1909
*Nov. 4.

THE NICHOLS CHEMICAL COMPANY OF CANADA (DEFENDANTS) } APPELLANTS;

AND

AMELIA LEFEBVRE (PLAINTIFF) ... RESPONDENT.

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

Negligence—Findings of fact—Common fault—Apportionment of damages.

In actions to recover damages for personal injuries in the Province of Quebec, where the plaintiff has been found guilty of contributory negligence the damages should not be divided equally between the parties, but apportioned according to the degree in which they were respectively blamable for its occurrence.

Judgment appealed from (Q.R. 36 S.C. 535) affirmed.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal(1), affirming the judgment of Hutchinson J., at the trial in the Superior Court, District of Saint Francis, which maintained the plaintiff's action with costs.

The plaintiff, on behalf of herself and as tutrix of her minor children, brought the action to recover $10,000 damages sustained through the death of her husband, the late Charles Newman, father of these minor children, occasioned, as alleged, by negligence for which the defendants were responsible. The trial judge found that the accident which caused the death

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

(1) Q.R. 36 S.C. 535.

of Newman was due to the common fault and negligence of Newman and of the company's foreman on the works where deceased had been employed, assessed the damages at $3,000, and awarded the moiety thereof to the plaintiff, $500 to her personally and $1,000 in her capacity of tutrix to the children. The effect of the judgment appealed from was to confirm the adjudication by the trial judge.

C. E. White, for the appellants.
Nicol, for the respondent.

THE CHIEF JUSTICE.—This is an action brought on behalf of the widow and children to recover damages resulting from the death of one Newman, who was killed by a loose rock falling on him while at work in a mine owned and operated by the appellants. The trial judge finds as a fact that the foreman of the mine was aware, at the time of the accident, of the danger caused by the presence of this rock in the roof of the stope or drift where Newman had been ordered by him to work, and that he took no steps to protect the workman; and, on appeal, the Court of Review agreed in the conclusion reached on this question of fact by the trial judge. Our attention was not drawn, at the argument here, to any evidence which would justify us in setting aside this concurrent finding of the courts below.

It is also found as a fact, both in the first court and on appeal, that Newman had been instructed to carefully observe the state of the roof each morning before commencing his work so as to ascertain if there was any loose rock there and that, on the occasion of the accident, he failed to follow this instruction and by so doing contributed to the accident.

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The Chief Justice.

The courts below, following the settled jurisprudence of the Province of Quebec (Lamothe, "Accidents du Travail," p. 68), held that as both plaintiff and defendants were shewn to have been in fault the court must apportion the damages; and we see no reason to disturb that decision. *Price* v. *Roy*(1).

It may be necessary to draw attention to the confusion which seems to exist with respect to the application of the rule now adopted in Quebec in actions of damages against employers where it is found that there is common fault (*faute commune*). The principle of the French law which, it is said, has been recently adopted in that province, is that where the party who claims compensation for an injury caused by the fault of another has been also guilty of fault, which contributed to the accident he must share the responsibility, and, in that case, the damages are not divided equally as is the rule in the English admiralty courts (*Cayzer* v. *Carron Co.*(2), *per* Lord Blackburn, at page 881), and under the Revised Statutes of Canada (1906), ch. 113, sec. 918; but the plaintiff is awarded only a proportion varying according to the degree in which the respective parties were to blame. Planiol, vol. 2, no. 889.

The appeal is dismissed with costs.

GIROUARD J.—The rule of law with regard to *faute commune* is not new in Quebec. I submit with due respect, it is old and simply ignored for a while as I have explained in the case of *The Shawinigan Carbide Co.* v. *Doucet*(3).

(1) 29 Can. S.C.R. 494. (2) 9 App. Cas. 873.
(3) 42 Can. S.C.R. 281.

DAVIES J. agreed with the Chief Justice.

IDINGTON J. agreed that the appeal should be dismissed with costs.

DUFF and ANGLIN JJ. agreed with the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellants: *Cate, Wells, White & McFadden.*

Solicitor for the respondent: *Jacob Nicol.*