

Harold Eaton McMillan      -      -      -      -      -      -      *Appellant*

*v.*

The Canadian Northern Railway Company      -      -      -      *Respondents*

FROM

THE COURT OF APPEAL FOR SASKATCHEWAN.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 24TH OCTOBER, 1922.

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*Present at the Hearing :*

VISCOUNT CAVE.

LORD PARMOOR.

LORD PHILLIMORE.

LORD JUSTICE CLERK.

MR. JUSTICE DUFF.

[*Delivered by* VISCOUNT CAVE.]

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This is an appeal from a judgment of the Court of Appeal of Saskatchewan, affirming the judgment of the Court of King's Bench for the same province, whereby judgment was entered for the respondent company in an action brought by the appellant for damages for injuries. The action is similar in some respects to that of *Walpole v. The Canadian Northern Railway Company*, in which judgment has lately been delivered by the Board; but there are material differences both of fact and law to which reference must be made.

The appellant, at the time of the accident giving rise to the action, and for some time prior thereto, was a resident in Ontario, and was employed by the respondent company as a locomotive fireman. On the 12th November, 1918, the appellant in the course of his employment, was working a switch engine on the respondents' railway at Rainy River in the province of Ontario; and while he was so employed, some railway coaches, which were standing on an inclined side track and which had not been

properly braked, ran down the track and struck the appellant's locomotive, causing him serious injuries. It is common ground that the failure to set the brakes on the coaches was due to the negligence of a switchman in the respondents' service. The appellant took no proceedings in Ontario, but on the 18th February, 1919, commenced this action against the respondents in the Court of King's Bench for Saskatchewan, claiming damages for the injuries caused to him by the negligence of the respondent company or their servants.

The action was tried by Mr. Justice Bigelow and a jury, and the jury fixed the damages sustained by the appellant at \$10,700; but the learned Judge nevertheless entered judgment for the respondents, holding that the accident was not maintainable "because the plaintiff (appellant) was domiciled in Ontario at the time of the accident, and the Ontario statute gave the Board under the Workmen's Compensation Act, exclusive jurisdiction over the matter in question." On appeal to the Court of Appeal for Saskatchewan, that Court (consisting of Haultain C.J. and Lamont and Turgeon JJ.) affirmed the judgment, but on somewhat different grounds. Hence the present appeal.

Before examining the reasons given by the Court of Appeal for its decision, it is necessary to state briefly the statute law applicable to the case. By Part I of the Workmen's Compensation Act of Ontario (4 George V, Chapter 25), which applies to railways, it is provided (by section 3) that:—

"Where in any employment to which this Part applies personal injury by accident arising out of and in the course of the employment is, after a day to be named by proclamation of the Lieutenant-Governor-in-Council, caused to a workman, his employer shall be liable to provide or to pay compensation in the manner and to the extent hereinafter mentioned."

Accident is defined (by section 2) as including a wilful and an intentional act, not being the act of the workman, and a fortuitous event occasioned by a physical or natural cause. Other material sections are as follows:—

"4. Employers in the industries for the time being included in Schedule 2 (which includes railways) shall be liable individually to pay the compensation."

"5. Employers in the industries for the time being included in Schedule 1 shall be liable to contribute to the accident fund as hereinafter provided, but shall not be liable individually to pay the compensation."

"13. No action shall lie for the recovery of the compensation whether it is payable by the employer individually or out of the accident fund, but all claims for compensation shall be heard and determined by the Board."

"15. The provisions of this Part shall be in lieu of all rights and rights of action, statutory or otherwise, to which a workman or his dependents are or may be entitled against the employer of such workman for or by reason of any accident happening to him on or after the first day of January, 1915, while in the employment of such employer, and no action in respect thereof shall lie."

The Act fixes the scale of compensation, and sets up a Workmen's Compensation Board, which is to make and collect the assessments on employers in Schedule 1, and is to have exclusive jurisdiction to determine all questions arising under Part I of the Act. By

Part II of the Act the doctrine of common employment is excluded as to all employers falling within that Part ; but this provision has no application to railway companies.

It will be seen from the above summary that the Workmen's Compensation Act of Ontario differs from that of British Columbia (which was in question in *Walpole's* case) in one material respect, viz., that in the former province claims for compensation for accident are in the case of certain industries, including railways, to be made not against the Board, but against the employers individually ; but the amount of compensation so recoverable is limited by the statute and is recoverable only by proceedings before the Board. It should be added that in Saskatchewan the doctrine of common employment is altogether excluded (R.S.S. 1920, c. 39, section 26).

The action brought by the appellant in the present case is a common law action for tort ; and it is well-established that in order to found such an action in this country for a wrong alleged to have been committed abroad, two conditions must be fulfilled which were defined by Mr. Justice Willes in *Philips v. Eyre* (1870, L.R., 6 Q.B. at page 28) as follows :—

“ First, the wrong must be of such a character that it would have been actionable if committed in England . . . Secondly, the act must not have been justifiable by the law of the place where it was done.”

The same rule, of course, applies to an action brought in one province of Canada for a wrong alleged to have been committed in another ; and it is, therefore, necessary, in order that the present action may be sustained, to establish, not only that the negligent act upon which the action is founded would have been actionable under the law of Saskatchewan if it had been committed within that province, but also that it was not justifiable by the law of Ontario. Whether the first condition is complied with in this case need not be considered if (as the Court of Appeal have held) the second is not fulfilled. The learned Judges of the Court of Appeal pointed out that up to the time of the passing of the Workmen's Compensation Act of Ontario the negligence in question, having been committed by a fellow servant of the appellant, would not have been imputed to the respondents or susceptible of any proceedings against them ; and they held that the fact that by the Act the respondents were made liable to pay compensation for the accident in question did not make it otherwise than justifiable so far as they were concerned. The latter point was dealt with by the Chief Justice as follows :—

“ The liability thus created is not to pay damages for a wrongful act, but compensation for an accident. The right to compensation is founded on accident simply, not on negligence or any other actionable wrong. The act complained of in this case was the act of a fellow servant, which, by the law of Ontario, is neither wrongful nor unjustifiable so far as the employer is concerned, and in regard to which the employer may justly be said to be innocent or excusable. The accident which happened in this case was an unforeseen event, which neither of the parties has occasioned or could prevent. The mere fact that the employer is liable to pay compensation for such an accident

does not, in my opinion, attach any character of wrongfulness or unjustifiableness or guilt (as opposed to innocence) to the *act* upon which an action in this Province, founded entirely on tort, can be supported. The gist of the action is negligence, the ground for compensation is the accident."

In their Lordships' opinion the reasoning of the Chief Justice, which was in substance adopted by the other members of the Court, is both sound in itself and sufficient to conclude this case. No action for the negligence in question could have been brought against the company in Ontario apart from the statute ; and the claim given by the statute is not a claim for damages for tort, but a claim (strictly limited in amount) for compensation for the accident. The statute, therefore, does not make the negligence of the fellow servant not justifiable by the employer. There is no question in this case of criminal liability.

For the above reasons their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed with costs.



In the Privy Council.

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HAROLD EATON McMILLAN

v.

THE CANADIAN NORTHERN RAILWAY  
COMPANY.

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DELIVERED BY VISCOUNT CAVE.

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