Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Robinson v. *The Canadian Pacific Railway, from the Supreme Court of Canada; delivered 23rd July* 1892.

Present:

LORD WATSON.
LORD MACNAGHTEN.
LORD MORRIS.
LORD HANNEN.
SIR RICHARD COUCH.
LORD SHAND.

[*Delivered by Lord Watson.*]

This is an action of damages brought before the Superior Court of the Province of Quebec by the Appellant, the widow of Patrick Flynn, on her own behalf and as tutrix of their minor child, upon the allegation that the death of her husband, which occurred on the 13th November 1883, was the result of bodily injuries sustained by him on the 27th August 1882, whilst he was in the service of the Respondents, through the negligence of their employés.

The case was tried in April 1885 before Mr. Justice Doherty and a jury, who found for the Appellant, and assessed damages at $2,000 to herself and $1,000 to her child. The Appellant then applied to the Superior Court, sitting in review, to have judgment entered in terms of the verdict; and the Respondents moved for a new trial. The Court rejected the Appellant's application, and allowed the Respondents a new trial upon payment of the costs

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of the last, and without costs of the motion, upon the ground that the presiding Judge had wrongly directed the jury that, in estimating damages, they were entitled to consider the anguish and mental sufferings of the widowed mother and orphan child. That decision was on appeal set aside by the Queen's Bench, who gave effect to the verdict with costs of suit. On appeal from the Queen's Bench the Supreme Court of Canada reversed their decision, restored the judgment of the Superior Court in review, and condemned the Appellant in the costs of the appeals to the Queen's Bench and to the Supreme Court of Canada.

On a second trial, in November 1888, before Mr. Justice Davidson, the jury again found for the Appellant, with $4,500 damages to herself and $2,000 to her child; and thereupon the Appellant moved the Superior Court in Review for judgment. The Respondents moved in the same Court for (1) a new trial, (2) arrest of judgment, and (3) judgment in their favour *non obstante veredicto*. The second and third of these motions were rested upon a plea then put forward for the first time by the Respondents, to the effect that more than twelve months having elapsed between the death of Patrick Flynn and the date of the injuries which are said to have occasioned it, all right of action competent to him had been extinguished by prescription; and that by law the right of the Appellant to recover damages for such bodily injuries was also extinguished before his death. The Court, as its decree bears, heard parties upon all of these motions, and by a majority of two to one dismissed the Respondent's motions, and granted that of the Appellant with all costs of suit not previously adjudicated upon. On appeal by the Respondents, the Court of Queen's Bench, consisting of five Judges, unanimously

affirmed the judgment of the Court below on all points with costs.

The case was then carried by appeal to the Supreme Court of Canada, who, on the 22nd June 1891, by a majority of four to one, reversed the decisions of the Queen's Bench in appeal and of the Superior Court in review; dismissed the Appellant's motion for judgment; also refused and dismissed the motions made by the Respondents "for a new trial and in arrest of "judgment"; and granted the Respondents' motion for judgment *non obstante veredicto*, with costs of action in all three Courts. On the application of the Appellant, their Lordships humbly advised Her Majesty to grant special leave to appeal against that part of the judgment which sustains the new plea raised by the Respondents after the second trial. In making that recommendation, their Lordships were influenced by these considerations,—the general importance to the Province of Quebec of the question arising upon the construction of its Civil Code; the great difference of judicial opinion which it evoked; and the fact that the decision of the majority in the Supreme Court appears, from the judgment of Mr. Justice Taschereau, to have been based to some extent upon the authority of English decisions. Their Lordships intimated that they would not hear a third appeal upon a motion for new trial involving no question of law, but that, in the event of their sustaining the appeal allowed, they would, if the matter of new trial should prove to be still open to the Respondents, remit it for decision to the Court below.

The Appellant's claim is founded upon Section 1,056 of the Civil Code of Lower Canada, the first paragraph of which enacts that, "In all cases "where the person injured by the commission of "an offence or a quasi-offence dies in con-

"sequence, without having obtained indemnity "or satisfaction, his consort and his ascendant "and descendant relations 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." The Appellant brought the action within seven months after her husband's decease, while the prescription thus made applicable to her statutory claim was still current. But Section 2,262 (2) of the Code provides that actions "for bodily injuries" are prescribed by one year, "saving the special "provisions contained in Article 1,056, and cases "regulated by special laws." Seeing that Patrick Flynn lived for nearly 15 months after the date of the injuries which caused his death, their Lordships see no reason to doubt that any claim competent to him against the Respondents had been cut off by prescription. Whether the Appellant has thereby been deprived of the right of action which, in the circumstances of this case, she would undoubtedly have had under Section 1,056 if he had died during the currency of the prescriptive period applicable to his right, depends upon the construction of the two sections of the Code which have just been referred to.

The Code became law in the year 1866, and Section 1,056 superseded the provisions of Cap. 78 of the Consolidated Statutes of the then Province of Canada (1859), which, though not identical in expression, were the same in substance with the enactments of the English Statute, 9 & 10 Vict., cap. 93, commonly known as Lord Campbell's Act. In both Statutes a right of action is given, in general terms, to the representative of the deceased, for behoof of his widow and other relations entitled, in all cases where an act or default is such as would, if death

had not ensued, have entitled the party injured to maintain an action. Their provisions leave indefinite some things which in the Code are defined. They leave to implication the conditions upon which the right is not to survive, and, by that omission, favour the suggestion that what was intended to pass to the representative was such right of action as the deceased had at the time of his decease. In England the statutory period of limitation applicable to such claims by injured persons is six years. The observations of English judges cited at the bar, and noticed by Mr. Justice Taschereau, did not refer to, and can hardly have contemplated a case in which that period had elapsed before the death of the injured person. The authorities from which they were taken merely establish that, under the English Act, the representative can have no right of action, *first*, where the act or default complained of raised no liability to the deceased, at common law, or by reason of his having contracted to bear the risk of it; and, *secondly*, where the deceased has been compensated or has settled and discharged his claim. These authorities can have no bearing upon the point raised for decision in this appeal, unless it can be shown that the provisions of the Code are in substance identical with those of the Statute to which they have reference.

In the course of the argument, Counsel for the parties brought somewhat fully under their Lordships' notice the law of reparation applicable to cases like the present, as it existed prior to the enactment of the Code; and they discussed the question whether and, if so, how far Cap. 78 of the Statute of 1859 altered or superseded the rules of the old French law. These may be interesting topics, but they are foreign to the present case, if the provisions of Section 1,056 apply to it, and are in themselves

intelligible and free from ambiguity. The language used by Lord Herschell in *Bank of England* v. *Vagliano Brothers* (I. Ap. Ca., N. S., p. 145), with reference to the "Bills of "Exchange Act, 1882" (45 & 46 Vict., c. 61), has equal application to the Code of Lower Canada. "The purpose of such a statute surely was that "on any point specifically dealt with by it, the "law should be ascertained by interpreting the "language used instead of, as before, by roaming "over a vast number of authorities." Their Lordships do not doubt that, as the noble and learned Lord in the same case indicates, resort must be had to the pre-existing law in all instances where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning. But an appeal to earlier law and decisions for the purpose of interpreting a statutory Code can only be justified upon some such special ground.

In so far as they bear upon the present question, the terms of Section 1,056 appear to their Lordships to differ substantially from the provisions of Lord Campbell's Act and of the Provincial Statute of 1859. The Code ignores the representative of the injured person, and gives a direct right of action to his widow and relations, a change calculated to suggest that these parties are to have an independent, and not a representative right. A difference of much greater importance is to be found in the fact that the Code distinctly specifies certain conditions affecting the right of action competent to the deceased, which are also to operate as a bar against any suit at the instance of his widow and his ascendant or descendant relations after his death. These conditions are not expressed in either of the Statutes referred to; and, according to a well-known canon of

construction, it must be taken that they were inserted in the Code for the purpose of making it clear that no conditions affecting the personal claim of the deceased, other than those specified, are to stand in the way of the statutory right conferred upon his widow and relatives. The first paragraph of Section 1,056, read in its ordinary and natural sense, enacts that the widow and relations shall have a right to recover all damages occasioned by the death from the person liable for the offence or quasi-offence from which it resulted, provided they can show (1) that death was due to that cause, and (2) that the deceased did not, during his lifetime, obtain either indemnity or satisfaction for his injuries.

Assuming, as the jury have found, that the death of Patrick Flynn in November 1883 was due to bodily injuries sustained in August 1882, for which the Respondents were answerable, then all the conditions requisite in order to give the Appellant a right of action have been fulfilled to the letter. The prescription established by Section 2,262 (2) had cut off the deceased's right of action in August 1883; but the code does not make it a condition of the right of action given to the Appellant by Section 1,056 that her husband's claim shall not have prescribed. That prescription is not, within the meaning of the Code, equivalent to indemnity or satisfaction is made perfectly clear by a reference to Section 1,138, which enumerates the various ways in which an obligation may be extinguished. The argument of the Respondents, if given effect to, would practically add to the language of Section 1,056 words which are not to be found there, such as "and without his claim having been otherwise "extinguished," or, in other words, involves the insertion of a new condition which the Legislature has excluded.

It appears to their Lordships that, when sections 1,056 and 2,262 (2) are read together, it becomes apparent that the deceased's claim in respect of his bodily injuries, and the claim of his widow and relations in respect of his death, were to run separate courses of prescription; and that their claim, which cannot emerge until his death occurs, was not to be either directly or indirectly affected by the provisions of 2,262 (2). The saving clause in that subsection is only intelligible upon the footing that it was meant to treat the death as the foundation of their right of action; to apply to that right the rule of prescription introduced by section 1,056, and to exempt it altogether from the operation of the prescriptive rule which limited the deceased's claim.

It may be noticed that the provisions of the second paragraph in section 1,056, are inconsistent with the view that, in order to give a claim to his widow and relations, the deceased must have had a good cause of action at the time of his death. These provisions plainly assume that, on the death of a person dying from wounds received in a duel, his widow and relations would have a good action for all damages thereby occasioned against his antagonist, although he himself could have no right of action, their sole object being to extend liability to others who took part in the duel, whether as seconds or witnesses.

The Respondents argued that, in the event of judgment being against them upon the question of the widow's title to sue, the case ought to be sent back to the Supreme Court of Canada, in order that they may be heard upon their motion for a new trial. Having now the record before them, their Lordships are of opinion that the course thus suggested is no longer open. The judgment appealed from bears, *inter alia*, "That the motions by the Appellants (*i.e.*, the "present Respondents) for a new trial and in

" arrest of judgment should be and the same " were respectively refused and dismissed." As it stands, that is an express adjudication upon the very point which the Respondents desire to have reheard; and the Supreme Court of Canada can have no jurisdiction to review it. In order to meet that difficulty, the Respondents suggested that the decerniture was inserted *per incuriam,* and that the Supreme Court might strike it out, upon a motion to correct their judgment; and they relied upon the circumstance that the point is not discussed in the opinion of Mr. Justice Taschereau. Without clear grounds for doing so, their Lordships are not inclined to protract litigation, already excessive. Considering that all the Judges, seven in number, who heard the motion in the Courts of Quebec Province were of opinion that the evidence warranted a verdict against the Respondents, that one of them only thought the verdict ought to be disturbed, and that upon the single ground that the damages awarded were too large, their Lordships see no reason to suppose that the judgment of the Supreme Court of Canada was incorrectly framed or that any injustice will be done by their finally disposing of the case at this stage.

Their Lordships will therefore humbly advise Her Majesty to discharge the judgment appealed from, to restore the judgment of the Superior Court in review, dated the 31st January 1889, and the judgment of the Queen's Bench in Appeal, dated the 19th June 1890, and to order the Respondents to pay to the Appellant her costs of the appeal to the Supreme Court in the second trial. The Respondents must also pay to the Appellant her costs of this appeal.