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THE CENTRAL VERMONT RAILWAY COMPANY (DEFENDANT).... } APPELLANT;

AND

DAME MARGARET BAIN (PLAINTIFF)..... } RESPONDENT.

*Mar. 17, 18
*Apr. 9

THE GRAND TRUNK RALWAY COMPANY OF CANADA (DEFENDANT IN WARRANTY)..... } APPELLANT;

AND

DAME MARGARET BAIN (PLAINTIFF)..... } RESPONDENT.

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

Negligence—Master and servant—Railway companies—"Joint operation"—Control—Limited liability of each company—Art. 1054 C.C., —Art. 1384 C.N.

The G.T.R. Co. was operating a line of railway between Montreal and St. Johns, P.Q., and the C.V.R. Co. was also operating a line between St. Johns, P.Q., and St. Albans, Vt. An agreement was entered into between the companies "to operate jointly, and as one line, the railway from Montreal to St. Albans." The same train crew was to remain in charge during the trip; but it was provided "that each party should pay the train and engine men employed in the joint service for the service performed by them on its own line," and "that * * * the rules and regulations of" either company "shall apply while the trains are upon the lines of that company." A through train, thus operated between St. Albans and Montreal, met with a collision, on the G.T.R. Co's line, caused by the negligence of an engineer in charge of the train from the starting point; and the respondent's husband was killed.

Held that, at the time of the collision, the engineer was in the employment and under the sole control of the G.T.R. Co., and the C.V.R. Co. could not be held liable for the accident.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault, JJ.

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Held, also, that "the joint service," referred to in the agreement, could only be construed as joint in the sense of being a continuous service, one part being controlled by one company and the other part by the other.

Per Brodeur and Mignault JJ.—The agreement between both companies is not *res inter alios acta* with regard to the respondent and her husband.

Judgment of the Court of King's Bench (Q.R. 28 K.B. 45), reversed.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), affirming the judgment of the Superior Court, District of Montreal, and maintaining the plaintiff's action and the action in warranty, with costs.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported. The respondent's husband, while attending to his duties as locomotive fireman in the service of the Grand Trunk Railway Co., was killed on this company's line, near Montreal, by an engine belonging to the Central Vermont Railway Co. The respondent obtained before the Superior Court at Montreal, from the Grand Trunk Railway Co., a sum of $2,025 under the "Workmen's Compensation Act," but she took another action, under the common law for $25,000 as damages, against the Central Vermont Railway Co., which then formed an action in warranty against the Grand Trunk Railway Co. in pursuance of an agreement to that effect between both companies. The G.T.R. Co. intervened in the principal action and pleaded *inter alia* that, having paid already to the respondent the sum of $2,025, all her claims had been extinguished. The Central Vermont Railway Co. also contested the action declining any liability. The trial court awarded $10,000 to the respondent and maintained the action in warranty. The Court of King's Bench affirmed this judgment.

(1) Q.R. 28 K.B. 45.

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The Chief Justice.

Eug. Lafleur K.C. and *A. E. Beckett K.C.* for the appellant: The Central Vermont Railway Company.

Henri Jodoin K.C. for the appellant: The Grand Trunk Railway Company.

E. Fabre Surveyer K.C .and *C. G. Ogden K.C.* for the respondent.

THE CHIEF JUSTICE.—At the close of the argument in this case, I entertained no doubt that the appeal of the Central Vermont Railway Co. should be allowed and the action against it dismissed.

The accident which caused the death of the plaintiff's husband was due to the negligence of the engineer Frost and the question to be determined was whether at the time of the accident he was in the employment of the Central Vermont Railway Co. or that of the Grand Trunk Railway Co.

The former company is a foreign one, and its powers within Canada are limited to running its trains from the international border line to St. Johns, in the Province of Quebec.

An agreement had been entered into between that company and the Grand Trunk Railway Co. to run a train jointly between St. Albans, U.S.A., and Montreal, via St. Johns, with provisions, amongst others, that the Central Vermont Railway Co. should pay the wages of train crew as far as St. Johns, and the Grand Trunk Railway Co. should pay them from that point to Montreal. The Central Vermont Railway Co was the engineer's employer till the train reached St. Johns. From that point on to Montreal, the Grand Trunk Railway Co. became his employer, paid his wages, and he was under their direct control. The operation of running the train between St. Albans and Montreal was referred to in the agreement between the two companies as a joint one, but in the light of the facts

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and the limited powers of the Central Vermont Railway Co., it can only be construed as joint in the sense of being a continuous service, one part being controlled by one company and the other part by the other company.

Having reached the conclusion that Frost's employer at the time of the accident was the Grand Trunk Railway Co., which alone had power to run trains on that part of the railway track and which company alone paid and was liable to pay his wages, I am of the opinion that the appeals must be allowed and the action against the Central Vermont Railway Co. dismissed with costs throughout if the companies insist upon collecting them.

IDINGTON J.—The question raised by this appeal must turn upon whether or not the engine driver, Frost, was at the time and place of the accident in question under the control of the Central Vermont Railway Co. or that of the Grand Trunk Railway Co.

It seems to me (with deference to those holding otherwise) impossible to say that either in law or in fact he was under the control of the Central Vermont Railway Co., which had no authority in law to run a train to Montreal.

These companies simply entered into an agreement for interchange of traffic on a basis which would enable them to constitute a through train and through traffic by means of lending men and cars and engines to the other when the train ran over the other's line.

The agreement as drawn seems to shew clearly that such was the purpose had in view. And to put that beyond doubt, it expressly provided that the pay of men engaged in the service, and incidental expenses, and the consequent damages claimed by third parties,

arising from the carrying on of the business, should be borne by that company over whose road said men and material travelled.

More than that, the rules and regulations of the company owning the road used were to be those governing the traffic carried over it, and could not in law be otherwise.

All the stress laid upon the descriptive expressions "joint line" and "to operate jointly" used in the agreement do not change its character. And if we could make them the governing factors in determining the nature of what the agreement really is, we might find a partnership which would not help the respondent's cause, but defeat it. Indeed, when we consider the contract as a whole we find these expressions are not entirely inapt if correctly applied.

I think the appeal should be allowed with one set of costs throughout.

ANGLIN J.—Having regard to the limitations upon the charter powers of the Vermont Central Railway Co. and to the terms of the agreement between that company and the Grand Trunk Railway Co., I am clearly of the opinion that the engineer Frost was, at the time of the collision which resulted in the death of the plaintiff's husband, in the employment and under the sole control of the latter company. Far from being inconsistent with this view, the weight of the oral evidence, I think, supports it. The operation of the route from St. Albans to Montreal was "joint" only in the sense that the service to be provided was continuous. Each railway company retained full control of the traffic over its own line of railway and, so far as appears, over the earnings of that traffic. The case of one company exercising running rights over the tracks of another is entirely different. North bound

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trains, while running between St. Albans and St. Johns, were Vermont Central trains in the sense that they were run by and under the exclusive control of that company. At St. Johns, they became Grand Trunk trains in the same sense and so continued until they reached Montreal. The members of the train crews, to whichever company they owed general allegiance, while operating on the Grand Trunk Railway Co., were its employees and under its control. That, as Mr. Justice Cross says,

> is the decisive element which engenders responsibility.

The Vermont Central Railway Co., though Frost's original employer, cannot be responsible for the consequences of his negligence in the discharge of his duties while the servant of the Grand Trunk Railway Co., as his *patron momentané*.

I would, therefore, with respect, allow these appeals and dismiss the action—with costs throughout, if asked.

BRODEUR J.—The question in this appeal is whether the engineer Frost was under the control of the Central Vermont Railway Co. or of the Grand Trunk Railway Co. when he caused the accident which resulted in the death of the respondent's husband. The appellants contended that he was under the Grand Trunk Railway Co.'s control. On the other hand, the respondent claims that he was the Central Vermont Railway Co.'s servant.

The judges below, with one exception, maintained respondent's contention.

The accident occurred on the Grand Trunk Railway Co.'s line near Montreal. The train in charge of the engineer Frost runs between St. Albans and Montreal by virtue of an agreement between the two appellant

companies, the Central Vermont Railway Co. and the Grand Trunk Railway Co.

The line between St. Albans, Vermont, and St. Johns, P.Q., is the property of the Central Vermont Railway Co.; and the Grand Trunk Railway Co. is the owner of the line between St. Johns, P.Q., and Montreal. In the ordinary course of business, the Central Vermont trains and engines should not go further than St. Johns; and there the passengers would have to change cars and board Grand Trunk cars for Montreal. The crews and engines should also be changed.

Those interchanges of trains, crews and engines would entail losses of time, inconvenience for the passengers and larger costs of operation. In order to obviate that, the two companies made in 1896 an agreement "to operate jointly and as one line" the railway from Montreal to St. Albans for both freight and passenger business. Each contracting party was to furnish a mileage proportion of engines, cabooses and train crews, and was to pay the train and engine men for the services performed by the latter on its own line,

and neither of the parties hereto shall be held responsible to the other for the actions of such joint employees while upon the line of railway of the other party.

The following stipulations were also found in the agreement:—

That each of the parties hereto shall assume all liability for loss or damages sustained in operating said trains on its own line,

and that

the rules and regulations of the Grand Trunk Railway Co. shall apply while the trains are upon the lines of that company.

The employees were paid on the mileage basis by each company, and they were receiving rates of wages when working on the Central Vermont line different

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from those paid for working on the Grand Trunk line.

The train which caused the accident was a passenger train composed of crews originally engaged by the Grand Trunk Railway Co. or by the Central Vermont Railway Co. The engineer Frost, whose negligence caused the accident, had been originally engaged by the Central Vermont Railway Co.; but in order to take charge of that through train he had to pass an examination before the Grand Trunk Railway Co.'s authorities. The train was composed of a Central Vermont engine and of Grand Trunk cars.

Once that train had reached the Grand Trunk line at St. Johns, it became for all intents and purposes a Grand Trunk Railway train. The crews came under the orders of the latter company and under its control. The movements of the train and the actions of its employees were under the orders of the Grand Trunk, and the Central Vermont lost all control over its own original employees, who received their salaries from the company on whose line they were running. Those employees were liable to be dismissed by the latter company and, in fact, that engineer Frost was dismissed by the Grand Trunk Railway Co.

Art. 1054 C.C. says that a person is responsible for the damage caused by the fault of persons "under his control." At the time of the accident, Frost had ceased to be under the control of the Central Vermont Railway Co., but he was then in the pay of and was employed by the Grand Trunk Railway Co.

The liability stipulated by our Code in art. 1054 C.C. against the employer rests upon the right of the latter to supervise and direct the work (Sirey, 1900-1-56).

It was, under the contract in question, the duty of the Grand Trunk Railway Co. and not of the Central

Vermont Railway Co. to supervise Frost's work and to give him the necessary directions. It has been suggested that he was under the influence of liquor. If that suggestion be correct, then the Grand Trunk Railway Co. was at fault to have had an engineer in that condition while in charge of the train.

Now the fact that Frost had been hired by the Central Vermont Railway Co. does not alter the situation. As it had been decided by the Court of Cassation, in a case reported in Sirey, 1903-1-104:—

La responsabilité édictée par l'article 1384 C.N.

(which corresponds to art. 1054 C.C.)

s'applique, en cas d'accident survenu par la faute du préposé, non pas au patron habituel mais au patron momentané qui avait ce préposé sous ses ordres et sur lequel il avait une autorité exclusive au moment de l'accident. En conséquence, c'est le patron momentané qui doit être déclaré civilement responsable.

Applying that principle in the present case, I say: The *patron habituel* of Frost was the Central Vermont Railway Co., but his *patron momentané*, at the time of the accident, was the Grand Trunk Railway Co.

It was said by the learned judge of the Superior Court that the contract between the Central Vermont Railway Co. and the Grand Trunk Railway Co. was with regard to the plaintiff and her husband *res inter alios acta* and could not bind the employees of the respective companies. Of course, in the case of Frost, he could refuse to work for the Grand Trunk Railway Co., since he had been engaged by the Central Vermont Railway Co.; but he was willing to work for the Grand Trunk Railway Co. since he was paid by the latter company.

As to the plaintiff herself or her husband, she was bound, in order to recover, to prove and to establish that the servant who caused the accident was employed

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by the Central Vermont Railway Co. She proved that he was originally hired by the latter company, but it was shewn also that, by virtue of an agreement between the two railway companies and accepted by the employee himself, the latter became a temporary employee under the control of the Grand Trunk Railway Co. It is not a contract *inter alios acta*; but it is a contract which determines the contractual relations of the parties and which affect also the relations of third parties with those employers and employees.

A person is a victim of an accident arising out of the construction of a building. The owner of the building has made with an independent contractor an agreement to carry out that construction. That contract is binding upon all those who would suffer from an accident in the course of that contract. If the victim could sue the owner of the building, then the latter could very well decline any liability on the ground that the servant who caused the accident was the contractor's servant; and the contract which he would invoke for that purpose could not be considered as *res inter alios acta*.

For all those reasons I have come to the conclusion that the accident was caused by the negligence of Frost, and when the latter was under the control of the Grand Trunk Railway Co.

As to the costs, I am of opinion that the filing of two contestations by the appellants and the taking of two appeals was unnecessary in view of the intimate relations of the appellants and that there should be granted to them the costs of one contestation and of one appeal.

The appeal should be allowed with costs of one contestation and of one appeal.

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MIGNAULT J.—Il y a dans cette cause une question de droit et une question de fait.

La question de droit souffre moins de difficulté, parce que la cour d'appel parait avoir pleinement reconnu la doctrine sur laquelle je me base, et, s'il y a erreur dans le jugement qui nous est déféré, ce n'est que sur la question de fait.

L'action de la demanderesse est basée sur le dernier paragraphe de l'article 1054 du code civil:—

> Les maîtres et commettants sont responsables du dommage causé par leurs domestiques et ouvriers dans l'exécution des fonctions auxquelles ces derniers sont employés.

Il n'y a pas de différence, si ce n'est d' expressions, entre cette disposition et l'article 1384-3° du code civil français. Nous pouvons donc nous guider d'après la doctrine française.

Je trouve cette doctrine très bien expliquée dans une note de Dalloz: 1909-1-135. La décision commentée par l'arrêtiste avait jugé que

> la responsabilité civile décrétée par l'article 1384 ayant pour fondement tout à la fois le libre choix qu'a fait le commettant de ses employés et le droit de leur donner des instructions ou ordres dans l'accomplissement de leurs fonctions, un arrêt peut condamner un commettant comme civilement responsable des fautes de ses employés, mis à la disposition d'un tiers, alors qu'il est constaté qu'il avait conservé sur eux le droit de surveillance et l'autorité.

Commentant cette décision de la cour de cassation, l'arrêtiste, dont je supprime les renvois, fait observer que

> cette décision tire une conséquence logique du fondement reconnu en jurisprudence à la responsabilité du commettant à l'égard de ses préposés. La jurisprudence décide, en effet, que la responsabilité des commettants ne suppose pas seulement qu'ils ont choisi leurs préposés, mais encore qu'ils ont le droit de leur donner des instructions et des ordres, qu'ils ont un droit de surveillance et de direction. On doit en conclure que, lorsque le commettant met son préposé à la disposition d'un tiers, pour savoir qui, du commettant ou du tiers, est responsable des fautes du préposé, il faut rechercher celui qui a le droit de donner des instructions au préposé. Si le tiers acquiert ce droit, c'est lui qui est responsable. Mais si, au contraire, comme dans l'espèce ci-dessus,

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le commettant a conservé l'autorité et le droit de donner des instructions, lui seul est responsable des fautes commises par le préposé; il n'y a pas eu déplacement de la responsabilité.

J'ai cité l'arrêt qui a donné lieu à ces commentaires et où on a jugé qu'il n'y avait pas eu déplacement de la responsabilité, parce que, en fait, le commettant avait conservé l'autorité et le droit de donner des instructions.

Dans un autre arrêt de la cour de cassation, au contraire, et vu que le commettant n'avait pas conservé l'autorité et le droit de donner des instructions, on a jugé que

la responsabilité édictée par l'article 1384 c. civ. s'applique, en cas d'accident survenu par la faute d'un préposé, non pas au patron habituel, mais au patron momentané qui avait ce préposé sous ses ordres, et sur lequel il avait une autorité exclusive au moment de l'accident (Cassation, 26 janvier 1901. Sirey, 1903, 1-104).

La distinction est donc bien claire et, comme je l'ai dit, elle n'est pas contestée par la cour d'appel. Tout dépend de la solution de fait à donner à la question suivante: Lequel des deux patrons, la compagnie du Vermont Central ou la compagnie du Grand Tronc, avait le nommé Frost sous ses ordres et avait une autorité exclusive à son égard, au moment de l'accident qui a coûté la vie au mari de l'intimée?

Jusqu'ici je me trouve en plein accord avec la cour d'appel, mais, en répondant à cette question de fait, j'ai le regret de ne pouvoir partager l'opinion de la cour supérieure et de la cour d'appel.

Pour déterminer laquelle des deux compagnies, la compagnie du Vermont Central ou la compagnie du Grand Tronc, avait le nommé Frost sous ses ordres au moment de l'accident, il faut consulter la convention intervenue entre les deux compagnies. Cette convention n'est pas, comme le savant juge de la cour supérieure le croit, *res inter alios acta* à l'égard de l'intimée. A la base même de toute action qu'elle

pourrait intenter en vertu de l'article 1054 C.C., il y a la question de savoir si Frost était le préposé de la compagnie du Vermont Central au moment de l'accident. Or, on produit la convention entre cette compagnie et la compagnie du Grand Tronc, et cette convention fait voir que dès que le convoi du Vermont Central atteignait Saint-Jean en se dirigeant dans la direction de Montréal, tous les employés du convoi venaient sous les ordres et autorité exclusifs de la compagnie du Grand Tronc. Peu importe que cet arrangement désigne les trains comme "joint trains," ou le service des convois comme "joint service." Chaque compagnie restait maîtresse absolue chez elle, elle payait les employés pour le travail fait sur sa ligne, et ces employés, pendant qu'ils se trouvaient sur la ligne de l'une des deux compagnies, n'avaient d'ordres à recevoir que de cette compagnie seule. Les articles 6 et 12 de la convention en font foi:—

6th. That each party hereto shall pay the train and engine men employed in the joint service for the service performed by them on its own line, and neither of the parties hereto shall be held responsible to the other for the actions of such joint employees while upon the line of railway of the other party hereto.

12th. That in operating the said joint service, the rules and regulations of the Grand Trunk Railway company shall apply while the trains are upon the lines of that company, and the rules and regulations of the Central Vermont Railroad Company shall apply while the said trains are upon the lines of that railroad company, but it is understood that the regulations of both companies shall be such as to facilitate the prompt and safe operating of said joint trains.

L'honorable juge Cross objecte que la compagnie du Vermont Central aurait pu ordonner à Frost de ne pas dépasser telle ou telle station entre Saint-Jean et Montréal. Il n'y a rien dans la preuve qui fasse voir que cette compagnie pouvait, en fait, donner un tel ordre à Frost, et, si elle l'avait fait, elle aurait violé son engagement avec la compagnie du Grand Tronc. Du reste, nous devons juger cette cause d'après la preuve

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au dossier; et cette preuve, tant testimoniale que documentaire, constate que Frost était, lors de l'accident, sous les ordres et autorité exclusifs de la compagnie du Grand Tronc.

Je suis donc d'opinion de maintenir l'appel de la compagnie du Vermont Central.

Mais la compagnie du Grand Tronc se porte appelante contre le jugement de la cour d'appel qui a confirmé le jugement de la cour supérieure à son égard. Ce dernier jugement a renvoyé sa défense à l'encontre de l'action principale et l'a condamnée à indemniser la compagnie du Vermont Central de la condamnation prononcée contre cette compagnie. Puisque dans mon opinion l'action principale de l'intimée doit être renvoyée, l'action en garantie de la compagnie du Vermont Central contre la compagnie du Grand Tronc tombe (*Archbald* v. *DeLisle* (1), et autorités y citées).

Il reste à décider du sort de la défense faite par voie d'intervention par la compagnie du Grand Tronc à l'encontre de l'action principale et qui a été produite le même jour que la compagnie du Vermont Central produisait son plaidoyer. Cette défense sur laquelle l'intimée a lié contestation doit être maintenue, et il s'ensuit que l'appel de la compagnie du Grand Tronc doit également être maintenu.

Quant à l'action en garantie, je suis d'avis qu'elle doit être renvoyée.

Au sujet des frais, je ne puis m'empêcher de croire qu'il y a eu multiplication inutile de procédures dans la contestation de l'action de l'intimée par ces deux compagnies qui paraissent étroitement liées. Deux défenses distinctes ont été produites le même jour par la compagnie du Vermont Central et par la compagnie du Grand Tronc, quand une seule défense par l'une de

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ces compagnies aurait suffi. De même, il y a eu deux appels devant la cour d'appel et deux appels devant cette cour. Usant de la discrétion qui appartient au juge en matière de frais, je suis d'avis de condamner l'intimée à payer les frais d'une seule contestation en cour supérieure et d'un seul appel devant la cour d'appel et devant cette cour. Je n'accorderai pas de frais de la demande en garantie.

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Appeal allowed.

Solicitor for the appellant, The Central Vermont Railway Company: *A. E. Beckett.*

Solicitor for the appellant, The Grand Trunk Railway Company: *Henri Jodoin.*

Solicitor for the respondent: *C. G. Ogden.*