*Privy Council Appeal No.* 199 *of* 1919.

**Dame Margaret Bain** - - - - - - *Appellant*

*v.*

**The Central Vermont Railway Company and others** - - *Respondents.*

FROM

**THE SUPREME COURT OF CANADA.**

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# JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JULY, 1921.

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*Present at the Hearing:*

VISCOUNT HALDANE.
VISCOUNT CAVE.
LORD DUNEDIN.
LORD ATKINSON.
LORD SHAW.

[*Delivered by* LORD DUNEDIN.]

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Hedges, a locomotive fireman in the employment of the Grand Trunk Railway Company, was killed in the course of his duties at Montreal on the 2nd February, 1915, by being run into by another engine driven by an engineer called Frost. It is admitted that Frost was guilty of negligence. Frost was in the service of the Central Vermont Railway Company. The widow of Hedges, for herself and an infant daughter, received compensation from the Grand Trunk Railway Company under the Workmen's Compensation Act, for the death of her husband. This disentitled her to raise any action against the Grand Trunk, but in terms of art. 7334 she was entitled to recover against any person other than the employers against whom she had a right of action. She accordingly raised action against the Central Vermont Railway Company. That Company is an American Railway Company but owns a line in Canada extending from the boundary to St. Johns in the Province of Quebec. The Grand Trunk have a line from Montreal to St. Johns. The two Companies entered into an agreement for the joint working of the line from

Montreal *via* St. Johns to St. Albans in Vermont. It is unnecessary to set forth the agreement in full; the relevant clauses are as follows:—

> "Whereas, it is considered desirable and to the mutual advantage of both parties hereto to operate jointly, and as one line, the railway from Montreal to St. Albans, for both freight and passenger business. . . .
>
> "That each party may furnish its mileage proportion of passenger and freight engines (the engines of both Companies to be as nearly as possible of equal capacity), cabooses and train crews thereof used in joint service between Montreal, Canada and St. Albans, Vermont. . . .
>
> "That each party hereto shall pay the train and engine men employed in the joint service for the service performed by them on its own line, and neither of the parties hereto shall be held responsible to the other for the actions of such joint employees while upon the line of railway of the other party hereto."

As Frost, at the time of the accident, was driving a train on the Grand Trunk line and as his negligence consisted in his failing to attend to Grand Trunk signals, the Central Vermont Company denied liability on the ground that Frost, at the time of the accident, was in the employment of and subject to the orders of the Grand Trunk.

The learned Trial Judge found for the plaintiff. He thought that as Frost was engaged by the Central Vermont Company he was their servant, and that in a question with the plaintiff the agreement between the Companies was *res inter alios acta.* This was manifestly a bad ground of judgment. The agreement between the Companies would indeed be *res inter alios acta* in so far as it covenanted as to liability *inter se*, but in so far as it determined the position of the servants who performed their functions on the joint line it was obviously admissible as the best evidence. On appeal to the Court of King's Bench, that Court, by a majority, one Judge dissenting, affirmed the decision of the Trial Judge, but on a different ground. On appeal to the Supreme Court of Canada that Court unanimously agreed with the dissenting Judge and dismissed the action. Appeal has now been taken to His Majesty in Council.

It seems to their Lordships that there was indeed no difference of opinion between any of the Judges in the Courts below, with the exception of the Trial Judge, as to the law to be applied to the case. Indeed it cannot be more concisely or accurately stated than it was by Cross, J., who gave the judgment of the majority in the Court of King's Bench when he says:—

> "He (Frost) was in the general service of the Central Vermont Railroad Company, but it is well established that the master, in whose general service a man is, is not responsible for the tortious act of the man if the control of the master has been, for the time being, displaced by the power of control of another master into whose temporary service the man has passed by being lent (even gratuitously) or sub-contracted.
>
> "In such a case, it is the 'patron momentané' and not the 'patron habituel' who is responsible,"

and he quotes *inter alia* in support the case of *Donovan* v. *Laing & Syndicate* (1893) 1 Q.B. 629.

The same view of the law is repeated in each and all of the admirably clear judgments of the learned Judges of the Supreme Court of Canada. The difference of opinion arises, therefore, upon the view taken of the facts. It is true that in general it is well to abide by the view of the facts taken by the tribunal of first instance. But while this is so when any question of credibility is involved, it does not follow when the view of facts rests rather upon inference from facts as to which there is no dispute other than a difference of view as to the facts themselves.

What then was the position of Frost? The question is really admirably expressed by the French phrase. It is common ground that the Central Vermont Company was to Frost the "patron habituel" but which of the two Companies was the "patron momentané"? Their Lordships have no hesitation in agreeing with the view unanimously taken by the learned Judges of the Supreme Court. The *ratio decidendi* of the Court below lies in the view that in the words of Cross, J., "the Central Vermont Company retained a measure of control of Frost instead of having put him completely under the orders of the other Company." He cites as justifying this view that if Frost had been told by the Central Vermont Company to stop at a certain station on the line he must have done so and that he had a duty to keep clean and preserve his engine the property of the Central Vermont Company. It is from these facts he draws the conclusion that the control of the Central Vermont Company was not excluded. Their Lordships think that this is leaving out of view the point of time at which the position must be determined. In the words of the judgment reported by Sirey and quoted by Brodeur, J., you are to look to the "patron momentané qui avait ce préposé sous ses ordres et sur lequel il avait une autorité exclusive *au moment de l'accident.*" It is nothing to the purpose that there may be at the same time a sort of residuary and dormant control of the "patron habituel." Now what caused the accident? The disregard of the signals. They were Grand Trunk signals. These signals were the mechanical expression of the orders of the Grand Trunk, orders which Frost at that moment was bound to obey. At that moment and for the purpose of regulating the speed of the train Frost was under the orders of the Grand Trunk. As a matter of fact so literally was the arrangement, embodied in Section 6 of the agreement already quoted, carried out that Frost signed a separate receipt for the payments made to him by each Company respectively for his services while working on each line respectively. Payment is not everything; it is a circumstance pointing to who is the employer, but the real test is control, and at the moment of the accident the control of Frost was in the Grand Trunk.

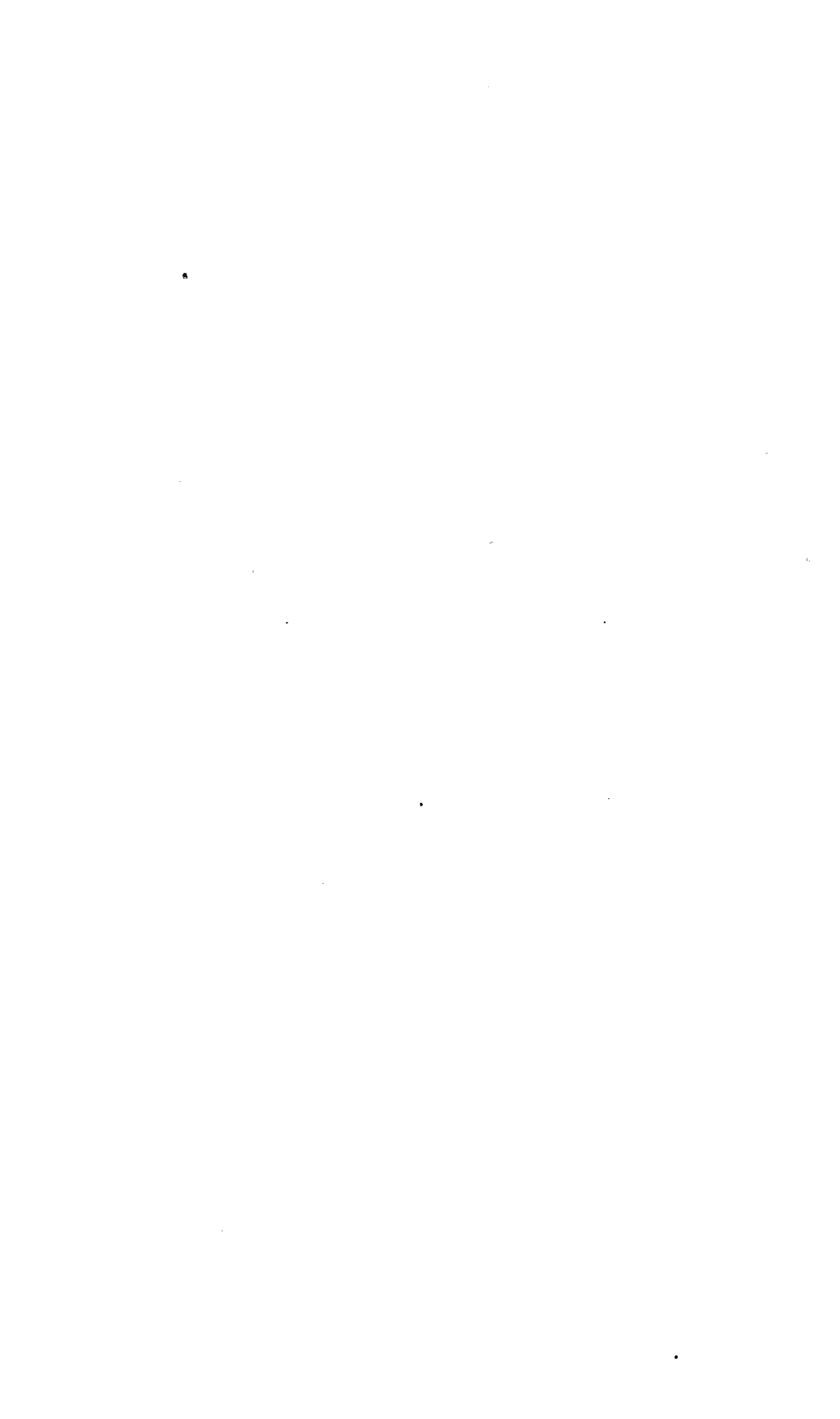
Their Lordships had occasion to examine the law on this subject in a very recent case which had not been decided when the Supreme Court gave judgment. It is the case of *La Société Maritime Francaise* v. *The Shanghai Dock and Engineering Company, Limited,* which is not yet reported. They can only repeat what they there said, that they were of opinion that the law was accur-

ately laid down by Bowen, L.J., in *Donovan* v. *Laing* (L.R. 1893, 1 Q.B. 629). The first sentence of the judgment of Bowen, L.J., which was there quoted is as follows :—

> "We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act."

This is precisely what was laid down in the case reported by Sirey already quoted, and it expresses precisely the test which the Supreme Court has in this case applied to the facts.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.



**In the Privy Council.**

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DAME MARGARET BAIN

*v.*

THE CENTRAL VERMONT RAILWAY COMPANY
AND OTHERS.

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DELIVERED BY LORD DUNEDIN.

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