THE CANADIAN PACIFIC RAILWAY COMPANY, (DEFENDANTS).... } APPELLANTS;

AND

DAME AGNES ROBINSON (PLAINTIFF) ..... } RESPONDENT.

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*Mar. 8 & 9.

*June 20.

ON APPEAL FROM THE COURT OF APPEAL FOR LOWER CANADA (APPEAL SIDE). *

Damages—Misdirection as to solatium—New Trial—Art 1056 *C. C.*

In an action of damages brought for the death of a person by the consort and relations under Art. 1056. C. C. which is a re-enactment and reproduction of the Con. Stats. L. C. ch. 78, damages by way of solatium for the bereavement suffered cannot be recovered.

Judgment of the court below reversed and new trial ordered.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing the judgment of the Court of Review on the motion granting a new trial.

* PRESENT—Sir W. J. Ritchie C. J. and Strong, Fournier, Henry and Taschereau JJ.

(1) 2. M. L. R. Q. B. 25.

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This was an action by a widow for herself and daughter for damages arising from the death of the husband of the former caused by an accident attributable to the fault of the defendant railway company. The case was tried by a jury, and there was a verdict for the plaintiff.

The plaintiff's motion for judgment was met by one for a new trial on the part of the defendants, which was made on five different grounds: 1st. The omission from the assignment of facts for the jury of some of the things necessary to be proved. 2nd. Misdirection. 3rd. Partiality on the part of the jury. 4th. The absence of an important witness at the commencement of the trial without any fault of the party, and whose evidence was tendered before the close of the proceedings but refused by the Court. 5th. The discovery of new evidence since the trial.

The part of the judge's charge reduced to writing conformably to Article 405 of the Code of Civil Procedure, in consequence of defendants' objections as to misdirection, is as follows:—

"With reference to the fifth ground or head of objec-
"tions, and which is the only one involving a question
"of law, the judge told the jury, in effect, that in
"assessing the amount of damages, if they found for
"plaintiff, they had right to and might consider the
"nature of the anguish and mental sufferings of the
"widowed mother and her orphan child."

And another of the grounds for the motion for new trial was:—

"Because an important and essential witness on be-
"half of the defendants was absent at the time of the
"trial without any fault on their part, and said witness
'appearing before the plaintiff had submitted her case
"to the jury, his evidence was duly tendered by the de-
"fendants, but was refused by the Court, the said defen-

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"dants having made due diligence to have the witness "present in time at the said trial, and he having been "prevented by causes beyond his control or that of the "defendants; and the evidence of the said witness being "still obtainable."

The following is an extract of the minutes of the prothonotary for the 28th April, 1883.

"The defendants move that the case be postponed to "examine Charles Scott, of Philadelphia, a witness "summoned, now on his way to Montreal. Affidavit "of R. T. Heneker fyled in support of said motion.

"The Court allows ten minutes in order to give time "to said Charles Scott to appear before this Court and "give his evidence.

"The time allowed by the Court to permit witness "Scott to appear having expired, the *enquête* of defendants is declared closed.

"The *enquête* on both sides is declared closed.

"Mr. Harry Abbott, counsel for defendants, addressed "the court and jury.

"At the conclusion of Mr. Abbott's address, Mr. "Charles Scott, the witness above mentioned being pre-"sent into court, application is made by defendant's "counsel for leave to examine him as a witness.

"Mr. Hatton, one of plaintiff's counsel, objects to the "examination of said witness at this stage of the case.

"The objection of Mr. Hatton is maintained by the "court."

C. Scott's affidavit is as follows:

Charles Scott, of Philadilphia, in the state of Pennslvania, one of the United States of America, manufacturer. being duly sworn, doth depose and say:—

(1) I was the manufacturer and owner of the machine in question in this cause at the time the accident in question occurred to deceased, Patrick Flynn.

(2) The machine on the day of the accident, was lying at the Grand Trunk Railway freight depôt, and was brought from there to the Canadian Pacific Railway Company's shops at Hochelaga, upon a

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waggon to the shed in question, hired by me.

(3) I had previously applied to Mr. Blackwell, the then mechanical superintendent of the Canadian Pacific Railway Company for permission to take the machine to the Canadian Pacific Railway Company's shops, for the purpose of exhibiting a test of springs which had been sent up here by me. Mr. Blackwell referred me to Mr. Black, the mechanical foreman at Hochelaga Station. I asked Mr. Black if he would hire me some men to unload this machine, or whether I would send the men from the freight depot with the team. He replied that it was not worth while to do that; that he would furnish the men to unload the machine and put it in the shops; and I told him I would pay the men for their services.

(4) I arrived at the shops shortly after the accident; and hearing of it, expressed my willingness to Mr. Blackwell to do something for the man, Flynn, who had been injured; and gave him a cheque for one hundred dollars.

(5) I paid Mr. Black the sum of twenty or twenty-five dollars, I am not quite sure which, for the services of the men who had engaged in unloading the machine.

(6) The machine was in my possession, that is to say, upon the waggon and in its unloading, until it was actually delivered in the Canadian Pacific Railway shops, and it continued to be my property and was afterwards removed from there in the same manner, that is without any special appliances except rails or planks, which were not fastened together or secured in any particular manner, merely sliding it off and on the truck.

(7) I have always moved these machines in the same manner, and have never had an accident. I have never seen the rails or planks braced together under them; and I moved this very machine again from the Grand Trunk to the Canadian Pacific Railway new shops afterwards in the same manner.

And I have signed.

The jury having returned a verdict awarding $2,000 damages to the respondent and $1,000 to her child, the Court of Review, on the motion for the new trial, granted the motion for a new trial. On appeal to the Court of Queen's Bench, that Court reversed the judgment of the Court of Review, and ordered judgment to be entered for the plaintiff for the amount of damages awarded by the jury.

Scott Q.C. and *H. Abbott* for the appellants.

The following authorities may be cited on the question of misdirection and improper rejection of evidence:

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Fuller v. *G. T. R. Co.* (1); *Bourdeau* v. *G. T. R. Co.* (2).

As to the solatium allowed, see *Ravary* v. *G. T. R. Co.* (3); *St. Lawrence & Ottawa Ry. Co.* v. *Lett* (4).

The evidence shows that the accident was caused by the negligence of fellow servants of the deceased for which defendants are not liable. See McDonald on Master and Servant (5); *Morgan* v. *Vale of Neath Ry. Co.* (6); *Lovell* v. *Howell* (7); *Howells* v. *Landore Siemens Steel Co.* (8); *Feltham* v. *England* (9).

Arts. 1056, 426 and 427 sub-sec. 7 were referred to.

Hatton Q C. for the respondents.

The grounds relied on for a new trial should have been urged before the verdict was entered. It is too late to bring them forward now. See *Cannon* v. *Huot* (10).

Fuller v. *G. T. R. Co.* and *Bourdeau* v. *G. T. R. Co.* relied on by appellants' counsel, do not apply, as the circumstances in those cases were different from the present. See *Hall* v. *Canadian Copper & Sulphur Co.* (11).

The propriety of the direction to the jury as to mental suffering, &c., must be decided according to the law of Quebec. *Ravary* v. *G. T. R. Co.* (3) contains the law on this point. The articles of our Code 1053–5 on this subject were copied from the Code Napoleon Arts. 1382–6 inclusive.

As to the right to recover these damages see *Labelle* v. *City of Montreal* (12); *Evans* v. *Monnette* (13); *Richelieu Nav. Co.* v. *St. Jean* (14).

The case of *St. Lawrence & Ottawa Ry. Co.* v. *Lett* (4)

(1) 1 L. C. L. J. 68.
(2) 2 L. C. L. J. 186.
(3) 6 L. C. J. 49.
(4) 11 Can. S. C. R. 422.
(5) P. 303 et seq.
(6) L. R. 1 Q. B. 149.
(7) 1 C. P. D. 161.
(8) L. R. 10 Q. B. 62.
(9) L. R. 2 Q. B. 33.
(10) 1 Q. L. R. 139.
(11) 2 L. N. 245.
(12) 2 M. L. R. (S. C.) 56.
(13) 30 L. C. J. 204.
(14) 28 L. C. J. 91.

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was decided under English law and does not apply to Quebec.

The following authorities were also referred to: Sourdat (1); Dalloz Jurisprudence générale, Vo. Responsibilité No. 1; Toullier (2); Potter's Dwarris on Statutes (3). The resolution of the Barons of the Exchequer in Heydon's case (4); *Allan et al* v. *Pratt* Court of Queen's Bench (appeal side) Montreal, coram Dorion C.J., Tessier, Cross and Baby J.J., reported in Montreal Daily Gazette of 19th March instant by Mr. Kirby, editor of the Montreal Law Reports, from the notes of Mr. Justice Cross who delivered the judgment of the Court which was unanimous.

SIR W. J. RITCHIE C.J.—I think the damages must be estimated, not by the injured feelings of the plaintiff, but must rest on the privation of some advantage actually suffered or reasonably expected to be suffered from the homicide and to be compensated by a sum of money in lieu thereof.

The statute provides for the assessment of damages by a jury in proportion to the injury suffered by the wife, &c., from the death of the deceased. The code provides for his consort and his ascendant and descendant relatives recovering "all damages occasioned by such death" (5), all damages occasioned—that is to say, according to the loss they have severally and personally sustained, capable of ascertainment by a reasonable calculation in money, in which calculation the feelings of the parties are not to be taken into consideration for the purpose of assessing damage, but the actual pecuniary damage sustained.

I think the reasoning of Justices Badgeley and Duval in *Ravary* v. *Grand Trunk Railway* (6),

(1) Pp. 24, 39.
(2) Vol. 11, Paris, 1830.
(3) Ed. for 1871. p. 275, note 5.
(4) P. 184, note 6.
(5) See Art. 1056, C. C.
(6) 6 L. C. J. 58.

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should prevail.

The code appears to me to have intended to embody the provisions of the statute passed when Ontario and Quebec were in union and to be substantially the same, and under which statute the same rule for assessing damages would be applicable alike to Ontario and Quebec; and this I cannot think the code intended to alter, and which rule, on the authority of the cases in Ontario as well as those in England under a similar statute and from which the Canadian act was copied, clearly excludes damages by way of solatium for wounded feelings.

I think it would be much to be regretted if we were compelled to hold that damages should be assessed by different rules in the different provinces through which the same railroad may run.

If the damages are so assessed as solatium to the widow and next of kin for the bereavement and mental suffering, how is it to be apportioned? It seems to me very difficult, if not impossible, to say how much the feelings of the mother and each of the children have respectively suffered. I am of opinion that the appeal should be allowed and a new trial ordered.

STRONG J.—The respondent instituted this action, as well on her own behalf as in the quality of tutrix of her minor daughter Mary Agnes Flynn, to recover damages for the death of her former husband Patrick Flynn, which was the consequence of an accident met with by the deceased while in the employ of the appellants when engaged with other employees in unloading a machine from a waggon or truck, and which accident, as the respondent alleges, was occasioned by the negligence of the appellants in not providing proper appliances for performing the work in the course of which it occurred. The respondent in her declaration

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claimed a trial by jury. The appellants pleaded two pleas; That the accident was not caused by the negligence of the appellants but by the negligence, carelessness and inattention of the deceased himself, and that every possible means to prevent any accident were used by the appellants' employees at the time in question—in short a plea of contributory negligence. The other plea was the general issue. The respondent replied to the first plea by a general answer denying its allegations.

Assignments of the facts to be proved having been furnished by the parties, the cause came on for trial on the 27th and 28th April, 1885, before Mr. Justice Doherty and a jury. The facts of the marriage of the respondent with the deceased and the birth of the minor as issue of that marriage having been admitted, the jury after having heard the testimony of numerous witnesses found in answer to questions put to them by the judge (amongst other findings):—That the deceased Patrick Flynn was, in unloading the machine, acting under the orders of the appellants' officers and so in the employ of the appellants; that the accident was caused by the fault or negligence or want of skill of the company appellants or their servants; that the deceased Patrick Flynn was not guilty of carelessness, negligence or rashness in connection with the unloading of the machine; that the respondent had suffered damage to the amount of $2000 and the minor child of the respondent to the amount of $1000 by reason of the death of their husband and father. It appears from the report of the trial made by the learned judge, and which forms part of the record, that overruling the objections on that head of the appellants' counsel, he told the jury in effect, that in assessing the amount of damages if they found for the respondent "they had right to and "might consider the anguish and mental suffering of the

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"widowed mother and her orphan child."

The appellants moved before the Court of Review for a new trial on five specific grounds: (1) Because the assignment of facts submitted to the jury did not contain all the facts necessary to be found; (2) Because the judge misdirected the jury; (3) Because the jury exhibited undue partiality in favor of the respondent; (4) Because an important witness for the appellants was, without any fault on their part, absent at the time of the trial and that the witness appearing after the evidence had been closed, but before the respondent's counsel had begun to address the jury, the learned judge refused the application of the appellants' counsel to have him examined; (5) Because of the discovery of new evidence. The Court of Review considered all these grounds of the motion insufficient save the fourth, but upon that ground granted a new trial on payment of costs.

On an appeal from this decision of the Court of Review, the Court of Appeals disallowed all the grounds for a new trial, reversed the judgment of the Court of Review, and gave judgment in the respondent's favor on the verdict, for the damages found by the jury. From this last judgment the present appeal has been taken to this court.

I entirely agree with both the courts below that the 1st, 3rd and 5th grounds assigned in the motion for a new trial are insufficient, and further with the Court of Appeals that the proposed witness Scott, whose absence without any fault on the part of the appellants formed the 4th ground of appeal, was not so material that it ought to have induced the ourt to remit the cause for the consideration of another jury. It appears to me that Scott's evidence, as detailed in his affidavit, is not inconsistent with the finding of the jury that the deceased was in the actual employ of the appellants

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when the accident happened. It would not establish a case where workmen had (to use the expression of the present Master of the Rolls in the case of *Murray* v. *Currie* (1)) been lent to another employer. The evidence of Oliver, the appellants' own witness, shows conclusively that the deceased and the men engaged with him in unloading the machine which caused the accident were acting under the immediate directions of Oliver as foreman of the gang, who was himself acting in obedience to the orders of his superior officer, Jackson, who acted as he did with the sanction of Mr. Black the general foreman of the appellants' mechanical works at Hochelaga.

In the face of this evidence at the trial, taken in conjunction with what Scott says in his affidavit, no jury could be expected to find that the deceased was not in the employment of the appellants when the accident happened, and I am therefore of opinion that the Court of Appeal exercised a wise discretion in refusing to grant a new trial on this ground in exercise of the powers conferred by article 426, No. 15 of the Code of Civil Procedure.

As regards the first ground for a new trial there was ample evidence of negligence which was entirely a matter for the consideration of the jury. The point principally made under this head, in the argument of the present appeal, was however, that the appellants were not responsible for the negligence of the fellow servants of the deceased. This point, 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

(1) L. R. 6 C. P. 24.

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of Quebec (1).

The point on which I feel compelled with sincere respect to differ from the Court of Appeals is that comprised in the second ground specified in the motion viz : misdirection—the particular misdirection which I consider fatal to the verdict being that the learned judge told the jury that they were at liberty in estimating the damages to consider the anguish and mental suffering of the respondent and her child.

The present action is founded on article 1056 of the Civil Code which is as follows :—

In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death. In the case of a duel, action may be brought in like manner not only against the immediate author of the death, but also against all those who took part in the duel, whether as seconds or as witnesses. In all cases no more than one action can be brought in behalf of those who are entitled to the indemnity, and the judgment determines the proportion of the indemnity which each is to receive. These actions are independent and do not prejudice the criminal proceedings to which the parties may be subject.

The first question which presents itself is: Whether this article is to be taken as a reproduction of the enactment contained in the consolidated statutes of Canada, cap. 78, and as providing for the continuance of the action conferred by that act, exclusively of all other actions by the persons named in the article, for the same cause, or whether it is to be considered as putting an end to the remedy given by the statute and as continuing or reviving an action known to the former common law of Lower Canada, an action to be regulated as regards the recovery of damages by the principles of French law and irrespective altogether of the rules in relation to damages applied in proceedings

(1) Demolombe Vol 31 No. 368; Sourdat Vol. 2 No. 911.

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under the act.

From the terms of article 1056 it is apparent that the only action which can now be brought by or on behalf of the persons named in it to recover indemnity for the death of a relative is one subject to the provisions of the article, for it says in express terms, that no more than one action can be brought for that purpose. Therefore the action given by article 1056 and the action conferred by the statute cannot co-exist as cumulative and alternative remedies, but the statutory action must be considered as entirely superseded by an action depending on this article of the code. The question we have to decide therefore is one concerning the interpretation of the article, and the answer to it must depend on whether or not we can say that article 1056 contains in its terms intrinsic evidence of an intention to continue the remedies given by the statute rather than that given by the common law.

The consolidated statute cap. 78 was derived from the statute of Canada 10 & 11 Vic. cap. 6. which in turn was (as is well known) a literal re-enactment of the Imperial Statute 9 & 10 Vic cap. 93 commonly called Lord Campbell's Act. If, therefore, article 1056 is to be considered as embodying the provisions of the statute it is clear that, according to a rule of construction which has the sanction of the highest authority, it ought to receive the same interpretation at our hands as that which the English courts have applied to the original act.

The principal argument against the contention that article 1056 is to be interpreted in the same manner as the statute is that derived from the former law of Lower Canada as it existed at the time of the passing of the statute in relation to the remedial rights of the relatives of deceased persons whose deaths had been caused by "délits" or "quasi-délits."

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It appears that such an action could have been maintained on well established principles of the old French law. Further, it may be conceded that in such an action the plaintiff was not limited to an indemnity in respect of such pecuniary or material loss as he might be proved to have sustained by the death of his relative, but beyond and apart from these damages, he might also recover in respect of that which the learned judge in his charge to the jury in the present case defined as "the anguish and mental suffering of the plaintiff and her child;" and which Larombière (1), in a passage quoted in the respondent's factum, designates as "the moral wrong to the natural and "legitimate affections of the party complaining;" in short that same element of damages, which in the Scotch law is termed the "solatium," by which name also it has been rejected by the English courts as a ground of damages to be recovered in an action brought under Lord Campbell's act. Whilst, however, I am willing to concede for the present purpose that damages by way of consolation for the bereavement suffered could be recovered in an action brought at common law before the statute, the judgment of Mr. Justice Badgley in *Ravary* v. *G. T. R. Coy.* (2), and the French authorities referred to therein, shew that even this was by no means free from doubt.

The jurisprudence of the courts of the Province of Quebec bearing on the questions involved in the present case, so far as it can be collected from the published report of the decisions of those courts, is somewhat scanty. We have been referred, however, to some cases of which the three following may be particularly noticed.

In the case of *Ravary* v. *The G. T. R. Co'y.* (2) which

(1) Vol. 5 p. 714. (2) 6 L. C. J. 49.

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was decided by the Court of Appeals, in 1860, a majority of the court consisting of Sir H. L. Lafontaine C.J., Mr. Justice Aylwin and Mr. Justice Bruneau (sitting *ad hoc*) held, that irrespective of the statute an action could be maintained by the widow and children of a man who had been killed by an accident resulting from the negligence of a railway company against the authors of the death, and that in such an action damages were recoverable in respect of a "solatium"—and this decision was based on the jurisprudence of the French courts both ancient and modern, and the opinions of writers of authority collected from several legal treatises, all referred to in the full and learned judgment of Mr. Justice Aylwin. It also seems to have been the conclusion of the majority of the court, that, even in an action avowedly brought under the statute, the rule as to damages would be the same, and that in this latter case the decisions of the English courts against such a measure of damages would not apply. This decision was far from being arrived at unanimously. Mr. Justice Badgley, in a judgment entitled to weight as well from the force of argument as from the great research which it displays, recorded his reasons for an opinion opposed to that of the majority of the court, and in this latter opinion Mr. Justice Duval concurred. In the Court of Review, on the motion for a new trial in the same case, two of the three judges who composed that court, Mr. Justice Mondelet and Mr. Justice Day, expressed opinions coinciding with that of Badgley J, while the third judge, Mr. Justice Smith, was in favor of sustaining the verdict by which the jury had given damages for a considerable amount without any proof of material or pecuniary loss, such damages being attributed by them to a solatium exclusively. This verdict, too, was in direct contradiction to the charge of the judge who presided

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at the trial, by whom the law was laid down in the same way as it was afterwards adopted by the majority of the Court of Review and by Mr. Justice Badgley in the Court of Appeal.

There was, therefore, very considerable dissent from the judgment of the Court of Appeal, and opposed to the views of the four judges whose opinions there prevailed there were those of five judges who all, at different stages of the same cause, gave judgments in it, including the judge who presided at the trial, two judges in the Court of Review, and the two dissentient judges in the Queen's Bench. It is not, therefore, surprising that in the case of *Provost* v. *Jackson* (1), decided in the Court of Appeals at Montreal in 1863, on an appeal from a judgment pronounced in the Superior Court in 1860, we find no disapproval expressed by the majority of the court of the "motifs" of the judgment of the Superior Court in Review, in which it was considered that an action by a father and mother for causing the death of their son depended entirely on the statute, although the *ratio decidendi* of the Court of Appeals certainly was the failure of the plaintiffs to prove their intermarriage. In *Ruest* v. *Grand Trunk Railway Coy.* (2), decided in 1878, Mr. Justice McCord determined that the action given by article 1056 is exclusive of any other action to recover damages for the loss suffered by the death of a relative within the degrees provided for by the article, and he held that no such action was maintainable by the brothers and sisters of the deceased. The learned judge's own language is as follows:—

> 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 herein mentioned. According to the terms of this article, the consort and ascendant and descendant relations can

(1) 13 L. C. J. 170. (2) 4 Q. L. R. 181.

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alone have the right to claim damages for death occasioned by quasi-offence. In so far therefore as the brothers and sisters of Ruest are concerned the action is not founded and the defence *en droit* will be maintained.

These are the only authorities to be found in the reports which throw any light on the question we have to decide on this appeal.

The conclusion I have arrived at, after considering these and other authorities, and the terms in which the fourth section of the statute is expressed as well as those of the articles, is, that the common law action was entirely superseded, at least as regards the persons mentioned in the second section as those for whose benefit an action might be brought, by the action given by the statute, and that article 1056 was a re-enactment and reproduction of the statute and is to be interpreted in the same way. The fourth section of the statute provides that, "not more than one action 'shall lie for and in respect of the same subject of com-"plaint"—that is "a subject of complaint" entitling the parties named in the 2nd section to an action to be brought by a nominal plaintiff for their benefit. I think it impossible that the intention of the legislature to exclude all other actions for the benefit of the same parties and for the same cause, at common law or otherwise, could have been more explicitly demonstrated than by these words. I am therefore of opinion, that from the date of the enactment of the statute the remedy, for the causes mentioned in it, was confined to an action founded on it. In like manner, entirely agreeing in this respect with Mr. Justice McCord's decision in *Ruest* v. *G T. Ry. Co.*, I am of opinion that the almost identical words, "not more than one action can be "brought on behalf of those who are entitled to the "indemnity," contained in article 1056, have the same effect of restricting the remedy of the relations named in the article to an action founded on its terms.

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Then the state of the law of Lower Canada at the date of the promulgation of the Civil Code being such as I have mentioned—that the only remedy for persons coming within the degrees of relationship specified in the statute, was an action founded on the statute—it would seem to be a reasonable inference, apart altogether from the internal evidence afforded by the language and provisions of the article, that the action given by it was intended to afford the same remedy and to be subject to the same limitations and restrictions as the former statutory action. When, however, we find on an examination of the terms in which the article is expressed that it includes the same persons as those for whose benefit an action under the statute could alone be maintained, that it is exclusive of all other actions for the same injury, that it is subject to the same anomalous condition that the right to institute it may be intercepted by indemnity or satisfaction made to the deceased in his lifetime, and that the same exceptionally short period of prescription applies to it, and that whilst in all these features it resembles the statutory action, it differs entirely and radically from the action given by the old French law, it appears to me we may safely conclude that it was not intended by the code to lay down any new law or to give any new remedy or to revive the old extinct common law action, but merely to continue the same state of the law as that which previously existed under the statute.

This also accounts for the absence, as applied to art. 1056, of the marks by which the codifiers distinguished new law.

Then taking it as established that art. 1056 is to be read and interpreted as an adoption into the code of the provisions of the statute, and having regard to the history of the legislation already stated, we are bound to follow the English courts in the con-

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struction which, in the early case of *Blake* v. *Midland Railway Company* (1), they placed on the original enactment, viz: that it does not authorize the assessment of damages in respect of the injured feelings and affections and mental sufferings of the party complaining. The rule that courts, in construing colonial statutes copied from Imperial legislation, ought to follow the construction applied by the English courts has the sanction of the highest authority. In the case of *Trimble* v. *Hill* (2) the Judicial Committee of the Privy Council lay down the rule just adverted to as one which ought invariably to be acted on and applied by colonial courts in interpreting statutes of English origin. It is true that the case of *Blake* v. *Midland Railway Company* was not a decision of a Court of Appeal, but, independently of being the decision of a court comprised of very eminent judges, of whom the author of the act, Lord Campbell, was one, it has ever since been acquiesced in by text writers and acted on by the courts as an authoritative construction of the act. Moreover, it was tacitly recognized as a sound decision in *Rowley* v. *P. & N. W. R. Co.* (3) where the principles on which damages are to be calculated in an action brought by a widow and children for indemnity under Lord Campbell's act were considered, and certain rules laid down which entirely exclude the element of damage now in question.

I am therefore of opinion that the learned judge should have instructed the jury that the plaintiff and her child were not entitled to recover any damages in respect of and by way of consolation for the bereavement they had suffered and that his direction to the contrary was erroneous.

Further, in view of the great injustice and incon-

(1) 18 Q. B. 93.

(2) 5 App. Cas. 342.

(3) L. R. 8 Ex. 221.

venience which would be sure to result if so impalpable a ground of damages as the solatium could be taken into account by juries in estimating damages in cases like the present, I should, if the question came before us without previous decision, as *nova res*, for these reasons, which are very ably pointed out in the judgment of Mr. Justice Cross, unhesitatingly adopt the same conclusion as that arrived at in the case of *Blake* v. *Midland Railway Co.*

I am of opinion to reverse the judgment of the Court of Queen's Bench and restore and affirm that of the Court of Review for a new trial.

FOURNIER and HENRY J.J. concurred with the Chief Justice that there had been misdirection.

TASCHEREAU J.—I am of opinion that the judge at the trial misdirected the jury in telling them that, in assessing the amount of the damages, they might consider the nature of the anguish and mental sufferings of the plaintiff, or, in other words, that they could make an estimation of her tears, sighs, and sorrows, in pounds, shillings, and pence.

Though the French law allowed a larger basis for a pecuniary compensation in such cases, I take it that now, with us, under article 1056 of the code, which is the re-enactment of our statute 10–11 Vic. similar to Lord Campbell's Act, there is no difference between the English law and ours on the subject. The Privy Council held, in *Trimble* v. *Hill* (1), that when a colonial legislature has passed an act in the same terms as an Imperial statute, and the latter has been authoritatively construed by a Court of Appeal in England, such construction should be adopted by the courts of the colony. And in *City Bank* v. *Barrow* (2), in the House of Lords, on the interpretation of an article of

(1) 5 App. Cas. 342. (2) 5 App. Cas. 664.

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our code, Lord Blackburn said that where a colony re-enacts an Imperial statute it is as if the English law was carried over bodily to the colony, and in construing the colonial law, the interpretation given to the similar law by the courts in England should be followed. I think this reasonable rule should be followed in this case.

When by the 10th and 11th Vic. the legislature of the United Canadas re-enacted Lord Campbell's act, it was the intention not only to provide for damages resulting from death in Upper Canada but also to put the law in both Provinces on the same footing. That is why the act was extended to Lower Canada, though the common law then gave a remedy for such injuries. It cannot have been intended by this legislation, that if a man was killed in Upper Canada, no solatium should be granted to his wife or legal representatives by way of damages, but that if he was killed in Lower Canada, such a solatium could be given. That in the present case, for instance, this plaintiff can get a solatium, because her husband was killed in Lower Canada, whilst if he had been killed a few miles further west, in Upper Canada, none would be granted under the same statute. The statute and the code entirely changed the laws. 1st, As to prescription; by article 2261, C. C. it would be two years; 2nd, As to the parties entitled to the action; 3rd, In giving only one action to all the parties injured; 4th, In denying, as in England (1), the action where the deceased party had himself obtained an indemnity (2). From this it is evident in my opinion that the action now given is an entirely different one from the common law action. And if different in four such important respects, can it be contended that as to a fifth, the mea-

(1) *Read* v. *Great Eastern Railway*, L. R. 3 Q. B. 555.

(2) *Chemin de fer* v. *Magaud*, Dalloz 72, 2, 97.

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sure of damages, the principles of the common law action can be engrafted on the statutory action? This obviously would be to set at naught the intention of the legislator, who, for no other reason than to have the law in both Canadas on the same footing, has extended this legislation to Lower Canada, and this no doubt as it was to principally affect companies incorporated for and running their roads through both Provinces.

It could not be contended, I take it for granted, that, if the English act had been extended to Scotland, it would not receive there the same construction as is given to it by the courts of England. A statute would not be held to mean one thing in England and another in Scotland. And so here, I take it, it cannot mean in Lower Canada what it does not mean in Upper Canada, or give a larger remedy in one Province than in the other.

Furthermore, in this section itself (1056) of the code, there is intrinsic and, to my mind, unmistakeable evidence that the Legislature intended that the measure of damages in such cases should be thereafter the same in Lower Canada as in Upper Canada. That is in the enactment that if the deceased has himself obtained an indemnity, this will be a bar to any action by his consort or legal representatives for their injuries resulting from his death. This, as I have already remarked, is entirely new law. Previously, at common law, the indemnity received by the deceased, or the action by him instituted for his injuries, was no bar to his consort or relatives' action for their own injuries resulting from his death. They were held to be two distinct rights giving the two distinct actions (1). But now the code, as the statute did, though in no such express words, clearly refuses a new action to the survivors in such cases (2).

(1) *Re Chemin de fer* v. *Magaud, Ubi supra.*

(2) *Read* v. *The Great Eastern* (cited above).

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Now, is this not, as Mr. Justice Cross well remarked in the court below, enacting as clearly as if it were laid down in so many words, that anguish of mind and mental sufferings are not to be the subject of pecuniary compensation. The injured man, if he settled before his death with the party who caused his injury, obviously did not settle for his wife's or children's anguish of mind caused by his death. So that when the action in that case is taken away from said wife or children it is, it seems to me, equivalent to an express enactment that their anguish of mind is no ground for damages.

The code, in my opinion, has taken away the common law action and the remedy it gave.

When *Ravary* v. *The G. T. R.* (1) was decided, before the code, it might have been a question whether the statute had had that effect. But since the code there can be no doubt on the subject, and that case upon that ground is entirely distinguishable.

It is expressly enacted by art. 2613 thereof that all laws previously in force are abrogated in all cases in which express provision is thereby made upon the particular matter to which such laws relate. This clearly leaves for an injury caused by death nothing but the action given by art. 1056, and the jurisprudence is all in that sense. *Provost* v. *Jackson*, judgment of Superior Court (2); *Ruest* v. *G. T. Ry.* (3); *G. T. Ry.* v. *Godbout* (4). And if the statutory action only now lies, the statutory damages can only be allowed. Moreover, when *Ravary* v. *The G. T. R.* was decided *Read* v. *The Great Eastern Railway* had not been decided, and there was not in the statute, as there is now in art. 1056, the express refusal of the action where the

(1) 6 L. C. J. 49.
(2) 13 L. C. J. 170.
(3) 4 Q. L. R. 181. S. C. in appeal 1 L. N. 129.
(4) 6 Q. L. R. 63.

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deceased had received an indemnity. That consideration was consequently not before the judges who determined that case. I would, for all these reasons, hold that the charge of the learned judge at the trial in this case is as illegal here as it would be in Ontario or in England.

But I go further and would hold that even under the French law, supposing that it ruled this case, the charge of the learned judge was illegal by its vagueness. Laurent (1) would call it dangerous. I would say it is illegal, because it is dangerous. The jury may have been led to believe, under the terms in which it was given, that they might consider the anguish of mind and mental sufferings of the plaintiff during the fifteen months that elapsed between the accident to the husband and his death. Clearly this could not be taken into consideration. Then, apart from this there is not a single authority that sustains such a charge. In this case, there is even no evidence of what the deceased earned at his death; nothing but the speculative opinion of one witness who hardly knew him. No evidence whatever of how much it would take to educate the child and to support her or her mother, not a word of all this. None. All the authorities cited by Mr. Justice Badgley in *Ravary* v. *The G. T. R.* demonstrate that there must be some basis upon which the damages can be assessed. I need not refer to them more particularly here. As said by Mr. Justice Mondelet, in that case in the Superior Court (2):—

> If vindictive damages were to be given, without any rule, upon the mere caprice of juries excited by public clamor, there would be no safety for railway companies against the most monstrous fines.

If a jury could be charged, as has been in this case, the court would lose all control over their verdict. In the present case, for instance, a verdict for $10,000 or $20,000 would be unassailable, if this one is. It is not

(1) Vol. 20 p. 569. (2) 1 L. C. J. 283.

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a question of excessive damages. How could the court say that the damages are excessive, if it has no means to ascertain on what principles and for what they have been assessed. The court, it seems to me, should direct the jury to state what amount they grant for actual real damages, and what amount for mental sufferings or anguish of mind. Otherwise, the court has no check on the verdict. The jury should also be charged that though they may take into consideration the mental sufferings and anguish of mind of the plaintiff, yet the damages must not be assessed to an amount out of proportion with the actual pecuniary loss they have suffered. Such are the remarks of the court of Marseilles in the case cited by Laurent (1), of *Compagnie P. L. M.* v. *Olivier* (2). If in France, where the damages are *à l'arbitrage du Juge*, these considerations guide the courts in the assessments of such damages, I think that with us, in a case tried by a jury, the court should direct them that they also are to be guided by these considerations. The jury should also be told of the rule of law, that, for a death caused by an accident, they cannot give as heavy damages as for a death caused by an assassination or any crime, a rule admitted by all the writers, and mentioned by the court in the case of *Enfants Verviers* v. *Constant* (3). The law authorizes vindictive damages and damages for a *préjudice moral*, in cases where the party causing the death has acted with malice or committed a *délit*, but not when the death was caused by a *quasi-délit*. For this proposition we have no less an authority than that of the Cour de Cassation, the highest tribunal in France, in the case of *Re Roche* (4), who held that:

Les dommages-interêts reclamés en matière criminelle ne doivent pas necessairement être restreints, comme en matière civile, au pré-

(1) Vol. 20 No. 525.
(2) Dalloz 73, 2, 57.
(3) Dalloz Responsabilité No. 190' Laurent vol. 20 No. 530.
(4) Dalloz 53, 5, 167.

judice matériel résultant du crime ou du délit; ils peuvent aussi, comprendre le préjudice moral causé à la partie civile par ce crime ou par ce délit.

Said the court:—

Attendu que cet article n'est point applicable aux dommages intérêts résultant d'un délit ou d'un quasi delit; que les dommages intérêts réclamés en matière criminelle ne sont pas de la même nature, et peuvent n'être pas restreints comme doivent l'être ceux qui sont réclamés en matière civile, que le préjudice matériel résultant d'un crime ou d'un délit peut, en outre, être accompagné d'un préjudice moral qui peut entrer dans les appreciations du juge et, par consequent, influer sur la quotité des dommages-intérêts qu'il accorde à la partie civile—Rejeté.

Is not this holding, as unequivocally as can be, though in the negative form, that though for a crime damages for a moral loss can be given, yet for a *délit civil* or a *quasi-délit*, none but the real damages for the pecuniary loss are allowable? And it is only for murders or other crimes that all the books and *arrêts* in France before the codes allow damages. This remark applies specially to the authorities cited by Sourdat at No. 54 (1). The *arrêt* of the 3rd of April, 1685 (2), (the reference in Sourdat is wrong) was in a case of murder, in fact these cases are all trials in the criminal courts.

The respondent has invoked as supporting the legality of the judge's charge to the jury a passage from Sourdat (3), where the author says that an indemnity is due to a son for the death of his father even if his father had been entirely supported by him. This, is a mere opinion of the author, coupled with the argument of a member of the French bar in one of his cases, and then it must be remarked that the author in that passage, as in No. 54 of the same book, speaks of a death caused by a murder. The same remarks applies to the passage in Demolombe (4). To the opinions of

(1) De la Responsabilité, vol. 1 No. 33.

(2) Journal des audiences, 984.

(3) Vol. 1, No. 33.

(4) Vol. 31, No. 675.

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those commentators I find a forcible answer by the annotator to the *Magaud* case (1), in Dalloz, in the following words :—

Ces arguments inspirés par des reminiscences de notre ancienne législation, ou l'action publique et l'action civil n'étaient pas nettement distinguées comme elles l'ont été par notre droit pénal moderne, ne sont conformes ni aux principes généraux sur la responsabilité, ni même aux sentiments qu'éveille aujourd'hui généralement dans une famille l'accident ou même le crime qui lui a enlevé un des siens. Il ne répugne pas moins à la loi qu'aux sentiments les plus nobles de l'âme humaine de faire d'un malheur de famille une source de vengeance et de gain. La personne qui a perdu un enfant ou un père qui était à sa charge ne nous parait donc pas fondée à venir demander à l'auteur de l'accident le prix en argent de sa douleur. L'individu qui a éprouvé un préjudice moral, par suite de l'atteinte portée à sa réputation ou à son honneur, est bien venu à réclamer une réparation, parce qu'il craint d'avoir perdu l'amitié, l'estime et le respect des honnêtes gens, et qu'il veut prendre des mesures pour faire taire ou pour punir le mensonge et la calomnie. Mais la personne à qui un accident a enlevé un père infirme ou un jeune enfant, n'a reçu aucune atteinte dans sa considération ; son malheur a dû au contraire lui attirer de nouvelles affections et de nouvelles sympathies. Et puis, si de pareilles questions pouvaient s'agiter devant les tribunaux, il faudrait permettre d'apprécier, de discuter, et même de nier les sentiments de tendresse et d'amitié qui existaient entre la victime et la réclamante.

Enfin quel criterium guiderait le juge dans la fixation des dommages-intérêts? Il en faut donc revenir à ce principe qu'on ne peut exiger une réparation pécuniaire qu'à raison du préjudice souffert dans ses intérêts matériels ou moraux; mais non dans ses affections et ses sympathies.

Le juge accueillera la demande d'un père, d'un enfant, d'une veuve, venant dire: cette mort, qui me frappe dans mes affections les plus chères, porte aussi un grave préjudice à ma fortune, à mon avenir, ou à mon honneur. Mais il ne prêtera pas l'oreille au plaideur qui osera dire: cette mort me cause une immense douleur et des regrets éternels; diminuez-en l'amertume et la durée au moyen d'une somme d'argent!

I refer also to Dalloz (2).

Il ne suffit pas, pour justifier l'intervention civile d'une personne qu' elle ait été blessée dans ses affections, ses goûts ou ses habitudes, par un fait criminel; il faut, que l'action civile soit fondée sur un préjudice sérieux et appréciable.

(1) Dalloz 72, 2, 98. (2) Rep. v. instruct. crim. No. 81.

And at No. 83—Une lésion purement morale peut servir de fondement à une action civile dès que cette lésioin résulte d'un crime ou d'un délit.

And to Mangin, Action publique (1) where he says :—

Il ne a suffirait pas non plus que le delit l'eût blessé dans ses affections.

Also to Larombière (2), where the writer gives the considerations that should guide the judge in the assessment of damages for mental sufferings, which I hold the judge with us should mention to the jury for their guidance.

In the *Magaud* case (3), a widow with her children was suing a railway company for damages caused by the accidental death of her husband. The plaintiff recovered but there is not a word in the judgment of solatium or damages for mental sufferings on the contrary, the court distinctly holds, that

La réparation devant toujours être calculée sur le préjudice réel et sur la privation plus ou moins grande imposée à celui qui se plaint.

Likewise in a case of *Boesch* v. *Gitz* cited in Merlin (4), where 600 francs ($120) are granted to the widow of a man who has been killed by the defendant, "pour dommages réels," but not a word of damages for sorrows and anguish of mind. The same remark applies to the case of *Caderousse Gramont* (5).

I refer also to a case of *Joire*, 17 Febry, 1819, (6). It was there held that

Le préjudice résultant d'un délit ne donne par lieu à des dommages interêts s'il ne constitue qu'un préjudice moral et non un préjudice pecuniare.

I am of opinion that the appeal should be allowed and a new trial granted.

Appeal allowed and new trial ordered with costs.

Solicitors for appellants: *Abbott, Tait, Abbott & Campbell.*

Solicitor for respondents: *J. C. Hatton.*

(1) No. 113.
(2) 5 Obligations p. 716.
(3) Dalloz, 71, 1, 97.
(4) Quest de droits, Vo. réparation civile, p. 156.
(5) S. V. 63, 1, 321.
(6) Sirey. Recueil Général, vol. 6, 2, 26.