1953
Mar. 18, 19
1954
Sept. 22

BETWEEN:

EMILY SHPUR, by her next friend ANNIE SHPUR and JOHN SHPUR } SUPPLIANTS,

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Negligence—The Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c)—The Vehicles and Highway Traffic Act, R.S.A. 1942, c. 275, ss. 51, 52, as amended by S. of A. 1950, c. 76, s. 11—The Petition of Right Act, R.S.C. 1927, c. 158—Right-of-way at intersection.

The suppliants claimed damages for injury and loss as a result of a collision between an automobile driven by Walter Shpur, the son of one of the suppliants, and an automobile driven by Constable W. G. Wright, a member of the Royal Canadian Mounted Police.

(1) (1952) C.S. 134. (2) [1952] Ex. C.R. 396.
(3) [1950] Ex. C.R. 402.

The collision occurred at about 11.15 p.m. on October 26, 1952, in the intersection of 1st Street East and Railway Avenue in Vegreville, Alberta.

Held: That, while sections 51 and 52 of The Vehicles and Highway Traffic Act could not bind the Crown in right of Canada or have the effect of imposing upon it a different liability from that which was imposed by the amendment of section 19(*c*) of the Exchequer Court Act in 1938 in the light of the law of negligence in force in the several provinces of Canada on that date, the Crown may take advantage of any defence that would be open to a defendant by section 8 of the Petition of Right Act.

2. That in a claim under section 19(*c*) of the Exchequer Court Act the Crown can take the benefit of the law as it exists at the time it is called upon to file its statement of defence whereas such law may perhaps not be available in support of the suppliant's claim.

3. That section 51 of The Vehicles and Highway Traffic Act, as enacted in 1950, not only gives a statutory right-of-way to the driver of a vehicle approaching an intersection from the right of a driver approaching it from the left but also imposes a statutory duty on the latter to yield the right-of-way to the former.

4. That the prior entry into the intersection of the driver on the left does not give him the right-of-way over the driver on the right. The statutory right-of-way which the driver on the right has cannot be displaced by the prior entry into the intersection of the driver on the left, nor can such prior entry help him to escape from his statutory duty to yield the right-of-way to the driver on his right.

5. That the driver on the right has the right to assume, until the contrary becomes apparent, that the driver on the left will yield the right-of-way to him. *Walker* v. *Brownlee and Harmon* [1952] 2 D.L.R. 450 followed.

6. That Walter Shpur did not keep a proper lookout to his right and did not have his car under proper control with the result that he failed to yield the right-of-way to Constable Wright's car as he should have done.

PETITION OF RIGHT for damages under section 19(c) of the Exchequer Court Act.

The action was tried before the President of the Court at Edmonton.

E. W. Sully for suppliants.

H. S. Hurlburt Q.C. and *J. T. Gray* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (September 22, 1954) delivered the following judgment:

In this petition of right the suppliants claim damages for injury and loss as the result of a collision between the suppliant John Shpur's automobile, a 1949 Mercury sedan,

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driven by his son Walter Shpur, in which the suppliant Emily Shpur, the daughter of the suppliant John Shpur, was a passenger and the Crown's automobile, a Pontiac coach, driven by Constable William G. Wright, a member of the Royal Canadian Mounted Police. As the result of the collision the suppliant John Shpur's automobile was damaged and the suppliant Emily Shpur sustained personal injuries. The Crown's automobile was also damaged and the respondent counterclaims for this loss.

It is alleged by the suppliants that their injury and loss resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment. The claim is made under section 19(c) of the Exchequer Court Act, R.S.C. 1927, chapter 34, as amended in 1938, which reads as follows:

> 19. 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;

It is established law that the onus of proof in a claim under this section rests on the suppliant. In this case it is admitted that at the time of the collision Constable Wright was a servant of the Crown and acting within the scope of his employment. The issue is thus whether there was negligence on his part and the suppliants' injury and loss resulted therefrom.

Emily Shpur was thrown against the side of the car in which she was riding and suffered bruises on her face, arms and thighs and cuts from broken glass on the right side of her face. There were three main lacerations, one long one on her forehead, another over her cheek bone and the third between her nose and upper lip. The cuts were bevelled and jagged so that when they healed there was a heavy scar formation. This was quite noticeable and the scars will likely be permanent. There was also some loss of feeling where the scars had formed. Apart from the scars and the loss of feeling the suppliant has fully recovered from her injuries. While it is not possible at this stage to say what effect the scars may have on the suppliant's appearance

when she grows up there will be some disfigurement. If I were called upon to assess her general damages I would put them at $2,500.

The suppliant John Shpur has proved damages amounting to $385.45 made up of $100 for medical services to his daughter, $25.45 for her hospital expenses and $260 for the damage to his automobile.

The collision occurred at about 11.15 p.m. on October 26, 1952, in the intersection of 1st Street East and Railway Avenue in the Town of Vegreville in Alberta. Prior to entering the intersection Walter Shpur was proceeding in a southerly direction on 1st Street East and Constable Wright was travelling in an easterly direction on Railway Avenue. The collision occurred at about the centre of the intersection and the two vehicles came to a standstill near its southeast corner. The road was of earth and gravel, quite well packed. At the time of the collision the road was dry with some loose dirt on top and the visibility was good.

At the date of the collision sections 51 and 52 of The Vehicles and Highway Traffic Act, R.S.A. 1942, Chapter 275, as amended by section 11 of chapter 76 of the Statutes of Alberta, 1950, provided as follows:

> 51. When two vehicles approach or enter an intersection at approximately the same time,—
>
> (*a*) the driver of the vehicle that is to the right of the other vehicle shall have the right-of-way; and
>
> (*b*) the driver of the vehicle that is to the left of the driver of the other vehicle shall yield the right-of-way to the other vehicle;
>
> except as provided in this Part.

In my opinion, this section not only gives a statutory right-of-way to the driver of a vehicle approaching an intersection from the right of a driver approaching it from the left but also imposes a statutory duty on the latter to yield the right-of-way to the former. The section is mandatory. The driver of the vehicle approaching or entering an intersection from the right *shall* have the right-of-way and the driver of the vehicle approaching or entering from the left *shall* yield the right-of-way.

On the conclusion of the trial I was of the opinion that Walter Shpur had failed to yield the right-of-way to Constable Wright, as section 51 of the Act required him to do, and, if counsel for the suppliants had not raised the question

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of law which he did I would, for reasons which I shall state later, have delivered judgment orally that the suppliants were not entitled to any of the relief sought by them and that the respondent was entitled to recover the amount of the counterclaim. But the questions raised were of such importance that I considered it wise to reserve judgment.

In the course of his argument counsel submitted that sections 51 and 52 of The Vehicles and Highway Traffic Act, as enacted in 1950, had no application in this case, but that the law of negligence to be applied was the law of negligence of Alberta as it stood on June 24, 1938, when Parliament by its amendment of section 19(c) of the Exchequer Court Act with effect as from that date first imposed liability on the Crown for the negligence of its officers and servants in driving an automobile, including as part of such law section 49 of The Vehicles and Highway Traffic Act, 1924, Statutes of Alberta 1924, Chapter 31, as amended by section 2 of Chapter 55 of the Statutes of Alberta, 1926, and section 6 of Chapter 62 of the Statutes of Alberta, 1934, reading as follows:

> 49 (1) Whenever any vehicle is turning from one highway into another the driver of any other vehicle approaching the intersection of the highways to the right of such vehicle shall have the right-of-way, and similarly, the driver of such first mentioned vehicle shall have the right-of-way over any vehicles approaching the intersection of the highway on his left.
>
> (1*a*) The driver of a vehicle approaching an intersection of highways or a cross-road shall yield the right-of-way to a vehicle which has entered the intersection.
>
> (1*b*) When two vehicles are upon an intersection at the same time, that vehicle shall have the right-of-way which entered the intersection from the right of the driver of the other vehicle.

This section became section 52 of The Vehicles and Highway Traffic Act, R.S.A. 1942, Chapter 275.

On this basis counsel submitted that under this state of the law the right-of-way at intersections was vested in the driver of the vehicle which had entered the intersection first, that the evidence showed that Walter Shpur had done so and that, consequently, the collision was the result of negligence on Constable Wright's part.

The contention put forward by counsel for the suppliants was an interesting one. In support of his submission he relied upon the judgment of this Court in *Tremblay* v. *The*

King (1). There I referred to the history of section 19(c) of the Exchequer Court Act, which was reviewed extensively by Supreme Court of Canada in *The King* v. *Dubois* (2) and by this Court in *McArthur* v. *The King* (3). It was clearly established by the Supreme Court of Canada in the *Dubois* case (*supra*) and in *The King* v. *Moscovitz* (4) that under the predecessor of section 19(c) of the Exchequer Court Act, prior to its amendment in 1938, there was no liability upon the Crown for the negligence of its officer or servant while driving a motor vehicle even although he was acting within the scope of his duties or employment in so doing, where the driving of such vehicle was not in any way related to or connected with a public work. It is equally clear that liability for such negligence was first imposed on the Crown by the amendment of section 19(c) of the Exchequer Court Act that was made in 1938 by the elimination from the section of the words "upon any public work".

Then, following and applying the principles enunciated by the Supreme Court of Canada in *The King* v. *Armstrong* (5) and *Gauthier* v. *The King* (6), I expressed the following opinion, at page 12:

> That in claims against the Crown made under section 19(c) of the Exchequer Court Act, as amended in 1938, where the claim is for loss or injury resulting from the negligence of an officer or servant of the Crown in driving a motor vehicle while acting within the scope of his duties or employment, the liability of the Crown is to be determined by the law of negligence of the province in which such alleged negligence occurred that was in force in such province on the 24th day of June, 1938, when the amendment by which liability for such negligence was first imposed upon the Crown came into effect, except in so far as such provincial law is repugnant to the terms of the said section or seeks to impose a liability upon the Crown different from that imposed by the section.

I then referred to the statement of Fitzpatrick C.J. in *Gauthier* v. *The King* (*supra*), at page 182:

> Provincial statutes which were in existence at the time when the Dominion accepted a liability form part of the law of the province by reference to which the Dominion has consented that such liability shall be ascertained and regulated, but any statutory modification of such law can only be enacted by Parliament in order to bind the Dominion Government.

(1) [1944] Ex. C.R. 1.
(2) [1935] S.C.R. 378.
(3) [1943] Ex. C.R. 77.
(4) [1935] S.C.R. 404.
(5) (1908) 40 Can. S.C.R. 229 at 248.
(6) (1918) 56 Can. S.C.R. 176 at 180.

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and found, accordingly, that the terms of the Motor Vehicles Act of Quebec to which I had referred, since they were in force prior to 1938, were as applicable in a claim against the Crown under section 19(c) of the Exchequer Court Act, as amended in 1938, as they would be in an ordinary action between subject and subject.

It was on this basis that counsel for the suppliants rested his submission. But, unfortunately for the suppliants, the law is in an anomalous state. It is quite clear that the suppliants could not take advantage of sections 51 and 52 of The Vehicles and Highway Traffic Act if they had the effect of imposing a liability upon the Crown different from that which existed in 1938. That is to say, if the facts had been the reverse of what they were, as I have found them later in these reasons, and Walter Shpur had had the right-of-way and Constable Wright had failed to yield it to him the suppliants could not have asserted such statutory right-of-way as against the Crown for this might have resulted in a liability upon it that was greater than that which would have rested upon it if sections 51 and 52 of The Vehicles and Highway Traffic Act, as enacted in 1950, had not been enacted and the law had remained in its previous state.

This is similar in principle to the situation in *Canadian National Ry. Co* v. *Saint John Motor Line Ltd.* (1) where it was held by the Supreme Court of Canada that the Contributory Negligence Act of New Brunswick, which came into force in 1925, had no application to the facts of the case since the law to be applied was that of October 30, 1887, when the predecessor of section 19(c) of the Exchequer Court Act first began to operate, and the application of the Contributory Negligence Act was apt to operate in such a way as to compel the Canadian National Railway Company which was in a position similar to that of the Crown to bear part of the loss, which it might otherwise have entirely escaped by reason of the other party's contributory negligence. The Court sent the case back for a new trial with instructions that the liability of the Railway Company was to be determined according to the law of New Brunswick that was in force prior to the introduction of the Contributory Negligence Act.

(1) [1930] S.C.R. 482.

But while the suppliants could not have taken any advantage as against the Crown of any provisions of The Vehicles and Highway Traffic Act enacted after June 24, 1938, that they would not have had under the legislation that was in effect on that date it does not follow that the Crown is in the same position. For while sections 51 and 52 of The Vehicles and Highway Traffic Act could not bind the Crown in right of Canada or have the effect of imposing upon it a different liability from that which was imposed by the amendment of section 19(c) of the Exchequer Court Act in 1938 in the light of the law of negligence in force in the several provinces of Canada on that date, the Crown may take advantage of any defence that would be open to a defendant in a case as between subject and subject. This is specifically provided for by section 8 of the Petition of Right Act, R.S.C. 1927, chapter 158, which provides as follows:

8. The statement of defence or demurrer may raise, besides any legal or equitable defences in fact or in law available under this Act, any legal or equitable defences which would have been available if the proceeding had been a suit or action in a competent court between subject and subject; and any grounds of defence which would be sufficient on behalf of His Majesty may be alleged on behalf of any such person as aforesaid.

It is consistent with principle that this should be so for the liability of the Crown under section 19(c) of the Exchequer Court Act is only a vicarious one: *vide The King* v. *Anthony* (1), and could not be greater than that of Constable Wright and it is clear that if he had been sued personally he could have relied upon whatever advantage sections 51 and 52 gave to him by way of defence to the action against him. Since he could have relied upon the existing law so can the Crown by reason of the vicarious nature of its liability, quite apart from the specific authority of section 8 of the Petition of Right Act. I had occasion to consider this matter in *Zakrzewski* v. *The King* (2) where the question was whether the Crown could avail itself of section 84 (1) of The Highway Traffic Act, R.S.M. 1940, chapter 93, which provided:

84. (1) No action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained.

(1) [1946] S.C.R. 569. (2) [1944] Ex. C.R. 163.

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and I held that it could, saying, at page 169:

> The Crown may clearly avail itself in a petition of right proceeding of such provincial laws of prescription and limitation of action as may be in force in the appropriate province at the time it is called upon to make its statement of defence in the same way as a subject might avail himself of such laws in a suit or action between subject and subject.

Thus we have the anomalous situation that in a claim under section 19(c) of the Exchequer Court Act the Crown can take the benefit of the law as it exists at the time it is called upon to file its statement of defence whereas such law may perhaps not be available in support of the suppliant's claim. Consequently, it may well happen that a suppliant will not have the same rights as against the Crown for damages resulting from the negligence of its officer or servant as he would have had as against an individual or a corporation under precisely similar circumstances if the damages had resulted from the negligence of a servant or officer of such individual or corporation. This anomalous state of the law follows from the principles laid down in the cases of *The King* v. *Armstrong* (*supra*), *Gauthier* v. *The King* (*supra*) and others to the same effect. The anomaly cannot be removed otherwise than by an Act of Parliament declaring that in claims under section 19(c) of the Exchequer Court Act, as amended in 1938 (now section 18(c) of the Exchequer Court Act, R.S.C. 1952, Chapter 98), the law of negligence to be applied shall be the law of the province in which the cause of action shall arise that is in force in such province at the time of such cause of action and would be applicable if the proceeding were a suit or action between subject and subject. Such a declaratory enactment would make the suppliant and the Crown equal before the law, a result which, in my opinion, is greatly to be desired.

It follows from what I have said that the respondent may rely upon sections 51 and 52 of The Vehicles and Highway Traffic Act. That being so, I need not consider the law as it stood on June 24, 1938.

Sections similar to sections 51 and 52 of the Alberta Act have been discussed in several cases. For example, in *Drapeau* v. *Boivin* (1) section 36 (7) of the Motor Vehicles

(1) (1933) 54 B.R. 133.

Act of Quebec, R.S.Q. 1941, chapter 142, which was in effect at the time of the decision, was considered. So far as relevant it read as follows:

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

In the Court of King's Bench the judgment of Galipeault J. of the Superior Court was confirmed. He had held that if effect was to be given to the law the driver of a vehicle could not enter an intersection with his vehicle,

Avant de s'être assuré qu'il ne venait pas sur la rue Caron, à sa droite, de voiture, à proximité de la sienne, et avant de s'être rendu compte qu'une collision n'était ni probable, ni possible.

and went on to say:

Pour se rendre ainsi compte de la situation, le conducteur doit regarder à sa droite avant de s'engager dans le croisement des chemins: si la vue lui est cachée, il doit user d'une précaution plus grande et arrêter son véhicule, si nécessaire.

Thus the section imposed a high duty of care on the part of the driver coming to an intersection to see to it that the driver coming to it from his right could pass through it safely. But this rule must be qualified by the dictates of common sense as pointed out by Hall J. in *Anderson* v. *Guardian Insurance Co. of Canada* (1): *vide* also the statement of Masten J.A. in *Hanley* v. *Hayes* (2).

In *Kennedy Lumber Company, Limited* v. *Porter* (3) the Saskatchewan Court of Appeal had to consider a similar provision, namely, section 45(2) of The Vehicles Act, R.S.S. 1930, chapter 226, which provided:

45. (2) Where a person operating a motor or other vehicle meets another vehicle at an intersection of highways the vehicle to the right shall have the right of way.

There the Court of Appeal, reversing the trial judge, held as the head note states:

Held that the fact that the car to the left is within the intersection before the car to the right enters it does not displace the latter's right to have the right of way. On the contrary, in an action resulting from a collision within an intersection the first question to be answered is: Why did not the driver to the left give way and keep out of the danger zone?

(1) (1933) 54 B.R. 407 at 410. (2) (1924) 55 O.L.R. 361 at 366.
(3) (1932) 1 W.W.R. 230.

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In that case Turgeon J.A., as he then was, rejected the contention that the plaintiff in that case had the right of way because his car was in the intersection first. At page 231, he said:

> An attempt was made in this case, and succeeded at the trial, and, I note from the decisions, has been made in other cases, so to distort the statute and to whittle away the right which it confers on the driver to the right, and the corresponding duty which it imposes on the driver to the left, that one would almost believe from some of the things said that the driver to the right is *prima facie* guilty in the case of a collision and that the onus is on him to show why he made use of his right of way. The statute contemplates no such procedure. In the ordinary case accidents of this sort could not happen if the driver to the left stopped his car, or reduced his speed, so as to give way to the man on his right and to allow him to cross the dangerous area first. This is what the Legislature intends shall happen; and when such an accident occurs it seems to me that the first question to be answered is why the driver to the left did not give way and keep out of the danger zone.

Sections of the sort under review reject the view that the right of way at an intersection belongs to the driver of the vehicle who enters it first. It plainly does not. The purpose of such sections is to prescribe a rule of the road for the purpose of eliminating collisions at intersections or lessening their number. That was the view of Duff C.J. in *Swartz* v. *Wills* (1) where the Supreme Court of Canada had before it for consideration a British Columbia statute similar to the one under review. There he said:

> I can perceive no ambiguity or obscurity in this language. The driver approaching an intercommunicating highway is to keep a lookout for drivers approaching upon the right upon that highway and to make way for them. If everybody does this a collision is not only improbable, it is hardly possible.

In *Tremblay* v. *The King* (2) I approved the decision of the Quebec Courts in *Drapeau* v. *Boivin* (*supra*) and held that its effect is that the driver of a vehicle on coming to an intersection must give right-of-way to a driver coming from his right, not only when the two vehicles are coming into the intersection at the same time but also when the driver sees a vehicle coming towards the intersection from his right even although he has himself reached the intersection first. This rule governs where the vehicles are approaching the intersection so nearly at the same time

(1) [1935] S.C.R. 628 at 629. (2) [1944] Ex. C.R. 1.

and at such a rate of speed that if both proceed, each without regard to the other, a collision is reasonably to be apprehended: *vide Hanley* v. *Hayes* (*supra*). To say that under sections such as the ones under review the driver of the vehicle who first enters an intersection has the right of way even as against a driver approaching the intersection from his right would not only be a distortion of the language of the section but would also defeat the purpose of the rule of the road which it enacts in that it would tend to an increase, rather than a decrease, in the number of collisions at intersections by inviting an increase of speed on the part of drivers of vehicles approaching an intersection and a competition between them to see who could enter the intersection first and thus acquire the right of way as against the driver of the other vehicle. In the *Tremblay* case (*supra*) I also expressed the view that compliance with the Quebec rule of the road gives rise to certain duties of care on the part of the driver of the servient vehicle, the one coming from the left, namely, that he shall keep a proper lookout to his right on coming into and passing through the intersection and also that he shall keep his vehicle under adequate control as to its speed, so that he will be able to stop in time to allow the driver of the dominant vehicle, the one coming from the right, to pass if his failure to do so would be likely to result in a collision.

But the most striking decision on the subject is that of the Supreme Court of Canada in *Walker* v. *Brownlee and Harmon* (1). There the Court had to consider section 41 (1) of the Highway Traffic Act, R.S.O. 1950, chapter 167, which provided:

> 41. (1) Where two persons in charge of vehicles or on horseback approach a cross road or intersection, or enter an intersection, at the same time, the person to the right hand of the other vehicle or horseman shall have the right-of-way.

All the judges of the Court sat on the case. The head note of the cited report gives the decision of the majority of the Court as follows:

> Where a collision between two cars occurs at an intersection when the driver of one car fails to yield the statutory right-of-way properly belonging to the driver of the other car but it appears that the latter could have seen the offending car had he looked to his left, he cannot nevertheless be held negligent unless the driver of the offending car

(1) [1952] 2 D.L.R. 450; [1952] S.C.R. ix.

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establishes that the person enjoying the right-of-way had a sufficient opportunity to avoid the collision had he acted with reasonable care after becoming aware or after he should have been aware of the other driver's disregard of his right-of-way. It is not enough that the accident would possibly have been avoided had he looked.

Cartwright J., speaking for Locke J. as well as for himself, put the *ratio decidendi* of the decision as follows, at page 461:

> While the decision of every motor vehicle collision case must depend on its particular facts, I am of the opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was *fons et origo mali.*

This decision is a most important one. It completely and emphatically rejects the view that the prior entry into the intersection of the driver on the left gives him the right-of-way over the driver on the right. It does not. To hold otherwise either directly or indirectly by suggesting that the prior entry of the driver on the left prevents the operative effect of the section would be a distortion of its plain language. The statutory right-of-way which the driver on the right has cannot be displaced by the prior entry into the intersection of the driver on the left, nor can such prior entry help him to escape from his statutory duty to yield the right-of-way to the driver on his right. But the importance of the decision rests particularly on its positive emphasis on the statutory right which the section confers on the driver on the right which includes a right to assume, until the contrary becomes apparent, that the driver on the left will yield the right-of-way to him. The decision in this case goes farther than any previous decision in recognizing the statutory right of the driver on the right and the corresponding statutory duty of the driver on the left. It is a striking declaration of the extent of the former's right and of the responsibility of the driver on the left to ensure his safe passage through the intersection.

In my opinion, the principle of the *Walker* v. *Brownlee and Harmon* case (*supra*) is plainly applicable in the present case.

There was, as is not unusual in collision cases, conflicting evidence of what happened immediately prior to the collision. I shall first summarize the evidence of Walter Shpur. He was driving the suppliant John Shpur's car with his permission. He had called for his 12 year old sister, the suppliant Emily Shpur, at their aunt's place and had proceeded south on 1st Street East for about two blocks before coming to the railway tracks. There was quite a steep grade coming up to them. He was then going at about 20 miles per hour but slowed down to check for trains to approximately 15 miles per hour. When he had crossed the tracks he looked south to see whether there was any traffic ahead of him and to the right to see whether there was any traffic coming from the west on Railway Avenue. He did not see any oncoming vehicle and proceeded south. He picked up momentum up to about 20 miles per hour. He looked to his right again when he was approximately 60 feet from the intersection of 1st Street East and Railway Avenue and saw the headlights of a car coming from the west on Railway Avenue. This car, which was Constable Wright's car, was then about 100 to 110 feet from the intersection. He immediately applied his brakes because he saw the car coming from the west and believed the cars were going to collide—the car from the west was coming fast and he just knew they were going to hit. He could not turn to his right on Railway Avenue because Constable Wright's car was on the left side of the road. He had just about come to a stop when he reached the intersection, his car then going at about 3½ to 4 miles per hour. At that time Constable Wright's car, which had been going at possibly from 30 to 35 miles per hour on Railway Avenue, had slowed down to about 15 miles per hour. When he saw that he could not turn to his right he turned to the left but Constable Wright's car went straight on. The front part of the left side of Constable Wright's car struck his car on its right front fender and pushed it off to the left. The two cars ended up together in the south-east corner of the intersection, about 20 to 25 feet from the point of impact. The skid marks made by his car extend back for 22 feet whereas those made

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by Constable Wright's car went back for 40 feet. Walter Shpur asserted that Constable Wright could have avoided hitting his car if he had swerved about 10 feet to the right and also that he could have avoided the collision by turning to his right into Railway Avenue if Constable Wright had been on his right side of the road. He also stated that the north-west corner of 1st Street East and Railway Avenue was a partially blind corner because of some maple trees and spruce trees immediately north of Railway Avenue and near the corner, and that after he had crossed the tracks and first looked to his right he could not see Constable Wright's car on Railway Avenue because he was too close to the bushes.

On cross-examination Walter Shpur altered his evidence in some important respects. He admitted that he had told Sergeant Willan, to whom further reference will be made that he was going 20 miles per hour when he was crossing the tracks and increased his momentum after that so that he was going more than 20 miles per hour when he first saw Constable Wright's car approaching from his right. He also admitted that he had told Sergeant Willan that he saw the car to his right just as he got close to the intersection. When he was unable to tell the Court why he could not have stopped before he got to the intersection if he was 60 feet from it and going at only 20 or slightly more than 20 miles per hour he said that he put his brakes on as soon as he saw the lights of the other car and finally admitted that he was then about 35 feet from the intersection. He also admitted that he knew that he should yield the right-of-way to a car coming from his right. He also stated that a person north of the railway tracks and coming south on 1st Street East could not because of the height of the tracks see a car coming east on Railway Avenue.

I shall next summarize the evidence of Constable Wright. He was a member of the Vegreville detachment of the Royal Canadian Mounted Police. He had finished his town patrol duties and was on his way back to the R.C.M.P. barracks. He had gone north on Main Street, the first street west of 1st Street East, turned right on Railway Avenue and proceeded east on it. Because of cars parked on the south side of the street near Main Street he travelled on the left hand side of the road. He was going at about 25

miles per hour. As he approached the intersection of Railway Avenue and 1st Street East he pulled over to the centre line of the road and slowed down intending to make a left turn on 1st Street East. He had put his brakes on to do so and then slammed them on when he noticed a car coming from the left on 1st Street East and travelling south. This was Shpur's car. He was about 45 feet west of the intersection when he first saw it. It was about the same distance. He judged its speed to be about 20 to 25 miles per hour. He had been checking for a right hand approach on 1st Street East and had looked to his right before he saw the car coming from the left. When he put on his brakes he turned his wheel to the right but because his brakes were on his car did not respond. He entered the intersection approximately at the centre line of Railway Avenue. He could not tell which car entered the intersection first. He did not see the Shpur car turn to the left. As far as he could tell it was going straight. The cars collided at approximately the centre of the intersection, the left front of his car with the right front fender of Shpur's car. After they hit the back ends of the cars came together and then apart and the cars finally came to rest about 10 or 11 feet from the point of impact in the southeast corner of the intersection, the Shpur car being a little farther south than his. After Walter Shpur had left with his sister Emily Constable Wright phoned Sergeant L. F. Willan, who was in charge of the R.C.M.P. detachment at Vegreville, and helped him in taking measurements. The skid marks made by his car were on about the centre of Railway Avenue and extended back from the point of impact about 38 feet, whereas those made by Shpur's car were on 1st Street East and went back 22 feet from the point of impact.

There was very little variation in Constable Wright's evidence on his cross-examination. He admitted that he was approximately 30 feet from the west side of the intersection when he first saw the Shpur car and also that prior to coming to the intersection he might have been going more than 25 miles per hour. Just before the collision his speed was about 5 miles per hour.

There were some important statements by Walter Shpur that were proved to be untrue. After he had given his evidence Constable Wright and Sergeant Willan went back to

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Vegreville and made some tests. Constable Wright stated that the trees north of Railway Avenue near the north-west corner of that street and 1st Street East would have very little effect on the ability of a person travelling south on 1st Street East to see what was coming from the west on Railway Avenue. Such a person could see something coming quite plainly. He could see quite a distance west along Railway Avenue, approximately about 300 feet, and could see a car travelling east on Railway Avenue even if it was close to the trees. Constable Wright did not agree that the north-west corner of the two streets was altogether blind. You could see cars coming there quite plainly. Moreover, even if a person were in a car on 1st Street East at the intersection of that street north of the railway tracks he could see a car at the intersection of 1st Street East and Railway Avenue. Such a person could also see a car coming from the west on Railway Avenue for a distance of approximately 300 feet west of the intersection and could see such a car all the way while proceeding south on 1st Street East, while approaching the railway tracks, while crossing them and afterwards right to the intersection.

The evidence of Sergeant Willan was to the same effect. After identifying several photographs of the cars involved in the collision and explaining the legend attached to the plan of the intersection, filed as Exhibit 3, which he had prepared, he stated that there would have been room for Walter Shpur to turn to his right on Railway Avenue between Constable Wright's car and the north edge of the travelled portion of the road and then went on to explain the results of the tests which he and Constable Wright had made. They had first stationed a car on 1st Street East at the first intersection north of the tracks. This was 395 feet north of the intersection of 1st Street East and Railway Avenue. They then had put a car on Railway Avenue facing east and determined how far west of the intersection this car could be and still be visible to the driver of the first car. Sergeant Willan put this distance at 264 feet instead of approximately 300 feet as Constable Wright had stated. Sergeant Willan had paced the distance. Both cars, of course, had their lights on. The result of this test led to the conclusion that the driver of a car travelling south on 1st Street East could, even when he was north of the

tracks and 395 feet north of the intersection of 1st Street East and Railway Avenue, see a car going east on Railway Avenue when it was 264 feet west of the intersection and keep it in view at all times as he was proceeding south on 1st Street East towards the intersection.

The two police officers had made another interesting test. They had put one car on 1st Street East at the intersection north of the tracks with its lights on facing south and another car on 1st Street East at the intersection of Railway Avenue with its lights facing north. These cars were 395 feet apart with the railway tracks between them. By a series of measurements of the heights at which the lights of one car could be seen from the position of the other car, the details of which need not be set out, the police officers determined that the grade on 1st Street East from the north up to the railway tracks and to the south from the tracks was very slight. The level of the tracks was only 2 feet higher than that of the first intersection north of the tracks and only 3 feet higher than that of the intersection of 1st Street East and Railway Avenue. Sergeant Willan was not shaken in his cross-examination. Indeed, when he was questioned about the trees near the corner he stated that there was no obstruction.

In my opinion, the evidence is conclusive that Walter Shpur did not look to his right after he had crossed the track, as he said he did, or that he was approximately 60 feet from the intersection when he first saw Constable Wright's car. If he had looked at either of these distances he would have seen the car approaching the intersection from his right and could have stopped in plenty of time to yield the right-of-way to it as he should have done. There would then have been no collision. I do not accept his statements that he could not see a car coming from the west on Railway Avenue when he was north of the railway tracks and that he could not see Constable Wright's car after he had crossed the tracks because it was travelling too close to the bushes. The evidence of the two police officers completely disproves these statements. There was nothing to obstruct his view. Where there is nothing to obstruct the vision and there is a duty to look it is negligence not to see what is clearly visible: per Cannon J. in the *Swartz* case (*supra*). The fact is that Walter Shpur did not look to his

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right at all until he was about 35 feet from the intersection. He was then going too fast to be able to come to a stop before he reached the intersection. If he had had his car under adequate control in view of the circumstances he could have turned to his right on Railway Avenue or, failing that, he could have turned to his left. On the evidence before me I have no hesitation in finding that he did not keep a proper lookout to his right and did not have his car under proper control with the result that he failed to yield the right-of-way to Constable Wright's car as he should have done. His failure to do so was negligence on his part and the collision with its damage and hurt to the suppliant resulted therefrom.

There remains for consideration the question whether there was also negligence on Constable Wright's part. In my opinion, there was not. It is true that he was travelling partly to the left of the travelled portion of the road and may have intended to cut the corner but this had nothing to do with the collision. It would have happened even if his car had been wholly to the right of the centre of the travelled portion of the road and he had proceeded to pass to the right of the centre of the intersection before making a left turn to proceed north on 1st Street East. Moreover, it was reasonable and proper that when he had his foot on the brakes as he was nearing the intersection preparatory to making a left turn on 1st Street East he should first carefully check to his right to see whether there was any traffic coming from the south on 1st Street East before looking to his left. The south-west corner of this street and Railway Avenue was really a blind corner because of a picket fence and a high building behind it so that it was necessary to come almost up to the intersection before it was possible to see whether there was any north-bound traffic on 1st Street East. Moreover, although he did not put this forward, Constable Wright was entitled to assume that a car coming from the north on 1st Street East, being on his left, would yield the right-of-way to him. But apart from that he saw the Shpur car as soon as could be reasonably expected of a driver who would first look to his right, particularly at a dangerous corner. As soon as he saw the car coming from his left and apparently going straight on he slammed on his brakes and turned his wheel to the right. But he

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was then only 30 feet from the intersection, the slamming of the brakes prevented the car from responding to the turn of the wheel and there was nothing that he could do to avoid the collision. His position was, indeed, strikingly similar to that of the driver on the right in the *Walker* v. *Brownlee and Harmon* case (*supra*) and I find him equally free from negligence.

Under the circumstances, I find that Walter Shpur was solely to blame for the collision and its unfortunate results.

This means, of course, that the respondent is entitled to recover the amount of the counterclaim for the damage done to the Crown car. This was admitted at $388.40.

There will, therefore, be judgment that neither of the suppliants is entitled to any of the relief sought in the petition of right and that the respondent is entitled to recover the sum of $388.40 from the suppliant John Shpur. The respondent is also entitled to the costs of the claim as against the suppliants and of the counterclaim as against the suppliant John Shpur.

Judgment accordingly.