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HIS MAJESTY THE KING (RESPONDENT) ..... } APPELLANT;

*Feb. 28; Mar. 3. *May 5.

AND

MERGUERITE HENRIETTA JANE ARMSTRONG (SUPPLIANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Negligence of fellow-servant — Operation of railway — Defective switch—Public work—Tort—Liability of Crown—Right of action—Exchequer Court Act, s. 16(c)—Lord Campbell's Act—Art. 1056 C.C.

In consequence of a broken switch, at a siding on the Intercolonial Railway, (a public work of Canada), failing to work properly, although the moving of the crank by the pointsman had the effect of changing the signal so as to indicate that the line was properly set for an approaching train, an accident occurred by which the locomotive engine was wrecked and the engine-driver killed. In an action to recover damages from the Crown, under article 1056 of the Civil Code of Lower Canada:

Held, affirming the judgment appealed from (11 Ex. C.R. 119), that there was such negligence on the part of the officers and servants of the Crown as rendered it liable in an action in tort; that the "Exchequer Court Act," 50 & 51 Vict. ch. 16, sec. 16(c), imposed liability upon the Crown, in such a case, and gave jurisdiction to the Exchequer Court of Canada to entertain the claim for damages; and that the defence that deceased, having obtained satisfaction or indemnity within the meaning of article 1056 of the Civil Code, by reason of the annual contribution made by the Railway Department towards The Intercolonial Railway Employees' Relief and Insurance Association, of which deceased was a member, was not an answer to the action. *Miller* v. *The Grand Trunk Railway Co.* ([1906] A.C. 187) followed.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

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APPEAL from the judgment of the Exchequer Court of Canada (1) which maintained the respondent's petition of right with costs.

The suppliant, on behalf of herself and her children, claimed damages from the Crown, under the provisions of section 20 (*c*) of the "Exchequer Court Act" (R.S. [1906] ch. 140), and article 1056 of the Civil Code of Lower Canada, for the death of her husband who met his death in consequence of injuries sustained while he was in the discharge of his duty as a locomotive engineer in the employ of the Crown and in charge of the engine attached to a west-bound passenger train on the "Intercolonial Railway" (a public work of Canada), at DeLotbinière station in the Province of Quebec, on the 26th of November, 1903. The suppliant charged that the employees of the Crown left the east-end switch of the siding in an unsafe condition, not properly locked nor set to take the main line; that no flagman had been placed to stop the west-bound passenger train which was being driven by the engine in charge of deceased; and that the semaphores and signals were not set at danger.

The switch in question was what is known as a "stub-switch"; the pointsman had attempted to set the switch for the siding, moved the crank and target in such a manner as to indicate that the switch was open, but, owing to some alleged defect in the connecting bar, and possibly to the effect of a snow storm clogging the rails, the swing-rails failed to act as intended and take the line of the siding. The engineer applied the brakes on approaching the siding but the train was still moving at considerable speed, the driv-

(1) 11 Ex. C.R. 119.

ing wheels mounted the track at the points, left the main line and continued to run along the ties for a short distance when the engine was wrecked and the engineer received the injuries which caused his death. The evidence shewed that the target was for the main line; the bolts of the connecting rod were broken and the swing-rails, curved by the impact of the train, were set for the main line after the accident, and there was no padlock on the switch.

The defence raised the following points of law: (*a*) that no action in tort could lie against the Crown; (*b*) that any right of action given by the statute was personal and could lie only at the suit of the personal representatives of deceased; (*c*) that deceased, by his contract of employment, had released and discharged the Crown from any claims of the nature sought to be enforced; and (*d*) that the negligence alleged to have caused the accident was that of a fellow-servant of deceased and, consequently, there could be no liability on the part of the Crown. It was also charged that the deceased, by failing to obey rules and observe certain signals set against his train, had been himself the cause of his own misfortune by contributory negligence.

The Exchequer Court judge, Burbidge J., held that there was a right of action under the 16th section of the "Exchequer Court Act," (now sec. 20) and that article 1056 C.C. applied; he found that deceased was, at the time of his death, a member of the "Intercolonial Railway Employees' Relief and Insurance Association," class C., and that, except that the suppliant had not accepted the insurance money to which she was

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entitled, the case was similar to *Grenier* v. *The Queen* (1). The learned judge, following *Miller* v. *The Grand Trunk Railway Co.*(2), and *Robinson* v. *The Canadian Pacific Railway Co.*(3), maintained the petition of right with costs.

Newcombe K.C. (Deputy Minister of Justice) for the appellant. Independently of statute the Crown is not liable; see cases cited and remarks by Strong C.J. in *City of Quebec* v. *The Queen*(4), at page 423. Section 16(*c*) of the "Exchequer Court Act" was not intended to create any liability which did not formerly exist. The full title of the Act "An Act to Amend 'the Supreme and Exchequer Courts Act' and to make better Provision for the Trial of Claims against the Crown," shews its scope and that it was not to give a remedy but to confer jurisdiction upon the court to give effect to an existing remedy. The trial judge derives the liability from the "Official Arbitrators Act"(33 Vict. ch. 23, sec. 1; R.S.C. ch. 40, sec. 6), the jurisdiction of the official arbitrators having been transferred to the Exchequer Court by 50 & 51 Vict. ch. 16, sec. 58. Whatever jurisdiction may have been transferred to the Exchequer Court by this provision it did not impose any liability, and there is nothing to warrant the Exchequer Court in entertaining a petition of right based upon a wrong in respect of which the Crown cannot be under any liability unless imposed by statute.

Section 16(*c*) of the "Exchequer Court Act" cannot be so construed as to create liability in this case,

(1) 6 Ex. C.R. 276.
(2) [1906] A.C. 187.
(3) (1892) A.C. 481.
(4) 24 Can. S.C.R. 420.

or to affect the application of the maxim *actio personalis moritur cum personâ*. See Broom's Legal Maxims (5 ed.), p. 909. The provision is apparently intended to afford jurisdiction for giving effect to claims of the kind mentioned where such claims can be independently established.

The right of action, if any, given by section 16(*c*) is a personal one and an action will only lie at the suit of the personal representatives of the deceased. That section does not by any implication give effect, as against the Dominion Crown, to the provisions of any provincial statute. A Dominion statute is not intended to receive as many different constructions as there are provinces in the Dominion. The section must receive a uniform construction all over the whole Dominion, for it was intended to operate in each part of Canada in precisely the same way and with precisely the same effect. Hence it is quite immaterial to consider the provisions of article 1056 of the Civil Code. An intention in favour of uniformity must be presumed unless a contrary intention be clearly expressed. In all the provinces legislation more or less closely corresponding to "Lord Campbell's Act" has been adopted. In all the provinces other than Quebec the right of action given by these statutes is certainly a representative one. In some of the provinces the action must be instituted in the name of the personal representatives of the deceased. In others the widow may sue in her own name. In Quebec, the Judicial Committee have considered, in *Robinson* v. *The Canadian Pacific Railway Co.*(1), followed in *Miller* v. *The Grand Trunk Railway Co.*(2), that the relatives have an independent and not a representative right.

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

(2) [1906] A.C. 187.

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There is, therefore, no uniformity of provincial legislation to which the Dominion statute can reasonably be held to have had reference, and it becomes necessary, if the Dominion statute imposed a new liability, to determine, irrespective of the various provincial enactments, what is the nature of the claim, who may be claimants, and what is to be the measure of damages. It is for the jurisprudence of the Dominion courts to construe the statute and determine the extent of the liability. In the section, the words "death" or "injury" are coupled together. In the case of injury, only the person who may have a claim can sue, although others dependent upon him may be damaged to the same or even to a greater extent than if he had been killed. Equally in the case of death it would seem that the right of action must be represented in the same manner, that is by the personal representative or those claiming under the person.

While the Judicial Committee have decided that article 1056 C.C. involved differences from the law governing actions under "Lord Campbell's Act," except in regard to such points, the law remains the same. The article is substantially the old statute of the Province of Canada (10 & 11 Vict. ch. 6, C.S.C., [1859] ch. 78); *The Canadian Pacific Railway Co.* v. *Robinson*(1), at pages 123 and 125, *per* Taschereau J.

Article 9 C.C. shews that article 1056 C.C. does not apply to the Crown. Special provisions affecting the Crown are also contained in certain articles of the Code shewing that the Crown is specially mentioned where it is intended that the Crown shall be affected. See article 1994 C.C., considered in *Exchange Bank of Canada* v. *The Queen*(2); arts. 2,222, 2,286 and 2,211

(1) 14 Can. S.C.R. 105.

(2) 11 App. Cas. 157.

to 2,216 C.C.; *Maritime Bank* v. *The Queen*(1), and authorities there cited; Chitty's Prerogatives of the Crown, pp. 4 *et seq.*, and p. 25; *Attorney-General* v. *Black*(2), *per* Reid C.J.; *Monk* v. *Ouimet*(3), *per* Dorion C.J. The result will be the same if the principles of the French common law be held to apply. Burlamaqui, *"Principes du Droit de la Nature et des Gens,"* vol. 4, pp. 98 *et seq.*; Vattel's Law of Nations (Chitty's translation), pp. 15 and 16.

The deceased by his contract of employment released and discharged the appellant from any claims of the nature of the present claim. The question is not to be governed by provincial law. If the Code is not to be looked to, the suppliant can have no right of action if deceased himself never had such right, and any defence which would have been available against the deceased, had he survived, may be set up in this action. Such is the established rule in actions under "Lord Campbell's Act." Addison on Torts (6 ed.), pp. 604 *et seq.; Griffiths* v. *The Earl of Dudley*(4). Deceased was a member of the Intercolonial Railway Employees' Relief and Assurance Association, an unincorporated society, to the funds of which the Government of Canada contributes annually $6,000. It is obligatory on every railway employee to become a member of this association. One of its rules was that, in consideration of such contribution, the Government should be relieved of all claims for compensation for injury or death of any member. These rules were in force at the time of the accident, and had been in force throughout the whole period of the employment of the deceased, and the contribution by

(1) 17 Can. S.C.R. 657.
(2) Stu. K.B. 324.
(3) 19 L.C. Jur. 71.
(4) 9 Q.B.D. 357.

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the Crown to the funds of the association had continued during the whole period. It was one of the terms of the contract under which the deceased sought and obtained employment that he would become a member of the association and be bound by its rules, and he agreed, in consideration of such employment, the contribution of the Government of Canada and the advantages to which he might become entitled under the rules of the association, that the Government should be relieved of all claims for compensation arising from injury or death. He would therefore have been precluded from maintaining an action had he survived, and the suppliant is likewise precluded. *Clements* v. *London & North Western Railway Co.*(1); *Griffiths* v. *The Earl of Dudley*(2). The deceased thus obtained satisfaction, and his relatives have therefore no claim under article 1056 C.C., even if applicable.

The negligence alleged to have been the cause of the accident, was that of a fellow-servant of the deceased. On the principles just discussed, this defence is not to be judged by either English or French law, as such, but by the jurisprudence of the Exchequer Court proceeding on the principles of broad and general application, and, even if governed by Quebec law, the plea affords a good defence under that law. The principle underlying the doctrine of common employment is stated in *Hutchison* v. *York, Newcastle & Berwick Railway Co.*(3). A servant when engaging undertakes, as between himself and his master, to run all the ordinary risks of the service (*risque professionnel*), and this includes the risk of negligence upon

(1) [1894] 2 Q.B. 482. (2) 9 Q.B.D. 357.
(3) 5 Ex. 343.

the part of a fellow-servant in the discharge of his duty as servant of the common master. It is not a positive rule establishing freedom from liability of employers in a particular class of cases, but the purely negative rule that, a servant having undertaken to accept the ordinary risks of his employment, the risk of injury arising from negligence of his fellow-servants is not an exception to such risks. The doctrine, only comparatively recently established, lays down no new principles. See *Priestly* v. *Fowler*(1) decided in 1837, in which the doctrine was first laid down, and *Bartonshill Coal Co.* v. *McGuire*(2), at page 306, *per* Chelmsford L.C. The principles on which the doctrine is based are discussed by Lord Chancellor Cranworth in *Bartonshill Coal Co.* v. *Reid* (3), at page 284, and further elaborated by Lord Chancellor Cairns in *Wilson* v. *Merry*(4), at pages 331-2.

The position is that, by the statute, a certain liability is imposed upon the Crown, and it is for the court to say what limitations, if any, are to be placed upon that liability. The Crown now asks, just as the first advocates of the doctrine asked, that its liability be so limited not because it is the law in England but because such limitation is a reasonable one. The jurisprudence of England is an illustration and not an authority on the question.

The Dominion Parliament recently passed the statute, 4 Edw. VII. ch. 31, providing against contracting out by railway servants. It does not apply in the case of Government railways, although it was competent for Parliament to pass similar legislation that

(1) 3 M. & W. 1.
(2) 3 Macq. 300.
(3) 3 Macq. 266.
(4) L.R. 1 H.L. Sc. 326.

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would. Can the effect be the same? Is it immaterial whether such legislation is passed or not? If so, the effect of the "Exchequer Court Act" must be to make the Crown liable, unless the Parliament has said it will not be liable; in other words, that it is liable unless Parliament has said, not that it will, but that it will not be liable. In the *Miller Case*(1) it was decided that 4 Edw. VII. ch. 31 was valid, and (so far as the Province of Quebec is concerned) the statute only confirms the alleged existing law. But the Grand Trunk Railway Co. was, admittedly, subject to the laws of Quebec, and the Dominion is not. In the case of the Dominion Crown it is a question of creating the liability, and for this a Dominion statute is necessary.

The limitation of the liability by the jurisprudence of this court is by no means confined to the doctrine of common employment. A single other instance will suffice. Assume, as is suggested, that the Quebec law does not recognize the defence of contributory negligence (*Canadian Pacific Railway Co.* v. *Boisseau*(2)), yet it might certainly be properly and probably successfully invoked in the Exchequer Court. See *Priestly* v. *Fowler*(3); *Farwell* v. *Boston and Worcester Rd. Corporation*(4); *Hutchinson* v. *York, etc., Ry. Co.*(5); *Bartonshill Coal Co.* v. *Reid*(6), *per* Lamworth L.J., at pages 285, 298, 300; *Wilson* v. *Merry* (7), at pages 330-331; Smith's Master and Servant (with notes on Canadian law) 6 ed., pp. 183, *et seq.*

Even if the question is to be decided according to Quebec law, the plea of common employment affords a good defence under that law. It is not to be found

(1) (1906) A.C. 187.
(2) 32 Can. S.C.R. 424.
(3) 3 M. & W. 1.
(4) 4 Metcalf 49; 3 Macq. 316.
(5) 5 Ex. 343.
(6) 3 Macq. 266.
(7) L.R. 1 H. of L., Sc. 326.

in the Code, but it is not a matter *positivi juris* but is of a negative character. The law in Scotland, like the Code, is founded on the civil law. The House of Lords held that the doctrine obtained as much in Scotland as in England; and why? The Lord Chancellor, in *Bartonshill Coal Co.* v. *McGuire*(1), said: "But it is said * * * there is no such law existing in Scotland. I own I was surprised to hear the assertion made, because I had assumed that the authorities in England had been based upon principles which were not of local application nor peculiar to any one system of jurisprudence. The decisions upon the subject in both countries are of recent date, but the law cannot be considered so; the principles upon which these decisions depend must have been lying deep in each system ready to be applied when the occasion called them forth." See also *Canadian Pacific Railway Co.* v. *Robinson*(2), at page 125, *per* Taschereau J.

It has now to be considered whether or not there is anything in the Quebec jurisprudence which will support the claim that the doctrine does not obtain in that province. In 1865, in *Fuller* v. *Grand Trunk Railway Co.*(3), it was decided that a servant had no action of damages against his employer for any injury he might sustain through the negligence of his fellow-servants, that French law did not govern the case, and the Court of Review decided in accordance with the principles laid down in the English cases of *Priestly* v. *Fowler*(4) and *Hutchinson* v. *York, etc., Railway Co.*(5). This was followed, in 1867, by *Bourdeau* v. *Grand Trunk Co.*(6), where it was decided

(1) 3 Macq. 300.
(2) 14 Can. S.C.R. 105.
(3) 1 L.C.L.J. 68.
(4) 3 M. & W. 1.
(5) 5 Ex. 343.
(6) 2 L.C.L.J. 186.

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that "the plaintiff cannot recover damages from his employers, the accident having occurred through the negligence of a fellow-servant. The plaintiff in entering the service of the company took the risk of these accidents upon himself." In *Robinson* v. *The Canadian Pacific Railway Co.*(1), the question of common employment was not really raised, but Ramsay J., expressed an opinion that it was settled law in this country that the employer was liable for the want of skill of a fellow-servant, and added, "We assimilate the want of skill of the fellow-workman to defective plant." That this is precisely what the English law does. It is an essential principle of common employment that a master is only relieved of liability if he has done his own duty by providing proper plant as well as properly qualified servants. In 1896, in *Dupont* v. *The Quebec Steamship Co.*(2) the Court of Review based its judgment on the use of defective machinery and Cimon J., adds: "J'ajouterai que j'ai beaucoup de doute que Dupont puisse être considéré un *fellow-servant,* de l'équipage du Muriel."

In 1887, in *Canadian Pacific Railway Co.* v. *Robinson*(3), at page 114, we find an *obiter dictum* of Chief Justice Strong: "This point (the negligence of a fellow-servant of the deceased) however well founded in fact would be an insufficient defence in point of law, for, according to the best French authorities, the rule of modern English law upon which that defence is founded is rejected by the French law which governs the decisions of such questions in the Province of Quebec," and he cited two French text writers, 31 Demolombe, No. 368, and 2 Sourdat, No. 911. Even

(1) M.L.R. 2 Q.B. 25. (2) Q.R. 11 S.C. 188.
(3) 14 Can. S.C.R. 105.

assuming the French law were as settled as supposed, it is not correct to say that the decision of such questions in the Province of Quebec is governed by French law, especially when, as appears to be the case here, the decision of the courts depends on the express terms of the French Code. In 1894, in *Filion* v. *The Queen*(1), the above opinion of Strong C.J., is the only authority referred to by Burbidge J., for his judgment rejecting the defence of common employment, and the Supreme Court(2) on this point simply approved the judgment of the Exchequer Court. In *The Queen* v. *Grenier*(3), the Exchequer Court was reversed, the Supreme Court holding that the deceased had obtained satisfaction during his lifetime, and there is again an *obiter dictum* of Strong C.J., who says of the defence of common employment: "There is no use in referring to authorities on this point as we are bound by our previous decisions regarding it." In *The Asbestos and Asbestic Co.* v. *Durand*(4), at page 292, King J., delivering the judgment of the majority of the court, refers without comment to the previous cases of *The Queen* v. *Filion*(1), and *The Queen* v. *Grenier* (3), but he adds: "Nor was the deceased a consenting party to the excessive quantity of dynamite being deposited near him, for the evidence shews that the deposit of such a quantity was contrary to the usual course of business."

The above appears to constitute the whole body of the jurisprudence of the Dominion and provincial courts on the question of the place in the law of Quebec of the doctrine of common employment. It really comes down to an *obiter dictum* of the former Chief

(1) 4 Ex. C.R. 134.
(2) 24 Can. S.C.R. 482.
(3) 30 Can. S.C.R. 42.
(4) 30 Can. S.C.R. 285.

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Justice Strong. With all respect, this cannot be entitled to much weight in a matter involving principles of such great consequence. There is nothing in either the law or jurisprudence of the Province of Quebec which can reasonably be set against the weighty and considered decisions of the House of Lords above referred to; decisions based, as they expressly claim, not on any peculiarities of English law or jurisprudence but on principles of broad and universal application.

We also refer to *Ryder* v. *The King*(1), *per* Nesbitt J., at pages 465, 466; *Hall* v. *Canadian Copper Co.* (2); *Slattery* v. *Morgan*(3); 12 Am. & Eng. Encyl. of Law (2 ed.) 901, notes as to the French jurisprudence respecting *risque professionnel,* and authorities there cited; *Spence* v. *Healey*(4), as to satisfaction in anticipation, and 1 Am. & Eng. Encycl. of Law, *vo.* "Accord," at page 423.

R. C. Smith K.C. and *W. G. Mitchell* for the respondent. The evidence clearly shews that the accident was caused solely by the fault of the officers and servants of the Crown in the discharge of their duties as employees on the railway and that no contributory negligence can be ascribed to the deceased.

Under the circumstances the Crown cannot be discharged from responsibility. It seems that a wide distinction lies between the nature of the action instituted under "Lord Campbell's Act" and art. 1056 C.C.; *Robinson* v. *Canadian Pacific Railway Co.*(5); *Miller* v. *Grand Trunk Railway Co.*(6).

(1) 36 Can. S.C.R. 462.
(2) 2 Legal News 245.
(3) 35 La. Ann. 1166.
(4) 8 Ex. 668.
(5) [1892] A.C. 481.
(6) [1906] A.C. 187.

As to the defence of common employment, see *Filion* v. *The Queen*(1).

An action in tort lay against the Crown, under section 1 of the Act, 33 Vict. ch. 23, passed in 1870, if the claim arose from death or injury to the person or property on any railway, canal or public work under the control and the management of the Government of Canada. This Act was abrogated by 50 & 51 Vict., ch. 16, creating the Exchequer Court of Canada and, from sections 58 and 59 of that Act, any claim which could be made the subject of a decision by the official arbitrators may be subject to the jurisdiction of the Exchequer Court; a new jurisdiction was created extending to claims of the nature of a tort, like the present one, and liability was imposed on the Crown in such cases for the wrongful acts of its officers and servants.

Apart from the statute the Crown is bound by the provisions of the Civil Code and can claim no immunity except that which constitutes the attributes of sovereignty; *Campbell* v. *Judah*(2); *Exchange Bank of Canada* v. *The Queen*(3). Article 9 C.C. does not relieve the Crown from responsibility; 2 Migneault, pp. 106 *et seq.;* 2 Loranger, Civil Code, pp. 194 to 197; Chitty, Prerogatives of the Crown, page 382.

As to the claim that because, at the time of his death, deceased was a member of the Intercolonial Railway Employees' Relief and Insurance Association no action can be maintained, see *Robinson* v. *The Canadian Pacific Railway Co.*(4), and *Miller* v. *Grand Trunk Railway Co.*(5). The Privy Council laid down the rule that the right of action under art.

(1) 4 Ex. C.R. 134; 24 Can. S.C.R. 482.
(2) 7 Legal News 147.
(3) 11 App. Cas. 157.
(4) [1892] A.C. 481.
(5) [1906] A.C. 187.

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1056 C.C. is an independent and personal right and is not, as in "Lord Campbell's Act," conferred on the representatives of the deceased only. Therefore, unless deceased obtained real and tangible indemnity or satisfaction for the offence or quasi-offence, the right of action remains unimpaired in his widow and children.

In the first place, the indemnity payable in respect to the insurance did not come from the offender even in part. In this case, on reference to rule 7, it will be seen that in case of death the full amount to be raised is collected in proportion from every surviving member who pays an assessment according to the amount of his insurance. It is quite evident that the amount contributed by the Railway Department to the association is not devoted to the death fund but to the sick fund. Secondly, the Privy Council, in the *Miller Case* (1), found that the payment is independent of and bears no relation to the offence or quasi-offence and would equally have to be paid if the deceased had died a natural death. The same reason applies in the present instance. That decision supports the view that the Crown is not relieved from responsibility by reason of membership in the association. The Privy Council, in the *Miller Case* (1), merely assumed the by-law to be valid. But if the right of action, vested in the widow and children of the deceased, is separate, personal and independent, the legality of a by-law or regulation under the provisions of which the Crown could, in advance, contract itself out of responsibility and the deceased relieve the Crown of a responsibility which did not, as yet, exist to the extent of depriving

(1) [1906] A.C. 187.

the widow and children of their recourse, it can be successfully assailed.

There is no Dominion law affecting negligence; the *lex loci* must apply to the civil right to be dealt with in the province. See 2 Wharton, Conflict of Laws (3 ed.), secs. 475, 477; also other authorities cited in *Dupont* v. *Quebec Steamship Co.*(1), by Routhier J., at page 192. Art. 1056 C.C. is not a re-enactment of "Lord Campbell's Act," see *per* Pagnuelo J., in *Miller* v. *The Grand Trunk Railway Co.*(2), at page 363, and authorities cited; *Roy* v. *The Grand Trunk Railway Co.*(3). We also rely upon *Bélanger* v. *Riopel*(4), at p. 258; *Dupont* v. *The Quebec Steamship Co.*(1); *Robinson* v. *The Canadian Pacific Railway Co.*(5); *The Queen* v. *Grenier*(6), at page 51, and *The Asbestos and Asbestic Co.* v. *Durand*(7).

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs.

DAVIES J.—I agree in the conclusion as to the main facts reached by the trial judge that Charland failed properly to set and lock the switch. I have gone carefully over the evidence and have reached the conclusion that the switch was not at the time in good working order. Had it been so, Charland's attempts effectively to set the switch would have been successful. He brought the crank to its proper place and set the safety hasp in its proper notch. This was not

(1) Q.R. 11 S.C. 188.
(2) Q.R. 21 S.C. 346.
(3) 4 Legal News 211.
(4) M.L.R. 3 S.C. 198.
(5) 14 Can. S.C.R. 105, at p. 114.
(6) 30 Can. S.C.R. 42.
(7) 30 Can. S.C.R. 285.

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done as he says himself without difficulty and trouble, a fact which Bruce's evidence fully supports. It seems reasonably certain, however, that while Charland was successful in putting the switch crank in place and setting the safety-hasp, such action which, in the case of the switch crank and attachments in good working order, would have resulted in placing the switch-rails flush with the rails on the main line, did not do so. The switch-crank and the safety notch were set properly for the main line, and the target so indicated, but owing to some breakage or defect in the attachments, aggravated possibly by the snow which had fallen that morning to a depth of about three inches, I conclude from the evidence that the switch-rails did not move in unison with the crank and were not made flush either with the main line or the switch-line. I think the evidence of Bruce and Charland, the two men in the best position to judge, shews that the switch-crank appeared properly set for the main line and that the target so indicated, but neither of them were able to say that they looked to see whether the switch-rails had swung so as to be flush with the main rails as if the attachments had been in order would have been the case. Bruce was too far away to see as to the rails being flush, and Charland, who was on the spot, says he did not look. Considering the trouble and difficulty he had in getting the switch-crank and the safety hasp in their places, I think it was negligence on his part not to have looked and seen whether the switch-rails had, after all his labour and efforts, swung to their proper place.

If the crank and safety hasp were set as he describes, and Bruce confirms, and the target indicated that the main line was open, no blame whatever could

be attached to the deceased engineer for continuing on his course. Charland's evidence of the trouble he had with the switch lends great colour to the positive evidence of Bruce as to what he saw and the expert evidence of Houston as to how the accident occurred.

I think the evidence of Bruce, who was standing on the station platform looking at the approaching engine, of Mitchell, the conductor of the train, who saw the marks of the wheels on the ties, and of the expert witness Houston, the track master, prove that the accident started at the junction of the switch-rail with the main line rail and not at the frog as submitted by the Crown. Bruce says he saw the front wheels of the engine, at this point of the switch, mount the rails which would not have taken place had the switch-rails been set true for the main line, although the indicator or switch-signal so pointed.

I conclude from the evidence of the conductor, Mitchell, that the engineer, Goddard, as he got up to the switch observed that, notwithstanding the target indicated the main line was open, the rails were not right and that he immediately applied the brakes, which action might have had something to do in helping on but unfortunately did not prevent the accident and, in any case, is not charged as negligence on his part.

In the result, my conclusion is that the accident was neither caused nor contributed to by any negligence of Goddard's, but that, as the evidence shews, the working parts of the switch must have been out of order before the accident or were put out of order by Charland's working them at the time; that their defective working condition was probably contributed to by the fall of snow, that Charland managed, with

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effort and after trouble, to get the crank and safety hasp in their places, but was not successful in bringing the rails of the switch and main line together, and that this failure which he negligently left unobserved caused the accident, no negligence being attributable to the deceased engineer.

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

I also agree on the authority of *Miller* v. *The Grand Trunk Railway Co.*(1), which, in my opinion, governs this case, that the defence raised by the Crown of the deceased having obtained satisfaction or indemnity within the meaning of article 1056 of the Civil Code by reason of the annual contribution made by the Intercolonial Railway Employees' Relief and Insurance Association, Class C., cannot be sustained.

I also concur with the trial judge that our decisions are binding upon us to the effect that the doctrine of contributory negligence (so called) only applies in the Province of Quebec to the mitigation of the damages which would otherwise be recovered by

(1) [1906] A.C. 187.

the injured party and does not operate to defeat his action.

The appeal should be dismissed with costs.

IDINGTON J.—I cannot find as a fact that the deceased engine-driver so neglected his duty as to render his conduct contributory to his own death.

The application of the emergency brakes indicates he saw what, if he had seen sooner, might have averted the accident.

I cannot, however, say upon the whole evidence that his failure to see sooner was the result of negligence.

As to the other questions raised we are bound, as to some of them, I think, by decisions here, and, as to others, by the decisions in the Privy Council, and cannot interfere.

The appeal as a result fails and should be dismissed with costs.

MACLENNAN J.—I agree in the opinion of Mr. Justice Davies.

DUFF J.—The contentions advanced by the appellant are, with the exception of one which I am about to discuss, fully dealt with by the learned trial judge, and, as I entirely agree with his reasoning and his conclusions, it is not necessary that I should, save as to that exception, say anything further about them.

A contention not referred to by the learned judge and apparently but little discussed at the trial, was pressed upon us, viz., that the negligence of the deceased, Holsey Cleveland Goddard, is an answer to

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the action. That contention necessarily, in the circumstances, proceeds upon the proposition that a person situated as Goddard was, and observing the rules, must have seen that the switch was set for the siding.

There seem to be insuperable obstacles in the way of giving effect to that contention at this stage. The evidence, for example, of the witness Bruce, put forward by the Crown as a substantial part of the defence, was to the effect that the witness observed the signal at the switch immediately before the approach of Goddard's train, and that it appeared to be set for the main line. In view of that evidence it is quite impossible to say that the implied finding of the learned trial judge on this point is a finding so clearly erroneous as to justify the reversal of it.

Appeal dismissed with costs.

Solicitor for the appellant: *E. L. Newcombe.*

Solicitors for the respondent: *Laflamme & Mitchell.*