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*Oct. 18, 19.
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*Feb. 1.

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

WASYL KIZLYK IN HIS OWN BEHALF AND ALSO AS AND BEING THE ADMINISTRATOR OF THE ESTATE AND EFFECTS OF HIS DAUGHTER MARY KIZLYK, DECEASED (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Railways—Child, while passing between cars on spur track in railway grounds, crushed by cars being moved by switching operations —Railway company sued for damages—Action dismissed at trial on motion for non-suit—New trial ordered on appeal—Whether there were questions which should have been submitted to jury—Railway company's duty to child—Whether child a trespasser.

At the end of a spur track in defendant's grounds at a flag station on defendant's line of railway, a railway car, acquired and converted into a school-room by the Department of Education of the Province of Manitoba, was, under an agreement with defendant, located and used as a school for the settlement in the vicinity. A barricade was erected on the spur track so that no railway operations thereon could extend to the track where the school car rested. For about two months before the accident in question a line of box cars had been on the spur track, with a gap of 1½ or 2 feet between the two cars thereof nearest the school car, the nearer of said two cars being about 90 or 94 feet from the steps of the school car. A school girl, 12 years old, who, with some companions, had left the school earlier than usual (as examinations were being held), went from the school along a

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Rand JJ.

certain used way beside the spur track but left the way and proceeded to go through the said gap and was crushed by the coupling of the cars by a switching engine operating at the farther end of the line of cars, and died from her injuries. The children had no warning of movement of the cars. Defendant's employees did not know that children were outside the school and near the train. There were facts in evidence, discussed in the judgments, as to previous warnings to children with regard to the railway tracks and cars, as to ways used or available for going home from school, as to distances and directions, and other circumstances.

Defendant was sued for damages. The trial Judge, on motion for nonsuit, held that the girl was a trespasser in entering said gap, took the case from the jury and dismissed the action. The Court of Appeal for Manitoba, 51 Man. R. 33, ordered a new trial. Defendant appealed.

Held (Kerwin and Rand JJ. dissenting): Defendant's appeal from the order for a new trial should be dismissed. On the evidence, there were questions which should have been submitted to the jury.

Discussion as to duty to trespassers, and as to whether the girl should be considered a trespasser under the circumstances.

Per Davis J.: Whether a person is really a trespasser is a question of fact (*Grand Trunk Ry. Co.* v. *Barnett,* [1911] A.C. 361, at 370) and was for the jury on a proper direction. The jury should have been asked whether on the evidence they thought that defendant knew or should have known of the likelihood of school children being about the cars at the time, and, if the jury thought so, then, was there a neglect of duty to the girl on defendant's part that caused the accident.

Per Kerwin and Rand JJ., dissenting: The trial Judge was right in taking the case from the jury and dismissing the action, as there was no evidence to submit to the jury upon which they might return a verdict that would justify a judgment against defendant. A finding that the girl was upon the tracks by defendant's permission would have been perverse, there being no evidence to justify it. It was not a case where defendant's employees knew or should be held to have known or expected at the time in question that children were or were likely to be on or about the cars. There was no allurement. On its own property defendant was performing a normal and usual operation. The girl was a trespasser in entering the gap, and, putting defendant's duty towards her as such on the highest ground, it did nothing in breach of such duty. (*Canadian Pacific Ry. Co.* v. *Anderson,* [1936] S.C.R. 200, at 203, 208, cited).

APPEAL by the defendant from the judgment of the Court of Appeal for Manitoba (1) allowing (Trueman J.A. dissenting) the plaintiff's appeal from the judgment of Donovan J. at trial.

The plaintiff's daughter, twelve years of age, was crushed while passing between two box-cars, about 1½ or two feet apart, at the end of a line of box-cars on a spur track of the

(1) 51 Man. R. 33; [1943] 2 W.W.R. 1; [1943] 3 D.L.R. 194.

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defendant in its grounds at Darwin station, Manitoba, a flag station on the defendant's railway, and she died from her injuries. While she was passing between the two box-cars as aforesaid the line of cars was moved by a switching engine operating at the farther end of the line of cars. The material facts and circumstances of the case sufficiently appear in the reasons for judgment in this Court now reported.

The action was brought by the plaintiff, in his own behalf and also as the administrator of the estate and effects of his said daughter, against the defendant for damages.

The action was tried before Donovan J. with a jury. On a motion for non-suit, Donovan J. (who held that the child was a trespasser in entering upon the space occupied by the rails and the space in between them) took the case from the jury and dismissed the action. The Court of Appeal set aside the judgment at trial and ordered a new trial (Trueman J.A., dissenting, would have dismissed the appeal). The defendant appealed to this Court.

H. A. V. Green K.C. and *Ian Sinclair* for the appellant.

F. Heap K.C. for the respondent.

The judgment of Rinfret and Hudson JJ. was delivered by

HUDSON J.—The facts are fully set forth in the judgment of Mr. Justice Robson in the court below and by my brother Davis in his judgment, which I have had an opportunity of reading. I shall say no more than to emphasize a few of these facts which, in my mind, should determine the disposition of this appeal.

The children were young. They were bound by law to attend the school. To reach the school car, those whose homes were north of the railway had to cross two main railway tracks and to travel through the railway company's property for several hundred yards. The road through these yards usually travelled by the children in going to and returning from school lay to the south of the side track. For some distance before reaching the school, this roadway was immediately adjacent to the track without any fence or ditch intervening. The two rear cars on the side track with the gap between them had remained in the same position for two months before the accident. It was ad-

mitted by the defendant that there was also available a road or way to the north of the side track which the children might take if so minded and, in that event, it would be necessary for them to cross this side track at some point.

The whole situation was one which demanded great care on the part of the defendant.

There was no negligence in placing the cars on the side track and leaving them there, but the immediate cause of the accident was the movement of these cars. As stated by Lord Justice Scrutton in *Mourton* v. *Poulter* (1):

> The liability of an owner of land to trespassers does not arise where there is on the land a continuing trap, such as that which was considered in a case in the Supreme Court of the United States of an innocent looking pond which contained poisonous matter: *United Zinc and Chemical Co.* v. *Britt* (2). There, as the land remains in the same state, a trespasser must take it as he finds it, and the owner is not bound to warn him. That, however, is a different case from the case in which a man does something which makes a change in the condition of the land, as where he starts a wheel, fells a tree, or sets off a blast when he knows that people are standing near. In each of these cases he owes a duty to these people even though they are trespassers to take care to give them warning.

The gap between the cars here could not be considered a trap while the cars were stationary, but was that so when the cars were put in motion under all of the circumstances here?

In a note with reference to the cases of *Excelsior Wire Rope Co.* v. *Callan* (3), and *Mourton* v. *Poulter* above (4), in 46 L.Q.R. 393, Sir Frederick Pollock says:

> But the kind and amount of warning called for must, in any case, depend on the circumstances, among which the apparent capacity of endangered persons to take care of themselves may have to be counted.

The plaintiff's daughter was not a trespasser when she was on the roadway to the south of and within a foot or two of the spur track, nor would she have been a trespasser on the north side of this track. Must she then be considered as a trespasser when passing from one side to the other under the circumstances here?

The effect of the most recent authoritative decisions is fairly stated in Winfield on Torts, 1937 Ed., at page 607:

(1) [1930] 2 K.B. 183, at 191.
(2) (1922) 258 U.S. 268.
(3) [1930] A.C. 404.
(4) [1930] 2 K.B. 183.

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The disposition of children of tender years to mischief has given their elders nearly as much trouble in the law Courts as outside them, and the law about dangerous structures has been modified with respect to them in a way which may be thus formulated:

An occupier must take reasonable care to see that children, of whose presence he knows or ought to know or to anticipate and who are too young to appreciate the danger of some attractive object under his control and within his knowledge, are protected against injury from that danger either by warning which is intelligible to them or by some other means.

* * *

The only respect in which a child differs from an adult is that what is reasonably safe for an adult may not be reasonably safe for a child and what is a warning to an adult may be none to a child.

At page 610:

The result of [certain cases referred to] is that if a child is a trespasser, he cannot recover unless the danger were put there expressly to injure him or unless the defendant knows that it is extremely likely that he will be exposed to grave danger.

In my view, there was evidence here sufficient to warrant a submission of the questions of fact to the jury. For this reason, I would dismiss the appeal with costs.

DAVIS J.—The facts of this case are very unusual. Practically all negligence actions turn upon their own facts but this case peculiarly does so. Decisions in other cases on different facts are a very doubtful guide in determining the issue in this appeal.

The action arose out of the unfortunate death of a twelve-year-old schoolgirl who was caught between two box cars of the Canadian Pacific Railway when they were being coupled up. The main defence of the railway company is that the child was a trespasser to whom the railway company was under no duty. The trial judge thought the unfortunate child was a trespasser and took the case from the jury and dismissed the action on a motion for non-suit. The Court of Appeal for Manitoba, Trueman J.A. dissenting, ordered a new trial; the railway company appealed to this Court from that order.

The facts are simple and are really not in dispute, although exceptional in their character. The Department of Education of the Province of Manitoba acquired, we are not told from whom, a railway passenger car and converted it into a schoolroom. The purpose appears to have been to use this school car in deserted parts of the province

as has somewhat recently, I understand, become a practice in the Province of Ontario, of having a school car go from settlement to settlement in the sparsely populated northern sections of the province so as to afford the children of those districts an opportunity to receive some schooling. In this case, whatever the original intention was, the Department of Education decided to leave this particular school car more or less permanently at a definite location, Darwin, there to be used instead of building a schoolhouse. Darwin is a flag station in Manitoba on the main line of the Canadian Pacific Railway running between Winnipeg, Manitoba, and Kenora, Ontario. Trains stop at the station only when flagged to do so; it is not a regular stopping place. There is not even what one could call a village at the location; there are a few houses scattered in the vicinity; it is not an agricultural section of the country but there is some cutting and shipping of timber as cordwood or railway ties and the like. An agreement was made between the Canadian Pacific Railway Company, the School District of Darwin Station and the Minister of Education whereby, for a money consideration, this school car was run down the railway spur track (which runs easterly from a connection on the south side of the main line), to be left permanently within the railway company's station grounds at the end of the spur track.

Some eighteen or twenty children from the neighbourhood appear to have attended school in the railway car. While the doors at one end of the car had been closed up, a door at the other end was left open on the south side of the car for the children to go in and out; children living north of the railway, as the deceased child did, would have to cross both the spur and the main tracks to and from school; there was no fenced-in approach to or exit from the car to or from any public highway. The railway company in its factum admits that "the school car was situated where it was landlocked by property of the company". A good deal was said about a cinder path that ran along the south side of the spur track as being a safe and adequate road available to the children, but it could scarcely be called in any sense a roadway. To that improvised school building—the railway car fitted up as a school—the children of the neighbourhood went day by day and at their recess periods had no other place to play than around the car and about the tracks.

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The most significant fact is that the railway company had left six box cars standing on the same spur track on which the school car was placed. The fifth and sixth cars were standing apart, a distance of a foot and a half or two feet between them. The rear of the sixth car (nearest the school car) was approximately ninety feet from the nearest end of the school car.

These box cars had stood there on the spur track near the school car undisturbed, empty and with the doors open, for a period of some two months before the day of the accident, and it would not be unnatural if the school children had come to regard them as fixtures there. There was evidence that the school children played in and around these cars—playing tag, hide-and-seek, and other children's games. One of the children said in evidence that they would hide "sometimes around the wheels of the box cars and sometimes in the cars". It is in evidence that on different occasions three different foremen of the railway company (one of them a section foreman) warned the children not to play around the cars, but a jury might well take the view that that sort of warning would be ineffective with a lot of school children. That evidence establishes, however, that the railway company knew of the practice of the school children and of the danger inherent in the situation.

On the day of the accident it was not a question of the children playing around the cars. School had been let out a little earlier at the noon hour because they had had some examinations and four of the children were making their way northerly across the tracks in the direction in which their homes lay; and the jury might well have inferred that they were on their way home for their dinner. They proceeded to pass through the open space between the fifth and sixth box cars, but just at the moment that this twelve-year-old girl was going through the gap the cars were suddenly moved by a switching engine up at the front of the six cars and she was caught, in the coupling process, between the fifth and sixth cars and died within a few hours from her injuries. There is no suggestion that there was the slightest warning or notice given that after the cars had stood there for a couple of months they were at that moment to be moved and the two end cars coupled up. With the hindsight of an adult, many explanations

were offered us on behalf of the railway company as to how this child could have crossed the tracks without any harm coming to her—of course it is suggested that there were ninety feet between the end of the school car and the end of the sixth car, and the children might have crossed at that point, or they might have walked alongside the spur track till they got to the front of the six cars and then have crossed. Those are all very easy statements to make after an event. They fail however to take into account the element of human nature and offer little assistance to me on the question so strongly advanced and argued on behalf of the railway, that the child was at the moment and place of the accident a trespasser in the strict legal sense of the word, to whom the railway company owed no duty of warning.

It is said that the railway did not know the child was there at the time. No one suggests that it did; but if the railway company knew that there was the likelihood of the school children being in or about those box cars, I should have no doubt that there was a duty on the railway to see that children were not then about the cars, and if they were, to warn them of the impending movement of the cars.

I do not think the case should have been taken from the jury. Whether a person is really a trespasser is a question of fact, as said in the judgment of the Privy Council in *Grand Trunk Railway Company of Canada* v. *Barnett* (1), and was for the jury on a proper direction. I think the jury should have been asked whether on the evidence they thought the railway company knew or should have known of the likelihood of the school children or some of them being about the box cars at the time and if the jury thought so, then, secondly, was there a neglect of duty on the part of the railway company to the deceased child that caused the accident? The question whether the accident was caused or contributed to by the child's own negligence is, of course, also a question of fact for the jury.

It was strenuously contended by counsel for the railway company that knowledge of likelihood is not sufficient in law; that the person charged with neglect must either have seen the child or at least have known that the child was there. With that contention I do not agree. The

(1) [1911] A.C. 361, at 370.

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American Law Institute has done an invaluable work of legal research, particularly in the field of modern tort problems, and those in English common law jurisdictions are under a heavy debt for its Restatement on Torts. Section 334 states the law thus:

> 334. A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety.

To much the same effect I take the language of Lord Atkin to be when he said very recently in the House of Lords in *East Suffolk Rivers Catchment Board* v. *Kent* (1):

> * * * every person whether discharging a public duty or not is under a common law obligation to some persons in some circumstances to conduct himself with reasonable care so as not to injure those persons likely to be affected by his want of care.

I am loath to believe that the law of this country will recognize the position of this school child in the special circumstances as only that of a trespasser in the sense in which that word is strictly and technically used in law, to whom no obligation to take care existed.

For the above reasons I think the case should go back to be tried with a jury. That was the order of the Court of Appeal for Manitoba which was appealed from. I should therefore dismiss the appeal with costs.

The judgment of Kerwin and Rand JJ., dissenting, was delivered by

KERWIN J.—My sympathy goes out to the parents of Mary Kislyk, who was killed in the unfortunate occurrence giving rise to these proceedings, but, as Lord Justice Farwell remarked in *Latham* v. *Johnson* (2), "sentiment is a dangerous will-o-the-wisp to take as a guide in the search for legal principles". On the legal principles applicable, the trial judge was right, in my opinion, in taking the case from the jury and dismissing the action brought by the girl's father. He was right in so doing because there was no evidence to submit to the jury upon which they might return a verdict that would justify a judgment against the Railway Company. To demonstrate this

(1) [1941] A.C. 74, at 89. (2) [1913] 1 K.B. 398, at 408.

requires a statement of the evidence, including various distances or measurements which, while put in exact figures, will be understood as only approximate.

By an agreement of December 28th, 1940, the School District of Darwin Station No. 1950, in the Province of Manitoba, was given permission by the Company to place and maintain a railway school car on the easterly one hundred feet of the Company's spur line at Darwin. Darwin is merely a flag station on the through line of railway between Kenora and Winnipeg. There are two main lines of tracks, the east-bound one being north of the west-bound line, and there is a private crossing that runs north and south over both main lines. Ten feet east of the east limit of this crossing is the switch for the spur line, which runs in a general southeasterly direction (including a slight curve) for 760 feet. The spur line is entirely on the Company's property.

In pursuance of the agreement, the school car, 64 feet long, was duly placed at the very end of the spur. The only entrance to and exit from it was by means of steps at its west end. Forty-eight feet west of these steps the tracks were narrowed and a barricade of railway ties erected so that no railway operations on the spur line could extend to the tracks on which the school car rested. From the steps, a roadway 10 feet in width ran along the south side of the spur track for some distance and then curved southwesterly and north to meet the road forming the private crossing. This roadway was cindered in places where it adjoined the tracks and could be used by teams, automobiles and foot passengers, except in very wet weather.

It was used by people in the vicinity to bring railway ties to be loaded on railway cars placed from time to time for that purpose on the spur line. On the day of the accident, June 24th, 1941, there were six such cars, numbered for convenience from west to east as 1 to 6. The first five were coupled together while between cars 5 and 6 was a gap of two feet. The length of each car may be taken as about 40 feet. The distance from the east end of car 6 to the barrier of railway ties was 46 feet. It was therefore 94 feet from the steps of the school car to the east end of car 6 and 134 feet to the gap between cars 5 and 6. Except that one car had been loaded with ties and taken out, the

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situation as to these cars had remained the same for approximately two months, including the gap between cars 5 and 6.

The roadway was also used by the pupils attending school in the school car. These pupils were mainly, if not entirely, the children of the Company's employees and among them were Mary Kislyk and Joe Moroz, each about twelve years of age. The latter lived about one-quarter of a mile to the west of the private crossing and to the north of the tracks. Mary also lived to the west of the private crossing and north of the tracks but a little east of Joe. There were other pupils whose homes were north of the tracks, and we know of at least one, Alfred Barclay, who, during the school term, lived with relatives to the south of the Company's right-of-way.

School was held in the car from Christmas, 1940, to the date of the accident. According to Joe Moroz, on the first day of school, the teacher warned the pupils, including Mary Kislyk, to go to and from school along the ten-foot-wide roadway that led from the school car and not any other way, and not to play around any cars that might be on the spur track, and not to get on the spur track or the main line. His father told him not to play on the box cars or on the spur track. On another occasion, when Joe and other children not identified were playing around the cars on the spur track, a section foreman dove them away. Alfred Barclay said that he and other children played hide and seek for a time soon after the school commenced being held in the railway car, going underneath and around the cars. He remembered being warned by the teacher about playing around and on the cars and on the line, and he was warned by two different section foremen not to play near the cars. The area generally used by the children as a playground was to the south, and east of the railway car.

On the day of the accident, examinations were being held in the school. Alfred Barclay was the last to arrive that morning. Although school generally commenced at nine o'clock, for some reason he did not come until about eleven. The pupils were dismissed half an hour earlier than usual, i.e., at 11.30. About five minutes before such dismissal, what are described as railway cook cars or boarding cars came in from the east on the south main line track and were left standing on such main line track a little to the west of the school car. Upon school being dismissed,

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the first pupils to leave were Joe Moroz, Mary Kislyk and two other children. Joe was in the lead and ran along the roadway and then walked through the gap between the fifth and sixth cars. It will be recollected that the distance from the school steps to the gap was only about 134 feet. He then saw an engine backing up on the spur line. He called to Mary not to follow him but his warning came too late and Mary was crushed between the fifth and sixth cars.

Much was attempted to be made in argument as to why Joe or any pupil should go through the gap at this particular time. It was suggested that they would be allured by the cook cars which contained several men, and also emphasis was laid upon the fact that across a ditch, between the spur line and the west-bound main line, were laid some poles, and at another spot a single tie, and upon the fact that the grass approaching these poles and tie was trampled down. In truth the evidence as to the grass and the poles and tie over the ditch is that the poles and tie were placed some time before by railway men for their own convenience. There was no path and there is not even a suggestion that Joe Moroz ever attempted to go home that way or that he was considering doing so on the 24th of June. In cross-examination he was asked: "Q. It was just a mischievous prank to run between the cars?" to which he answered "Yes". The trial judge then intervened when the following occurred:

Q. The Court: Do you know what that means? Do you know what a mischievous prank is?—A. Yes.

Q. What is it?—A. When you are up to something.

The Court: I thought perhaps he didn't understand that.

There is no evidence that the Company ever permitted, much less invited, any of the school children, including Mary Kislyk, to play or walk or be upon any of its cars or any of its tracks, including the tracks of the spur line. This being so, and on the evidence referred to, if the jury had been asked as the jury in *Grand Trunk Railway Co.* v. *Barnett* (1) was asked, if the victim of the accident was upon the tracks by permission of the Company, and had answered Yes, there would be no evidence to justify the answer and the finding would be perverse.

I agree with the trial judge that Mary was a trespasser in entering upon the space occupied by the rails and the space in between them, and that it is not a case where the

(1) [1911] A.C. 361.

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Railway employees knew, or should be held at the time in question, 11.30 a.m., to have known or expected that children were, or were likely to be, playing around the stationary cars or on the tracks. There was no allurement and, even if the duty of an occupier of premises to a trespasser may be placed on such a high plane, there was no reason, I repeat, why the employees of the Company should in this case have known or anticipated that it was likely that any school children would be on or about the empty cars on the spur line at 11.30 in the morning.

The authorities were exhaustively considered by the Chief Justice of this Court in *Canadian Pacific Railway Co.* v. *Anderson* (1). His remarks, at page 203, are applicable to the present case:

> They [meaning the Railway Company] are engaged in the execution of statutory powers and are, therefore, under an obligation to take reasonable care not to cause unnecessary harm to those who may be injured by a careless or unreasonable exercise of their rights. But they are under no obligation to intending trespassers to prevent them effectuating a trespass upon their cars, which are a part of the railway; whether they be children or adults. If they permit children to climb upon their cars they may find themselves in the position of tacit licensors and, in consequence, affected by duties towards them as licensees; but nobody suggests (such a suggestion is negatived by the evidence) that the respondent was a licensee.

The *Anderson* case (1) was, of course, tried by a judge without the intervention of a jury but in the present case there was no evidence upon which a jury could find that Mary Kislyk was a licensee.

On its own property, the Railway Company was performing a normal and usual operation on the spur line track. The following remarks of the Chief Justice at page 208 of the *Anderson* case (1) are, I think, relevant:

> So long as a person is actually using his vehicle in the ordinary and accustomed way, he is, it would appear, entitled to the enjoyment of it without the curtailment of his rights by trespasses or encroachments of anyone. The fact that the vehicle may present an irresistible allurement to children in the street can make no difference. There is neither negligence nor nuisance in making use in the ordinary way of a vehicle presenting attractions of such a character to infants. If, unfortunately, children of an age too tender to possess the capacity to take care of themselves put themselves in a position of danger by getting into it without the consent of the persons in charge of the vehicle, and without their knowledge, then there arises just one of those risks to which such children, when left unguarded, will unhappily be subject. The person who is making use of a vehicle he employs in the usual way, having committed no wrong, is not chargeable with responsibility for them.

(1) [1936] S.C.R. 200.

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Mary Kislyk was a trespasser and the only duty owing to her by the Company was not intentionally to injure her or "not to do a wilful act in disregard of humanity towards her" or "not to act with reckless disregard of the presence of the trespasser". Even if the duty of an occupier of premises towards a trespasser be put on the highest ground, the Railway Company did none of these things. The appeal should be allowed and the judgment at the trial restored with costs throughout.

Appeal dismissed with costs.

Solicitor for the appellant: *H. A. V. Green.*

Solicitors for the respondent: *Heap, Arsenych & Murchison.*