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*Feb. 10.
*May 9.

CANADIAN NATIONAL RAILWAY COMPANY (DEFENDANT) ..... } APPELLANT;

AND

SAINT JOHN MOTOR LINE LIMITED (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK (APPEAL DIVISION)

Negligence—Railways—Crown—Action against Canadian National Ry. Co. for damages for alleged negligence in operation of what was formerly the Intercolonial (a Canadian Government) railway—Defence of contributory negligence—Application of provincial Contributory Negligence Act (R.S.NB., 1927, c. 143)—Canadian National Railways Act, R.S.C., 1927, c. 172, ss. 12, 15, 33, 2 (a), 3, 16, 19, 21—Exchequer Court Act, R.S.C., 1927, c. 34, s. 19—Consideration by Supreme Court of Canada of question of law not raised below.

Plaintiff sued defendant, the Canadian National Ry. Co., for damages for alleged negligence causing a collision, at Saint John, N.B., between plaintiff's omnibus and defendant's train, in defendant's operation of what was formerly the Intercolonial (a Canadian Government) railway. Defendant pleaded contributory negligence of plaintiff. The jury found, on questions submitted to them, that the injury was caused by joint negligence of the parties; defendant's negligence being in its flagman not remaining long enough to warn traffic properly, and plaintiff's being in insufficient attention of the bus chauffeur and excessive speed; that the proportions of fault were: defendant 90%, plaintiff 10%. Plaintiff recovered judgment for the damages assessed, subject to above apportionment, which judgment was, subject to reduction of amount, affirmed by the Supreme Court of New Brunswick, Appeal Division. Defendant appealed to this Court. The *Contributory Negligence Act* of New Brunswick (R.S., 1927, c. 143) provides for apportionment of liability according to degrees of fault. Its application was not questioned in the courts below, but was attacked by defendant (in its factum and argument) on its appeal to this Court.

Held (1): As the evidence upon which the question as to the application of said Act depended was before the Court and it was not suggested that any further proof material to its elucidation would or could have been produced had the question been made prominent at the trial, it was proper for this Court to decide it (*The Tasmania,* 15 App. Cas., 223, at p. 225; *Connecticut Fire Ins. Co.* v. *Kavanagh,* [1892] A.C., 473, at p. 480, and other cases referred to).

(2): The trial judge, in charging the jury, should have ignored said Act with its provisions for apportionment of the damages, and instructed the jury to ascertain the cause of the collision, and, if there were negligence on both sides, to find, by application of the principles of the common law, whether it was the negligence of the plaintiff or that

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

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of the defendant which operated directly as the effective cause. In the different course taken there was serious misdirection. This Court could not, therefore, do justice to the case upon the present findings, and there must be a new trial, subject, however, to defendant's election therefor upon terms imposed as to costs.

Defendant, with relation to the Intercolonial Railway, was answerable only for the liabilities to which the Crown would have been subject if the railway's management and operation had not been transferred to defendant and the action had been brought in the Exchequer Court directly against the Crown; defences available to the Crown were available to defendant; (*Canadian National Railways Act,* R.S.C., 1927, c. 172, especially ss. 12, 15, 33, also ss. 2 (*a*), 3, 16, 19, 21; and orders in council as to defendant company, of October 4, 1922, and January 20, 1923, considered); contributory negligence is a defence (*Wakelin* v. *London & South Western Ry. Co.,* 12 App. Cas. 41, at p. 48); the Crown's, and therefore defendant's, responsibility was to be regulated by the general law of New Brunswick as it prevailed on October 30, 1887, when (in its original form) what is now s. 19 of the *Exchequer Court Act,* R.S.C., 1927, c. 34, came into effect (*Ryder* v. *The Queen,* 36 Can. S.C.R., 462, and earlier decisions referred to therein; *Armstrong* v. *The King,* 11 Can. Ex. C.R., 119; 40 Can. S.C.R., 229, at p. 248); and, therefore, the provincial *Contributory Negligence Act,* which was not in force earlier than 1925, c. 41, had no application.

APPEAL by the defendant from the judgment of the Supreme Court of New Brunswick, Appeal Division, which, in effect, dismissed its appeal (except to the extent of reducing the damages recovered, from $3,711.60 to $2,933.20) from the judgment of Byrne J. (on the findings of a jury) for the recovery by the plaintiff against the defendant of damages in respect of a collision between an omnibus of the plaintiff and a freight train of the defendant on March 11, 1927, at Saint John, New Brunswick.

The material facts of the case are sufficiently stated in the judgment now reported. By this judgment a new trial was ordered upon the defendant electing for it within thirty days, upon certain terms imposed as to costs; otherwise the appeal to be dismissed with costs.

I. C. Rand K.C. for the appellant.

C. F. Inches K.C. and *A. M. Latchford* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The plaintiff (respondent) sued the defendant railway company (appellant) for damages sustained in a collision between the plaintiff's motor omnibus

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and a freight train of the defendant company, which took place at Saint John, N.B., on 11th March, 1927, at the junction of Marsh street, upon which the defendant operates a spur line of railway, and City Road, alleging negligence on the defendant's part by reason of excessive speed, absence of proper lookout and failure to sound its engine whistle and bell. These allegations of fact were denied, and the defendant moreover pleaded contributory negligence of the plaintiff, in that the plaintiff's omnibus was proceeding, without chains, at dangerous and excessive speed, and without maintaining a proper lookout. The train suffered some slight damage in the accident, and the defendant counterclaimed for this; but, as the damage proved to be inconsiderable, the counterclaim was withdrawn at the trial.

The case was tried at Saint John before Byrne J., with a jury, and the evidence adduced covers 127 printed pages of the case. The learned judge submitted questions, upon which the jury found that the accident was caused by the joint negligence of the parties, in the proportions of 90 per cent. on the defendant's part, and 10 per cent. on the plaintiff's part; apportionment being authorized by the general provisions of the *Contributory Negligence Act* of New Brunswick, R.S., 1927, ch. 143, the application of which was not questioned in the courts below; and the jury assessed the damages at $4,124.11, which included $1,000 for the plaintiff's loss of the use of its omnibus while undergoing repairs. The plaintiff accordingly recovered damages for $3,711.60.

The defendant appealed to the Appellate Division of New Brunswick, where the findings were attacked on its behalf as unjustified by the proof, and it was contended that the action should be dismissed, or, in the alternative, that the damages should be reduced. The defendant's grounds of appeal were thus stated in the judgment of the Appellate Division:

1. On the findings of the jury it appears that the legal cause of the accident was the negligence of the plaintiff and the action should have been dismissed with costs.

2. There was no basis in fact or in law on which the jury could find the proportions of responsibility declared, and in the absence of such the damages should have been equally divided.

3. There was no sufficient basis on the evidence submitted to justify the jury in awarding damages of $1,000, for loss of use of the bus.

The court, upon consideration of these objections, reduced the judgment entered at the trial, holding that, in respect of the damage, amounting to $1,000, which the jury had found for the loss of use of the plaintiff's omnibus, there was no proof to establish an amount in excess of $135, and that the total recovery should therefore be limited to $2,933.20.

The defendant appealed to this court, and at the hearing, upon the assumption that the judgment was right in the particular which remains to be discussed, the court expressed itself as unwilling to disturb the findings or judgment of the Appellate Division.

But Mr. Rand, for the defendant, raised ingeniously a new and important point, which had not been considered or mentioned at the trial, or upon the provincial appeal. The point is, however, stated in the appellant's factum; and, as I understand the submission of the learned counsel, it depends upon the interpretation and effect of the *Canadian National Railways Act,* R.S.C., 1927, ch. 172; the contention being that the action is, in reality, against the Crown, and that, in relation to the undertaking which was formerly known as the Intercolonial Railway, the Canadian National Railway Company is no more than an officer or servant of the Crown entrusted with the management and operation; that the Act, and the executive orders thereunder, substitute the present method of administration for that which previously prevailed under the *Government Railways Act* (now ch. 173 of R.S.C., 1927) and are not intended to enable the company, either on its own behalf, or for the Crown, to assume any responsibility to which the Crown would not, in the like case, formerly have been subject; and, moreover, seeing that the *Contributory Negligence Act* of the province does not apply to or affect the Crown in the right of the Dominion, it cannot serve to alter the rights of the parties as they would, but for that Act, have been found to exist.

It was objected on behalf of the respondent that it is now too late to raise such a question; but the practice of this court has, I think, conformed very closely to that which

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is well established in England, and we have for our guidance the rulings of the House of Lords and of the Judicial Committee of the Privy Council in such cases as *The "Tasmania"* (1), where the general rule is stated by Lord Herschell; and in *Connecticut Fire Insurance Co.* v. *Kavanagh* (2), a judgment of the Judicial Committee, in which Lord Watson says:

> When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. To accept the proof adduced by a defendant in order to clear himself of a charge of fraud, as representing all the evidence which he could have brought forward in order to rebut a charge of negligence, might be attended with the risk of doing injustice.

See also *Banbury* v. *Bank of Montreal* (3); *Wilson* v. *United Counties Bank Ltd.* (4); *North Staffordshire Railway Co.* v. *Edge* (5).

The Order in Council of 4th October, 1922, constituting the company, is in evidence, also the Order in Council of 20th January, 1923, which recites

> That the Canadian National Railway Company, hereinafter called the Company, has been brought into existence by virtue of an Order in Council passed on the 4th day of October, 1922, whereby certain persons were nominated directors of the Company pursuant to the provisions of Section 1 (now Section 3) of the said Act.
>
> That the powers of the General Manager in respect of the Canadian Government Railways were heretofore entrusted by Order in Council dated 20th November, 1918, to certain persons from time to time constituting the Board of the Canadian Northern Railway Company, and that the powers of General Manager in respect of the Canadian Government Railways so entrusted are now being exercised by the persons who constitute the Board of Directors of the Canadian National Railway Company.
>
> That it is expedient to terminate the authority of the said persons to act as General Manager of the Canadian Government Railways and to entrust in lieu thereof the management and operation of the said railways to the Company, pursuant to the provisions of Section 11 (now Section 19) of the said Act as above in part mentioned. The effect of

(1) (1890) 15 App. Cas., 223, at p. 225.
(2) [1892] A.C., 473, at p. 480.
(3) [1918] A.C., 626.
(4) [1920] A.C., 102.
(5) [1920] A.C., 254.

said change will be to make applicable to the management and operation of the said railways many of the provisions of the said Act, and to accomplish the main purpose of the said Act as expressed in the recital thereto, namely—

"to provide for the incorporation of a Company under which the railways, works and undertakings of the Companies comprised in the Canadian Northern System may be consolidated, and together with the Canadian Government Railways operated as a national railway system."

And thereupon the Order in Council proceeds to declare that the Canadian Government Railways, which for the purpose of section 10 (now section 2) of the said Act, shall include the following lines designated specifically—

The Intercolonial Railway

The National Transcontinental Railway

The Lake Superior Branch leased from the Grand Trunk Pacific Railway Company

The Prince Edward Island Railway

The Hudson Bay Railway,

and as a general designation all other railways and branch lines, the title to which, and to the lands and properties whereon such railways are constructed, is vested in His Majesty, be by Order in Council entrusted in respect of the management and operation thereof to the Company on the terms in the said Act expressly specified, namely, that such management and operation shall continue during the pleasure of the Governor in Council and shall be subject to termination or variation from time to time in whole or in part by the Governor in Council.

It is also provided "that the Order in Council of November 20, 1918, above referred to, be cancelled."

In these circumstances, it appears that the evidence upon which the controversy now under consideration depends is before the court; and it is not suggested that any further proof material to the elucidation of the question would or could have been produced if the point now raised had been made prominent at the trial. Consequently, following the practice above explained, I shall proceed to consider the merits of the appellant's contention.

It is necessary briefly to consider the relevant provisions of sec. 19 of the *Exchequer Court Act*, R.S.C., 1927, ch. 34. By that section, which, in its original form, came into effect on 30th October, 1887, when the Exchequer Court was constituted, it is enacted:—

The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

* * * * *

(*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

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(*d*) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council;

* * * * *

(*f*) Every claim against the Crown arising out of any death or injury or loss to the person or to property caused by the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon, in or about the construction, maintenance or operation of the Intercolonial Railway or the Prince Edward Island Railway.

These clauses must be read in the light of the decisions, of which the earlier leading examples are mentioned in the case of *Ryder* v. *The King* (1); and by these and the later authorities it is well established in this Court that not only does the Exchequer Court acquire jurisdiction to adjudicate the classes of claims above described, but also that in such cases liability is imposed upon the Crown to respond in damages for the negligence of its officers or servants where, in the like circumstances, such a liability would rest upon a subject corporation or individual according to the law of the province in which the claim arose, as that law existed at the time when the *Exchequer Court Act* began to operate.

The judge of the Exchequer Court reviewed the cases in *Armstrong* v. *The King* (2). He said:—

It may be taken to be settled by the general concurrence of judicial opinion in the cases referred to that it was the intention of Parliament that the liability of the Crown should be determined by the general laws of each province in force at the time when such liability was imposed.

And he proceeds to explain, and to elaborate his view. This judgment was maintained by the Supreme Court (3), Davies J. (afterwards the Chief Justice) saying, at page 248:—

On all the legal points debated so fully at bar I am in agreement with the conclusion of the learned trial judge. I think our previous decisions have settled, as far as we are concerned, the construction of the clause (*c*) of the 16th section of the *Exchequer Court Act*, and determined that it not only gave jurisdiction to the Exchequer Court but imposed a liability upon the Crown which did not previously exist, and also that such liability was to be determined by the general laws of the several provinces in force at the time such liability was imposed and that the case at bar is within the provision of the above cited amendment.

And an application for special leave to appeal to the Judicial Committee of the Privy Council was refused.

In this state of the authorities, I do not consider that the court is now at liberty to take a different view as to the

(1) (1905) 36 Can. S.C.R. 462. (2) (1907) 11 Can. Ex. C.R. 119.
(3) (1908) 40 Can. S.C.R. 229.

interpretation of the statute; and, if the defendant company, with relation to the Intercolonial Railway, answers only for the liabilities to which the Crown would have been subject if the management and operation of the railway had not been transferred to the company; and, if the responsibility of the Crown is to be regulated by the law of New Brunswick as it prevailed on 30th October, 1887, there is, of course, no authority for the application of the provincial *Contributory Negligence Act,* which was in force not earlier than chapter 41 of New Brunswick, 1925.

That Act, as revised, now appears as ch. 143 of the Revision of 1927, and it provides:—

2. Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault:

Provided that:

(*a*) If having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally, and

(*b*) Nothing in this section shall operate so as to render any person liable for any loss or damage to which his fault has not contributed.

3. In actions tried with a jury the amount of damage, the fault (if any), and the degrees of fault shall be questions of fact for the jury.

Questions were submitted to the jury, and the material findings were these:—

5. Was the injury suffered in the collision caused by the joint negligence of the servants of the plaintiff and defendant company?—A. Yes.

6. If so, in what proportion do you say that each party was at fault? —A. Defendant: 90 per cent. Plaintiff: 10 per cent.

9. If the injury suffered was caused by the joint negligence of the plaintiff and defendant,

(*a*) In what did the negligence of the servants of the defendant consist?—A. The flagman did not remain in the street sufficiently long enough to properly warn vehicular or pedestrian traffic.

(*b*) In what did the negligence of the servant of the plaintiff company consist?

A. Not sufficient attention was paid by the bus chauffeur to the entrance of Marsh Street, and he was exceeding the limit of speed set by the City of Saint John.

Therefore, in a case controlled by these findings, the *Contributory Negligence Act,* if it apply, is apt so to operate as to compel the defendant company to bear a part of the loss, which it might otherwise have entirely escaped by reason of the plaintiff's contributory negligence. Hence the question now raised as to whether the Crown has, by the effect of the Orders in Council under the *Canadian Na-*

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tional Railways Act, so enlarged or affected its liabilities with respect to the operation of the Intercolonial Railway as to become subject to the general legislation of the respective provinces in which the railway operates as it may, from time to time, exist.

The governing provisions of the *Canadian National Railways Act* are these:—

By sec. 2 (*a*), the expression "Canadian Government Railways" includes all railways and parts thereof

or interests or any of them as may be designated, whether generally or in detail, in any Order in Council from time to time subsisting, entrusting the management and operation thereof to the Company under the provisions of section nineteen of this Act.

The incorporation of the company is provided for by sec. 3, whereby the Governor in Council nominates directors, and thereupon the persons so nominated and their successors, and others who may from time to time be nominated in like manner as directors, "shall be and are hereby incorporated as a company, under the name of Canadian National Railway Company."

By sec. 12,

The Company may, in respect of the operation of its lines of railway or the lines of railway of the Canadian Northern System or the Canadian Government Railways, use the name "Canadian National Railways" as a collective or descriptive designation of all lines of railway or railway works under its control, without, however, affecting the rights or liabilities of any of the respective corporations, including His Majesty, for any of their respective acts or omissions.

There is a pertinent suggestion in the last three lines, and it should be recalled in connection with sec. 33, which I shall presently quote.

Section 15 is a more important section; it reads as follows:—

Notwithstanding anything in the *Government Railways Act* or the *Consolidated Revenue and Audit Act,* all expenses incurred in connection with the operation or management of the Canadian Government Railways, under the provisions of this Act, shall be paid out of the receipts and revenues of the Canadian Government Railways.

2. In the event of a deficit occurring at any time during any fiscal year the amount of such deficit shall from time to time be payable by the Minister of Finance out of any unappropriated moneys in the Consolidated Revenue Fund of Canada, the amounts paid by the said Minister under this section to be included in the estimates submitted to Parliament at its first session following the close of such fiscal year; and in the event of a surplus existing at the close of any fiscal year such surplus shall be paid into the said fund.

Section 16 provides that, notwithstanding anything in the *Government Railways Act* or any other Act, the provisions of the *Railway Act* respecting the operation of a railway shall apply to such of the Canadian Government Railways

as would but for the passing of this Act be subject to the *Government Railways Act,* during such time as the operation and management thereof is entrusted to the Company under the provisions of this Act.

I have not discovered that, for present purposes, this substitution of the *Railway Act* for the *Government Railways Act* makes any material difference; but there are sections 385 and 419 of the *Railway Act* that should not escape attention, if, upon a new trial, it should be found that the negligence causing the accident consists in breach of their provisions.

By section 19,

The Governor in Council may from time to time by Order in Council entrust to the Company the management and operation of any lines of railway or parts thereof, and any property or works of whatsoever description, or interests therein, and any powers, rights or privileges over or with respect to any railways, properties or works, or interests therein, which may be from time to time vested in or owned, controlled or occupied by His Majesty, or such part or parts thereof, or rights or interests therein, as may be designated in any Order in Council, upon such terms and subject to such regulations and conditions as the Governor in Council may from time to time decide; such management and operation to continue during the pleasure of the Governor in Council and to be subject to termination or variation from time to time in whole or in part by the Governor in Council.

By section 21 the company may, with the consent of the Governor in Council, construct and operate railway lines, branches and extensions.

And, finally, by section 33, it is enacted that

Actions, suits or other proceedings by or against the Company in respect of its undertaking or in respect of the operation or management of the Canadian Government Railways, may, in the name of the Company, without a fiat, be brought in, and may be heard by any judge or judges of any court of competent jurisdiction in Canada, with the same right of appeal as may be had from a judge sitting in court under the rules of court applicable thereto.

2. Any defence available to the respective corporations, including His Majesty, in respect of whose undertaking the cause of action arose shall be available to the Company, and any expense incurred in connection with any action taken or judgment rendered against the Company in respect of its operation or management of any lines of railway or properties, other than its own lines of railway or properties, may be charged to and collected from the corporation in respect of whose undertaking such action arose.

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When, in the concluding lines of subs. 2 of sec. 33, it is provided that any expense incurred in connection with any action taken or judgment rendered against the company in respect of its operation or management of any lines of railway or properties, other than its own lines of railway or properties, " may be charged to and collected from the corporation in respect of whose undertaking such action arose," it is meant, I think, that it is the Canadian National Railway Company by which the charge may be made and collected, and that the word " corporation " must be taken to include His Majesty, because, at the beginning of the subsection, His Majesty is expressly included among the corporations to which the subsection applies.

Now, of course, if the *Canadian National Railways Act* had not been passed, and if the Intercolonial Railway were still working under the former system, this action would have been brought against the Crown, and, by the ordinary procedure of the Exchequer Court, a fiat would have been requisite; but, from the last quoted section, which declares that such an action may be brought against the company without a fiat in any court of competent jurisdiction, it reasonably follows that a provincial court, having general jurisdiction in cases of tort, may entertain an action against the company to recover damages for negligence in the operation of the railway which could formerly have been adjudged against the Crown in the Exchequer Court, and may determine the liability and declare and enforce it against the company where the Exchequer Court could, under the former procedure, have authorized the recovery.

Then, while by sec. 12 it is suggested that the rights or liabilities of His Majesty are not to be affected by the incorporation of the Canadian Government Railways in the Canadian National Railway System, it is plainly enacted by subs. 2 of sec. 33 that, as to actions against the company in respect of the operation of the Canadian Government Railways, defences available to His Majesty shall be available to the company; and contributory negligence is a defence; *Wakelin* v. *London and South Western Ry. Co.* (1); moreover, by the same subsection, and by sec. 15, the liabilities incurred are chargeable to His Majesty, and

(1) (1886) 12 App. Cas., 41, at p. 48.

therefore it seems plain enough that it was not intended to charge the company with any greater obligation than that which the Crown would have incurred if, in the absence of these provisions, the action had been instituted in the Exchequer Court directly against the Crown.

From these considerations it results that there was serious misdirection in the learned judge's charge to the jury. If I am right in my conclusions, he should have ignored the *Contributory Negligence Act,* with its provisions for apportionment of the damages, and instructed the jury to ascertain the cause of the collision, and, if there were negligence on both sides, to find, by the application of the principles of the common law, whether it was the negligence of the plaintiff, or that of the defendant, which operated directly as the effective cause. It is impossible, therefore, to do justice to the case upon the present findings, and there must be a new trial, if the defendant so elect, having regard to the terms which, I think, should reasonably be imposed; and it seems only right that the plaintiff should not, in any event, be put to expense by reason of the costs of the trial and of the appeal to the Appellate Division of New Brunswick, which have been lost by reason of the defendant's failure to raise, in the lower courts, the contention upon which it now succeeds. Therefore I think that this appeal may properly be disposed of by a direction that there should be a new trial upon payment by the defendant of the plaintiff's costs of the former trial and of the appeal to the Appellate Division, as between solicitor and client, and that the costs of the present appeal shall abide the event, subject, however, to the condition that the defendant must so elect within thirty days; and, if the defendant do not comply with these terms, that this appeal shall be dismissed with costs.

New trial ordered upon appellant electing within 30 days to take the same, on certain terms imposed as to costs; should appellant not so elect within 30 days, appeal to be dismissed with costs.

Solicitor for the appellant: *Thomas J. Allen.*

Solicitor for the respondent: *Hugh H. McLean.*