IN THE MATTER of the Petition of Right of

MARGUERITE HENRIETTA JANE ARMSTRONG ..... } SUPPLIANT; 1907 June 24.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Government railway.—Injury to the person—Negligence—Liability of Crown—50-51 Vict. c. 16, s. 16 (c)—Interpretation—Art. 1056 C.C.L.C.—Right of action—Waiver by accepting indemnity.

The provisions of section 16 (*c*) of 50-51 Vict. c. 16 (now R.S.C. 1906, c. 140, s. 20 (*c*)) not only gives exclusive original jurisdiction to the Exchequer Court of Canada to hear and determine claims against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, but imposes a liability upon the Crown to answer in such cases for the wrongful acts of its officers or servants.

The suppliant's husband, in his lifetime a locomotive engineer employed on the Intercolonial Railway, was killed in an accident on the railway while on duty. The accident happened by reason of a fireman, who was employed on another train belonging to the same railway, failing properly to set and lock a switch in the performance of his duty.

Held, that the case fell within the provisions of s. 16 (*c*) above mentioned, and that the Crown was liable in damages.

Held, following *Miller* v. *Grand Trunk Railway Co.* ([1906] A. C. 187), the result of which is to overrule *The Queen* v. *Grenier*, (30 S. C. R. 42), that the right of action conferred by art. 1056 of the Civil Code of Quebec on the widow and relatives of a deceased employee whose death has been caused by negligence for which the employer is responsible, is an independent and personal right of action, and is not, as in the English Act known as Lord Campbell's Act, conferred on the representatives of the deceased only; and that provision in a by-law of a society to which the deceased belonged, and to the funds of which the Crown subscribed, that in consideration of such subscription no member of the society or his representatives should have any claim against the Crown for compensation on account of injury or death from accident, did not constitute a good defence to the widow's action.

1907

ARMSTRONG v. THE KING.

Argument of Counsel.

PETITION OF RIGHT for damages for the death of the suppliant's husband alleged to have been occasioned by the negligence of servants of the Crown.

The suppliant's husband at the time of the accident which caused his death was employed in the capacity of a locomotive engineer on the Intercolonial Railway. The accident happened on the 27th November, 1903, at or near the Lotbinière station, in the Province of Quebec. The deceased was in charge of a locomotive which was derailed by reason of a switch being improperly set by the fireman of another train on the same railway.

Laflamme and *Mitchell* for suppliant;

Newcombe, K.C., for respondent.

January 11th, 1907.

The case was tried at Quebec; the argument being directed to be heard at Ottawa.

February 10th, 1907.

The case was now argued at Ottawa.

N. K. Laflamme, K.C., for the suppliant, contended that there was negligence proved to bind the Crown. The suppliant's husband was killed by reason of the failure of the fireman of another train to properly set and lock a switch. The deceased was a locomotive engineer on the Intercolonial Railway and was in charge of a locomotive at the time of the accident which resulted in his death. By reason of the switch being negligently set, the locomotive on which the suppliant's husband was riding was derailed. In this the Crown is clearly liable under the *Exchequer Court Act*, and Art. 1056 of the Civil Code gives a right of action in such a case to the widow and children, which is an independant right accruing only upon the death of the husband. (Cites *Miller* v. *Grand Trunk Railway Company* (1).

(1) [1906] A. C. at p. 194.

1907

ARMSTRONG v. THE KING.

Argument of Counsel.

E. L. Newcombe, K.C., contended that the facts did not show negligence as to the setting of the switch at all. The only theory arising from the facts is that the engineer failed to read the signals properly. If he had, he would have stopped his train. His failure to read the signals aright is attributable either to his engine running too fast or because he did not look out for them. In either event the negligence would be his.

Again, the deceased if he had lived could not have maintained an action because he had contracted himself out of his right. Art. 1056 C. C. does not give a right of action to the widow unaffected by any bar arising out of the husband's conduct during his life time.

In any event the Crown is not bound by the provisions of these articles.

Mr. *Laflamme*, in reply, cited *Grenier* v. *The Queen* (1); *Filion* v. *The Queen* (2) on the point as to the effect of art. 1056 C. C. on the Crown's rights.

THE JUDGE OF THE EXCHEQUER COURT now (June 24th, 1907), delivered judgment.

The petition is filed by the suppliant to obtain relief for herself and her two minor daughters for the death of her husband alleged to have been occasioned by the negligence of the servants of the Crown. The action is based upon clause (*c*) of the 16th section of *The Exchequer Court Act* (50-51 Vict. c. 16; see also R. S. C. 1906, c. 140, s. 20 (*c*)), by which it is provided that the Exchequer Court shall have exclusive original jurisdiction to hear and determine every claim against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown while acting within the

(1) 30 S. C. R. 42. (2) 24 S. C. R. 482.

1907

ARMSTRONG v. THE KING.

Reasons for Judgment.

scope of his duties or employment. Prior to the 23rd day of June, 1887, when the Act of the Parliament of Canada (50-51 Victoria, Chapter 16) came into force the subject had in Canada no remedy by petition of right for any wrong done to him by a servant of the Crown. (*The Queen* v. *McFarlane* (1); and *The Queen* v. *McLeod* (2). The Act 33rd Victoria, Chapter 23 (R. S. C. c. 40, s. 6) had made provision in such cases for a proceeding before the official arbitrators, but no petition of right would lie in any such case. In 1887 the jurisdiction that the official arbitrators had theretofore exercised was, by the Act first-mentioned, transferred to this court, and that jurisdiction was in that respect defined in the terms of the clause of the Act cited (50-51 Vict. c. 16, s. 16 (*c*)). This provision has been considered and discussed in a number of cases in this court, and on appeal in the Supreme Court of Canada, with the result (so far as the judgments of these courts may determine the matter) that it has been settled that the provision referred to not only gave jurisdiction to the court, but imposed a liability upon the Crown to answer in such cases for the wrongful acts of its officers and servants. (*The City of Quebec* v. *The Queen* (3); *Filion* v. *The Queen* (4); *The Queen* v. *Filion* (5); *Ryder* v. *The King* (6); *Paul* v. *The King* (7). I think, too, that it may be taken to be settled by the general concurrence of judicial opinion in the cases referred to that it was the intention of Parliament that the liability of the Crown should be determined by the general laws of each province in force at the time when such liability was imposed. If that is the true construction of the statute it will happen that the Crown may be liable to answer for its servant's wrongs in one

(1) 7 S. C. R. 216.
(2) 8 S. C. R. 24.
(3) 2 Ex. C. R. 269; 24 S. C. R. 429.
(4) 4 Ex C. R. 144.
(5) 24 S. C. R. 482.
(6) 9 Ex. C. R. 333; 36 S. C. R. 462.
(7) 38 S. C. R. 126.

province, when under like circumstances there might be no liability in some other province in the Dominion. That aspect of the matter is illustrated by *Filion's case* (1) where the cause of action arose in the Province of Quebec, and *Ryder's case* (2) where it arose in the Province of Manitoba. In the latter case the petition failed because the negligence proved was that of a fellow servant of the deceased; while in the former case it was sustained although the negligence complained of was also that of a fellow-servant of the deceased; it being held that such defence was not open to the defendant under the laws of the Province of Quebec. And in the present case, the question arises as to whether or not the Crown's liability is to be determined as a subject's would be by reference to the provisions of article 1056 of the Civil Code which provides that in all cases where the person injured by the commission of an offence or a quasi-offence, dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relatives have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death. That provision formed part of the general law of the Province of Quebec not only in 1887, when the Act 50-51 Victoria, Chapter 16, was passed, but also in 1870 when the *Official Arbitrators Amendment Act*, 33 Victoria, Chapter 23, was enacted. If that provision is applicable to cases where the death results from the negligence of the Crown's servants acting within the scope of their duties or employment on a public work in the Province of Quebec, the Crown's liability will in that province be different from what it is in the other Provinces in Canada. Dealing

1907

ARMSTRONG v. THE KING.

Reasons for Judgment.

(1) 4 Ex. C. R. 144; 24 S. C. R. 482.

(2) 9 Ex. C. R. 330; 36 S. C. R. 462.

1907

ARMSTRONG v. THE KING.

Reasons for Judgment.

with a similar question, Sir Henry Strong, C.J., in *The City of Quebec* v. *The Queen* (1), is reported as follows:

"It can make no difference that all the provinces save one derive their common law from that of England; the circumstance that the private law of one province, that of Quebec, is derived from a different source, makes it impossible to say that there is any system of law apart from statute, generally prevalent throughout the Dominion. No inconvenience can result from this, since every case which could arise would be provided for by the law of some one or other of the provinces."

I think the question as to whether article 1056 of the Civil Code of Lower Canada is applicable to cases where the death is occasioned by the negligence of a servant of the Crown acting within the scope of his employment upon a public work in the Province of Quebec, should be answered in the affirmative. And although such a construction of the statute makes against a uniform law throughout Canada respecting the Crown's liability in such cases, the Crown will not after all stand in any different position in that respect to any railway or other corporation which carries on its business in several Provinces of the Dominion.

The accident which occasioned the death, on the day following, of the suppliant's husband, occurred on the 26th day of September, 1903, in the Province of Quebec, at de Lotbinière Station on the Intercolonial Railway, a public work of Canada. The deceased was a locomotive engineer, and at the time of the accident was on duty on his engine which was derailed at the station mentioned. The accident happened because one Albert Charland, a fireman employed on another train on the railway, failed properly to set and lock a switch that, under the particular circumstances of this case, it was his duty to open and close. It is admitted that he failed to lock the

(1) 24 S. C. R. 429.

1907

ARMSTRONG v. THE KING.

Reasons for Judgment.

switch; and the weight of the evidence leads, I think, to the conclusion that he also failed to set it properly. The case is, I think, within the provisions of clause (*c*) of the 16th section of the *Exchequer Court Act* (1), that has been cited.

That leads to the consideration of a defence on the part of the Crown which is stated in the following terms in paragraphs eight to thirteen of the statement of defence:

" 8. The deceased Holsey Cleveland Goddard became during his lifetime and was at the time of his death, a member of the Intercolonial Railway Employees' Relief and Insurance Association, Class C.

" 9. Under the constitution, rules and regulations of the said association, of which the deceased had been furnished with a copy and the certificate of membership issued to him and in which he had nominated his wife, Marguerite Henrietta Jane Armstrong, the above named suppliant, as the person to receive all insurance moneys accruing upon the said certificate, the suppliant became entitled on the death of the said Holsey Cleveland Goddard to receive from the said association the sum of $250 insurance money.

" 10. The said sum of $250 was duly tendered by the said association to the said Marguerite Henrietta Jane Armstrong, who refused to accept the same.

" 11. By the constitution, rules and regulations of the said association it was provided that in consideration of the annual contribution of $6,000 from the railway department to the association, the railway department should be relieved of all claims for compensation for injury to or death of any member. The railway department made the said contribution.

" 12. It was further provided that all permanent male employees of the Intercolonial Railway should be contri-

(1) 50-51 Vict. c. 16, s. 16 (*c*).

1907

ARMSTRONG v. THE KING.

Reasons for Judgment.

butors to the said association during their employment. It was one of the terms on which the said Holsey Cleveland Goddard sought and accepted employment on the Intercolonial Railway that he would become a member of the said association and be bound by its constitution, rules and regulations.

"13. The said Holsey Cleveland Goddard, in his lifetime, by his contract of employment with the respondent, released and discharged the respondent from and agreed that the respondent should not be liable for any claim or demand of the kind sued for, including the suppliant's claim herein."

Except that in the present case the suppliant has not as yet accepted the insurance money to which she is entitled, the defence does not in this aspect of the case, differ materially from that which came under consideration in *Grenier* v. *The Queen* (1). In that case it was in this court held that the defence failed. In the Supreme Court of Canada, on appeal from this court, the defence was sustained. (*The Queen* v. *Grenier* (2). It is now contended that the result of the decision in *Miller* v. *The Grand Trunk Railway Company of Canada* (3) is to overrule *The Queen* v. *Grenier* (1). It seems to me that the contention is well founded and that the defence on which the Crown relies in this case cannot, in view of their Lordship's decision in *Miller's Case*, be sustained. In the latter case, following *Robinson* v. *The Canadian Pacific Railway Company* (5), it was held, contrary to what had been held in the Supreme Court in *The Queen* v. *Grenier* (6), that the right of action conferred by article 1056 of the Civil Code of Quebec on the widow and relatives of a deceased employee whose death has been caused by negligence for which the employer is

(1) 6 Ex. C. R. 276.
(2) 30 S. C. R. 42.
(3) [1906] App. Cas. 187.
(4) 30 S. C. R. 42.
(5) [1892] A. C. 481.
(6) 30 S. C. R. 42.

1907

ARMSTRONG v. THE KING.

Reasons for Judgment.

responsible is an independent and personal right of action; and not as in the English Act known as Lord Campbell's Act conferred on the representatives of the deceased only; and that a provision in a by-law of a society to which the deceased belonged, and to the funds of which the defendant company subscribed, that in consideration of such subscription no member of the society or his representatives should have any claim against the company for compensation on account of injury or death from accident, did not constitute a good defence to the widow's action. The insurance money to which she became entitled under the rules of the society did not proceed from the company, had no relation to its offence and was equally payable in case of natural death; and the deceased could not, by reason thereof, be said to have obtained indemnity or satisfaction within the meaning of article 1056 of the Civil Code. That case is not, I think, distinguishable either from the *Grenier Case* or from this case.

There will be a declaration that the suppliant is entitled to the following relief, that is to say:—to recover from the Crown for damages occasioned by the death of her late husband, (1) for her own use the sum of five thousand dollars; and (2) in her quality or capacity of tutrix for her minor children the sum of two thousand five hundred dollars, the latter sum to be apportioned as follows, namely:—one thousand dollars to Hilda Foster Goddard, and one thousand five hundred dollars to Lyall Wurtele Goddard.

The suppliant will also be allowed the costs of her petition.

Judgment accordingly.

Solicitors for suppliant: *Laflamme & Mitchell.*

Solicitor for respondent: *E. L. Newcombe.*