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

AND

MARY MILLER *ès qual.* (PLAINTIFF) ..... RESPONDENT

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*Oct. 9,12,13.
*Nov. 10.

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

Railways—Negligence—Braking apparatus—Railway Act, (1888) s. 243 —Sand valves—Notice of defects in machinery—Liability of Company—Provident society—Contract indemnifying employer—Indemnity and satisfaction—Lord Campbell's Act—Art. 1056 C.C.—Right of action.

The "sander" and sand-valves of a railway locomotive, which may be used in connection with the brakes in stopping a train, do not constitute part of the 'apparatus and arrangements' for applying the brakes to the wheels required by section 243 of the Railway Act of 1888.

Failure to remedy defects in the sand-valves, upon notice thereof given at the repair-shops in conformity with the company's rules, is merely the negligence of an employee and not negligence attributable to the company itself; therefore, the company may validly contract with its employees so as to exonerate itself from liability for such negligence and such a contract is a good answer to an action under article 1056 of the Civil Code of Lower Canada. *The Queen v. Grenier*, (30 Can. S. C. R. 42.) followed.

Girouard J. dissented on the ground that the negligence found by the ury was negligence of both the company and its employees.

APPEAL from the judgment of the Court of King's Bench, appeal side (1) affirming the judgment of the Superior Court, sitting in review, at Montreal, (2) in favour of the plaintiff, on the finding of the jury at the trial.

*PRESENT :– Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

(1) Q. R. 12 K. B. 1.

(2) Q. R. 21 S. C. 346.

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Actions were brought by the plaintiff, personally and as tutrix of her minor children, for damages sustained through the death of Richard Ramsden, her husband and the father of her children, alleged to have been caused by the negligence of the defendants. Deceased had been employed by the railway company, defendants, for a number of years and was killed while engaged in the performance of his duties as conductor of one of the company's freight trains at St. Henri Junction near Montreal. The causes were consolidated upon motion and tried before Doherty J. with a jury. The jury answered the questions submitted to them, and assessed the plaintiff's personal damages at $6,000 and those of the children at $4,000.

The accident which resulted in Ramsden's death was caused by a local passenger train of the company failing to stop when the semaphore was against it and coming in collision with the rear of the freight train which was standing on the tracks.

The questions submitted to the jury and their answers, so far as the issues on this appeal are concerned, were as follows:—

"2. Was the death of the said late Richard Ramsden caused,—

"(A.)—By the fault of the company defendant and its employees?—Yes.

"(*a.*) In running the Lachine train which struck the train upon which the said Richard Ramsden was employed, at a highly imprudent and dangerous speed when approaching the train-yard and switch, where the train which was struck was standing?—No.

"(*b.*) In running the locomotive of the said Lachine train with the tender in front?—No.

"(*c.*) In displaying no head light upon the said locomotive?—No.

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"(*d.*) In allowing the coal in the tender of the said locomotive to be piled so high that the engine driver could not obtain an unobstructed view of the line in front of him ?—Contributed to some extent.

"(*e.*) In approaching the distant semaphore inside of which Richard Ramsden's train was standing at a high rate of speed ?—No.

"(*f.*) In neglecting to stop the said Lachine train before reaching said semaphore ?—Yes.

"(*g.*) In allowing the locomotive of the said Lachine train to be used while in an unsafe and dangerous condition ?—Yes.

"(*h.*) In the fact of the sand-valves used in connection with the brakes of the said locomotive being out of order and useless ?—Yes.

"(*i.*) In failing to repair the defects in the said locomotive after the defects had been specially brought to the notice of the said company ?—Yes.

"(*j.*) In not whistling and giving no warning whatever of the approach of the said Lachine train ?—No.

"Or,—

"(B.)—By the fault of the said Richard Ramsden :—

"In failing to protect his train under and in accordance with the rules and regulations of the company defendant ?—No.

"3. Were the said rules and regulations well known to the said late Richard Ramsden, and had his attention been specially directed thereto immediately before the accident ?—Yes.

"4. If not the determining cause of the accident, did said failure of said Richard Ramsden contribute to bring about said accident ?—No.

"5. Was the said Richard Ramsden from the 30th of May, 1885, up to the time of his death a member of the G. T. R. Insurance and Provident Society, having

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made and signed the application for membership in the said society, defendant's exhibit No. 3, on or about the 20th of April, 1885, and received the certificate of membership, defendant's exhibit No. 4, on the 30th of May, 1885?—Yes.

"6. Did defendant annually contribute a proportion, and what proportion, to the fund and society aforesaid?—Yes. From 1885 to 1888 inclusive, $10,000; after 1888, $12,500 per annum, and for additional services contributed by company $10,000 to $15,000, as per evidence.

"7. Is defendant's exhibit No 2. a true copy of the rules and regulations and by-laws of said society in force at the time of the death of the said Richard Ramsden and during the whole period of his employment by defendant?—Yes,"

The trial judge reserved the case for the consideration of the Court of Review and stated that:—

"By their answers to questions 5, 6 and 7, the jury found that the late Richard Ramsden was at the time of his death a member of the G.T.R. Insurance and Provident Society, that defendant annually contributed to the said fund and society, and that defendant's exhibit No 2 is a true copy of the rules and regulations of said Society.

"By the last-mentioned answers, the jury find substantially the facts alleged in defendant's second plea to have been established. By interlocutory judgment rendered on the 5th March, 1900, dismissing an inscription in law of plaintiff, said plea was declared well founded in law, and, if established by the evidence, a good answer to plaintiff's action.

"Under these circumstance, and in view of the importance of the question of law raised by said plea, to wit, as to the binding effect upon plaintiff *ès nom et qualité*, of by-law No. 15 of the said society, which

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reads as follows :—' In consideration of the subscription of the Grand Trunk Railway Company to the society, no member thereof or his representatives shall have any claim against the company for compensation on account of injury or death from accident,' as relieving the company, defendant, from all liability in consequence of the death of said late Richard Ramsden, and whether the amount contributed to the said society by defendant, as found by the jury, constitutes its proper proportionate contribution as required by law, and of the fact that the questions of the effect of said by-law, and in what proportion, if any, the company defendant is by law, in order to claim the benefit thereof, bound to contribute to said society, are already under advisement before the Superior Court, sitting in Review, in this district, in a cause of *Ferguson* v. *The Company*, (1) defendant, I have reserved the case for the consideration of the Court of Review."

In the Court of Review the plaintiff moved for judgment for the damages assessed by the jury, and the defendants moved, on the findings, for dismissal of the action. The court dismissed the motion for dismissal and ordered judgment to be entered for the plaintiff, personally and *ès qualité*, with costs as of one action only (2). By the judgment appealed from (3) the judgment of the Court of Review was affirmed.

Lafleur K.C. and *Beckett* for the appellants. The jurisprudence settled by the case of *The Queen* v. *Grenier* (4) deprives the plaintiff of any right of action whatsoever against the said defendants. A workman may so contract with his employer, as to exonerate the latter from liability for negligence, and such renunciation is an answer to an action by his

(1) *See* (Q. R. 20 S. C. 54)
(2) Q. R. 21 S. C. 346.
(3) Q. R. 12 K. B. 1.
(4) 30 Can. S. C. R. 42.

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widow and her infant children to recover compensation in the event of his death. The Court of Review, at Montreal, in *Ferguson* v. *The Grand Trunk Railway Co.* (1), and the Court of Appeal for Ontario, in *Holden* v. *The Grand Trunk Railway Co.* (2), applied the rule laid down in *The Queen* v. *Grenier* (3) to the same by-law of the Grand Trunk Railway Insurance and Provident Society. The decision in *Robinson* v. *The Canadian Pacific Railway Co.* (4), merely related to the plea of prescription, but did not declare that indemnity could not be secured by special contract. In this case the by-law and regulations made for valuable consideration constitute a binding contract for indemnity against any action under arts. 1053 and 1056 C. C.

There is no finding by the jury that the company failed to provide the best known appliances for applying the brakes to the wheels as specified by sec. 243 of the Railway Act, 1888. They are silent on that point. The finding as to the defective sand-valves has nothing to do with the requirements of that section. The sand-valves do not form part of any "apparatus or arrangements" for applying brakes to the wheels in any way whatever. This is not the kind of negligence contemplated by that section. Then if they were defective, it was the duty of the employees to have put these sand-valves in order upon notice given at the repair-shops. This is not a case where negligence can be attributed to the company as distinct from its employees and there is no prohibition against making a contract to relieve them from liability in such case.

R. C. Smith K.C. and *Montgomery* for the respondent. The provisions of art. 1056 C. C. are laws of

(1) Q. R. 20 S. C. 54. (2) 30 Can. S. C. R. 42.
(4) [1892], A. C. 481.

public order and cannot be contravened or set aside by a private agreement; art. 13 C. C.

The society referred to is a continuation of the Grand Trunk Railway Superannuation and Provident Fund established by the Act of 37 Vict. ch. 65, in 1874. The portions of that Act relating to the fund are the preamble and sections 11, 12, 13 and 14. In 1878, by 41 Vict. ch. 25, sec. 2, *et seq.*, the company was authorized to make, either separately or in connection with the Superannuation and Provident Fund, provision for insurance against accident to its employees, including insurance in case of death. Sec. 3 provides that the company shall contribute to such fund annually any amount not exceeding one hundred and fifty per cent of the amount which may be subscribed annually to such fund by the members thereof. By sec. 4, the provisions of the Act of 1874 are made applicable to the fund created by the Act of 1878. The Great Western Superannuation and Provident Fund Act of 1880, established a similar fund for the Great Western Railway, and in 1884, by 47 Vict. ch. 52, sec. 17, the provisions of the Acts of 1874 and 1878 are made applicable to the whole Grand Trunk system. A similar provision is found in the Act of 1888, 51 Vict. ch. 58, par. 9. In none of these Acts is the slightest suggestion to be found of any such provision as is contained in by-law 15; therefore, this by-law is *ultra vires* and in excess of any powers, expressly or implied conferred upon the management. It is unreasonable and contravenes the civil laws of Quebec. See sec. 288 of the Railway Act, 1888, and arts. 13, 1053, 1056 C. C.; *Roach* v. *Grand Trunk Railway Co.* (1).

It is invalid as a contract, as appellants were not parties to it and no consideration was given. When the fund was formed, the appellants were ordered to

(1) Q. R. 4 S. C. 392.

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contribute to it not less than one-half nor more than three-halves of the amount contributed by the employees. When subsequently they were authorized to make, either separately or in connection with the fund, provision for insurance against accident or death, they were authorized to contribute not more than 150 per cent of the amount contributed by the employees, but no minimum was fixed. They elected to make this provision for insurance in connection with the fund, and the amalgamated funds were thereafter known under their present name, viz., "The Grand Trunk Insurance and Provident Society," so that since that time the appellants have been continually under a statutory duty to contribute to the funds of the society an amount representing at least one-half of the amount contributed by the employees to the superannuation and provident branch of the society, in addition to the contribution to the insurance fund.

It appears that the contribution of the appellants has been made generally without any distinction as to the different branches There is nothing to shew that this contribution would be even sufficient to cover the amount which the company is bound by law to contribute to the provident fund of the society; on the contrary, the contribution has not been increased since 1888, although great increases have been made, both in their system and in their number of employees since that time. The defence rests entirely upon this contribution, and the burden of proof was upon them to shew that they had at least contributed their proper proportion in order to bring the by-law into effect, which they have failed to do. The by-law creates an exception to the law and the evidence of the fulfilment of the conditions must be strictly scrutinized. The rules and regulations submitted to Parliament provided for an entirely distinct

consideration for the contribution of the company, *vide*, Rule 66 :—" The Grand Trunk Railway Company will, each half year, contribute, out of the revenues of the company, a sum in aid of the sick benefits and allowances of the Society, and in consideration thereof these rules and all alterations which may be made in them shall be subject to the approval of the directors of the Grand Trunk Railway Company." From the absence of any such evidence, only one inference can be drawn, that is, that absolutely no new consideration was given. A contribution already ordered by statute to be subscribed could not form the consideration for an agreement with individual members. As a contract it is void *ab initio*, for lack of a consideration. Such an agreement is contrary to public order, art. 13 C. C.; because it permits the appellant to contract itself, by anticipation, out of the consequences of its own gross negligence and not merely that of its employees. As regards gross or personal negligence, the French law, from which we derive our doctrine, is clear and indisputable. Nouveau Denisart " Fautes," p. 441; Demangeat, " Revue Pratique de Droit Français, vol. 55, p. 558."

Menus-Moreau, de la Responsabilité des Patrons, Clause de non-garantie; 1 Sourdat " Responsabilité," p. 679; 24 Demolombe, *n.* 406; 16 Laurent, No. 230; Sainctelette, p. 18, No. 5; Desjardins, Tr. de Droit Comm. et Marit., t. 2, No. 276; 1 Fuzier-Herman, art. 6, par. 13, 14; vol. 3, art. 1381, 1383, par. 1365, 1368, 1372-1375. See also 14 Am. & Eng. Encyc. of Law, p. 910; *Lake Shore & Michigan Southern Railway Co.* v. *Spangler* (1); *Kansas Pacific Railway Co.* v. *Peavy* (2); *Farmer* v. *The Grand Trunk Railway Co.* (3); *Brasell* v. *Grand Trunk Railway Co.* (4); *Glengoil*

(1) 28 A. & E. Rd. Cas. 319.
(2) 11 A. & E. Rd. Cas. 260.
(3) 21 O. R. 299.
(4) Q. R. 11 S. C. 150.

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Steamship Co. v. *Pilkington* (1) per Taschereau J. at page 157.

The right of action given by art. 1056 C. C. is not a representative one. That article is not merely an embodiment of Lord Campbell's Act, but differs from it in several very material respects. The clause, "without having obtained indemnity or satisfaction," is added; the clause as to the right of action in the case of a duel is also added. Under the civil law and under the French law the right of action of the relatives has always been distinct from that of deceased. Sourdat, vol. 1., Nos. 55 and 56. The same might be said of the jurisprudence of the Province of Quebec at least up to the time of the ruling in the *Grenier Case* (2). See *Ruest* v. *Grand Trunk Railway Co.* (3). The point has been clearly decided in *Robinson* v. *Canadian Pacific Railway Co.* (4). While it is true that the Judicial Committee had only to deal with the question of prescription, they laid down in the clearest possible terms the following principles:—(1.) That the action given by art. 1056 C. C. is not merely an embodiment in the Civil Code of Lord Campbell's Act, but that it differs substantially from it in its provisions; (2.) That this right of action given to the persons mentioned in art. 1056 C. C. is an independent and not a representative right; (3.) That the right of action given to the persons mentioned in that article is not barred by any conditions affecting the personal claim of the deceased other than those specified in the article, viz.:—(*a*) that the death was caused by the defendant; (*b*) that the deceased had not obtained indemnity or satisfaction. *Vide* remarks of Lord Watson at p. 487 of the report. The English decision in *Griffiths*

(1) 28 Can. S. C. R. 146.
(2) 30 Can. S. C. R. 42.
(3) 4 Q. L. R. 181.
(4) [1892] A. C. 481.

v. *Earl Dudley* (1), on which the judgment of the Supreme Court in the *Grenier Case* (2) relies, was cited by counsel for respondent before the Judicial Committee, but was evidently regarded as inapplicable to our law, as it was distinctly overruled.

The indemnity or satisfaction referred to in art. 1056 C. C. must have been obtained by the person injured between the date of injury and the date of death. S.V. 74, 2, 285.

Even if valid, the by-law does not exclude or affect the action of the wife personally. The by-law reads:— "In consideration of the subscription * * * *no member thereof nor his representatives* shall have any claim, etc." The respondents are not the representatives of the deceased, they did not succeed to his rights nor have the children even accepted his succession. The provision is an exceptional one derogating from the civil law, and must be interpreted with the greatest possible strictness—*exceptio est strictissimæ interpretationis.* The appellants are, moreover, the stipulating parties and, if any ambiguity exists as to the meaning of the word "representatives," it must be interpreted against them. Art. 1019 C. C.

Even if such a by-law could create an agreement barring any claim and binding not only upon the deceased, but also upon his widow and children, it must be disregarded in the present case, since the accident was the result of the company's failure to use the best appliances for stopping the train which brought about the collision. 51 Vict. ch. 29. sec. 243. The defective brakes and sand-valves were responsible for bringing about the accident, and it is to this cause that the jury attributed the accident in their verdict. The engine had originally been equipped with steam-brakes, but air-brakes had been substituted, the old

(1) 9 Q. B. D. 357. (2) 30 Can. S. C. R. 42.

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cylinders, however, being retained. Consequently, the air-cylinders were in a leaky condition and incapable of exerting a sufficient pressure to apply the brakes properly. Furthermore, the sand-valves were not of an approved type and were continually clogged up so completely as to prevent any sand being thrown upon the rail for the purpose of bringing about a quick stop. Both of these defects had been frequently brought to the notice of the company, but they had not been remedied.

The CHIEF JUSTICE.—The Court of Review's first *considerant* grounded upon section 243 of The Dominion Railway Act of 1888 was sufficient by itself alone to solve the controversy between the parties and to support the court's judgment in favour of the respondent. And, had I been able to come to the same conclusion upon that point, I would have refrained from considering the other questions raised in the case, the solution of which would then have been quite unnecessary for the determination of the appeal.

But I am unable to see that the sand-valves are or form part of

> apparatus and arrangements as best afford means of applying by the power of the steam-engine or otherwise the brakes to the wheels of the locomotive or tender, or both, or of all or any cars or carriages comprising the trains,

so as to bring the case under that section.

I therefore have to consider the other points involved in the appeal.

The first one, as to the legality of the stipulation by the company that they would not be responsible for injuries or death resulting from accidents, is concluded by our decision in *Glengoil* v. *Pilkington* (1), and *The Queen* v. *Grenier* (2).

(1) 28 Can. S. C. R. 146. (2) 30 Can. S. C. R., 42.

The accident in question must necessarily have been caused by the carelessness or negligence of some of the employees of the company, assuming that would make a difference. The jury, it is true, found that the accident was caused by the fault of the company and their employees. But I take it that in doing so they merely assumed that the company were responsible for the acts and omissions of their employees. That is why as one of the causes of the accident they found "in neglecting to stop the said train before reaching said semaphore." Had they intended to find as a fact that the company, *otherwise than through their employees*, were the cause of the accident, there would be no evidence to support such a finding. The negligence of Broadhurst, the engineer of the train in question, is clearly the proximate cause of it. He knew the defects of his engine, but failed to act accordingly.

Then, what the company really did was to limit their liability, not to stipulate non-liability. They admitted it, even in cases where in law their employee would have no claim against them by stipulating that the amount of the insurance would cover all the damages that he might suffer in case of accident, even if *that accident was due to his own fault or negligence.* So that, it is not merely the amount of insurance that the deceased agreed to accept as indemnity and satisfaction for any injury he might sustain in cases where the act of the company would have been the cause of the accident, but also, as part of that indemnity or satisfaction, the insurance against his own acts of negligence, where he would have had no claim at law against the company. The wife in such a case is entitled to the insurance even if her husband was exclusively the cause of his own death.

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The other material point argued before us presents some difficulty, as I view it.

Has the deceased ever received *indemnity or satisfaction* for the injury in question in the sense to be given to those words in art. 1056 C. C.? If so, by the *ratio decidendi* and the opinion delivered by their Lordships of the Privy Council in *Robinson* v. *Canadian Pacific Railway Co.* (1), the respondent's action fails. It is no doubt singular that any one can receive indemnity or satisfaction so as to bar an action which belongs to another. But that is the state of the law.

Here, were I unfettered by authority, I would be inclined to doubt if the deceased can be said to have received any indemnity or satisfaction, but I am bound by the authority of *The Queen* v. *Grenier*, (2) to hold that he has. The word *renunciation* used by the learned Chief Justice who delivered the judgment of the court in that case means nothing else, it is clear, than release in consideration of the indemnity or satisfaction that an employee under such circumstances agrees to have received in lieu of any further claim against the company in the case of his meeting any injury in the course of his employment. It was argued there, as it was at bar in this case, that an employee cannot stipulate in advance with his employer so as to defeat, in case of his death, the action of his wife and children; and that such a stipulation was not the indemnity or satisfaction required by art. 1056. But that contention did not prevail. We were of opinion that the words "without having obtained indemnity or satisfaction" of the article of the Code would be meaningless if the construction contended for by the plaintiff in that case, as it is by the plaintiff here, prevailed, that an indemnity or satisfaction which would have barred an action by the deceased, had he

(1) [1892] A. C. 481. (2) 30 Can. S. C. R. 42.

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survived, does not also bar the action by the consort and children. That cannot be. That would be reading out of the article the words "without having obtained indemnity or satisfaction." In other words, by the decision of the Privy Council in the *Robinson Case* (1), the survivors have an action under the Code though the deceased, when he died, had lost his right of action, *except* when it is because the deceased had obtained indemnity and satisfaction that he had lost his right of action. In such a case, by exception, the law is the same under the Code as it is in England under Lord Campbell's Act. However small the indemnity accepted by the deceased may have been, in whatever form or shape he may have accepted it, at what time he has accepted it, makes no difference.

In that Robinson case, the Privy Council held that the prescription of the action of the deceased was not an indemnity or satisfaction, and that in that case the wife had an action under the Code though the deceased when he died had none, conceding however in unequivocal language that indemnity or satisfaction to the deceased is a bar to the survivor's action. And in the *Grenier Case*, (2) we were bound, I need hardly say, by that decision and held in strict accordance with it, that there having been indemnity or satisfaction by the deceased in that case, the survivor's action did not lie, though it did lie in the *Robinson Case* (3) because the deceased there had not in his lifetime received indemnity or satisfaction.

I am of opinion that the appeal should be allowed with costs, and the action dismissed with costs in all the courts against the respondent.

SEDGEWICK J. concurred in the judgment allowing the appeal with costs.

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

(2) 30 Can. S. C. R. 42.

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GIROUARD J. (dissenting)—On the 29th January, 1900, respondent issued two actions against the appellants, one in her own name and the other in her quality as tutrix to her minor children, each action for $15,000 damages for the death of her husband while in the service of the company, at St. Henri, on the 2nd of January, 1900, through an accident which occurred on their line of railway, in consequence, it is alleged, of gross negligence on the part of the company and its servants and employees.

On motion of the respondent, these actions were combined by a judgment of the Superior Court of the 2nd November, 1900, but the question of costs was reserved.

The case was tried by a judge and a jury who found the following facts :—

2. Was the death of the said late Richard Ramsden caused.

(*a.*) By the fault of the Company Defendant and its employees ?—Yes.

(*f.*) In neglecting to stop the said Lachine train before reaching said semaphore ?—Yes.

(*g.*) In allowing the locomotive of the said Lachine train to be used while in an unsafe and dangerous condition ?—Yes.

(*h.*) In the fact of the sand-valves used in connection with the brakes of the locomotive being out of order and useless ?—Yes.

(*i.*) In failing to repair the defects in the said locomotive after the defects had been specially brought to the notice of the said company ? Yes.

Both parties moved for judgment upon the verdict, the respondent for the amount at which the damages were assessed, and the appellants for the dismissal of the action. The unanimous judgment of the Court of Review dismissed appellants' motion and maintained respondent's with costs as in one action only, and this judgment was unanimously confirmed by the Court of King's Bench.

The Court of Review was composed of the Acting Chief Justice, Sir Melbourne Tait, Mr. Justice

Pagnuelo, and Mr. Justice Curran, who gave judgment for the plaintiff on the verdict, although they do not entirely agree as to the reasons of judgment.

The Acting Chief Justice held the company responsible under section 243 of The Dominion Railway Act, 1888. Mr. Justice Pagnuelo and Mr. Justice Curran appear to have been against the company on all the points.

Appellants submit that under the judgment rendered in the case of *The Queen* v. *Grenier* (1) plaintiffs have no right of action whatsoever against the said defendants. It has been submitted on the other hand that *The Queen* v. *Grenier* (1) conflicts with *Robinson* v. *The Canadian Pacific Railway*, (2) decided by the Privy Council. I think that neither both contention is well founded.

I fail in the first place to see any such contradiction. In the *Robinson Case* (2), the point in issue was one of prescription under Articles 1056 and 2262 of the Civil Code. That prescription differs essentially from the prescription known to the French law, whether under the French code or the old law. It is not based upon a presumption of payment, but solely upon grounds of public policy, so much so that the judge in Quebec is bound to take notice of it *ex officio*. A judge in France never can do so.

It cannot be seriously pretended, it seems to me, that prescription is equivalent to the indemnity or satisfaction mentioned in article 1056 of the Civil Code. This point is clearly settled by the Privy Council in the *Robinson Case* (2). Lord Watson said .

That prescription is not, within the meaning of the Code, equivalent to indemnity or satisfaction is made perfectly clear by a reference to art. 1138. (2)

(1) 30 S. C. R. 42.

(2) [1892] A. C. 481.

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Girouard J.

In *The Queen* v. *Grenier* (1) there was no question of prescription; the point raised by the pleadings and decided by us was not whether the widow or children had a representative or an independent action—which no doubt they always had—but whether the deceased had obtained indemnity or satisfaction within the meaning of article 1056 of the Code, and we held that he had, by becoming a member of an insurance association, similar to the one now under consideration, which was composed of the employees on the Intercolonial Railway. As in this instance, they were all compelled, before entering the service, to join it and to make certain contributions to its funds in order to enable the association to provide certain pecuniary allowances to be paid to them or their families in cases of accident, in accordance with certain by-laws, rules, conditions and regulations, signed by each of them. The railway proprietors had annually contributed to this insurance fund large sums of money in consideration of which it was made a rule or by-law of the association agreed to by all the members that the railway proprietors should be relieved of all claims for compensation for injuries and even death of a member. The respondent has quoted several French decisions to establish that such an arrangement cannot cover a case of negligence. But they have no application here, where the law in this respect is different. Article 1056 of our Code cannot be found in the French Code. France is only governed by the general principles laid down in articles 1382, 1383, 1384 and 1385 of the French Code, corresponding to arts. 1053, 1054 and 1055 of our Code. Art. 1056, as far as "indemnity or satisfaction" is concerned is new law, not to be found in Lord Campbell's Act, as I presume these words under the common law of England were unnecessary, not even

(1) 30 Can. S. C. R. 42.

in the Canadian statutes, where probably the same impression prevailed in the legislature. The codifiers offer no explanation for art. 1056. It is not even alluded to in their reports and although it seems to me it was enacted with the view of making the jurisprudence of Quebec agree with that of Ontario, I do not see any change in the old French maxim which declares that no one can contract against his own negligence.

With regard to the railway insurance clause, the present case is the same as in *The Queen* v. *Grenier*. (1) I am bound by that decision, and I am yet of opinion that it was correctly decided. The opinion of the learned judge who delivered the judgment of this court may contain some unnecessary statements which may be considered as *obiter dicta*. It cannot be denied that the only question raised in that case was whether indemnity or satisfaction had been obtained within the meaning of article 1056 of the Civil Code. Following *Glengoil Steamship Co.* v. *Pilkington* (2) we held that the deceased had contracted with his employer so as to exonerate the latter from liability for the negligence of his servants and employees, and that the payment of the large annual contributions by the employer to the insurance fund, and accepted by the deceased under the by-law, was indemnity and satisfaction as to all parties, within the meaning of the article of the Code. I think the language of the Code is clear and comprehensive enough to cover an arrangement such as the one made by the railway proprietors with their employees. So we held at all events.

But this case is very different from *The Queen* v. *Grenier* (1). The death was due not to the negligence of the employees and servants only, but as the jury

(1) 30 Can. S. C. R. 42.) (2) 28 S. C. R. 146.

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found—and their findings are not attacked—to the negligence of both the company and the employees. I do not feel disposed to go behind these findings to ascertain the position of the company; the language of the jury is plain enough; they give their reasons which are satisfactory to my mind at least. I do not intend to substitute myself for the jury. I accept their verdict.

If the law of Quebec was like the law of England, I would not hesitate to apply *The Queen* v. *Grenier* (1) to a case of negligence of the employer like the present one. But in Quebec, although one can validly contract for exemption from liability for the negligence of his employees and servants, no one can free himself from responsibility for his own fault. This point we declined to decide in the *Glengoil Case.* (2) It must be observed that the latter case was decided not upon English authorities, but upon what we considered to be now the jurisprudence of France. Taschereau J. delivering the opinion of the court said:

> The jurisprudence in France, though perhaps formerly not uniform now sanctions the validity of such a contract (1).

The learned judge quoted a long array of *arrêts* and commentators. But I venture to say that upon the other more difficult question, as he says, as to the validity of a similar stipulation for one's own fault, no authority can be quoted in its favour; I have not been able at least to find one, and in face of that well settled jurisprudence I cannot agree to the contrary doctrine. It is held as contrary to an elementary maxim of law and it is expressly condemned by all the authorities which will be found collected in the respondent's factum, as contrary to public morals and public order, whatever may be the law of England under similar circumstances.

(1) 30 Can. S. C. R. 42. (2) 28 S. C. R. 146, 157.

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Our attention has been called to the last words of section 243 of The Railway Act 1888, which gives an action in certain cases of negligence "notwithstanding any agreement to the contrary with regard to any such person." If I understand these words correctly, they simply mean that the company may protect itself against certain acts of negligence, not mentioned in the clause; in the provinces where such an agreement can be made. But they cannot possibly mean to legalize what would be contrary to law in any province. I have therefore come to the conclusion that the agreement to an indemnity or satisfaction such as alleged by the appellants is null and void at common law with regard to the company's own negligence. Arts. 13, 990 C. C.

Taking this view of the case, it may not be necessary to examine the effect of clause 243 of The Railway Act. Speaking for myself, I cannot conceive that the answers of the jury do not bring the case within the exceptions of section 243 of The Railway Act. Such is also the opinion of the other judges in the courts below. Upon this branch of the case I cannot do better than quote the remarks of Acting Chief Justice Tait, in which I fully concur:

> Now the defendants, as shown by the question put to the jury with their consent, evidently considered the sand-valves as part of the apparatus or arrangements, or of the good and sufficient means which the statute requires them to provide, and the question admits that they were used in connection with the brakes of the locomotive. The jury found, as already pointed out, that Ramsden's death was caused by the fault of the company defendant and its employees, in the fact of the sand-valves used in connection with the brakes of the said locomotive being out of order and useless, and in failing to repair the defects in the locomotive after such defects had been specially brought to the notice of the company.
>
> Now it seems to me that to give this section such interpretation as would best insure the attainment of its object regarding the stopping of trains, we are justified in saying that the company has failed to

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conform to its provisions, and that the accident in question resulted from such failure.

I am of opinion therefore, that notwithstanding the agreement between Ramsden and the society, the defendants are responsible under this section of the Railway Act.

Mr. Justice Pagnuelo also concludes:

L'obligation de placer et de maintenir des freins effectifs est imposée à la compagnie, quoiqu'elle n'agisse que par ses préposés. Le défaut d'accomplir cette obligation est une faute de la compagnie elle-même, et toute convention faite avec les passagers ou ses employés pour la soustraire à sa résponsibilité civile est frappée de nullité absolue ; la compagnie sera résponsable de sa faute prouvée envers toute personne blessée et ses représentants, malgré toute convention contraire.

Je ne vois donc pas comment la compagnie peut, avec un semblant de raison, invoquer l'article du règlement de la dite societé pour se libérer de son obligation d'indemniser Ramsden, sa femme et ses enfants, suivant le cas. La cour suprême ne s'est pas prononcée sur cet article du statut, et la cause de *Grenier* (1) n'a rien qui ressemble à celle-ci.

For these reasons I am of opinion that the appeal should be dismissed with costs.

DAVIES J.—This appeal seems to be in some respects on all fours with the case of *The Queen* v. *Grenier* (1) in which this court held that an employee on the Intercolonial Railway who became a member of the Intercolonial Railway Relief & Assurance Association, and thereby assented to its rules and to the arrangement by which the Crown contributed $6,000 annually to the funds of the association, had by virtue of one of these rules contracted that the Crown

should be relieved of all claims for compensation for injuries to or for the death of any member of the association.

We are bound by this decision so far as it goes and also by the decision of this court in the case of *The Glengoil S. S. Co.* v. *Pilkington* (2) where it is held that an express agreement between carriers and ship-

(1) 30 Can. S. C. R. 42. (2) 23 Can. S. C. R. 146.

pers that the former should not be liable for negligence on the part of the masters or mariners or their servants or agents is not contrary to public policy nor prohibited by law in the Province of Quebec.

It was not determined in this latter case whether such an agreement if made expressly exempting carriers from their own negligence would in the Province of Quebec be illegal, nor does the *Grenier Case* (1) decide that point. In the case at bar it was contended that the by-law in question relieving the defendants from liability must be construed as extending only to the negligence of employees and not to that of the company itself; and that the answers of the jury to the questions put to them amounted to a finding that the negligence which caused the death of Ramsden was that of the company itself. I am unable to place this construction upon these findings of the jury, and am therefore relieved of the duty of determining whether the true construction of the by-law exempted the company from the consequences of its own negligence, and if so, whether such a by-law would be legally effective in the Province of Quebec. The jury was asked, among other things:

Was the death of the late Richard Ramsden caused (*a*) by the fault of the company defendants and its employees? to which they gave the general answer "Yes."

Then followed ten sub-questions of this main one pointing to some specific act of negligence, and among them the two following questions and answers:

Q. (*h*). In the fact of the sand valves used in connection with the brakes of the said locomotive being out of order and useless?—A. Yes.

Q. (*i*). In failing to repair the defects in the said locomotive after the defects had been specially brought to the notice of the company? —A. Yes.

To each question the affirmative answer was given. But such affirmative answer does not by any means

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involve the finding of a neglect of duty on the part of the company as distinct from the neglect of its employees.

No question is raised here as to any failure of duty on the part of the company to provide and maintain proper and suitable plant, works and machinery or suitable materials to repair daily defects, or competent servants to control and operate their railway. The question rather is whether having made proper provision for all of these things the company would be liable for the negligence of some of its employees in not repairing defects arising in the daily use of one of the engines and whether as to the latter their contract with Ramsden did not exempt them from liability.

I am unable to discover in these answers of the jury to the questions put to them any finding which directly charges the company as distinct from its officials, with any breach of common law or statutory duty. All the findings are consistent with neglect or breaches of duty by officials as against liability for whose negligence the defendant company has contracted exemption. The evidence shows that the repairs to the locomotive were reported at the round house, and that it was the duty of the workmen there to attend to these repairs. There is no evidence of any special bringing of these defects to the notice of the company or its executive officers as implied in question (*i*) submitted to the jury as distinct from the ordinary reports of defects made daily with regard to engines and locomotives by the engineer in charge of them. I am unable, therefore, to attach the meaning and weight to that finding which the counsel for respondent contended for.

It was strongly contended that the provisions of sec. 243 of The Railway Act, 1888, applied to the facts as found by the jury with regard to the sand-valves; and

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I confess I was at the argument impressed with the contention. But a critical examination of the section has convinced me that so far as the sand valves are concerned neither their presence nor their state of repair are covered by the section. Omitting those parts of the section which admittedly do not apply to the facts as proved herein, I think its true meaning is to oblige the company to provide and cause to be used on passenger trains such known apparatus and arrangements as best afford good and sufficient means of applying *the brakes to the wheels* of the locomotive or tender or both. The sand-valves are not necessary and do not contribute in any way to this purpose and their presence or state of repair cannot be said to effect a breach of or a compliance with the section.

Holding, as I do therefore, that the negligence found as the proximate cause of Ramsden's death was not that of the company as distinct from its officials and servants, and that as regards the latter the company had, under the authority of *Grenier's Case* (1), exempted itself from liability by its contract, and being also of the opinion that the negligence found was not within the 243rd section of The Railway Act, I think the appeal must be allowed.

I entertained doubts as to whether there was any such privity of contract between Ramsden and the Railway Company as would discharge the latter from liability in cases where that liability was found to exist. There was no express contract between Ramsden and the railway company. The contract between them must be gathered from the facts of Ramsden becoming a member of the insurance society one of whose by-laws provided for the exemption of the railway company from all claims by members of the society for damages caused by accident on the company's railway and the statutory annual payment by the railway company

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to the funds of the society. In the *Grenier Case* (1), however, the facts were precisely similar and that decision is binding on us.

KILLAM J.—This is an appeal from a judgment of the Court of Review of the Province of Quebec, pronounced under art. 494 of the Code of Civil Procedure, in a case which was tried by a jury and in which the trial judge reserved for the consideration of the court, under art. 491 of the Code of Civil Procedure, the question of the judgment to be entered upon the answers to certain questions submitted to the jury. The circumstances of the case and the answers of the jury have, for the most part, been sufficiently stated by the other members of the court.

For the purposes of this appeal, we must take the findings of the jury as absolutely correct. They establish that Richard Ramsden came to his death through such fault and negligence of the defendant and its employees as would have given him a cause of action for his injuries if he had lived, unless he was barred by the rules and regulations of the Grank Trunk Railway Insurance and Provident Society and his acceptance of them; and, under art. 1056 of the Civil Code of Quebec, the present plaintiffs have a similar right of action, unless it is barred in the same way.

In considering whether they are so barred, I think that we should start upon the assumption that we are bound by the decision of this court in *The Queen* v. *Grenier* (1) in so far as it is based upon similar facts. I accept the conclusion in that case, without intending to indicate any opinion upon the questions involved.

The rules of this particular society and the position of its members were considered by the Court of Review in Quebec, in *Ferguson* v *Grand Trunk*

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Railway Co. (1) and held to be practically the same, for the purposes of the question now arising, as in the case of the association of which Grenier was a member. I deem it sufficient upon this point to refer to the reasoning in that case.

But the circumstances of the present case raise some further questions of importance, first, upon the construction and application of section 243 of The Railway Act of Canada, 51 Vict. ch. 29; and, secondly, upon the special terms of the jury's findings.

For the purpose of applying the statute in the present instance, I would adopt the paraphrase indicated by the learned Chief Justice of the court below, thus:

> Every railway company which runs trains upon the railway for the conveyance of passengers, shall provide and cause to be used in and upon said trains such known apparatus and arrangements as best afford * * * good and sufficient means of applying by the power of the steam engine or otherwise, at the will of the engine driver or other person appointed to such duty, the brakes to the wheels of the locomotive or tender, or both, or of all or any cars or carriages composing the trains. * * * And every railway company which fails to comply with any of the provisions of this section shall * * * be liable to pay to all such persons as are injured by reason of non-compliance with this provision, or to their representatives, such damages as they are legally entitled to, notwithstanding any agreement to the contrary with regard to any such person.

But with all respect, I am unable to agree with the learned Chief Justice as to the effect of the clause. So far as it is now important, it deals only with the means of applying the brakes to the wheels. Of course, this again is a method of stopping the train, as a speedy stopping of the train may be a means of ensuring the safety of passengers or others in certain contingencies. But it appears to me quite as fallacious to apply the clause to every means of stopping the train as to every means of ensuring safety. It

(1) Q. R. 20 S. C. 54.

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is directed to certain specific devices and means expressly mentioned, and there is nothing to indicate a purpose to enact anything more than the words express.

There is no direct finding by the jury that the accident was due to any defect in the apparatus or arrangements affording means of applying the brakes to the wheels.

The use of the sand-pipes is given by the witness Broadhurst as being to

> put sand on the rail in order to cause the wheels to grip the rail and stop the train.

It is evident that the object is to increase the friction along the rails and not in any way to assist the application of the brakes to the wheels or to increase the power of the brakes. In the light of the evidence, it is clear that the sand-valves are in no sense apparatus or arrangements affording means of applying the brakes to the wheels, and that the jury's answer to the question referring to the sand valves as "used in connection with the brakes" does not involve a finding that they are such apparatus or arrangements or any part thereof.

The case under the statute seems to me to fail entirely.

It is upon the other part of the case that I have found the greatest difficulty. In the Grenier case the negligence was that of a co-employee of the injured man, and it is argued that the jury's answers in the present instance involve a finding that the accident was due to negligence personal to the company itself, as distinguished from its employees, against liability for which, by the law of the Province of Quebec, the company could not contract.

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In the *Glengoil Steamship Co.* v. *Pilkington* (1) this court held valid a stipulation relieving the company owning a steamship from liability for negligence of the master, and the master of a steamship would seem to stand as high in the representation of the company owning it as any superintendent or manager of a division of a railway in the representation of the railway company.

Looking at the evidence in the case before us, it appears that any defaults were those of subordinate officials. At least, they are not traced to any others. The evidence certainly did not warrant any finding of negligence on the part of the company, as distinguished from its employees.

In none of the particulars in which default is found is there clearly shown to have been a breach of any duty of the company as an employer to its employees. It is consistent with each that it was due to some official or officials. All are in matters ordinarily relegated to subordinate officials. Indeed, the neglect to stop the train, specified as one cause of the accident, could only be the neglect of those having actual control of it.

A finding of default by a person charged does not necessarily mean personal default; it may be based solely on the default of one for whom he is responsible.

I think, then, that there was not sufficient in the answers to warrant a judgment on the basis that the death was caused by gross negligence on the part of the company itself, as distinguished from its employees. For that purpose there should be a clear and unambiguous finding by the jury, just as in *Brasell* v. *La Compagnie du Grand Tronc* (2) it was pointed out by Pagnuelo J. that the burden is upon an employee who has agreed to assume the risks of the defaults of

(1) 28 Can. S. C. R. 146. (2) Q. R. 11 S. C. 150.

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his co-employees to show that injury has come to him from the gross negligence of the employer himself.

On the ground, then, that the facts do not sufficiently raise a case for the purpose, I refrain from discussing the question of the company's power to contract itself out of liability for its own defaults.

I would allow the appeal and direct the entry of judgment for the defendant with costs here and below.

Appeal allowed with costs.

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

Solicitors for the respondent: *Smith, McKay & Montgomery.*