HIS MAJESTY THE KING (RESPONDENT) ..... } APPELLANT;

AND

AMANDA DESROSIERS (SUPPLIANT) ..... } RESPONDENT.

1908

*Oct. 27.
*Dec. 1.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Negligence—Tort—Liability of the Crown—Demise of the Crown—Personal action—Release—Operation of railway—Common employment—Exchequer Court Act, 50 & 51 *V. c.* 16, *s.* 16(*c*)—*Appeals to Privy Council.*

Under sub-sec. (*c*) of sec. 16 of the "Exchequer Court Act" (50 & 51 Vict. ch. 16) an action in tort will lie against the Crown, represented by the Government of Canada.

Under the Civil Code of Lower Canada, in case of death by negligence of servants of the Crown, an action for damages may be maintained by the widow of the deceased on behalf of herself and her children. The action of the widow is not barred by her acceptance of the amount of a policy of insurance on the life of deceased from the Intercolonial Railway Employees' Relief and Insurance Association, under the constitution, rules and regulations of which the Crown is declared to be released from liability to make compensation for injuries to or death of any member of the association. *Miller* v. *Grand Trunk Railway Co.* ((1906) A.C. 187) followed.

The doctrine of common employment does not prevail in the Province of Quebec.

The right of action for compensation for injury or death by negligence of Government employees does not abate on demise of the Crown. *Viscount Canterbury* v. *The Queen* (12 L.J. ch. 281) referred to.

The Judicial Committee of the Privy Council refused leave to appeal from a judgment of the Supreme Court of Canada in accord with a long series of decisions in the Dominion. *Armstrong Case* referred to by the Chief Justice at page 76 *post.*

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

1908

THE KING v. DESROSIERS.

APPEAL from the judgment of the Exchequer Court of Canada (1) maintaining the suppliant's petition of right, and awarding her the sum of $3,000 for her own use, and the further sum of $1,000 in the right of her minor child, together with costs.

The suppliant, on behalf of herself and as tutrix of her minor child, claimed damages from the Crown on account of the negligent operation of the Intercolonial Railway by its servants and officers whereby Achille DeChamplain, the deceased husband of the respondent, who was a brakesman employed on the said railway, was fatally injured whilst on duty at Sayabec Station, in the Province of Quebec, on the 22nd of May, 1900.

At the time of the accident the deceased was assisting in carrying out some shunting operations, and was run over by a moving car, sustaining such injuries that he died shortly after. No one witnessed the accident, and there was no evidence to shew how it actually occurred, but it was suggested that the deceased got his foot caught between the rail and the guard rail; that the space between these should have been filled with packing; that it was not so filled, and that, if it had been, the accident would not have occurred.

Chrysler K.C., for the appellant. The findings of the learned trial judge are entirely against the weight of evidence.

The provisions of section 262 of the "Railway Act, 1888," relating to packing, are not in the Government Railway Act," but the suppliant put in, as an exhibit, the rules for the guidance of Intercolonial trackmen, rule 82 of which reads: "The foreman must see that

(1) 11 Ex. C.R. 128.

all spaces less than five inches between rails, frogs, crossings, switches, guard rails, et cetera, are filled and kept filled in with wood packing, or other suitable material; such packing not to reach higher than the underside of rail head."

It is submitted: (1) That the evidence does not shew how the accident happened or what was its cause. (2) That no negligence is shewn on the part of any of the railway servants. (3) That the weight of the evidence shews that so far as the regulations as to packing have any bearing on the case they were duly complied with.

The occupation of a brakesman is necessarily hazardous. The deceased was well acquainted with the Sayabec district, in which he had worked for years. He had been actually working at the very place where the accident occurred for several days previously, assisting with the loading operations which were going on at the time when it happened. There was nothing unusual in the conditions there on that day, and it is impossible to acquit him of imprudence and carelessness without which the accident could not have occurred.

The learned trial judge has decided this case, so far as the law is concerned, by reference to the case of *The King* v. *Armstrong*(1), which was tried at the same time, and we crave leave to refer to so much of the factum in that appeal as deals with the law of the case(2), and the argument at bar, as given in the Supreme Court report at pages 232 *et seq.*

There is, however, the further legal objection to the present suit that the cause of action arose in the

(1) 40 Can. S.C.R. 229; 11 Ex. C.R. 119.

(2) See *per* C.J., at p. 75 *post.*

1908

THE KING v. DESROSIERS.

lifetime of Her late Majesty Queen Victoria, that an action would only lie against Her Majesty, and that the same abated on her death. See *Viscount Canterbury* v. *The Queen*(1), in which it was sought to make the late Queen liable upon a petition of right for a wrong done by a servant of William IV., and it was objected, first, that the Queen was not the personal representative of the late King, and, secondly, that if she was, the case was within the rule *actio personalis moritur cum personâ*. There was no decision on the point, though it was referred to by Lord Lyndhurst, who, in terms clearly indicating his opinion that it was a fatal objection to the suit, said:

> Another objection has been urged against the claim of the petitioner. If the case were one between subject and subject this objection would be fatal, and it is admitted on the part of the petitioner that he can only expect success if he had a right to redress in an action against a private individual. Now, the cause of action arose in the time of the late King, and it is clear that had this been a case between subject and subject, an action could not be supported on the principle that *actio personalis moritur cum personâ*. It is contended that a different rule prevails where the Sovereign is a party, but some authority should be adduced for such distinction. It is true, indeed, that the King never dies—the demise is immediately followed by the succession, there is no interval, the Sovereign always exists, the person only is changed. But if there be a change of person, why is the personal responsibility arising from the negligence of servants, (if indeed such responsibility exists), to be charged on the successor, ceasing as it does altogether in the case of a private individual? In the case of a subject the liability does not continue in respect of the estate; it devolves on neither the heirs nor the personal representative; it is extinct. I should find it difficult, therefore, in the case of the Crown, to say with any confidence that the liability continued, and was transferred to the successor, unless some distinct authority were shewn in support of such a doctrine. Several cases were referred to for this purpose in the argument at the bar, but they were cases of grant, covenant, debt, or relating to the right of property, in which, from the analogy to the case of a subject, the Crown might be liable in respect to succession, and do not, I think, sufficiently establish the principle for which they were cited.

(1) 12 L.J. ch. 381; 1 Phillips, 306.

Auguste Lemieux K.C., for the respondent. The respondent relies upon the reasons for judgment stated by the learned trial judge, and also contends that the right of action conferred by articles 1054 and 1056 of the Civil Code is not representative, but a direct and independent right accruing to the persons therein mentioned for the recovery of damages from the party responsible for the injury. The deceased had no control over this right of action, which came into existence only on account of his death, and no agreement as to the indemnity entered into by him can limit or affect the remedy given to his widow and child by art. 1056, C.C. We refer, on this point, to *Miller* v. *The Grand Trunk Railway Co.*(1).

THE CHIEF JUSTICE.—I would confirm the judgment with costs. As to the facts connected with the accident, I accept, although with some hesitation, the conclusion reached by the trial judge that the death of DeChamplain, husband of the respondent, was caused by the negligence complained of.

In his factum, at page 6, under the head of "the law of the case," the Attorney-General says:

> The learned judge of the Exchequer Court has given judgment in this case so far as the law is concerned by reference to the case of *Marguerite Henrietta Jane Armstrong* v. *The King*, which was tried at the same time. The judgment in the latter case is now under appeal to this honourable court, and the Attorney-General craves leave to refer to so much of his factum in that appeal as commencing at page 8 deals with the law of the case.

At the page referred to I find the points of law raised by the defence to that suit thus summarized:

> (*a*) The action is in tort and no such action will lie against the Crown.

(1) [1906] A.C. 187.

1908

THE KING v. DESROSIERS.

The Chief Justice.

(*b*) The right of action, if any, given by the statute (The Supreme and Exchequer Courts Act, 50 & 51 Vict. ch. 16, sec. 16(*c*)), is a personal one, and the action will only lie at the suit of the personal representatives of the deceased H. C. Goddard.

(*c*) The deceased, by his contract of employment, released and discharged the appellant from any claims of the nature of the present claim.

(*d*) The negligence alleged to have been the cause of the accident was that of a fellow servant of the deceased.

All these questions were decided by this court against the appellant in the *Armstrong Case*(1) on the ground that the law had been settled in a long series of cases; and, on the application for leave to appeal to the Privy Council from that judgment, Lord MacNaghton said as a ground for refusing the application, referring to the decisions of this court:

This seems to have been the law for eighteen years.

(See report of argument in Privy Council, p. 17.) (2). In these circumstances, we are of opinion that the judgment in the *Armstrong Case*(1) is conclusively binding on this court.

The appellant, however, urges the further legal objection that the cause of action arose in the lifetime of Her Majesty Queen Victoria; that an action would only lie against Her Majesty; and that the same abated on her death. In view of all the circumstances connected with the institution and subsequent conduct of these proceedings it is doubtful whether such a defence should be raised; but if we must deal with it we are of opinion that the principle *actio personalis moritur cum personâ* has no application here. This is an action for money reparation to the widow and children of a party injured who was killed as a result of the injuries and the Crown is—within the limita-

(1) 40 Can. S.C.R. 229.

(2) Cf. *per* Girouard J. in *Abbott* v. *City of St. John* (40 Can. S.C.R. 597) at p. 602.

1908

THE KING v. DESROSIERS.

The Chief Justice.

tions prescribed in section 16 of the "Exchequer Court Act"—liable in any case in which a subject would, under like circumstances, be liable. *The Queen* v. *Fillion* (1). There is no doubt under the old French law, which is now the Quebec law, the principles of which are applicable here, that if this was a case between subject and subject the wrongdoer's representative would be liable, in which we follow the rule of the canon rather than of the old Roman law. Pothier, No. 675, par. 7 (Bugnet ed.); Pandectes Françaises, *vo.* "Responsabilité civile," Nos. 1824 *et seq.* Nos. 1869 and 1870; Beaudry-Lacantinerie—Obligations, vol. 3, 2nd part, No. 1884, No. 2886; Sourdat, No. 53, 53 *bis* & 58.

Further the law of reparation applicable to cases like the present is expressed in article 1056 of the Quebec Code, which gives in express terms an independent direct right of action to the plaintiffs against the person who commits the offence or quasi-offence or his *representatives.* Why should we make an exception to this general rule in a case where the Sovereign is a party? If under the law the liability continues in the case of a subject in respect of his estate and devolves upon his heirs or personal representatives, why in a case against the Crown should the liability not continue and be transferred to the successor? The King never dies, the demise is immediately followed by the succession; there is no interval, the Sovereign always exists; the person only is changed, as Lord Lyndhurst said, in *Viscount Canter-*

(1) 24 Can. S.C.R. 482.

1908

THE KING v. DESBOSIERS.

The Chief Justice.

bury v. *The Queen*(1). The doubt expressed by His Lordship could not exist here because it is based entirely on the assumption that there would be, in the circumstances of the case, no liability if a subject was defendant and, as I have attempted to shew, here the subject would undoubtedly be liable.

Since the judgment in *Armstrong* v. *The King*(2), it must be considered as settled law that the "Exchequer Court Act" not only creates a remedy, but imposes a liability upon the Crown in such a case as the present and that such liability is to be determined by the laws of the province where the cause of action arose. *The King* v. *Armstrong*(2), at p. 248. See also *Monaghan* v. *Horn*(3), *per* Taschereau J. at pp. 441 *et seq.* and R.S.C. (1906), ch. 101, sec. 5.

GIROUARD J. agreed with the Chief Justice.

DAVIES J.—I concur in the judgment of the Chief Justice, but with great hesitation as regards the conclusion reached by the trial judge upon the facts.

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

MACLENNAN J.—I agree that the appeal should be dismissed for the reasons stated by Burbidge J. in delivering the judgment appealed from.

(1) 12 L.J. Ch. 281. (2) 40 Can. S.C.R. 229.
(3) 7 Can. S.C.R. 409.

DUFF J. concurred in the dismissal of the appeal.

1908

THE KING v. DESROSIERS.

Appeal dismissed with costs.

Solicitor for the appellant: *E. L. Newcombe.*

Solicitor for the respondent: *Louis Taché.*