds, documents and assurances in writing as may be necessary to vest the same in the purchaser.

The presiding judge deduced from the reading of the deeds, as well as from the parol evidence, that wire "D" was not sold to Gatineau Electric Company, but was retained by Hull Electric Company for purposes connected with the traction system. St. Germain J., in the Court of King's Bench, read the deed the same way and justified his conclusion by very elaborate reasons with which I agree and need not repeat here. I am not, however, disposed to render a judgment according to the verdict, first because I apprehend that the jury may have been confused by the charge of the judge, and also because the amount awarded appears to me grossly excessive, and out of proportion to the evidence.

Article 475 C.C.P. says that

the jury find the facts, but must be guided by the directions of the judge as regards the law.

The jury has to be clearly instructed on that point and I must say with all due deference that this has not been done in a satisfactory way in the present case. The respective provinces of judge and jury have not been clearly defined and confusion in the minds of the jury seems to have resulted from such misdirection. For instance, the judge says:

vis-à-vis la demanderesse, elle ne connaissait pas le propriétaire du fil; l'action me paraît bien fondée.

And further:

Par conséquent, j'arrive à la conclusion qu'il y a du fait et du droit, et, tant que c'est du droit, comme je vous l'ai dit, vous êtes obligés de me suivre, c'est que vous ne pouvez pas refuser à la demanderesse d'avoir une action contre la Hull Electric Company.

The jury has not been left entirely free in its province of finding facts. This may explain that the answer to question 6a is not only a finding of fact, but really a judgment. The jury says that Hull Electric Company is *responsible* for its negligence and imprudence in keeping wire "D" too close to the bridge. Responsibility is the legal consequence of facts alleged and proven, and it belongs to the Court and not to the jury to deduce responsibility from the facts found.

Since dictating the above, I have had the advantage of reading Justice Rand's notes of judgment and for the additional reasons therein stated and to which I adhere, I would allow the appeal and direct a new trial; respondent should pay the costs in this court and also the costs of the first appeal; as to the costs of the first trial, they should follow the result of the second trial.

Appeal dismissed with costs

Solicitor for the appellant: *Auguste Lemieux.*

Solicitors for the respondent: *Brais & Campbell.*