THE VICARIOUS LIABILITY OF A MASTER FOR THE TORTS OF HIS SERVANT

It is a well-established doctrine that, under certain conditions, a master is liable for the injuries which his servant causes to third parties. The basis of this doctrine has yet to be satisfactorily explained. One of the earliest suggestions as to its basis was that of Holt, C. J., when he stated about 1700:

> for seeing somebody must be the loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger.[1]

During the past two and a half centuries many other eminent jurists and text-book writers have expressed their opinions on why liability should settle upon one who has personally committed no wrong: some have suggested that he who sets a force into motion for his benefit and under his control should be responsible for its actions and results; many have felt that there should be a remedy against one who is in a position to pay for the damages suffered — and up until recent times, that person has usually been the master rather than the servant; still others have attempted to find a logical basis for the doctrine rather than suggesting social or economic reasons why it should exist, but with little success.[2]

Recently Denning, L. J., proposed that what has always been regarded as vicarious liability is actually personal liability to see that care is exercised by one's servant; that a negligent act or omission by a servant amounts to personal default in the master himself.[3] His Lordship stated:

> The reason for the master's liability is not the mere economic reason that the employer usually has money and the servant has not. It is the sound moral reason that the servant is doing the master's business, and it is the duty of the master to see that his business is properly and carefully done. A master who sends a lorry out on the road with his servant in charge is morally responsible for seeing that the lorry does not run down people on the pavement.... It is his lorry, and it is engaged on his business. He takes the benefit of the work when it is carefully done, and he must take the liability when it is negligently done. He is himself under a duty to see that care is exercised in the driving of the lorry on his business. If the driver is negligent there is a breach of duty, not only by the driver himself, but also by the master.[4]

His Lordship apparently bases his reasoning upon a literal application of the maxim *qui facit per alium facit per se:* he who acts through another, acts through himself. In fact, in a later case,[5] he quotes this maxim and states that an employer is made liable, not so much for the employee's fault, but rather for his own fault committed through the employee.[6] The House of Lords, however, has expressly rejected his Lordship's submission. In disposing of it Lord Reid stated:

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(1) **Hern v. Nichols**, 1 Salk. 289; 91 E.R. 256.
(2) See Laski; "The Basis of Vicarious Liability", 26 Yale L.J. 105.
(3) **Broom v. Morgan** [1953] 1 All E.R. 849.
(4) **Ibid**, at pp. 853-854.
(5) **Jones v. Staveley Iron & Chemical Co., Ltd.** [1955] 1 All E.R. 6.
(6) **Ibid.**, at p. 8.

> It is a rule of law that an employer, though quilty of no fault of himself, is liable for damage done by the fault or negligence of his servant acting in the course of his employment. The maxims respondeat superior and qui facit per alium facit per se are often used, but I do not think that they add anything or that they lead to any different results. The former merely states the rule badly in two words, and the latter merely gives a fictional explanation of it.[7]

So while many jurists and text-book writers continue to search for the basis of the doctrine of vicarious liability, and others have long abandoned any hope of finding the font from which it has sprung, it cannot be denied that the rule is universally accepted and applied.

A master will be vicariously liable if his servant is acting within the scope or course of his employment when the act or omission, which is complained of, occurs. If a servant is doing something "on a frolic of his own", his master will not be liable as the servant has exceeded the bounds of his employment;[8] under such circumstances the servant occupies the position of a stranger in relation to his master. The determination of whether an act or omission is within the scope of a servant's employment is always a question of fact which will turn on the particular circumstances of each case.

There is no doubt that a master is responsible for those acts which he has expressly authorized his servant to do and that are tortious in themselves or will necessarily result in a tort when carried out.[9] Difficulty in determining liability arises when the servant performs an authorized act in a negligent or unauthorized manner, or commits an act which is either unauthorized, prohibited or maybe even criminal. In such cases the master, in attempting to avoid vicarious liability, usually alleges that the servant has removed himself from the scope of his employment by his actions.

The master may argue that it is never within the scope of his servant's employment to do an act in a negligent manner. In a sense, the act complained of has not been authorized. However, if the servant is acting within the scope of his employment when he committed the act complained of, he is merely doing something in a careless and negligent manner which he was employed to do carefully.

For example, in *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board*[10] the board had in its employ a gasoline truck driver. While delivering gasoline into the tanks of a gasoline station from his truck, he lighted a cigarette and carelessly threw away the lighted match which resulted in a fire and considerable damage. One of the questions was whether the driver's negligence was within the course of his employment. Lord Wright stated in the House of Lords:

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(7) **Staveley Iron & Chemical Co., Ltd. v. Jones, [1956] 1 All E.R. 403 at p. 409.**

(8) **Battistoni v Thomas and Thomas [1932] S.C.R. 144; Hoar v. Wallace et al [1938] O.R. 666.**

(9) **See Hals. (2nd) Vol. 22 at pp. 221 et seq.**

(10) **[1942] 1 All E.R. 491.**

> The act of a workman in lighting his pipe or cigarette is an act done for his own comfort and convenience and at least, generally speaking, not for his employer's benefit. That last condition however, is no longer essential to fix liability on the employer. *(Lloyd v. Grace, Smith & Co.)*. Nor is such an act *prima facie* negligent. It is in itself both innocent and harmless. The negligence is to be found by considering the time when and the circumstances in which the match is struck and thrown down. The duty of the workman to his employer is so to conduct himself in doing his work as not negligently to cause damage either to the employer himself or his property or to third persons or their property, and thus to impose the same liability on the employer as if he had been doing the work himself and committed the negligent act. This may seem too obvious as a matter of common sense to require either argument or authority.[11]

The act of a servant that is complained of may have been performed in an unauthorized manner, but that in itself will not remove it from the scope of his employment as was evidenced in a recent Nova Scotia case.[12] In that case it was part of an usher's duties to see that no disturbance occurred in the theatre and that no one talked or placed their feet upon the seats. H. was a patron and upon his making a disturbance, the usher requested him to leave. An exchange of words took place and the usher struck H. believing that the latter was about to hit him. The court found that unnecessary violence had been used and held the theatre owners vicariously liable even though they had not authorized the use of such violence; the usher was performing his duties of keeping order in the theatre but he was doing it in an unauthorized manner.[13]

It is not unusual for an employee to be informed by his employers at the time he is hired that he is not to do certain things while purporting to carry out his duties — or he may receive notice of such instructions from time to time while he is within their employ. A disregard of such prohibitions will not of itself remove the servant from the sphere of his employment if it only affects the manner or mode of performing his authorized duty.

For example, notice the case of *C.P.R. v Lockhart*[14] where the railway company issued instructions that its employees were not to drive their own cars in connection with company business unless they carried insurance against public liability and property damage risks. S. was employed by the company as a carpenter and general handyman and had full knowledge of this prohibition. In the course of his employment he prepared a key for a locker in the company's North Station at Toronto. Upon being instructed to proceed to the North Station for the purpose of testing the key, he took his own car, which was uninsured, although there were other means of transportation available. On the way he negligently injured the infant respondent who commenced an action against him and the company. The trial judge dismissed the action against the

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(11) **Ibid., at p. 497.**

(12) **Hyslop & Hyslop v. M. E. Walker Ltd. [1956] 1 D.L.R. (2d) 777.**

(13) **Cf. Griggs v. Southside Hotel Ltd. and German [1947] 4 D.L.R. 49; also note Percy v Corporation of City of Glasgow [1922] 2 A.C. 299.**

(14) **[1942] 3 D.L.R. 530.**

company upon the ground that the driving of a privately owned and uninsured car was not an act falling within the class of acts which S. was authorized to perform. Eventually the case was considered by the Judicial Committee of the Privy Council. It was of the opinion, in view of the fact that S. was required to travel between stations in the course of his employment, that the means of transportation used was clearly incidental to the execution of that which he was authorized and employed to do; the prohibition merely limited the means by which he was to execute the work he was employed to do. A breach of that prohibition was not sufficient to remove S. from the course of his employment. The company was vicariously liable to the injured infant.

If a master could hide behind a prohibition all he would have to do to be immune from vicarious liability would be to instruct his servant never to commit a tortious act. However, as Mr. Justice Willes once commented on such prohibitions:

> In my opinion those instructions are immaterial. If disobeyed, the law casts upon the master a liability for the act of his servant in the course of his employment; and the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability.[15]

It was not until after the turn of the last century that any question appears to have been raised as to whether a servant's act should be for the benefit of his master to be within the scope of employment. Indeed, cases up to that time seem to imply that an act was, of necessity, for the benefit of a master to be within the scope of his servant's employment. However, in 1912 the House of Lords found itself squarely faced with the problem in *Lloyd v. Grace, Smith & Co.*[16]

In that case Mrs. Lloyd owned a cottage and held a mortgage on other property. She desired to find a more profitable investment and approached the defendant firm with that thought in mind. She was interviewed by one S., the defendant's managing clerk, who conducted all the conveyancing business of the firm, and believing him to be a partner of the firm, placed the matter in his hands. By divers fraudulent means he had the cottage conveyed and the mortgage assigned to him, both of which he turned into cash and used for his own ends. The sole partner of the defendant firm contended that S. was not acting within the scope of his employment because his actions were solely for his own benefit and not that of his employer. Their Lordships expressly rejected this defence, stating that it was a tortious act wilfully committed by S. in conducting the business which he had a right to conduct honestly on behalf of his employer. The fact that the benefit derived from the clerk's actions accrued to the clerk alone did not of itself take the fraud out of his scope of employment.

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(15) **Limpus v. London General Omnibus Company** (1862), 1 H. & C. 526 at p. 539; 158 E.R. 993 at p. 998.

(16) [1912] A.C. 716.

The *Lloyd* case also illustrates the point that the wilful commission of a crime during the course of employment will not of itself remove a servant from his sphere of employment or relieve his master from the vicarious liability arising as a result of that crime.[17] In a later case the English Court of Appeal found that the owner of a private detective agency was vicariously liable for personal injuries suffered by a lady when an operator from the agency blackmailed her in attempting to force her co-operation in securing certain information desired by the owner of the agency.[18]

The problem sometimes arises as to whose servant a man was at the time he committed a tortious act. Such a situation can occur when a general employer gratuitiously lends or hires out one of his employees to another party to perform certain tasks for that party. If such an employee negligently injures X. in performing those tasks, to whom, besides the employee, can X. look for damages? Is the situation clarified by the general employer contracting with the sub-hirer, at the time of the lending or hiring out, that the servant shall be the servant of the latter while working for him? The determination of this problem is of the utmost importance from the injured party's point of view: he could join both as party defendants but, of course, he does not want to incur needless costs which he would have to pay by bringing an action against the person who is not vicariously liable.

In *Mersey Docks and Harbour Board v Coggins & Griffiths (Liverpool) Ltd. and McFarlane.*[19] the Board hired out to the respondent stevedoring company a crane, together with its driver, one Newall, for the purpose of loading a ship lying in Liverpool harbour. In the contract of hire it was provided that the driver would be the servant of the stevedoring company. While loading the ship Newall negligently ran into and injured one McFarlane, who sued Newall and the Board for damages. The Board brought an action to have the judgment against it discharged and to have substituted for it a judgment in favour of McFarlane for the same amount against the stevedoring company, claiming that Newall was, at the time of the accident, the servant or employee of that company.

In determining whether the Board or the Company were Newall's masters at the time the accident occurred, their Lordships stated that the test was: who had the *right to control* and direct how Newall was to carry out his work and operate his crane, as distinct from who had the right to directly benefit from his services? Applying this test, their Lordships found that the Board alone had the right to control Newall and direct the manner in which he worked. As Lord MacMillan stated:

> The stevedores were entitled to tell him where to go, what parcels to lift, and where to take them, i.e., they could direct him as to what they wanted him to do, but they had no authority to tell him how he was

(17) Also note **Barwick v. English Joint Stock Bank**, (1867) L.R. 2 Ex. 259.
(18) **Janvier v. Sweeney and another** [1919] 2 K. B. 316.
(19) [1946] 2 All E.R. 345.

> to handle the crane in doing his work. In driving the crane, which was the board's property confided to his charge, he was acting as the servant of the board, not as the servant of the stevedores. It was not in consequence of any order of the stevedores that he negligently ran down the plaintiff. It was in consequence of his negligence in driving the crane, that is to say, in performing the work which he was employed by the board to do.[20]

Viscount Simon pointed out, however, that the stevedoring company could have been liable if they had interfered and given directions to Newall as to how to drive the crane and he had complied with the resulting injury to McFarlane. In such a case the company would have been liable as joint tort feasors.[21]

In presenting the case the Board's counsel placed considerable reliance upon the clause in the hiring agreement to the effect that Newall was to be considered the servant of the stevedoring company. Their Lordships pointed out, however, that such a clause was not in itself sufficient to make Newall a servant of the stevedoring company. Before this could happen Newall would have to consent to the exchange: he could not become the servant of another against his will as the relationship of master and servant is a contractual one. Of course, his consent could be either expressed or implied, but as their Lordships pointed out, there is never a presumption that a change of employers has taken place. The burden is upon the person who claims that such a change has been effected, and it is a much heavier burden than merely showing that the benefit of a servant's services has been transferred.[22]

Although the type of clause just mentioned is insufficient in itself to bring about an exchange of employers, it is sometimes useful in determining whether the contracting parties intended that the general employer should be indemnified by the particular for the tortious acts of the former's servant when performing services for the latter. Of course, the prudent general employer will have an indemnification clause expressly inserted in the contract of letting or hiring so as to avoid any doubt as to what was intended—but again this will not affect the right of injured third parties to sue the general employer if he has the right to control at the time the injury occurs.

As we have noted, a master is vicariously liable for the negligent acts of his servant when they occur within the scope of the servant's employment whether they are authorized or not. However, if the servant is not liable for the act complained of, the master can have no vicarious liability, regardless of what his personal liability may be. The one exception to this general rule is when the servant causes personal injuries to his or her wife or husband, as the case may be.

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(20) **Ibid**, at p. 349.

(21) **Ibid**, at p. 349.

(22) Also note **Quarman v. Burnett and another** [1840] 6 M. & W. 499; 151 E.R. 509; **Bain v. Central Vermont Railway Company** [1921] 2 A.C. 412; **Century Insurance Company v. Northern Ireland Road Transport Board**, [1942] A.C. 509; **Chowdhary and another v. Gillot and others** [1947] 2 All E.R. 541.

At Common Law and under the Married Woman's Property Act of the Province of New Brunswick,[23] neither a husband nor a wife can sue the other for personal injuries. However, this immunity is personal to the spouse alone and does not extend to their respective employers if the injury occurs negligently during the course of employment.

In *Broom v. Morgan*[24] Mr. and Mrs. B. were employed by the defendant to run a public house. While Mr. B. was carrying bottles of beer from the cellar to the bar on the floor above, he negligently left a trap door open behind the bar without warning Mrs. B. or taking any steps to protect the opening. Mrs. B. failed to notice the opening and fell through, suffering personal injuries. Mrs. B. brought an action against the defendant, who raised the defence that in view of the fact that she could not sue her husband for his negligent act, she in turn could not bring an action against his employer for vicarious liability. The Court of Appeal upheld the trial judge's decision that the defendant employer was liable to Mrs. B. for injuries sustained, notwithstanding the legal immunity of Mr. B. from action at the suit of his wife. As Denning, L. J. stated:

> His (the husband's) immunity is a mere rule of procedure and not a rule of substantive law. It is an immunity from suit and not an immunity from duty or liability. He is liable to his wife, although his liability is not enforceable by action, and, as he is liable, so also is his employer, but with the difference that the employer's liability is enforceable by action.[25]

The case of *Broom v. Morgan* could have had its sequel if Mr. B. had been a person of substance. It appears, however, that the employer considered Mr. B. unworthy of a suit in order to regain the monies which had to be paid to Mrs. B. for the injuries caused her by the negligence of Mr. B. Although the average employee may not realize it, one of the implied terms of the contract of employment with his employer is, if it is not expressly stated otherwise, that the employee shall perform his duties with proper care and skill.[26] Therefore, if an employee negligently performs his duties and injures a third party, the master may sue the employee for breach of contract to regain any damages which he (the master) has had to pay upon his vicarious liability to the injured party. Although the sanction of dismissal is usually invoked, an action for damages at the suit of the master has always been available, but it appears to have rarely, if ever, been used. However, I submit that we will see a change in this situation now that the pendulum of improved economic conditions is rapidly swinging in favour of the working class. In the future our Mrs. B. will hesitate to sue her employer for personal injuries caused by the negligence of her husband for fear that the employer will in turn bring an action against Mr. B. and the family circle will be no better off financially.

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(23) R.S.N.B. 1952, c. 140, s. 56 (2).

(24) [1953] 1 All E.R. 849.

(25) Ibid, at p. 855.

(26) Harmer v. Cornelius (1858) 5 C.B.(N.S.) 236 at p. 246; 141 E.R. 94; Lister v. Romford Ice & Cold Storage Co. Ltd., [1957] 1 All E. R. 125.

In the recent English case of *Lister v. Romford Ice & Cold Storage Co. Ltd.*,[27] the pendulum had apparently swung sufficiently far enough to encourage an action for breach of the implied term to take care in the contract of employment. The appellant, L., and his father were employed by the respondent company as lorry driver and helper respectively. In the course of his employment, L. negligently ran into and injured his father, who obtained judgment for damages against the company for his son's negligence. The company's insurers paid the judgment and then, being subrogated to the company's rights and with a view to regain the amount they had to pay to L.'s father, brought an action in the name of the company against L. for breach of the implied contractual duty to drive with care. The insurance company was successful in obtaining judgment against L. in the amount of £1600 and costs, which was upheld on appeal by both the Court of Appeal and the House of Lords, although both Courts were divided.

This case is a practical illustration of the liability of a servant for failure to perform his duties with proper care and skill. However, there were other facts and findings equally interesting and important.

The respondent company was insured in respect of any liability which might be incurred by or arising out of the use of their vehicles upon the road. Such insurance was compulsory by statute before the company could lawfully operate any vehicles upon the highway.[28] There was also a form of endorsement upon the policy which provided that the indemnity given by the policy would be extended to any person in the employ of the company while driving a vehicle on the company's orders and for company's purposes; in other words, while acting within the scope of their employment.

L. contended that the endorsement protected him against the company's claim for indemnity. The House of Lords, however, brushed this contention aside by stating that the endorsement only covered third party claims and it was not that type of an action that faced L. in this case, but rather a claim for breach of a contractual duty. It is difficult to understand why this contention was dismissed in such a summary manner, as there appears to be sufficient grounds for considering the submission that L's liability actually arose out of the use of a motor vehicle: if he had not been driving the vehicle this action would never have arisen. An action for breach of contract merely served as the medium of attacking L; L's liability arose out of the negligent operation of one of the company's vehicles. However, such suggestions were disposed of without consideration.

Two further defences, among others, raised by L's counsel were considered to some extent by their Lordships, and one, in particular, caused divided opinion.

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(27) [1957] 1 All E.R. 125.

(28) Road Traffic Act, 1930, s. 35 (1).

Firstly, counsel contended that an implied term in the contract of service was that the respondent company would indemnify L. against all claims and proceedings brought against him for any act done by him in the course of his employment. This contention is all-embracing; whatever the degree of negligence and whether wilfully done or not, L claimed that he should go free and the respondent company should bear the burden. This contention was rightly rejected upon the ground that it would not be consistent with the duty of a driver to take reasonable care in driving his employer's vehicle.

Secondly, counsel contended that an implied term in the contract of service was that L. would receive the benefit of any contract of insurance effected by the respondent company covering their liability in respect of the action brought by L's father.

Viscount Simon confused the issue by only considering an amendment of this plea made by L's counsel. This amendment was to the effect that L. was entitled to be indemnified not only if the respondent company were in fact insured or required by law to be insured, but also if they ought, as reasonable and prudent employers, to have been insured against the risk in question. His Lordship dismissed the whole matter by declaring that the alleged implied term was not precise enough, that it was impossible to show when such a term was first supposed to have come into existence in the Common Law, that it was impossible to know where to draw the line (i.e., did it just apply to truck drivers or would it extend to other types of employees?), and that it would conflict with the employee's obligation to take care: none of which reasons, I submit, is very forceful.

Both Lord Morton and Lord Tucker felt that the implied term as originally stated was unnecessary to give the transaction such efficacy as both parties must have intended that it should have at the time the employee entered into his employer's service. Their Lordships also stated that such a term was unacceptable as it would deprive the insurers of their right of subrogation upon payment of any claims against the insured. However, they appear to have overlooked the fact that there is no rule of law preventing the insured from fettering away his rights to third parties; as Lord Somerville pointed out, the insurer only succeeds to those rights which the insured possessed at the time the cause of action arose.[29]

Lord Radcliffe and Lord Somervell were of opinion that such an implied term (whereby the appellant was to have the benefit of the employer's insurance) existed and would have allowed the appeal.

Lord Radcliffe based his opinion upon the fact that the employer was compelled by statute to carry insurance coverage against third party claims; without such coverage it was illegal to place vehicles upon the highway. His Lordship stated that in his view it was the employer's duty

(29) [1957] 1 All E.R. 125 at p. 147.

to procure the insurance, and it followed as a result that both he and his employees would impliedly agree that the coverage should be for the benefit of the latter as well as the employer himself.

Lord Somervell came to his conclusion independently of the statutory obligation. He stated:—

> When a man is engaged as a chaffeur or a lorry driver, the question whether his resources are at risk, should he cause damage through his negligence, is as important to him as it is to an owner driver. Nothing was said in this case and I dare say nothing is usually said. If, when such a contract was being negotiated, the question has been raised, it is obvious, I think, that the appellant would have stipulated for the usual cover that an owner driver provides for himself. If nothing is said, it is, in my opinion, for the employer to see that the driver's resources are protected by insurance. It is inconsistent with such an obligation that the employer should seek by action to make the driver personally liable, as in the present case.[30]

As a result of the decision in the *Lister* case, an almost intolerable situation has now developed in England under circumstances where employers and employees are covered by insurance policies similar to the one under consideration in that case. As Lord Radcliffe stated:

> The situation is this. If an accident takes place through negligence, the person injured can sue either employer or employee or both of them. If he sues the employee, alone, the latter calls on the insurance company for the cover which the employer has brought him; the insurance company has to provide the fund of damage required; neither the wages nor the savings of the employee can be touched to reimburse the insurers for the risk that they have underwritten. But if the injured person takes a different course, one which neither employer, employee nor insurance company can control, and sues the employer either alone or jointly with the employee, the position of the employee is, apparently, very much worse and the position of the insurance company, apparently, much better. For now the latter can indemnify itself for the money it finds by getting it back from the employee in the employer's name and the former, instead of getting the benefit of the insurance which his employer was to provide, is in the end of the one who foots the bill.[31]

If the injured party and the employee were husband and wife, a dilemma would really exist. The only course of action available would be against the employer, but he in turn, or his insurers by subrogation, might well bring an action against the negligent husband and take out of the same sugar bowl on the top shelf via the husband what has already been placed there via the wife.

If the employee is to be protected from suits at the instance of his employer, he will either have to carry his own personal insurance policy against such a possibility or else have an express term in the contract of employment covering such an eventuality. It is submitted that as soon as the various trade unions in England realize the significance of the

(30) **Ibid**, at p. 146.
(31) **Ibid**, at p. 141.

Lister decision, provisions will commence to appear in future collective agreements designed to protect union members from the possible effect of what is felt to be a serious error on the part of the House of Lords.

In the Province of New Brunswick the Insurance Act provides that an owner's policy shall insure, inter alia, a person who is driving any automobile with the owner's consent against liability imposed by law "arising from the ownership, use or operation" of such automobile.[32] The effect of this provision does not appear to be too unlike the endorsement in the *Lister* case. However, it is to be hoped that the Bench of this province will disregard the *Lister* case and not be influenced by it if similar circumstances are presented wherein an employee, while acting within the scope of his employment, causes injury to a third party through the use or operation of his employer's vehicle.

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(32) R.S.N.B. 1952, c. 113, s. 202 (1).