THE GRAND TRUNK RAILWAY OF CANADA (DEFENDANTS) ..... } APPELLANTS;

AND

NAPOLEON HUARD ET UX. (PLAINTIFFS) ..... } RESPONDENTS.

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*Oct. 31.
*Nov. 27.

THE GRAND TRUNK RAILWAY OF CANADA (DEFENDANTS) ..... } APPELLANTS;

AND

MARY JANE GOUDIE (PLAINTIFF PAR REPRISE D'INSTANCE) ..... } RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW AT MONTREAL.

Joint operation of railway—Master and servant—Negligence—Responsibility for act of joint employee—Traffic agreement—62 & 63 *V. c. 5(D.).*

Where by the negligence of the train despatcher engaged by the Grand Trunk Ry. Co. and under its control and directions, injuries were caused by a collision of two Intercolonial Railway trains on the single track of a portion of the Grand Trunk Railway operated under the joint traffic agreement, ratified by the Act, 62 & 63 Vict. ch. 5(D.), the company is liable, notwithstanding that the train despatcher was declared by the agreement to be in the joint employ of the Crown and the railway company and the Crown was thereby obliged to pay a portion of his salary. Judgment appealed from affirmed, Taschereau C.J. *dubitante.*

APPEALS from judgments of the Superior Court, sitting in review, at Montreal(1), affirming the judgments of the Superior Court, District of Montreal, maintaining the actions with costs.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

(1) *Atkinson* v. *The Grand Trunk Railway Co.* (Q.R. 27 S.C. 227).

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Both actions were for damages for the death of relatives, employees of the Crown on a Government railway, killed in a collision between two trains of the Intercolonial Railway, the property of the Crown and operated by the Government of Canada upon a portion of the defendants' railway, between the City of Montreal and the Village of Ste. Rosalie, in the Province of Quebec. At the time of the accident the Government trains were being run by the officers and servants of the Crown upon the line of the defendants' railway under an agreement between the Crown and the defendants, dated 1st February, 1898, which was ratified by the Act 62 & 63 Vict. ch. 5 (D.), the portion of the said railway above referred to being therein described as the "Montreal Joint Section." By the said agreement the company leased the "Montreal Joint Section" to the Crown for use jointly with the company on the terms and in the manner therein mentioned, the Crown to bear a share of the cost of maintenance and operating expenses of this portion of the railway, and among other things, the following provisions were contained in the agreement:

"In case of injury occurring to persons or property on the trains of either party, the proper officer of the party on whose train the said injury occurred shall settle the same as in all cases of settlement under this clause (7). The release executed shall be made to include and free and discharge both the parties hereto from all and further liability to the claimant.

"Any loss or damage to person or property on the trains of either of the parties hereto which may be caused in any manner whatever by the negligence or the fault of any person or persons in the joint employ of the parties hereto while in the working of said railway hereby demised or the terminals thereof, shall

be paid by the party upon whose train such loss or damage occurs, and such party shall save the other harmless and indemnify the other from all claims, costs, or proceedings for or in respect to such loss or damage.

"The superintendent, operators, despatchers, agents, and all others employed upon the repairs and maintenance and in the operation of the said joint sections, though paid by the Grand Trunk Railway in the first place, shall be considered as, and are in fact, in the joint employ of the parties hereto in reference to any question of liability of either party hereto to the other party for their negligence, and in reference to any and all other questions; and they shall render to each party such services as they may be called upon to render within the scope of their position or employment, and shall be subject to dismissal if they decline, neglect or refuse to render such assistance and service to either party hereto as such employees are usually called upon to render.

"Each of the parties hereto assumes all responsibility for the accidents or casualties upon, or to its own trains, and to its passengers, freight and employees, by reason of any imperfection of the track, or misplacement of switches by its own employee or a joint employee or strangers, or for damages for stock killed, or injury that may occur to persons walking upon the track or at highway crossings (if any liability therefor), or from any other cause (aside from or except collision, in any form, with the trains of the other party, or negligence of an exclusive employee of the other party) and no such accident or casualty shall give either party the right of action or claim against the other party, it being the intention and design that each party shall be responsible for its own

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trains, for the conduct of its own and joint employees as respect such trains, freight, passengers and employees, and generally, except when the other party or its employees are at fault."

The plaintiffs, admitting that the deceased were not in the company's service but were employees of the Crown, alleged that the deceased persons and the trains which collided were under the control of the company and its employees, for whom it was responsible, and that such employees negligently directed or allowed the trains to run in opposite directions on a single track of the railway, and thus caused the accident.

Sir Melbourne Tait, Acting Chief Justice, in delivering the judgment appealed from, referred to the facts in evidence as follows:

"An examination of the proof shews that the collision was due to the neglect of G. D. Stinson, then train despatcher at Bonaventure Station. When the west-bound train, drawn by engine No. 61, was reported to him at Ste. Rosalie, he issued to this train running orders to St. Hubert, but failed to provide for a crossing point between it and the east-bound train, drawn by locomotive No. 209, which had orders to run to Ste. Rosalie. The result of this neglect was that the two trains collided at about two and a half miles from Ste. Madeleine, at about 5.45 a.m.

"At the time of the accident the movements of the different trains between Montreal and Ste. Rosalie were under the control of Mr. Stinson, who had to provide crossing places for those running in opposite directions, without regard to which company owned the trains or by which company the employees thereon were engaged.

"Without going into the question how far, if at all.

Stinson was subject to the direct orders of the officials of the Intercolonial Railway, the evidence shews that he was selected, engaged and paid by the company defendant, and that in the performance of his duties he was governed by certain time tables, rules and regulations supplied him by that company, that he was also subject to orders of the chief despatcher, and that the whole despatchers' department was under the general superintendence of Mr. Blaiklock, the company defendants' superintendent of the Eastern division of its railway, which included within its limits the line between Montreal and Ste. Rosalie. He appointed and discharged train despatchers, and kept a record of their conduct while in the company's employ.

"Under the agreement, Stinson was in the joint employ of the parties thereto. He was a train despatcher at a terminal (Bonaventure Station). In section 8, despatchers are declared to be in fact in such joint employ, and by section 19 the Crown agrees to pay a share of his salary to the company defendant.

"The learned judge, in his judgment, refers to sections 11 and 20, and holds that the control of the movement of engines, vehicles and trains of the Intercolonial Railway, while on the portion of the line called in the agreement the "Montreal Joint Section," was vested in the company defendant to be governed by the time-tables prepared by said company, its reasonable regulations and the direction of its officials; and that the two trains, at the time of the accident, were under the agreement, and as a matter of fact, under the control of defendant company exercised through Stinson; that he was employed by the company and committed the fault which caused the collision while in the performance of the work for which he was so

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employed, and that the company was responsible for his fault, and that plaintiff, as a third party, was not affected by the clauses of the agreement which did not exempt it from responsibility towards her. The inscription in law was maintained in part with costs against defendant, and it was condemned to pay plaintiff $3,000 for damages without any costs.

"I concur in this judgment.

"The grounds urged against it by the company defendant in its factum (and it cannot be heard upon any other) are first, that it cannot be held responsible for damages caused by the negligence of those who were operating the trains of its lessee the Intercolonial Railway; that no liability arises from the fact that the accident occurred on Grand Trunk Railway territory, for a lessor is not responsible for an act of negligence made by his tenant on the leased premises; that the tenant is in no sense the agent of the landlord; in support of this, the case of *Keiffer* v. *Le Séminaire de Québec*(1), is cited; and secondly, that the company defendant cannot be held liable for the negligence of despatcher Stinson, who was a joint employee, because, when he, as such joint employee, was despatching Intercolonial trains, he was, in fact and in law, the servant of that railway and not the company defendants', and that his negligence in despatching two Intercolonial Railway trains without providing a meeting-place, can create no liability on the part of the company defendant.

"The company defendant also states in its factum that it does not invoke the agreement against third parties as being binding upon them. It asserts that it refers to it to ascertain what was in effect the position of the particular individual whose negligence

(1) (1903) A.C. 85.

caused the accident; that the question of fact must be determined by the court before any legal inferences can be drawn and the agreement between the lessor and lessee as to the joint employment of this individual is one of the facts which can only be determined by reference to the contract.

"Accepting the statement that Stinson was the joint employee of the parties, we can eliminate the first ground of defendants' appeal, and come down to the question whether both parties are not jointly and severally responsible for his fault. I think they are. This results from arts. 1054 and 1106 C.C., the latter of which says that the obligation arising from the common offence or *quasi*-offence of two or more persons is joint and several. *Pothier,* from whom this is taken, says (Obligations, No. 453):

"'Ce n'est pas seulement en contractant, que les préposés obligent leurs commettants. Quiconque a commis quelqu'un à quelques fonctions, est responsable des délits et quasi-délits que son préposé a commis dans l'exercise des fonctions auxquelles il était préposé, et s'ils sont plusieurs qui l'ont préposé, ils en sont tous tenus solidairement sans aucune exception de division ni de discussion.'

"Such joint and several responsibility towards third parties appears to have been contemplated by the agreement, and especially by the second part of section 7, which we are unanimous to confirm with costs."

Lafleur K.C. and *Beckett* for the appellants. The respondent cannot be held responsible for damage caused by the negligence of those who were operating the trains of its lessee, the Intercolonial Railway. No liability arises from the fact that the

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accident occurred on Grand Trunk territory. A lessor is not responsible for an act of negligence committed by his tenant on the leased premises. The tenant is in no sense an agent of the landlord: *Kieffer* v. *Le Séminaire de Québec*(1).

The respondent cannot be held liable because the accident occurred through the negligence of the despatcher Stinson, who was a joint employee. When he was despatching Intercolonial trains he was in fact and in law the servant of the Intercolonial Railway and in no sense the servant of the Grand Trunk Railway Company. Consequently, his negligence in despatching the two Intercolonial trains can create no liability on the part of the Grand Trunk Railway Company. The general superintendent of the eastern division of defendants' railway, and the chief despatcher, who appointed and discharged train despatchers and kept a record of their conduct while in the company's employ, were also joint employees within the meaning of the agreement.

Whatever might be the effect of section 20 of the agreement, as to the Grand Trunk Railway Company exercising a certain control over the joint staff, in a case which was covered by its terms, it has clearly no application to a despatcher who was not an official or employee of the Intercolonial Railway *on board* either of the trains. The section in terms refers only to the staff by which the Intercolonial trains are manned.

The appellants do not invoke the agreement as binding on persons not parties to the contract. But appellants refer to that contract to ascertain what was in fact the position of the particular individual whose negligence caused the accident. The question of fact must be determined before legal inferences can

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be drawn, and the agreement between the lessor and the lessee as to a joint employment of this individual is one of the facts which can only be determined by reference to the contract.

The cases referred to in art. 1106, C.C., and in Pothier, "Obligations," No. 453, are those in which several masters employ a common servant to do the same work, but the principles do not apply to cases where the same servant may be performing distinct and separate duties for different employers.

Lastly, as to the fact that the despatchers were chosen and paid by the defendants, no inference can be drawn that, *quoad* the particular service which Stinson was rendering at the time, *i.e.*, despatching the two Intercolonial Railway trains, he was, for that purpose, anything but an employee of the Crown. It is of no consequence through whom Stinson may have been paid his wages because the agreement provided that joint employees should be paid through the Grand Trunk Railway Company, the Intercolonial Railway contributing its proportion for the services rendered to it. The selection of the despatcher by the Grand Trunk Railway Company cannot change the position as it does not distinguish the present case from those in which a general servant is loaned or hired by his master to others. In all cases it is implied that the general employer has himself selected his servant but that the servant ceases to be his servant in respect of any particular work which is performed by that servant for another master.

Laflamme and *W. G. Mitchell,* for the respondents. The train despatcher whose negligence caused the accident was, at the time, in the service of the appellants; he had been hired and was paid by them; he

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was, while performing his duties, governed by the rules, regulations and time-tables issued by them and by the instructions of their superintendent and chief despatcher.

The evidence conclusively shews that the appellants had and exercised the entire and exclusive control over the movements of both Grand Trunk and Intercolonial trains on this section of their railway, while the Intercolonial Railway authorities exercised no control over the movements of their trains on that section, apart from preparing the schedules of regular trains and fixing the number of extra trains. The Intercolonial Railway authorities exercised no control whatever over the despatchers' department, or the crossing points. The despatchers follow the Intercolonial Railway schedule in the case of regular trains, but, in the case of extra trains, such as those which collided, the instructions of the despatcher guide altogether.

Appellants are not relieved from responsibility. under the circumstances, by the effect of statute 62 & 63 Vict. ch. 5 (D.), confirming the agreement of the 1st of February, 1898, because, as control is the foundation of responsibility, where there is control there is also responsibility, if fault be proved. The allegations of joint employment, joint control and joint ownership set up in the plea are not, properly speaking, allegations of fact, but depend entirely upon an interpretation erroneously placed upon the agreement and the statute. The plaintiffs cannot be in any manner bound or affected by this agreement to which they were neither parties nor privies. Under the circumstances proved, even this agreement, by its terms, would not relieve the defendants of their responsibility for the injuries resulting from their neg-

ligence. See art. 1106, C.C.; *Duquette* v. *Pesant dit Sans-Cartier*(1); *Jeannotte* v. *Couillard*(2); *Paquet* v. *Cité de Québec*(3); *Rancour* v. *Hunt*(4).

It is recognized jurisprudence that where a railway company grants running powers over its line to another railway company the owner, particularly when controlling the operation and movements of trains, remains responsible for collisions. 23 Am. & Eng. Encycl. of Law (2 ed.), p. 733, par. 6; p. 784, par. *b*; pp. 785, 786, 730, and p. 731, sub-par. *b* of par. 3.

The decision in the case of *Kieffer* v. *Le Séminaire de Québec*(5), has no application. There the act of negligence was that of the lessee; in the present case the act of negligence is that of the lessor.

Delisle K.C. held a watching brief on behalf of the Attorney-General for Canada.

THE CHIEF JUSTICE.—At the conclusion of the argument in these cases I was inclined to think that there was nothing in the appellant's contentions, but, after consideration, I am not so sure of it. I find, however, that the majority of the court have agreed to dismiss the appeals. The nature of the cases is such that I would not feel justified in delaying the judgments in that sense which are now ready to be given. I concur *dubitante*.

GIROUARD J.—Cette cause ne souffre aucune difficulté. L'appel doit être debouté avec depens pour les raisons données par Sir M. M. Tait, A.C.J.

(1) Q.R. 1 S.C. 465.
(2) Q.R. 3 Q.B. 461.
(3) Q.R. 8 S.C. 58.
(4) Q.R. 1 S.C. 74.
(5) (1903) A.C. 85.

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Davies J.

DAVIES J.—These appeals present the same facts, were argued together and are to be determined by the same considerations and principles.

I do not think the agreement between the Grand Trunk Railway Company and the Government as to the running rights which the Intercolonial Railway should have over the road can prevail to relieve the Grand Trunk Railway Company, the owner of the road, from its responsibility for the accident which resulted in the damage to the several respondents. It was the negligence of an employee of the Grand Trunk Railway Company which caused the accident, an employee selected, engaged and paid by them. The special work in which this employee was engaged had reference to the operation of the railroad as a whole, and was not confined to the running of the Intercolonial Railway trains over the road. We are not called upon to express any opinion as to the liability of the Intercolonial Railway to the plaintiff respondents, either jointly with the Grand Trunk Railway Company, or separately from them, and I expressly refrain from touching upon that point. Whether, under the running agreement between the Crown and the company, there is any right or remedy over, by the Grand Trunk Railway Company against the Intercolonial Railway, is a question not before us and which I decline to consider.

Once it is determined, as I think it was here rightly determined, that the negligence which caused the disaster was that of a Grand Trunk Railway employee in the discharge of his ordinary and general duties, the liability of that railway company to the injured plaintiffs is fixed.

The appeals should be dismissed with costs in each case.

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Idington J.

IDINGTON J.—These two cases turn upon the question of the liability of the appellants for the negligence of a train despatcher, hired by the defendants, now appellants, pursuant to the agreement between them and Her late Majesty, represented by the Honourable the Minister of Railways and Canals of Canada.

This agreement provided for the running of Intercolonial Railway trains over part of the appellants' track. It purports to lease thereby to the Crown, but provides in fact for a joint use of appellants' property.

The agreement was confirmed by 62 & 63 Vict. ch. 5 (D.), and appears in full, with that Act, in the Dominion statutes.

The negligence of the train despatcher resulted in two of the Intercolonial trains colliding on this track of the appellants used under the said agreement by the servants of the Crown in running Intercolonial trains in connection with that railway system.

This collision resulted in the death of engineer and fireman on one of these trains.

It was found by the learned trial judge and upheld by the Superior Court (in review) at Montreal that the appellants were liable and judgment was entered accordingly.

From this latter judgment the appeal is taken, and it is urged by the appellants that inasmuch as the train despatcher was engaged at the time solely in the directing of Intercolonial trains and, by the agreement in question, the agents of the Crown had some right to object to the employment by appellants of such officers, and the Crown had become bound to indemnify the appellants in such cases, and as they allege, also assumed the burthen of accidents on the

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Intercolonial trains, the Crown must be liable, if any one be liable, for the damages in question.

I am unable to take that view of the matter. The appellants had the right to hire, and to discharge, and, possibly, a right of interference in the directing of some trains which the Crown had not.

I think we must hold this train despatcher to have been the servant of the company.

Article 1054 of the Civil Code seems identical with what I take the English law to be on the subject of the master's liability.

There may be some difference between the effect of art. 1106 C.C., and the English law, as to a several liability in some such cases, but not in a way to touch this case.

The kernel of the matter is very much like that involved in the cases of *Laugher* v. *Pointer*(1) and *Quarman* v. *Burnett*(2), of which the first named gave rise to much difference of judicial opinion.

Having regard to the almost exclusive right to hire enjoyed by the appellants and the payment of the salaries by them to the despatchers they might hire, and also to the right of selection of the appellants' superintendent of their Eastern division, who was also the superior officer of those despatchers, and to the fact that he had been engaged and paid by the appellants in the same way as the despatchers (in almost every respect), I think it must be held that the appellants were, at the time of the accident in question, the masters who must answer for the negligence of this culpable despatcher, whose neglect caused the deaths in question.

The contract between the owners of these two

(1) 5 B. & C. 547.

(2) 6 M. & W. 499, at p. 507.

railway systems provides, by clause 8 thereof, as follows:

> The superintendent, operators, despatchers, agents and all others employed upon the repairs and maintenance and in the operation of the said joint sections, though paid by the Grand Trunk Railway in the first place, shall be considered as, and are in fact, in the joint employ of the parties hereto in reference to any question of liability of either party hereto to the other party for their negligence, and in reference to any and all other questions; and they shall render to each party such services as they may be called upon to render within the scope of their position or employment, and shall be subject to dismissal if they decline, neglect or refuse to render such assistance and service to either party hereto as such employees are usually called upon to render.

I am unable to understand how this can in this case help the appellants. It only shifts the point of view and seems to constitute both parties masters of the despatchers. They may, as suggested in the court below, be jointly liable. If joint masters and jointly liable, the effect of art. 1106 of the Civil Code, which governs this contract, is to render them severally liable and thus remove a difficulty possible to arise under English law but not in this case upon this Code.

In arranging time-tables and the running of extra trains it might be urged from the general scope of the contract that the appellants have the right of precedence in saying what should be done, though, it is true, bound to concede to the other party what may be reasonable in that regard.

The provisions of the contract for indemnity also point rather in the same direction.

These suggestions of precedence and the effect of the indemnity clauses are only such and are not to be taken as final opinions or even the important basis upon which my opinion rests here.

The contract in question is one that presents many

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sides and possible room for many distinctions in cases that may arise upon it.

I think the appeal ought to be dismissed with costs.

MACLENNAN J.—I am clearly of opinion that these appeals fail.

The simple question is, whose servant the train despatcher, by whose fault the accident occurred, was. He was employed by the appellants, was responsible to them alone for the performance of his duties, and they alone were responsible to him for his wages. It is plain that if his wages were not paid any action he could bring must be against the appellants alone and, in like manner, they alone could sue him for any fault in the performance of his duties.

I do not see how any agreement between the appellants and the Crown could give the latter any right of action against the despatcher.

Besides, even if both the appellants and the Crown were liable, it seems to be plain that, by Quebec law, the liability would be several, as well as joint, in a case like the present.

Appeal dismissed with costs.

Solicitor for the appellants: *A. E. Beckett.*

Solicitors for the respondents: *Laflamme & Mitchell.*