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THE TOWN OF MONTREAL WEST (DEFENDANT) ..... } APPELLANT; *Nov. 4. *Dec. 23.

AND

DAME SARAH HOUGH (PLAINTIFF)..... RESPONDENT.

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

Illegitimate child—Right of father or mother to maintain action for damages occasioned by his death—Art. 1056 C.C.

The father or the mother of an illegitimate child is not within the class of persons who are entitled under art. 1056 C.C. to maintain an action for "damages occasioned by (the) death" of the child.

Judgment of the Court of King's Bench (Q.R. 48 K.B. 456) rev.

APPEAL from the decision of the Court of King's Bench, Appeal Side, province of Quebec (1), affirming, except as to the *quantum* of damages, the judgment of the trial court, Weir J. (2), and maintaining the respondent's action for damages occasioned to her by the death of her natural son.

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

John T. Hackett K.C. for the appellant.

Thomas E. Walsh K.C. and *George Gogo K.C.* for the respondent.

The judgment of Anglin C.J.C. and Lamont J. was delivered by

ANGLIN C.J.C.—The defendant appeals from the judgment of the majority of the Court of King's Bench modifying, but only as to the amount allowed, the judgment of Weir J. upholding the plaintiff's claim.

The action was brought by the natural mother of David Hough, who was killed, as the plaintiff alleged, by the negligence of the defendant. In the view we take of the matter, the existence or non-existence of negligence is of little consequence. Upon that point, however, as at present advised, we should not be prepared to disturb the

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Cannon JJ.

(1) (1930) Q.R. 48 K.B. 456. (2) (1929) Q.R. 67 S.C. 322.

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judgment of the Superior Court, affirmed, as it has been, by the majority (4-1) of the Court of King's Bench.

The principal grounds of appeal to this court are:

(1) that the respondent had no legal claim for alimentary support upon the late David Hough as her natural son; and

(2) that the death of David Hough was not due to any negligence on the part of the appellant, but was due to his own fault.

Upon the second ground, as already stated, we will not interfere. The true question upon this branch of the case is not as to the weight of evidence in support of the judgment maintaining liability, but rather as to whether there is any evidence to justify the finding of negligence against the defendant and the inferences on which that finding rests. The appellant undertakes an almost impossible task when he seeks to convince us, in the face of opinions to the contrary already expressed by the learned trial judge and four judges of the Court of King's Bench, that there is no such evidence. In our opinion, there is evidence which, if believed, was sufficient to justify the inferences drawn by the trial judge on which he based his finding of negligence; and there is also enough to warrant his having acquitted the victim of the accident of any contributory negligence. Nor is the balance of the testimony so clearly and overwhelmingly against the plaintiff that we would be justified on that ground in setting aside the concurrent judgments below. These questions really depend on the appreciation of the evidence, both as to its veracity and as to the inferences of fact to which it gives rise. They were eminently matters for the consideration of the trial judge in the first instance; and, his views upon them having been affirmed on appeal, error therein must be demonstrated to our satisfaction in order to justify interference. This is the settled jurisprudence of this court. Such error has not been demonstrated; interference, therefore, on this aspect of the case is out of the question.

In regard to the quantum of damages allowed—$4,500 at the trial, reduced to $2,500 in the Court of King's Bench, there was in the latter court considerable divergence of views. Guerin J. would affirm the judgment as it was; Al-

lard J. would reduce the damages to the amount allowed by the Court of King's Bench, $2,500; Lafontaine C.J. did not discuss the matter, but probably agreed with one or the other of these two; Létourneau J., on the other hand, would reduce the recovery to $500; and Hall J. would dismiss the action, or, if compelled to allow damages, would make a reduction to $750. The practice of this court is not to interfere in the quantum of damages fixed by a provincial court of appeal, unless error in regard to the principle on which they have been assessed is shewn, or there is really no evidence to warrant the allowance. Here no error in principle is established; and the matter is merely one of appreciation of the sufficiency of the evidence, i.e., whether its weight was adequate to sustain the amount of the award. Following our usual practice in such matters, although, were the matter *res integra,* we would probably have given a smaller sum, we should, we think, decline to interfere with the amount allowed for damages.

As to the first ground of appeal, it was suggested from the bench to counsel for the appellant that the real basis of attack on the judgment against his client is not the alleged lack of legal right on the part of the plaintiff to alimentary support from her natural son, but the fact that, as merely his natural mother, she is not within the purview of art. 1056 C.C., on which she must base her right of action.

As was stated to counsel for the respondent in the course of the argument, it seems abundantly clear that the only right of action which the respondent can have must be based on that article, and that, under art. 1053 C.C., she can have no claim for " damages occasioned by the death " of her son. It may well be that, were there no art. 1056 C.C., the terms of art. 1053 C.C. would be deemed *in se* sufficiently wide to cover a claim for damages caused by the death of one killed through fault of the defendant, as has been held in France (where they have no provision corresponding to art. 1056 C.C.) in regard to the scope of arts. 1382-3 C.N., which cover substantially the same field as art. 1053 C.C. But the presence in the Civil Code of Quebec of art. 1056, providing expressly for the case of " damages occasioned by death " and directing that there shall

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be but one action, which is to embrace *all* the damages caused by such death, makes it clear that the intention of the legislature was to restrict claims for "damages occasioned by death" to cases within the purview of that article and to preclude actions under art. 1053 C.C. for such claims. (*Robinson* v. *Canadian Pacific Ry. Co.* (1)). So far, at all events, the matter may be regarded as settled in this court by the views to that effect unanimously expressed in *Regent Taxi & Transport Co., Ltd.* v. *Congrégation des Petits Frères de Marie* (2).

Moreover, the plaintiff's claim being under art. 1056 C.C., of which Lord Campbell's Act was the prototype (*Robinson* v. *Canadian Pacific Ry. Co.* (3)), *prima facie* at least, the basis for estimating the damages recoverable in this action (common fault having been excluded) should be the same as under the English statute (*City Bank* v. *Barrow* (4)). Of course, as was pointed out in *Miller* v. *Grand Trunk Ry. Co.* (5), *Canadian Pacific Ry. Co.* v. *Parent* (6) and elsewhere, there are, in other respects, noteworthy differences between the provisions of art. 1056 C.C. and those of Lord Campbell's Act (*Regent Taxi & Transport Co., Ltd.* v. *Congrégation des Petits Frères de Marie* (7); but we do not find anything in art. 1056 C.C. to justify our treating it as affording, to a plaintiff in Quebec, only some basis on which his damages must be estimated less liberal than that afforded by Lord Campbell's Act. Under that statute in England, and as adopted in Ontario, it is well settled that, while there can be no recovery for anything except actual loss susceptible of pecuniary appraisal sustained by the plaintiff and those whom he represents (*Jennings* v. *Grand Trunk Ry. Co.*) (8), "a reasonable expectation of pecuniary benefit" from the continued life of the deceased is all that a plaintiff need show in order to found a claim for damages, a legal right on his part against the deceased to alimentary support or otherwise, being unnecessary. (Mayne on Damages (10th ed.), p. 516, note (*b*)).

(1) (1887) 14 Can. S.C.R. 105, at 120.
(2) [1929] Can. S.C.R. 650.
(3) [1892] A.C. 481, at 486.
(4) (1880) 5 A.C. 664, at 679.
(5) (1906) 75 L.J.P.C. 45.
(6) [1917] A.C. 195, at 200.
(7) [1929] Can. S.C.R. 650, at 659.
(8) (1888) 13 A.C. 800.

The jurisprudence under art. 1056 C.C. is to the same effect. Thus, it was early settled that damages recoverable under that article do not include anything by way of compensation for *solatium doloris* as distinct from pecuniary loss (*Montreal* v. *Labelle* (1); *Jeannotte* v. *Couillard* (2); *Bouchard* v. *Gauthier* (3); and it is equally well established that a reasonable expectation, on the part of the plaintiff, of advantage from the deceased, the worth of which is estimable in money, suffices in an action against a wrongdoer responsible for the death of the victim of his fault (*Canadian Pacific Ry. Co.* v. *Lachance* (4); *Canadian Pacific Ry. Co.* v. *Robinson* (5); *Bernard* v. *Grand Trunk Ry. Co.* (6); *Hunter* v. *Gingras* (7); *Dumphy* v. *Montreal L.H. & P. Co.* (8).

We find Mr. Justice Duff, with the concurrence of Mr. Justice Girouard, in *Canadian Pacific Ry. Co.* v. *Lachance* (9), at p. 208, after alluding to the question of the right to *solatium,* saying,

> The jury may unquestionably take into consideration every other loss and every other disadvantage which are in the natural and ordinary course attributable to the death out of which the action arises and can fairly be appraised in money.

And I added, with the concurrence of Mr. Justice Idington, (p. 209),

> If the only element for consideration in estimating the damages in this case were the actual wages or earnings of the deceased, the task of the appellants in impeaching the verdict would be less difficult. But for loss of his services at home—of his care and protection of his wife and family—of his assistance in husbanding the family resources—for the loss of these and other kindred and substantial benefits and advantages, of which the death of the husband and father has deprived them, the plaintiffs were justified in asking compensation from the jury under art. 1056 C.C., which declares them entitled to recover "all damages occasioned by such death."

We are accordingly of the opinion that upon the first ground of appeal, as stated, the appeal cannot succeed.

It may be that, under the common law of Quebec, compensation in the case of death might have included an al-

(1) (1888) 14 Can. S.C.R. 741.
(2) (1894) Q.R. 3 K.B. 461, at 495-8.
(3) (1911) 17 R.L., N.S. 244.
(4) (1909) 42 Can. S.C.R. 205.
(5) (1887) 14 Can. S.C.R. 105.
(6) (1896) Q.R. 11 S.C. 69.
(7) (1921) Q.R. 33 K.B. 403, at 409, 412.
(8) (1905) Q.R. 28 S.C. 18, at 27.
(9) (1909) 42 Can. 8 S.C.R. 205.

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lowance for *solatium doloris* (*Ravary* v. *Grand Trunk Ry. Co.* (1); *Hunter* v. *Gingras* (2). It is also possible that a legal right to alimentary support, or something of the kind, from the deceased victim of the defendant's fault was essential to enable the plaintiff to sue.

But, under the common law of Scotland, which, we are assured by Mr. Justice Aylwin in the *Ravary* case (3), was, in these matters, "identical with" that of Quebec, the right to *solatium* was not recognized (or, in other words, the law did not recognize the supposed feeling of affection on the assumed injury to which that right to *solatium* was founded), except in the case of husband and wife, or ascendants and descendants. It did not recognize the right of collaterals to pursue an action for reparation of wrong done them on the ground of *solatium,* even though they were, as sisters, dependent upon their deceased brother for patrimonial support, since that dependence and that interest are quite irrespective of relationship and may exist where there is no relationship at all (*Eisten* v. *North British Ry. Co.* (4).

As the Lord President (Inglis) observed in that case,

> It appears to me that the true foundation of this claim is partly nearness of relationship between the deceased and the person claiming on account of the death, and partly the existence during life, as between the deceased and the claimant, of a mutual obligation of support in case of necessity. On these two considerations in combination our law has held that a person standing in one of these relations (i.e., husband, wife, father, mother or lawful child) to the deceased may sue an action like this for *solatium,* where he can qualify no real damage, and for pecuniary loss in addition, where such loss can be proved.

This passage was cited with approval by Lord Young in *Weir* v. *Coltness Iron Co., Ltd.* (5).

Quebec, however, is, in this matter, no longer under the regime of the common law, but is under a statutory provision, viz., art. 1056 C.C.; and it is on the construction of that article that the right of the plaintiff to maintain the present action must depend.

We have dwelt at considerable length upon the two grounds of appeal taken and discussed at bar to make it clear that neither of them affords a reason for setting aside

(1) (1857) L.C.J. 280; (1860) 6 L.C.J. 49.
(2) (1922) Q.R. 33 K.B. 403.
(3) (1860) 6 L.C.J. 49 at 50.
(4) (1870) 8 Ct. Sess. Cas. (3rd Series) 980, at 986.
(5) (1889) 16 Ct. Sess. Cas. (4th Series) 614, at 616.

the judgment appealed against and that it is, accordingly, necessary (Art. 10 C.C.), in order to dispose of this appeal, to consider the broader question suggested from the Bench (the negative of which counsel for the appellant tacitly declined to argue), viz., whether a natural mother is a "*mère,*" or, an "ascendant relation," within the meaning of those terms as used in art. 1056 C.C., and its converse, whether an illegitimate son is an "*enfant,*" or a "descendant relation," within the purview of the same article. This attitude of counsel probably accounts for the status of the plaintiff having apparently been taken for granted in the provincial courts (Mignault, Droit Civil, vol. 1, p. 108; but see Japiot, Proc. Civ. et Com., (1929 ed.) no. 160; *McFarran* v. *The Montreal Park and Island Railway Co.* (1). The learned judges in the Court of King's Bench appear to have devoted their attention largely to a consideration of the question whether or not the plaintiff had a legal claim for alimentary support upon the deceased, her natural son, the majority concluding that she had such a claim; and, on that ground, they maintained her status to sue. Mr. Justice Hall, who dissented, took the opposite view of this point and based his conclusion that the plaintiff had no status chiefly, if not solely, upon that ground, But it seems immaterial whether the plaintiff had, or had not, a legal claim for alimentary support, since she had, in fact, a reasonable expectation of receiving support in future from her deceased natural son.

The amendment of 1930 (20 Geo. V, c. 98, s. 1) not being retroactive, it is still advisable, in cases such as this arising before that date, to consider both the English and the French versions of art. 1056 C.C. in dealing with this question.

In this connection it is necessary to bear in mind that the statute, as originally enacted (Can. 10-11 Vic., c. 6; C.S.C. 1859, c. 78), which was applicable to both Upper Canada and Lower Canada and was the predecessor of art. 1056 C.C., contained a definition (s. 6), which gave the word "parent" there used a meaning that included "father and mother, grandfather and grandmother, stepfather and step-mother," and to the word "child" a mean-

(1) (1900) 30 Can. S.C.R. 410.

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ing that included "son and daughter, grandson and granddaughter, step-son and step-daughter." This corresponded to s. 5 of the original Lord Campbell's Act (9-10 Vic. Imp., c. 63). Indeed, the Canadian Act of 1847 is practically a verbatim copy of the Imperial Act of 1846, except that the latter did not contain anything equivalent to s. 3 of the Canadian Act, which had to do with duels, etc. But the interpretation clause has now disappeared and we are left to deal with the words of art. 1056 C.C. without its aid.

In England it was early decided, in *Dickenson* v. *North Eastern Ry. Co.* (1), that an illegitimate child is not within the statute (9-10 Vic., c. 93), Pollock C.B., saying,

I am of opinion that no rule should be granted, for I do not entertain any doubt that the word "child" in the Act means legitimate child.

Bramwell B., Channel B., and Pigott B., concurred.

This decision was in accordance with the well established rule of English law that, where the word "child" is used, either in a private document or in an Act of Parliament, it connotes, as a rule, a legitimate child only; and, conversely, where the words "father" and "mother" are used they signify lawful parents only. (*R.* v. *Totley* (2); *R.* v. *Birmingham* (3); *R.* v. *Maude* (4); *Hill* v. *Crook* (5); *Dorin* v. *Dorin* (6). In *Helton* v. *Lidlynch* (7), Lee C.J. said,

I know of no case that considers bastards as the children of anyone.

and Chapple J. concurring, said,

The word "children" in this Act (8-9 Wm. III, c. 30) must mean legitimate children.

and Wright J. added that

In the case of *New Windsor* v. *White Waltham* (8), the court declared that "illegitimate children were nobody's children."

The same idea prevailed in France (Ferrière, Dict. de Dr., vbo. "Enfants") S. 52, 2, 35; P. 51, 1,660.

We can conceive of no reason why a different intention should be imputed to the legislature of Quebec. It would be a libel on that province to suggest that (except, perhaps, in the particular covered by art. 237, discussed below,) illegitimacy is there less disfavoured by law than it is in

(1) (1863) 33 L.J. Exch. N.S. 91; 2 H. & C. 735.
(2) (1845) 7 Q.B. 596.
(3) (1846) 8 Q.B. 410.
(4) (1842) 65 R.R. 753.
(5) L.R. 6 E. & I. App. 265.
(6) (1875) L.R. 7 E. & I. App. 568.
(7) (1742) Burr. S.C. (2nd Ed.) 187-190).
(8) 1 Str. 186.

England, or in any province of Canada whose legal system is based on the English common law. Moreover, as Lord Sumner observed in *Quebec Light, Heat & Power Co.* v. *Vandry* (1), speaking of arts. 1053 and 1054 C.C.,

the statutory character of the Civil Code of Lower Canada must always be borne in mind * * *, (It) is and always must be remembered to be the language of a legislature established within the British Empire.

And, to adapt and apply language used of Art. 1056 C.C. by Viscount Haldane, in *Canadian Pacific Ry. Co.* v. *Parent* (2),

*The presumption to be made is that in enacting art. 1056 the Quebec Legislature meant, as an act of the Imperial Parliament would be construed as meaning, to confine the special remedy conferred to cases of (claims by legitimate parents and children). There is, in their Lordships' opinion, nothing in the context of the chapter of the Code in which the article occurs which displaces this presumption of its construction. The rule of interpretation is a natural one where law, as in the case of both Quebec and England (is based upon fundamental Christian morality). No doubt the Quebec legislature could impose many obligations in respect of (illegitimate children and natural parents); but, in the case of art. 1056 there does not appear to exist any sufficient reason for holding that it has intended to do so, and by so doing to place claims for torts committed (against illegitimates) in Quebec on a footing differing from that on which the general rule of (fundamental morality observed in the Imperial Parliament) would place them.

When, therefore, the legislature of Quebec speaks of father, mother and children ("père, mère et enfants") it must be taken to mean thereby, in the absence of clear indication to the contrary, lawful father, lawful mother and legitimate children, i.e., father and mother joined in lawful wedlock and the children of such a union. Indeed, the code itself suggests that this view prevailed with the legislature in enacting it. Thus, amongst the *obligations arising from marriage,* we find, by art. 166 C.C., that

Children are bound to maintain their father, mother and other ascendants, who are in want.

And, by art. 168 C.C., it is declared that

The obligations which result from these provisions are reciprocal.

Nevertheless, in order to extend their application, even partially, to illegitimate children, it was thought necessary to provide, as was done by art. 240 C.C., that

The forced or voluntary acknowledgment by the father or mother of their illegitimate child, gives the latter the right to demand maintenance from each of them according to circumstances.

(1) [1920] A.C. 662, at 671-2. (2) [1917] A.C. 195, at 205-6.

*(Passages in brackets indicate adaptations).

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So, it is seen that when the Code deals with illegitimate children it does so specifically and does not include them under the general description of children. There is no counterpart of art. 168 C.C. applicable to art. 240 C.C. Moreover, it will be noted that, whereas art. 166 C.C. declares the obligations of lawful children towards their parents, art. 240, conversely, declares the obligations of parents to their illegitimate children. If it were material, we would have to consider whether the dissenting opinion of Hall J., that no legal obligation for alimentary support of natural parents is imposed on their illegitimate children, should not prevail.

That the common law of Scotland also excluded from its description of " father " and " mother " persons not joined in matrimony who had children, and from the term "children" their bastard progeny, is also abundantly clear. It was so decided in *Weir* v. *Coltness Iron Co.* (1), above cited, it being there held that

the mother of a bastard child has no title to sue an action of reparation in respect of his death.

This view was confirmed by the House of Lords in *Clarke* v. *Carfin Coal Co.* (2), where it was held that

a parent of an illegitimate child has, by the law of Scotland, no right of action against a person whose negligence has caused its death.

I quote this significant passage from the judgment of Lord Watson (p. 418),

As matter of fact, it cannot be disputed that, although for a century past actions for *solatium* and damages have been sustained at the instance of husband, wife, or legitimate child, in respect of the death of a spouse, a child, or a parent, a similar action at the instance of a natural parent or child had never (with one exception, which appears to me to be of no moment) been heard of in the law of Scotland. In my opinion, the rule which admits the former class of suits does not rest upon any definite principle, capable of extension to other cases which may seem to be analagous; but constitutes an arbitrary exception from the general law which excludes all such actions founded in inveterate custom, and having no other ratio to support it. I venture to think that the Lord President in *Eisten* v. *North British Rly. Co.* did not mean to suggest that the rule (or rather the exception) was capable of being extended to cases other than those in which it had already been received. To my mind, it is evident that by "nearness of relationship" his lordship meant legal relationship; because he treats as an essential element of the pursuer's claim the right to demand *solatium*, which is a right to reparation for disruption of the family tie, and therefore impossible in the case of natural parent

(1) (1889) 16 Ct. Sess. 614. (2) [1891] A.C. 412.

and child; and also because his lordship subsequently describes the connection between a bastard and his putative father as "one which the law cannot recognize."

In *Wood* v. *Gray & Son* (1), Lord Watson, speaking of *Clarke* v. *Carfin Coal Co.* (2), said

> The practical effect of your Lordships' decision was to limit the class to persons standing in the legitimate relation of husband, father, wife, mother or child, to the deceased. In *Eisten v. North British Ry. Co.* (3), which is the leading authority upon this branch of the law, the Lord President (Inglis) observed: "As the existence of such claims in our common law is a peculiarity of our system, it is not desirable to extend this class of actions, unless they can be justified on some principle which has already been established." In that observation, which has been repeatedly made, in different terms, by other judges of the Court of Session, I entirely concur.

It is, therefore, abundantly clear that, by the common law of Scotland (and by the common law of Quebec, if they be identical, as Mr. Justice Aylwin in *Ravary's* case (4), assures us that, in these matters, they are), the mother of an illegitimate child was not within the class of persons who were entitled to maintain actions for "damages occasioned by death."

That art. 1056 C.C. was intended to restrict, rather than to enlarge, the class of persons entitled to maintain such actions has been the basis of more than one judgment in Quebec. Thus in *Hunter* v. *Gingras* (5), we find that the head-note reads, in part, as follows:

> L'article 1056 C. civ., tiré du chapitre 78 S. ref. du Canada, reproduisant la loi 10-11 Victoria, ch. 6, n'a pas créé un recours légal qui n'existait pas auparavant; il a simplement modifié ce recours qui existait en France depuis des siècles, en le restreignant aux plus proches parents, en donnant à ceux-ci une seule action, en établissant la prescription d'un an, et en refusant le recours lorsque le défunt lui-même a obtenu compensation. * * *

Again, in *St. Laurent* v. *La Cie de Telephone de Kamouraska* (6), it was held that the action under art. 1056 C.C. belongs exclusively to the persons mentioned in the article qui est restrictif et doit être interprété à la lettre.

The court there decided that the stepfather had no cause of action under art. 1056 C.C. in his own right; but, being in community with his wife, he could, as head of the community, maintain an action on behalf of the community in

(1) [1892] A.C. 576, at 581.
(2) [1891] A.C. 412.
(3) 8 Ct. Sess. Cas. (3d. Series) 980, at 984.
(4) (1860) 6 L.C.J. 49, at 50.
(5) (1921) Q.R. 33 K.B. 403.
(6) (1905) 7 Q.P.R. 293.

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her right. See too *Bonin* v. *The King* (1). And, in *Dionne* v. *La Compagnie des Chars Urbains* (2), we find it held that an adopted child, not being recognized by the Civil Code, the adopting father could not claim damages for his death under art. 1056 C.C.

Again, in *Gohier* v. *Allan* (3), it was held that

> By the terms of art. 1056 C.C. the only persons who have a right of action for the death of a person resulting from a quasi-delict, are his consort, and ascendant or descendant relatives; the brothers and sisters have no such right of action.

The plaintiffs failed in that case because they were not included within the enumeration of the persons entitled to maintain an action. (See, too, *Ruest* v. *Grand Trunk Ry. Co.* (4), and *Tessier* v. *Grand Trunk Ry. Co.* (5).

In *Ruest* v. *Grand Trunk Ry. Co.*, we find Mr. Justice McCord saying,

> But no such action lies except under the terms of article 1056, the express inclusiveness of which excludes the right of any other persons than those therein mentioned. According to the terms of this article the "consort and ascendant and descendant relations" can alone have the right to claim damages for death occasioned by quasi-offence.

This passage is explicitly approved by that great civilian, Strong J., in *Robinson* v. *Canadian Pacific Ry. Co.* (6).

While there is a marked dearth of direct authority in the Quebec courts on the question at issue, there is, at least, one case in the Court of Queen's Bench (*Provost* v. *Jackson* (7)), decided three years after the code was enacted, but upon the law as it stood before the code (as contained in C.S.C., c. 78), in which it was held, affirming the Superior Court *in banco,* which had agreed with the learned trial judge, that legal proof of the marriage of parents suing to recover damages for the death of their son was a *sine qua non* of the right to recover in the action. The point is put in these words by Johnson J. *ad hoc* (p. 170), with the concurrance of Duval C.J., Mackay A.J. and Torrance J. *ad hoc,*

> The ground on which the Court goes is this: The statute gives a right of action to surviving parents in certain cases. Now, in the present case, the parents have not proved their relationship; therefore there is no right of action.

(1) (1918) 18 Can. Ex. C.R. 150, at 158.
(2) (1895) Q.R. 7 S.C. 449.
(3) (1906) 8 Q.P.R. 129.
(4) (1878) 4 Q.L.R. 181.
(5) (1898) 5 R. de J. 1.
(6) (1887) 14 Can. S.C.R. 105, at 119-120.
(7) (1869) 13 L.C.J. 170.

and, as explained by Mackay A.J.,

> It was absolutely necessary on the part of Provost and his wife to prove their marriage, and establish that the boy killed was their son . . . The judge who tried the case was, therefore, right in saying that the defendants need not enter on their case as the marriage of the parents and birth of the son had not been proved.

This means that a valid marriage was essential to the plaintiff's right of action.

Caron J., who alone dissented, appears to rest his opinion chiefly on the grounds that the general denial in the defendant's plea of the allegations of the plaintiffs (which included the facts of their own lawful marriage and of the filiation of the deceased victim) did not suffice to put those facts in issue (See *Royal Institution* v. *Picard* (1); and that they were, in any event, sufficiently established in the case.

Nor is there any difference in substance between the enacting language of the statute (C.S.C., c. 78, s. 2) (excluding from consideration s. 6), which required that

> every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused,

and the terms of art. 1056 C.C., which enacts that

> dans tous les cas où la partie contre qui le délit ou quasi-délit a été commis décède en conséquence, * * * son conjoint, ses père, mère et enfants ont * * * droit de poursuivre, etc.

There can be no reason whatever for holding that, while the father and mother bringing the action as "parents," under s. 2 of C.S.C., c. 78, must have established that they were the lawful parents of the deceased victim by legal proof of their marriage, the like proof may be dispensed with where the right of action is given to the father and mother ("père et mère"), as it is in the terms of art. 1056 C.C. (French version).

Provost v. *Jackson* (2), must therefore, be regarded as a distinct authority supporting a negative answer to the question under consideration. It is cited without any adverse comment by Strong J., at p. 109, and by Taschereau J., at p. 126, in *Canadian Pacific Ry. Co.* v. *Robinson* (3).

The following observation of Lord Watson, in *Clarke* v. *Carfin Coal Co.* (4), already quoted, seems to me to

(1) (1898) Q.R. 14 S.C. 281.
(2) (1869) 13 L.C.J. 170.
(3) (1887) 14 Can. S.C.R. 105.
(4) [1891] A.C. 412, at 418.

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apply to the local situation, if the last word thereof be changed from " Scotland " to " Quebec."

As matter of fact, it cannot be disputed that, although for a century past actions for *solatium* and damages have been sustained at the instance of husband, wife, or legitimate child, in respect of the death of a spouse, a child, or a parent, a similar action at the instance of a natural parent or child had never (with one exception, which appears to me to be of no moment) been heard of in the law of Scotland.

Indeed, the recorded jurisprudence of the province of Quebec, as well under art. 1056 C.C. as under the statute which prevailed before it, and under the common law, which preceded the statute, presents no parallel to *Renton* v. *North British Railway Company* (1), the solitary case (of first instance) in the Scottish reports so slightingly alluded to by Lord Watson.

Nor is the plight of the plaintiff better if regard be had to the terms of the English version of art. 1056 C.C., which gives the right of action to " ascendant and descendant relations." The words " relations " and " relatives " are, for the present purpose, synonymous and interchangeable (Murray's Oxford Dictionary, pp. 398-9); both *prima facie,* import the idea of legal or lawful relationship.

When people speak of man or woman as brother or sister, son or daughter, unless they say something to the contrary, I think the meaning is legitimate son or daughter, brother or sister. (*Smith* v. *Tebbitt* (2), per Sir J. P. Wilde.)

Either word, " relations " or " relatives," may, if the circumstances or context necessarily imply that intention, include connections by blood only, i.e., illegitimate relations or relatives. Thus, we find Lord Herschell saying in *Seale-Hayne* v. *Jodrell* (3), where, with the other members of the court, he found that there was enough clearly to indicate such intention,

It is of course not open to dispute that the word " relatives " according to its natural interpretation, if there were nothing to show that another meaning was to be attributed to it, would not include those who were what may be termed natural blood relations, but whose parents or grandparents were not born in wedlock, and who therefore were not in the eye of the law related to the testator.

(1) (1869) 6 Sc. L.R. 255.

(2) (1867) L.R. 1 P. & D. 354, at 358.

(3) [1891] A.C. 304.

A like view was taken *In re Wood* (1), where the difficulty of importing such an intention is dealt with by Vaughan Williams L.J.; and *In re Corsellis* (2).

As illustrative of the strictness with which American courts construe the term "relations" when found in statutes dealing with their rights, reference may be had to *Kimball* v. *Story* (3), and *Horton* v. *Earl* (4). In the former a step-son was held not to be a child or relation, within the meaning of Gen. Stats., c. 92, s. 28, which saved from lapsing, by predecease of the devisee or legatee, any devise or bequest made "to a child or other relation" of a testator; in the latter, a brother-in-law was held not to be a "relation" within a like provision of the Pub. Sts., c. 127, s. 23; and in both instances the bequests were held to have lapsed. (See also *In re Renton's Estate* (5); and *Smith* v. *Knights of Maccabees* (6).

It would seem, therefore, equally clear, whether we take the French or the English version of art. 1056 C.C., that neither natural parents nor illegitimate children are within its purview.

A somewhat ingenious suggestion was made in the course of consideration of this case, viz., that the plaintiff might invoke arts. 237 and 239 C.C. in aid of her status. These articles read as follows:

237. Children born out of marriage, other than the issue of an incestuous or adulterous connection, are legitimated by the subsequent marriage of their father and mother.

239. Children legitimated by a subsequent marriage have the same rights as if they were born of such marriage.

But there is here no evidence whatever to indicate that John Barnes, whom the plaintiff married some nine years after the birth of her natural son David Hough (to wit, on the 15th October, 1883), was his father. Had that been the case, the plaintiff would certainly have said so when obliged, in the course of her examination on commission, to admit that David Hough was her natural son. Moreover, in addition to the most significant fact that the deceased David Hough never took the name of Barnes but always adhered to his mother's maiden name, Hough, we

(1) [1902] 2 Ch. D. 542.
(2) [1906] 2 Ch. D. 316.
(3) (1871) 108 Mass. 382.
(4) (1894) 162 Mass. 448.
(5) (1895) 10 Wash. 533.
(6) (1905) 127 Iowa 115.

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have the testimony of George Barnes, a son born of the marriage of John Barnes with the plaintiff, and a witness for her, that David Hough was his half-brother, thus indicating that, although born of the same mother, they had been begotten by different fathers. There can be no presumption in favour of the paternity of John Barnes; and the burden of proving it rested on the plaintiff. (*Provost* v. *Jackson* (1); see, too, art. 241 C.C.). The essential basis, therefore, for the application of art. 237 (*Lahay* v. *Lahay* (2)), viz., that David Hough was the son of John Barnes and Sarah Hough, is entirely lacking. In fact, the only fair inference from the evidence in the record is that John Barnes was not his father.

It was strongly urged at bar that a construction of art. 1056 C.C. excluding natural parents and illegitimate children savours of barbarism and would shock the sensibilities of persons holding enlightened views, and that, accordingly, the courts should give to it a construction more consistent with humane and liberal ideas. The short answer to this contention is that the courts must await the action of the legislature, whose exclusive province it is to determine what should be the law. Whatever may occur elsewhere (1929, Canadian Bar Review, vol. VII, p. 617) it would seem to be the plan of this " Court of Law and Equity " (R.S.C. (1927), c. 35, s. 3), to give effect to the intention of the legislature as expressed, not to make the law as they think it should be. *Judicis est jur dicere, non dare.*

The appeal will, therefore, be allowed, but without costs throughout.

DUFF J.—I have had the privilege of reading the judgment of the Chief Justice, as well as those of Mr. Justice Rinfret and Mr. Justice Cannon. I have no doubt that the rule of interpretation which the law of Quebec requires us to apply to art. 1056 limits " mother " to women who stand towards a victim in a maternal relation recognized by the law. To put it more pointedly, the article does not admit the claim of a mother in respect of the death of an illegitimate child.

(1) (1869) 13 L.C.J. 170.

(2) (1894) Q.R. 6 S.C. 366.

One additional observation I feel obliged to make. We have before us a dry question of law, and I do not think it incumbent upon me to express either approval or condemnation of the well known traditional attitude of the common law, of England as well as of France, towards illegitimacy.

We are, in consequence, constrained to allow the appeal, but I agree with my brother Rinfret that the plaintiff should not be required to pay costs here or below.

RINFRET J.—L'intimée, qui était la demanderesse en Cour Supérieure, a poursuivi l'appelante, la ville de Montréal-Ouest, pour lui réclamer les dommages-intérêts résultant du décès de David Hough. Dans sa déclaration, elle a allégué que David Hough était son fils et que la mort de ce dernier était attribuable à la faute et à la négligence de la ville et de ses employés.

La Cour Supérieure a jugé que le décès de Hough était dû à la négligence des employés de la ville et a accordé à l'intimée une somme de $4,500 de dommages.

La majorité de la Cour du Banc du Roi a confirmé ce jugement sur la question de responsabilité; mais elle a réduit le montant de la condamnation à $2,500.

Deux juges furent dissidents. Tous deux, d'après leur appréciation de la preuve, eussent fixé les dommages-intérêts à un montant moindre que celui qui fut accordé par la majorité de la cour. En outre, l'un d'eux était d'avis qu'il y avait eu faute contributoire de la victime; et, de ce chef, il eût fait une réduction additionnelle. L'autre eût rejeté l'action *in toto* pour la raison suivante:

La preuve a démontré que la victime était le fils naturel de l'intimée, or, disait-il, l'enfant naturel ne doit pas d'aliments à ses père et mère, parce que l'obligation alimentaire, qui est réciproque lorsqu'elle résulte des liens de parenté légitime, ne l'est pas dans les cas de filiation naturelle.

La reconnaissance volontaire ou forcée par le père ou la mère de leur enfant naturel, donne à ce dernier le droit de réclamer des aliments contre chacun d'eux, suivant les circonstances. (Art. 240 C.C.);

mais la loi n'accorde pas ce droit au père ou à la mère contre leur enfant naturel. Les dommages-intérêts que peut obtenir un père ou une mère, comme résultat du décès de son enfant, consistent uniquement dans la perte maté-

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rielle, c'est-à-dire dans la privation du secours alimentaire. Il s'ensuit que, le droit à ce secours n'existant pas dans l'espèce, la réclamation de l'intimée manque de base légale.

Devant cette cour, l'appelante nous a soumis de nouveau qu'elle n'était pas responsable de l'accident qui a causé la mort du fils de l'intimée; et, subsidiairement, que le montant des dommages accordés avait été calculé sur une base erronée. A l'appui de cette dernière prétention, elle invoquait cette théorie que, dans les cas de filiation naturelle, la réciprocité de l'obligation alimentaire n'existe pas en faveur du père ou de la mère.

Mais, au cours de l'argument, il a surgi une question qui n'avait été soulevée ni devant la Cour Supérieure, ni devant la Cour du Banc du Roi. Cette question est de nature telle que, si elle est tranchée à l'encontre de l'intimée, elle met fin à son action et il devient inutile de juger les autres points. C'est donc là que nous devons porter d'abord notre attention.

L'action est basée sur l'article 1056 du code civil. Dans la cause de *Regent Taxi & Transport Company* v. *La Congrégation des Petits Frères de Marie* (1), les juges de cette cour ont exprimé l'opinion que le recours auquel cet article pourvoit appartient exclusivement aux personnes qui y sont mentionnées. Cette opinion était conforme à un certain nombre d'arrêts de la jurisprudence de la province de Québec: *St-Laurent* v. *Compagnie de Téléphone de Kamouraska* (2), *Gohier* v. *Allan* (3), *Ruest* v. *Grand Trunk Co.* (4), *Dionne* v. *Compagnie des Chars Urbains* (5), *Tessier* v. *Grand Trunk Co.* (6).

C'est aussi ce qui ressort du jugement de monsieur le juge-en-chef Lamothe dans la cause de *Hunter* v. *Gingras* (7).

La question qui se pose dès l'abord est donc celle-ci:

La mère d'un enfant naturel est-elle une des personnes énumérées dans l'article 1056 du code civil?

Si la réponse est dans la négative, l'appel doit être maintenu et l'intimée doit être déboutée des fins de son action. Ce moyen de défense, comme nous l'avons dit, n'a pas été

(1) [1929] S.C.R. 650.
(2) (1905) 7 Q.P.R. 293.
(3) (1906) Q.P.R. 129.
(4) (1878) 4 Q.L.R. 181.
(5) (1895) Q.R. 7 C.S. 449.
(6) (1898) 5 R. de J. 1.
(7) (1921) Q.R. 33 K.B. 403, at 405.

invoqué par l'appelante, et il ne paraît pas avoir été discuté avant l'audition à la Cour Suprême. Je crois que nous devons quand même en tenir compte parce qu'il affecte le droit même de l'intimée de recouvrer une indemnité. Avant de passer à l'étude de la défense, la cour doit nécessairement se demander si le droit d'action a été établi. Or, le point de droit qui nous occupe, s'il est fondé, entraîne le rejet de l'action; et ce résultat s'imposerait même s'il n'y avait pas de défense au dossier.

En plus, par sa nature même, la question revêt un caractère d'ordre public qui empêcherait de l'écarter pour la simple raison qu'elle n'aurait pas été alléguée dans la défense, ni débattue au cours du procès. Nous croyons de notre devoir d'entrer dans l'examen de cette question.

Dans cette cause-ci, il faut accepter le fait que l'intimée est la mère de la victime. Les deux cours qui ont précédé l'ont décidé; et l'appelante ne nous a pas demandé de reviser les jugements sur ce point. Mais il est également admis de part et d'autre qu'elle est la mère d'un enfant naturel. Peut-elle, dans ce cas, réclamer le bénéfice de l'article 1056 du code civil?

Il ne suffit pas, pour répondre, de se borner au texte de l'article; il faut l'envisager dans son sens et dans son esprit; et, suivant l'expression de Baudry-Lacantinerie, *Des personnes,* vol. 1, 3 éd., n° 258, il faut " reconstituer la pensée du législateur ".

Nous sommes contraints d'admettre cependant que, en ce qui concerne l'article 1056 du code civil, nous manquons de plusieurs des procédés habituels d'investigation auxiliaire. Il n'y a pas dans le code Napoléon d'article correspondant à l'article 1056, et nous n'avons pas l'avantage de pouvoir référer à la jurisprudence des tribunaux français —excepté peut-être dans son application à un système de droit qui est semblable dans son ensemble. On ne nous a cité aucun jugement de la province de Québec où la question soit discutée. La cause de *Provost* v. *Jackson* (1), qu'on nous signale, ne me semble pas, en tout respect, constituer un *précédent.* D'abord, c'est une cause antérieure au code. Ensuite, il n'apparaît nulle part, dans le rapport de cette cause, que la légitimité de la filiation ait

(1) (1869) 13 L.C.J. 170.

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été mise en question. La déclaration alléguait

que du légitime mariage des demandeurs est né Joseph Provost * * * laissant pour ses héritiers naturels et légitimes et ses plus proches parents, ses père et mère etc.

A l'enquête, les demandeurs négligèrent de prouver leur mariage et la filiation du défunt, soit par la production d'actes de l'état civil, soit autrement. L'un des moyens des défendeurs en appel était que

les demandeurs n'ont pas produit la meilleure preuve de leurs qualités prises en l'action, savoir qu'ils étaient le père et la mère du défunt.

Dans les circonstances, mon humble opinion est que lorsque M. le juge MacKay dit:

In this case, it was absolutely necessary on the part of Provost and his wife to prove their marriage and establish that the boy killed was their son;

lorsque M. le juge Johnson dit:

Now, in the present case, the parents have not proved their relationship; therefore there is no right of action,

ni l'un ni l'autre n'ont présente à l'esprit la question de filiation légitime; mais ces passages de leurs jugements équivalent tout simplement à constater que les demandeurs n'ont pas prouvé l'allégation de leur déclaration telle que faite.

De même qu'il paraît y avoir dans la province de Québec absence totale de jurisprudence sur le point que nous discutons, nous sommes également privés, pour pénétrer la pensée du législateur dans l'article 1056, d'un autre moyen d'investigation, qui est de référer au rapport des codificateurs. Ainsi que le faisait remarquer monsieur le juge Mignault, dans la cause de *Regent Taxi* (1), à la page 683:

L'article 1056 est entré au code sans avoir passé par les rapports des codificateurs, et sans avoir figuré parmi les amendements que la législature fit au projet du code par la loi 29 Vict. c. 41.

Il n'est pas douteux que cet article tire son origine des statuts refondus du Canada de 1859, c. 78, qui reproduisent le statut 10-11 Vict., c. 6 (1847).

Et Lord Watson, dans la cause de *Robinson* v. *Canadian Pacific Ry. Co.* (2), signalait que ces statuts,

though not identical in expression, were the same in substance with the enactment of the English statute (9 & 10 Vict., c. 93) commonly known as Lord Campbell's Act.

Cela peut justifier de donner aux expressions qui se trouvent à la fois dans l'article 1056 du code civil et dans le

(1) [1929] S.C.R. 650. (2) [1892] A.C. 481.

Lord Campbell's Act le sens qui leur a été attribué dans la jurisprudence anglaise. Il paraît évident que, en vertu de cette jurisprudence, la mère d'un enfant naturel n'aurait pas de recours en l'espèce.

Mais, dans *Robinson* v. *Canadian Pacific Ry. Co.* (1), au passage que nous venons de citer, Lord Watson ajoutait (p. 487) que, sous certains rapports,

the terms of section 1056 appear to their Lordships to differ substantially from the provisions of the Lord Campbell's Act and of the provisions of the statute of 1859.

Les observations de Lord Davey, dans la cause de *Miller* v. *Grand Trunk Ry. Co.* (2) vont encore plus loin et considèrent qu'on ne serait pas en droit

in assuming this (i.e., une action en vertu de l'article 1056) to be a proceeding to be governed by the law applicable to actions under Lord Campbell's Act (p. 48).

Je préfère donc appuyer mon jugement sur l'interprétation interne de la loi. (Voir Geny, *Méthode d'interprétation*, 2e éd., vol. 1, p. 25.)

En insérant dans le code un principe inspiré d'un système de droit différent, il est raisonnable de croire que les termes dont le législateur s'est servi doivent être entendus suivant la signification qu'ils ont généralement dans la tradition doctrinale et dans le langage juridique du pays. Les mots " père ", " mère " et " enfants " dans l'article 1056 ne peuvent pas avoir pris dans la pensée du législateur du Québec un sens différent de celui qu'ils ont dans les autres articles du code.

Or, nous pouvons affirmer, croyons-nous, que chaque fois que ces mots sont employés seuls dans le code, excepté lorsque le texte impose une interprétation différente, ils réfèrent exclusivement à la paternité, à la maternité et à la filiation légitimes. Si le mot " enfant ", par exemple, dans l'article 54 du code civil, doit sans doute comprendre à la fois les enfants légitimes et les enfants naturels, à cause de la nature même de la prescription qu'il contient, il nous paraît certain que dans tous les autres cas où il se trouve seul dans le code, et, en particulier, dans le chapitre des successions, il signifie exclusivement les enfants légitimes. Comme conséquence, les mots " père " et " mère " signifient exclusivement le père ou la mère d'un enfant légitime.

(1) [1892] A.C. 481.

(2) [1906] 75 L.J. Rep. 45.

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Cette intention du législateur est spécialement marquée dans le contraste entre le chapitre du code qui traite des obligations qui naissent du mariage et celui qui traite des enfants naturels. L'article 166 dit que

les enfants doivent des aliments à leurs père et mère et autres ascendants qui sont dans le besoin.

Si les mots " enfants ", " père " et " mère " employés dans cet article visaient à la fois la parenté légitime et la parenté naturelle, l'article 240 n'aurait plus sa raison d'être. Il est à remarquer, au contraire, que le législateur, dans le but d'étendre à l'enfant naturel le droit de réclamer des aliments, a cru devoir édicter cet article spécial et, de plus, qu'il y a désigné l'enfant illégitime par les mots " enfant naturel ", indiquant bien par là que ce dernier n'est pas compris par l'emploi du mot " enfant " seul. L'article 239 vient compléter cet argument en édictant que seuls les enfants légitimés par le mariage subséquent ont les mêmes droits que les enfants nés du mariage. Toute l'économie du code civil est édifiée sur le principe de la légitimité de la filiation; et les droits résultant de la filiation naturelle, ou des relations entre les père, mère et enfants naturels sont traités à part dans des articles distincts.

Cette observation, d'ailleurs, ne s'applique pas seulement au code civil. Il est très important de noter que dans la loi des Accidents du travail (S.R.Q. 1925, c. 274) qui traite d'un sujet connexe aux articles 1053 et 1056 du code civil, lorsque le législateur parle de l'indemnité, il s'exprime comme suit (art. 4):

L'indemnité est payable de la manière suivante:

* * * * *

2. aux enfants légitimes ou aux enfants naturels reconnus avant l'accident, de manière à aider à pourvoir à leurs besoins jusqu'à l'âge de seize ans révolus, ou plus s'ils sont invalides.

On voit donc que lorsque l'intention est d'inclure les enfants naturels dans une disposition de la loi dans la province de Québec, cette intention est manifestée d'une façon expresse.

La conséquence qu'il faut déduire généralement de cette constatation est qu'il en est de même lorsque le législateur emploie les mots " père " ou " mère " seuls.

Par surcroît, cette interprétation est conforme à la tradition historique et doctrinale. C'est ainsi que l'envisagent Ferrière et Merlin.

Pothier (édition Bugnet, vol. 8, *Substitutions,* n° 67) dit:

67. Ce terme "enfants", soit dans la disposition, soit dans la condition, ne comprend que les enfants légitimes et ceux qui jouissent de l'état civil. Les bâtards n'y sont pas compris etc.

Laurent, dans ses *Principes de droit civil,* au volume 4, conclut dans le même sens que Pothier. Il se demande s'il y a une analogie entre la filiation naturelle et la filiation légitime. Il répond que là où les principes sont contraires il ne peut pas y avoir d'analogie. Les textes diffèrent, et l'esprit de la loi encore bien plus (p. 7). L'enfant naturel a une filiation aussi bien que l'enfant légitime; mais cette filiation n'est reconnue par la loi que dans la limite fixée par elle (p. 11). "L'esprit qui anime le code", ajoute-il, "est un esprit moral", et le code traite les enfants naturels différemment afin d'honorer le mariage. Plus loin (p. 43), il parle de la défaveur dont la loi frappe la filiation illégitime et la restreint dans les limites les plus étroites "parce qu'il en résulte une espèce de tache".

Cette constatation elle-même conduit au principe d'interprétation très ancien que toute législation a pour base principale "l'honnêteté et l'utile" et qu'on s'écarte de la volonté du législateur chaque fois qu'entre diverses significations possibles on admet celle qui n'est pas conforme à ce principe (Delisle, Principes de l'interprétation des lois, vol. 1, p. 10).

Pour les raisons que je viens d'exposer, j'en arrive à la conclusion que la mère d'un enfant naturel n'est pas comprise dans l'énumération des personnes qui peuvent recouvrer en vertu de l'article 1056 du code civil. Il s'ensuit que, dans l'espèce, l'appel doit être maintenu et l'action de la demanderesse-intimée doit être rejetée.

Mais l'appelante réussit par suite d'un moyen qu'elle n'a pas invoqué et qui eût mis fin à la cause dès le début des procédures, s'il eût été soulevé en temps utile. Dans les circonstances, je serais d'avis de n'accorder de frais à l'appelante dans aucune des cours.

CANNON J.—Sans qu'il soit nécessaire de décider si la mère qui, hors mariage, a porté et mis au monde un enfant qu'elle a reconnu peut réclamer des aliments de ce fils naturel, le jugement en cette cause dépend du sens que comportent les mots "mère" et "enfants" dans la version

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française de l'article 1056 du code civil, tel qu'il se lisait avant la modification apportée par 20 Geo. V., c. 98. Cet article 1056 n'avait pas été incorporé dans le rapport des codificateurs chargés de codifier les lois du Bas-Canada.

Le préambule du chapitre II des Statuts Refondus du Bas-Canada (concernant la codification des lois du Bas-Canada qui se rapportent aux matière civiles et à procédure) constate, en 1865, que les lois du Bas-Canada, en matière civile, étaient celles qui, à l'époque de la cession du pays à la Couronne d'Angleterre, étaient suivies dans cette partie de la France régie par la Coutume de Paris; que ces lois et coutumes avaient été modifiées en France et réduites à un code général, de manière que les anciennes lois encore suivies dans le Bas-Canada n'étaient plus ni réimprimées ni commentées en France, et qu'il devenait de plus en plus difficile d'en obtenir des exemplaires et des commentaires. Ce préambule constate de plus que nos lois civiles avaient aussi été modifiées par l'introduction de certaines parties des lois d'Angleterre dans des cas spéciaux.

Le paragraphe 6 ordonnait aux commissaires, en rédigeant le code civil, de n'y incorporer que les dispositions qu'ils tiendront pour être alors réellement en force et de citer les autorités sur lesquelles ils s'appuieraient pour juger qu'elles l'étaient.

Comme je l'ai dit plus haut, le rapport des commissaires ne contenant pas cet article 1056, nous devons nous contenter de constater qu'il fait partie de l'acte 29 Vict., c. 41, " concernant le code civil du Bas-Canada ", dont le préambule déclare que les commissaires se sont en tout point conformés aux exigences de la loi précitée, et que le projet, tel qu'amendé par la législature ayant été finalement adopté par les deux chambres, le code tel que contenu dans le rôle déposé au bureau du greffier du conseil législatif aura force de loi au Canada du jour plus tard fixé par proclamation, savoir, le 1er août 1866.

Le savant juge-en-chef de cette cour a démontré de quelle façon les tribunaux de l'Angleterre, dès avant et depuis cette date, avaient appliqué le Lord Campbell's Act, qui est certainement un statut anglais introduit substantiellement dans la législation civile du Bas-Canada par le parlement des provinces unies.

J'ai cru bon cependant de constater quelle interprétation on donnait aux mots " mère " et " enfant " dans l'ancien droit français, avant les changements introduits par la Révolution et le Code Napoléon.

Ferrière, *Dictionnaire de Droit,* vbo. " enfants ", dit:

On n'entend ordinairement par le nom d'enfants que ceux qui sont légitimes, car ce qui caractérise un enfant, c'est d'être né d'un père et d'une mère unis par un mariage public: *Filius est qui ex viro & uxore nascitur simul commorantibus, scientibus vicinis, aut qui legitimatus est subsequenti matrimonio.*

A l'égard des bâtards, on ne leur donne le nom d'enfants qu'en ajoutant quelque qualification, comme celle d'enfants naturels ou autre qui distingue leur condition de celle des enfants légitimes, surtout quand il s'agit de succession *ab intestat:* comme ils n'y ont aucune part, ils ne sont pas compris sous le nom d'enfants, non plus que quand il s'agit d'autres droits inhérents à la famille.

Il suffit de lire les articles de notre code civil pour constater que, lorsqu'on veut y parler des bâtards, on a ajouté, comme le dit Ferrière, la qualification d'enfants naturels, ou autre expression distinctive:

121. L'enfant naturel qui n'a pas atteint l'âge de vingt et un ans révolus, doit, pour se marier, y être autorisé par un tuteur *ad hoc* qui lui est nommé à cet effet.

218. L'enfant conçu pendant le mariage est légitime et a pour père le mari * * *.

237. Les enfants nés hors mariage, autres que ceux nés d'un commerce incestueux ou adultérin, sont légitimés par le mariage subséquent de leurs père et mère.

240. La reconnaissance volontaire ou forcée par le père ou la mère de leur enfant naturel, donne à ce dernier le droit de réclamer des aliments contre chacun d'eux, suivant les circonstances.

768. Les donations entrevifs faites par le donataire à celui ou à celle avec qui il a vécu en concubinage, et à ses enfants incestueux ou adultérins, sont limitées à des aliments.

(Cette prohibition ne s'applique pas aux donations faites par contrat de mariage intervenu entre les concubinaires.

Les autres enfants illégitimes peuvent recevoir des donations entrevifs comme toutes autres personnes).

Ferrière, *dito,* vbo. " Légitime ":

Se dit de celui qui est né en légitime mariage.

Dito, vbo. " Illégitime ":

On appelle celui qui est né d'une conjonction réprouvée, ou non autorisée par les lois, un enfant illégitime.

D'après moi, cet article 1056 a eu pour effet de limiter à certains membres de la parenté de la victime le recours qui, d'après 1053, aurait pu être exercé par tous ceux souffrant des dommages à la suite d'un délit ou quasi-délit causant la mort. Aussi longtemps que notre législation conservera le christianisme et sa morale comme base

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et réprouvera l'union libre, je suis d'avis qu'il faudra limiter aux pères et mères d'enfants légitimes le recours de 1056.

Je cite Merlin, *Répertoire de jurisprudence,* vbo. bâtard:

> Dans l'ordre de la nature, la condition des bâtards et des enfants légitimes est la même, puisqu'ils sont tous enfants du même sang; mais elle est inégale dans le droit civil qui prononce contre les bâtards, non seulement l'incapacité de succéder à leur père, mais même de recevoir de lui des dons et legs considérables: on regarde ces sortes de personnes comme n'étant d'aucune famille et n'ayant point de parents: c'est la loi civile qui établit cette différence entre les bâtards et les légitimes: c'est elle seule qui leur impose une peine à cause de la faute de leur père.

N'oublions pas, en cette matière, ce que disent Planiol et Ripert, II Droit civil, 1926, p. 6:

> Enfin il n'y a pas de partie du droit qui touche d'aussi près à la morale: l'organisation de la famille n'est solide que si elle est fondée sur une morale rigoureuse. Les règles qui gouvernent la famille constituent autant, et quelquefois plus, des préceptes de morale que des règles de droit.
>
> Par là le droit de famille touche de très près aux préceptes religieux eux-mêmes. De fait, il fut régi en France pendant de longs siècles par le droit canonique; si la Révolution l'a sécularisé, elle n'a pu en changer le caractère, et, dans la mesure où les lois révolutionnaires et les lois modernes se sont écartées des principes sur lesquels la famille avait été établie, elles ont affaibli la solidité de l'institution.

Partout dans le code, le mot "enfants", lorsqu'il est employé seul, n'a et ne peut avoir d'autre signification que celle d'enfants légitimes, sauf aux articles 54, 55 et 56, concernant les actes de naissance, où l'on prévoit le cas où un *enfant,* dont le père, ou la mère, ou tous deux, sont inconnus, est présenté au fonctionnaire public. D'ailleurs, notre législature a entendu maintenir le droit établi par la Coutume de Paris et par S.R.C. c. 78 (1859) codifiant les dispositions du statut 10-11 Vict., c. 6, dont le but, dit Mignault (5 C.C. 339) était de reproduire le statut impérial mieux connu sous le nom de "Lord Campbell's Act".

L'article 1056 doit recevoir l'interprétation et l'application qui lui étaient données sous l'empire de la loi qu'il a remplacée; chez nous, contrairement à ce qui a lieu en France, la position des enfants naturels ne diffère pas substantiellement aujourd'hui de celle qui leur était faite par le droit existant au temps de la cession du pays.

Je suis donc disposé à dire, adaptant le langage de la Cour d'Appel de Bordeaux, dans son arrêt du 4 décembre

1851, *re Masson* v. *Hostein* (1), que, dans le langage de l'homme, comme dans le langage de la loi française, ancienne et moderne, le mot " enfants " ne peut s'entendre que des descendants légitimes, car la législature, à moins de dire clairement le contraire, n'est censée prévoir que ce qui est honnête et légitime et n'est pas présumée supposer, comme faisant partie de la famille, des enfants naturels qui ne peuvent naître que d'une union réprouvée par la morale.

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Je suis d'avis de renverser le jugement des cours inférieures et de renvoyer l'action sans frais en première instance, en appel et devant cette cour.

Appeal allowed without costs.

Solicitors for the appellant: *Foster, Place, Hackett, Mulvena, Hackett & Foster.*

Solicitors for the respondent: *Walsh & Walsh.*