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April 4.

IN THE MATTER OF THE PETITION OF RIGHT OF

DAME EMELY GRENIER.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

*Government railway—Death resulting from negligence of fellow-servant—Common employment*—50-51 *Vict. c.* 16, *s.* 16 *(c.)*—*Art.* 1056 *C. C. L. C.*—*Widow and children—Right of action—Bar—Liability—Contract limiting—Measure of damages.*

The doctrine of common employment is no part of the law of the Province of Quebec. *Robinson* v. *Canadian Pacific Railway Co.* ([1892] A. C. 481); and *Filion* v. *The Queen* (4 Ex. C. R. 134; and 24 Can. S. C. R. 482) followed.

2. The widow and children of a person killed in an accident on a Government railway in the Province of Quebec have a right of action against the Crown therefor, notwithstanding that the accident was occasioned by the negligence of a fellow-servant of the deceased.

3. The right of action in such case arises under 50-51 Vict. c. 16 s. 16 (*c*) and Art. 1056 C. C. L. C., and is an independent one in behalf of the widow and children, which they may maintain in case the deceased did not in his lifetime obtain either indemnity or satisfaction for his injuries.

4. Under the provisions of section 50 of *The Government Railways Act*, while the Crown may limit the amount for which in cases of negligence it will be liable, it cannot contract itself out of all liability for negligence. *The Grand Trunk Railway Co.* v. *Vogel* (11 Can. S. C. R. 612); and *Robertson* v. *The Grand Trunk Railway Co.* (24 Can. S. C. R. 611) applied.

5. In cases such as this it is the duty of the court to give the widow and children such damages as will compensate them for the pecuniary loss sustained by them in the death of the husband and father. In doing that the court should take into consideration the age of the deceased, his state of health, the expectation of life, the character of his employment, the wages he was earning and his prospects; on the other hand the court should not overlook the fact that out of his earnings he would have been obliged

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to support himself as well as his wife and children, nor the contingencies of illness or being thrown out of employment to which in common with other men he would be exposed.

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PETITION of right for damages for injury to the person on a Government railway.

By her petition the suppliant alleged as follows:

1. Que la dite requérante était légitimement mariée avec feu Xavier Letellier, en son vivant, chauffeur à l'emploi du chemin de Intercolonial, et résidant à Fraserville;

2. Que de ce mariage sont nés deux enfants, savoir; Martha, actuellement âgée de deux ans et Alfred âgé de neuf mois—et Marie Anne Clara, née le cinq Decembre dernier (1898).

3. Que la dite requérante a, le six mai 1898, duement été nommée, en justice, tutrice aux dits deux enfants mineurs;

4. Que la dite requérante a accepté la dite charge, a été assermentée comme telle, et le dit acte de tutelle a été duement enregistré;

5. Que, le ou vers le 2 mai courant (1898), le dit feu Xavier Letellier a été tué dans une collision, sur le chemin de fer Intercolonial, dans le district de Kamouraska, à King's Sidings, entre les stations de la Rivière Ouelle et Sainte Anne de la Pocatière;

6. Que le dit chemin de fer Intercolonial est un ouvrage public qui appartient à Sa Majesté, et dont Elle a le contrôle et la direction;

7. Que la dite collision a eu lieu entre un train irrégulier (special train), savoir l'engin N° 3, montant allège (light engine) et conduit par l'ingénieur A. Boisvert et le chauffeur Charles Dion, et un train régulier, N° 48, appelé *market train*, conduit par l'ingénieur Jolivet et le chauffeur feu Xavier Letellier;

8. Que la dite collision et la mort du dit Xavier Letellier sont dues à la négligence coupable, la faute

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grossière et à l'ignorance des employés de Sa Majesté, sur le dit chemin de fer, pendant qu'ils agissaient dans les limites de leurs fonctions ou de leur emploi, et spécialement des dits Boisvert et Dion ;

9. Qu'il existe pour le service du dit chemin de fer Intercolonial des règlements généraux adoptés le 16 août 1876,—et aussi des règlements spéciaux pour la marche des trains,—imprimés à la suite des *time tables* et qui font partie des règlements généraux ;

10. Qu'entr'autres choses, il est ordonné par les dits règlements, " que seules les personnes reconnues pour " avoir des habitudes régulières et être sobres "—seraient employés pour la direction des trains ; " que " toute personne reconnue pour être ivrogne, ou pour " fréquenter les buvettes en devoir ou non,—sera " renvoyée du service, que l'ingénieur en charge d'un " engin allège (light engine) aura les mêmes devoirs " et responsabilités qu'un conducteur (Art. 60, 63, 64 " des règlements spéciaux) ; que les chauffeurs seront " soumis aux mêmes ordres que les ingénieurs, lors- " qu'ils seront sur les engins, et qu'ils devront assister " et remplacer l'ingénieur quand cela sera nécessaire " (Art. 204 & 205 des règlements généraux) ;

11. Que le dit ingénieur Boisvert avait l'habitude de fréquenter les buvettes et de s'enivrer, qu'il avait pris de la boisson et était en boisson lorsqu'il est parti de la Rivière du Loup, le 2 mai courant (1898), et ce, à la connaissance des employés du dit chemin qui avaient le contrôle du dit ingénieur ;

12. Que le dit chauffeur Charles Dion était un novice à l'emploi du dit chemin de fer depuis un mois seulement, ayant remplacé des employés compétents ; qu'il n'avait jamais appris ce métier de chauffeur ; qu'il n'avait alors fait que deux ou trois voyages comme tel, et qu'il ne connaissait aucunement les devoirs de sa position, ni les règlements du dit chemin de fer ; et

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ce, à la connaissance des employés du dit chemin qui en avaient le contrôle ;

13. Que lors de leur départ de la Rivière du Loup, l'ordre suivant a été donné aux dits Boisvert & Dion :

" L'engin No. 3 suivra Wilson spécial jusqu' à Saint " Charles, sur un signal blanc, marchera en avant du " No. 143—Rapportez-vous à Sainte Anne pour des " ordres.—Rencontrez le No. 50 à Saint Alexandre."

14. Qu'il est ordonné aux ingénieurs et chauffeurs par les règlements du dit chemin de fer Intercolonial— " de prêter attention aux signaux et d'arrêter quand " un signal est au danger (signal rouge, la nuit)—No. " 23, 35 et 173 des règlements généraux ; No. 41 des " règlements speciaux— ; que les trains spéciaux " doivent s'approcher avec précaution des stations " (Art. 18 des règlements spéciaux) ; que chaque fois " qu'un ordre est donné de rencontrer un train à une " station, ils doivent arrêter à cette station (Art. 42 des " règlements spéciaux) ;

15. Que malgré cet ordre et ces règlements et les signaux rouges (au danger) placés à la station de Saint Alexandre, les dits Boisvert & Dion n'y sont pas arrêtés, mais ont dépassé la station d'environ un mille, et ce n'est qu'après cela qu'ils y sont ensuite retournés pour prendre la voie d'évitement ;

16. Que cette conduite anormale et cette violation flagrante des règlements du dit chemin de fer—ont été connues des employés du dit chemin qui avaient le contrôle des dits Boisvert & Dion (Art. 168 des règlements généraux) ;

17. Qu'il est ordonné impérativement par les règlements du dit chemin de fer : (Art. 15, règlements spéciaux) "Special and working trains must keep at " least fifteen (15) minutes clear of the time of all " regular trains."

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Art. 19 (règlements spéciaux). "No irregular train "shall leave or pass a station unless it has time to "arrive at the next siding, at least fifteen (15) minutes "before the time fixed by the time table for the depar- "ture from there of a train coming in the opposite "direction."

Art. 148 (règlements généraux). "Irregular train "must be in a siding at least fifteen (15) minutes "before regular trains are due.....

18. Que le train No. 43 (market train) était dû en vertu du *time table*, à Sainte Anne à 21.31 (standard time);—à la Rivière Ouelle à 21.53—à Saint Philippe de Néri à 22.07;—à Saint Paschal à 22.28;

19. Que le train spécial (irregular train) conduit par Boisvert et Dion est passé à Saint Paschal, vers 22.04; —à Saint Philippe de Néri, à 22.08; à la Rivière Ouelle vers 22.18,—sans arrêter à aucune de ces stations et marchant sur le temps d'un train régulier, contrairement et en violation flagrante des règlements du dit chemin de fer, et ce, à la connaissance des employés et officiers supérieurs du dit chemin qui avaient le contrôle des dits Boisvert et Dion;

20. Que c'est cette négligence coupable et l'ébriété du dit Boisvert, l'incapacité et l'ignorance grossière du dit Chs. Dion et leur violation criminelle des règlements du dit chemin de fer qui ont été la cause directe et immédiate de la dite collision et de la mort du dit feu Xavier Letellier, le mari de la requérante, ainsi que cela a été reconnu à l'enquête du Coroner sur le corps du dit Letellier, le 3 mai 1898;

21. Que les dits Boisvert et Dion et les autres employés en devoir, le soir du 2 mai courant (1898), qui en avaient le contrôle, sont des employés de Sa Majesté sur le dit chemin de fer Intercolonial, et tous, ils agissaient alors dans l'exercice de leurs fonctions ou emplois; ce qui rend Sa Majesté responsable de la

mort du dit Xavier Letellier, tant en vertu de la loi en force dans la Province de Québec (1053-1054 C C.),—qu'en vertu de la 50 et 51 Vic., ch. 16, secs. 15 et 16 qui donnent juridiction à la Cour de l'Echiquier pour la connaissance de ces causes;

22. Que le dit Xavier Letellier était un jeune homme d'environ 27 ans, plein de force et de santé, promettant une longue vie;

23. Que le dit Letellier gagnait $1.85 par jour, faisait une semaine de six jours et demi à sept et huit jours, et son salaire sur le dit chemin de fer Intercolonial, ou tout autre chemin de fer pouvait, vû ses capacités et l'augmentation régulière des salaires, atteindre dans deux à cinq ans—$2.50 à $2.75 par jour, soit environ $100.00 par mois, et même au-delà;

24. Que la requérante est jeune, faible, pauvre, incapable de gagner sa vie par elle même, et de subvenir à son entretien, ni à l'entretien, l'élevage et l'éducation de ses deux enfants mineurs qui sont dépourvus de tous moyens, soit par eux-mêmes, soit de leurs parents;

25. Que la vie et l'entretien de la requérante, la vie, l'entretien et l'instruction des dits deux enfants, coûteront environ $1000.00 par année;

26. Que la requérante a beaucoup souffert dans sa santé, son repos et son bien-être par suite de la mort subite de son dit mari;

27. Que les dommages causés à la requérante et à ses dits deux enfants, par la mort du dit Xavier Letellier—s'élèvent à au moins la somme de $25,000.00;

28. Qu'une demande d'indemnité a déjà été faite au Surintendant du chemin de fer Intercolonial qui n'a donné aucune réponse satisfaisante.

C'est pourquoi, votre requérante, tant personnellement que comme tutrice à ses dits deux enfants mineurs,—demande à Sa Très-Excellente Majesté la

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Reine et la prie de vouloir bien accorder la présente pétition de droit et de lui payer une indemnité de $25,000.00 pour les dommages à eux causés par suite de la mort du dit Xavier Letellier, arrivée comme il est dit ci-dessus.

Her Majesty's Attorney-General for the Dominion of Canada pleaded to the petition as follows :

"1. Her Majesty does not admit the allegations set forth in the 3rd, 4th, 5th, 6th and 7th paragraphs of the petition of right, or any of them."

"2. Her Majesty denies that the alleged collision or death of the said Xavier Letellier were due to any negligence, fault or ignorance of the said engineer Boisvert, or the fireman Dion, or any other of Her Majesty's officers, servants or employees."

"3. Her Majesty denies the allegations set forth in the 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th and 28th paragraphs of the petition of right and each of them."

"4. The alleged collision took place on the 2nd May, 1898, between a light engine in charge of engineer Boisvert and fireman Dion and an accommodation train driven by engineer Jolivet and the said Xavier Letellier, fireman, and in the collision the said engineer Boisvert and the said fireman Letellier were instantly killed. The said engineer and fireman heretofore mentioned were fellow employees of Her Majesty in the service of the Intercolonial Railway of Canada, each properly qualified and skilled in the duties which he had to perform; and the accident causing the death of the said Letellier was due to the negligence of the said engineer Boisvert and fireman Dion, or one of them, and the death of the said Letellier was occasioned in the ordinary discharge of his duties as fireman through the negligence of his fellow

servants the said engineer Boisvert and fireman Dion while acting in the ordinary discharge of their duties, and the Attorney-General on behalf of Her Majesty avers that the alleged accident in which the said Letellier was killed, arising as it did from the negligence of his fellow-servant in the common employment, was one of those accidents the risk of which the said Letellier as between Her Majesty and himself contracted to bear."

" 5. The death of the said Xavier Letellier was not caused by any negligence on the part of Her Majesty or any of Her Majesty's officers, servants or employees."

" 6. The said Xavier Letellier being a permanent employee of Her Majesty in the service of the Intercolonial Railway of Canada, was a member of an association known as The Intercolonial Railway Employees' Relief and Insurance Association, which is an association composed of the employees of Her Majesty in the said railway service, to which the employees make certain contributions, and from the funds of which association certain allowances in accordance with the rules and regulations thereof are made to the members in case of accident or illness, or to their families in case of death. Her Majesty, through her Government of Canada, in order to enable the said association to pay such allowances, contributes annually to the fund of the said association the sum of $6,000.00, and such contribution had been made annually by Her Majesty throughout the term of the employment of the said Xavier Letellier, and was so made in consideration of the stipulations on the part of the said association set out in the rule or regulation hereinafter quoted. It is one of the rules and regulations of the said association that " in consideration of the annual contribution of $6,000.00 from the railway department" (thereby meaning Her Majesty in the

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right of Her Government of Canada) "to the association, the constitution, rules and regulations and future amendments thereto, shall be subject to the approval of the chief superintendent and the railway department," (thereby meaning Her Majesty in Her right aforesaid) "shall be relieved of all claims for compensations for injuries or death of any member." The said rule or regulation was in force at the time the said Xavier Letellier became an employee of Her Majesty and a member of the said association, and has ever since continued to be in force. The said rule or regulation was well known to the said Xavier Letellier, and he sought and accepted employment in Her Majesty's service and membership in the said association upon the stipulation among others that he should be bound by the said rule or regulation above set out.

"7. The Attorney-General on behalf of Her Majesty repeats the several allegations in the last preceding paragraph set forth, and says that the said Xavier Letellier by becoming a member of the said association and sharing in the benefits thereof, and by reason of the other facts in the said paragraph stated was in his lifetime estopped from setting up any claim against Her Majesty for compensation for any injury sustained by him in Her Majesty's said service, and that for the same reasons the suppliant and those on behalf of whom she sues are likewise estopped from setting up against Her Majesty the claim herein sued for."

"8. It was one of the terms of employment of the said Xavier Letellier by Her Majesty that Her Majesty should be relieved of all claims for compensation for injury or death of the said Xavier Letellier in anywise caused in the service of Her Majesty, and the death of the said Letellier, on account of which this action is brought, was caused while he was performing his duties in the service of Her Majesty."

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"9. The Intercolonial Railway Employees' Relief and Insurance Association was and is an association of the permanent employees of Her Majesty in the service of the Intercolonial Railway, the principal object of which association is to provide allowances for members of the association in case of accident or illness or for their families in case of death. The funds of the association are derived entirely from regular contributions made thereto by members, and the sum of $6,000.00 annually contributed thereto by Her Majesty, through Her Government of Canada. The said contribution so made by Her Majesty was and is made in consideration of the agreement between Her Majesty and each of the members of the said association that Her Majesty shall be relieved of all claims for compensation for injuries or damages sustained by any member of the association, and the Attorney-General avers that at the time of the employment by Her Majesty and the said Xavier Letellier it was agreed between Her Majesty and the said Xavier Letellier that in consideration of the payment by Her Majesty annually to the said association of the said sum of $6,000.00 he the said Xavier Letellier should not have any claim against Her Majesty for compensation for injuries or death sustained by him in the said service of Her Majesty. Her Majesty has during each year of the employment of the said Xavier Letellier duly paid and contributed to the said association the said sum of $6,000.00, and the said Xavier Letellier as a member of the said association has had the benefit thereof, and the suppliant and those on behalf of whom she sues has since the death of the said Xavier Letellier received or become entitled to the sum of $250 to be paid out of the funds of the said association on account of the death of the said Xavier Letellier."

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"10. At the time of the employment by Her Majesty of the said Xavier Letellier, the said Xavier Letellier agreed with Her Majesty that in consideration of the payment of a sum of money by Her Majesty for the benefit of the said Xavier Letellier, which sum of money Her Majesty did pay as so agreed, the said Xavier Letellier should not in any case have any claim against Her Majesty for any damages for injuries or death sustained by him in the service of Her Majesty."

"11. The suppliant on her behalf and on behalf of those for whom she sues herein has received from the said Employees' Relief and Insurance Association on account of the death of her said husband Xavier Letellier his death indemnity of $250, which amount the Attorney-General claims should be set off against any damages which may be recovered herein."

"12. The Attorney-General on behalf of Her Majesty repeats the several allegations set forth in the 6th paragraph hereof, and says that the suppliant on her own behalf and on behalf of those for whom she sues herein has accepted and received from the said Employees' Relief and Insurance Association out of the moneys so contributed thereto by Her Majesty the death indemnity of her husband the said Xavier Letellier, payable according to the rules and regulations of the said association amounting to the sum of $250, and that the suppliant is thereby estopped from setting up against Her Majesty the claim sued for herein."

"13. The damages caused to the suppliant and to her children by the death of Xavier Letellier do not amount to the sum of $25,000."

The suppliant replied to the defence, as follows: —

"1. La requérante nie les allégations Nos 1. 2, 3, 5, 7, 8, 9, 10, 11, 12 et 13, de la dite défense.

2. En réponse à l'allégué No 4 de la dite défense, la requérante dit que le chauffeur Dion n'était, lors de

l'accident du 2 mai 1898, aucunement qualifié comme chauffeur; que Boisvert, l'ingénieur, était sous l'influence des liqueurs enivrants quand il a pris charge de son engin, le même jour; que le fait que feu Xavier Letellier aurait été un co-employé de Boisvert et Dion (ce que la requérante nie) cela n'aurait pas pour effet de libérer Sa Majesté de sa responsabilité au sujet de la mort du dit Letellier."

" 3. En réponse aux allégués Nos 6, 7, 8, 9, 10 de la dite défense, la requérante dit: Que feu Xavier Letellier n'a jamais connu que Sa Majesté pouvait se libérer par suite de sa contribution de $6,000 au fonds d'assurance du chemin de fer Intercolonial de toute responsabilité pour les accidents causés par la faute de ses employés; que le dit feu Xavier Letellier n'a jamais accepté, ni reconnu, ni souscrit à aucune condition ou engagement pouvant limiter cette responsabilité; que Sa Majesté, en vertu de l'acte des chemins de fer du Canada, en force lors de l'accident du 2 mai, " ne peut " être dégagée d'aucune responsabilité, par aucun avis, " condition ou déclaration, pour les dommages causés " par la négligence, l'omission ou le manquement d'un " officier, employé ou serviteur du ministre "; que les dits Boisvert & Dion étaient, lors du dit accident, des employés, officiers et serviteurs du ministre, c'est-à-dire du ministre des chemins de fer et canaux."

" 4. La requérante, en réponse à l'allégué No 12 de la dite défense, dit: qu'elle répète l'allégué No 3 ci-dessus; que le paiement d'une assurance de vie, du dit feu Xavier Letellier ne peut, en aucune manière, affecter le recours en dommage de la requérante contre Sa Majesté, laquelle est responsable de ces dommages, malgré toute stipulation contraire; que la requérante, qui ne s'entend pas en affaires, ne peut avoir renoncé, en connaissance de cause, à son présent recours contre Sa Majesté; que toute telle renonciation, en supposant

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qu'elle existe, n'a été donnée que par erreur de la part de la requérante, qui n'a pas lu ni eu la lecture de ce qu'on a pu lui faire signer, et dans l'ignorance des règlements de l'association d'assurance du chemin de fer Intercolonial."

" C'est pourquoi la requérante conclut au renvoi de la dite défense de Sa Majesté, avec dépens."

The following admissions of fact were made by the parties before trial:

" The parties hereto admit paragraphs 1, 2, 3, 4, 5, 6, 7, 9, 10, 13, 14, 15, 17 and 18 of plaintiff's Petition of Right."

" The plaintiff admits that paragraph 8 of said Petition of Right be read as follows :

" Que la dite collision et la mort du dit Xavier Letellier sont dues à la négligence, à la faute et à l'ignorance des employés de Sa Majesté, sur le dit chemin de fer, pendant qu'ils agissaient dans les limites de leurs fonctions ou de leur emploi, et spécialement des dits Boisvert et Dion ;"

" Paragraph 12 to be read as follows :

" Que le dit chauffeur Charles Dion était à l'emploi du dit chemin de fer depuis un mois seulement ayant remplacé des employés compétents ; qu'il n'avait jamais appris ce métier de chauffeur; qu'il n'avait alors fait que deux ou trois voyages comme tel ;"

" Paragraph 19 to be read as follows :

Que le train spécial (irregular train) conduit par Boisvert et Dion est passé à St. Paschal vers 22.04 ;—à Saint Philippe de Néri à 22.08—à la Riviere Ouelle vers 22.18—sans arrêter à aucune de ces stations et marchant sur le temps d'un train régulier, contrairement et en violation des règlements du dit chemin de fer et ce devait être à la connaissance des employés et officiers supérieurs du dit chemin qui avaient le contrôle des dits Boisvert et Dion ;"

Paragraph 21 to be read as follows :

" Que les dits Boisvert et Dion et les autres employés en devoir le soir du 2 Mai courant (1898) qui en avait le contrôle sont des employés de Sa Majesté sur le dit chemin de fer Intercolonial, et tous, ils agissaient alors, dans l'exercice de leurs fonctions ou emplois ;"

" Paragraph 22 to be read as follows :

Que le dit Xavier Letellier était un jeune homme d'environ 27 ans, plein de force et de santé ;"

Paragraph 23 to be read as follows :

" Que le dit Letellier était un bon chauffeur, gagnait à l'époque de sa mort, quand il était employé, $1.60 par jour et dans le cours régulier des promotions il aurait pu se présenter en juin suivant,—époque à laquelle des promotions ont été faites,—pour subir l'examen comme ingénieur et en cas de succès et s'il avait continué d'être à l'emploi du Gouvernement, son salaire alors comme ingénieur aurait été de $2.10 pour la première année, $2.30 pour le deuxième, $2.50 pour la troisième et $2.75 pour la quatrième et les années subséquentes."

" Le dit Letellier est entré au service du Gouvernement en 1889 et depuis lors il a gagné les montants suivants :

| | |
|---|---|
| 1889 | $380 11 |
| 1890 | 453 43 |
| 1891 | 487 64 |
| 1892 | 388 52 |
| 1893 | 361 82 |
| 1894 | 339 59 |
| 1895 | 347 68 |
| 1896 | 266 47 |
| 1897 | 395 94 |
| 1898 | 170 96 |

Les parties pour les fins de cette cause consentent à ce que le tribunal consulte les tables de mortalité

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(actuary tables) de la Compagnie New York Life, si nécessaire, pour fixer les dommages."

The parties hereto further admit:

"1. That A. Boisvert, Charles Dion, Jolivet and Xavier Letellier, mentioned in the seventh paragraph of the Petition of Right, were in their respective positions fellow servants in the employ of the Intercolonial Railway and all under the control of the same superior officers, and working, at that time, as stated in said paragraph 7."

2. "That the deceased Xavier Letellier was a member of the association known as the Intercolonial Railway Employees' Relief and Assurance Association, which association is composed of the employees of Her Majesty in the railway service, and to which the employees make certain contributions and from the funds of which association certain allowances, in accordance with the rules and regulations thereof, are made to the members in the case of accident or illness, or to their families in the case of death, in the manner set forth in said rules and regulations."

"3. That the Government of the Dominion of Canada contributes six thousand dollars annually to this association, in consideration of which it was made a rule of the association that the Government should be relieved of all claims for compensation for injuries or death of any member, as stated in said rules."

"4. That Exhibit D (1) is a copy of the constitution and rules and regulations of the society, as approved by the chief superintendent therein mentioned; that the deceased Letellier was a member of the society; that he had received a copy and was aware of the said rules and regulations and that the plaintiff by virtue of said rules and regulations received the indemnity of two hundred and fifty dollars, being the amount mentioned in Exhibits D (7) and D (8)."

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"5. The defendant produces as Exhibit D (2) and D (3) two documents admitted to be certificates of membership of the said deceased Xavier Letellier in the said society and bearing his signature, and as D (4), D (5) and D (6) three receipts admitted to have been signed by him for copies of the revised constitution and rules and regulations."

The facts appearing upon the evidence are stated in the reasons for judgment.

January 31st, 1899.

The case was argued at Quebec before Mr. Justice Burbidge, upon questions of law reserved by the Registrar, to whom the case had been referred for enquiry and report.

*G. G. Stuart, Q.C.* and *N. C. Riou* for the suppliant.

The *Solicitor-General of Canada, E. L. Newcombe, Q.C., J. Dunbar, Q.C.* and *C. Pouliot* for the Crown.

*Mr. Stuart* stated there were in reality only two grounds upon which the Crown defended the action; first, that the accident by which the husband of the suppliant was killed was caused by the negligence of his fellow servants, and, secondly, that the deceased's membership in the railway insurance association, and the payment of the amount of the insurance to the suppliant, were facts which estopped the suppliant from recovering anything under her petition. Thus negligence on the part of the Crown's servants is admitted; and as to the effect of such negligence, I refer to the cases collected in the reporter's note to the case of *McKay's Sons* v. *The Queen* (1), and Art. 1056 of the Civil Code.

It has been decided over and over again in the Province of Quebec, and the principle has been affirmed in Quebec cases in the Exchequer Court and in the Supreme Court of Canada, that where the accident has

(1) 6 Ex. C. R. at p. 3.

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been caused by the negligence of a fellow servant, the person injured has nevertheless a right of action against the employer. *Filion* v. *The Queen* (1).

In answer to the second ground of the defence, we say that the suppliant's right of action is not in her capacity as representative of her deceased husband, but in her own right as provided for by Art. 1056 of the Civil Code. It was simply impossible for the deceased to have renounced a right on behalf of his wife which did not accrue until after his death. The right of action of the widow and children is a substantive one, and is never under the disposition of the father to the extent that it may be renounced by him. He cannot release the action.

Again, even if the action were by the legal representatives in right of the deceased, the receipt of the insurance money and the regulations of the insurance association would not be a bar. *Robinson* v. *Canadian Pacific Railway Company* (2).

Anything that was done between the deceased and the Government touching the insurance in question here, was, so far as the action at the suit of the widow and children is concerned, *res inter alios acta*.

Then, as to the question of contributory negligence, it is to be said that whatever effect contributory negligence would have under the circumstances of this case according to the principles of English law, under Quebec law such a condition would only affect the amount of damages recovered, and does not operate as a bar to the action.

The clause in the regulations of the I. C. R. Relief and Insurance Association is not binding on the suppliant even if she has her right of action in a representative capacity, for it contravenes section 50 of R. S. C. c. 38. *Lavoie* v. *The Queen* (3): *Roach* v. *Grand*

(1) 4 Ex. C. R. 145; 24 S. C. R. 482.

(2) [1892] A. C. 481.

(3) 3 Ex. C. R. 96.

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*Trunk Railway Co.* (1); *Farmer* v. *Grand Trunk Railway Co.* (2).

The receipt for the money received by the suppliant from the insurance association contains no release or discharge of any claim against the Crown, and cannot under any circumstances be taken into account in reduction of damages here. *Bradburn* v. *Great Western Railway Co.* (3); *Grand Trunk Railway Co.* v. *Jennings* (4).

The suppliant is entitled to a sum in damages which would compensate her for the loss of her husband's support of herself and children during his reasonable term of life.

*S. C. Riou* contended that the admission of facts narrows the issues down to two principal questions:— 1st. Whether the doctrine of common employment obtains in the Province of Quebec; 2nd. Whether the Crown is discharged by reason of its contribution to the funds of the insurance association, and the clause in the regulations of the association relieving it from liability.

Admitting that the deceased was in the employ of Her Majesty, as well as Boisvert and Dion, it cannot be established that the work the three of them were engaged in at the time of the accident was common. They were on different trains. *Pollock on Torts* (5). The doctrine of common employment is no longer in force in England since the enactment of 38 & 39 Vict. c. 90. Nor does it exist in France, or in the Province of Quebec. 2 *Boitard* (6). *Dalloz.*: Rep. Suppl. vo. "*Responsabilité*"; *Belanger* v. *Riopel* (7); *Dupont* v. *Quebec S. S. Co.* (8); *Filion* v. *Queen* (9).

(1) Q. R. 4 S. C. 392.
(2) 21 Ont. R. 299.
(3) L. R. 10 Ex. 1.
(4) 13 App. Cas. 800.
(5) P. 90.
(6) No. 911 p. 155.
(7) M. L. R. 3 S. C. 198, 258.
(8) Q. R. 11 S. C. 188.
(9) 24 Can. S. C. R. 482.

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The deceased's fellow servants, Boisvert and Dion, were incompetent for the work they were entrusted to do, and the Crown employing them is responsible for their negligent acts. 2 *Boitard* no. 884 pp. 124, 125 ed. 1887; *Dalloz*, Rep. Suppl. vo. "*Responsabilité*" no. 750; 20 *Laurent*, no. 570; 31 *Demolombe* no. 610 p. 530.

The French law ignores stipulations entered into to renounce damages for future wrongs.

Again, the insurance association is a private undertaking and distinct from the public administration of the Intercolonial Railway. Every permanent male employee is obliged to become a member of it. It is a general and unilateral condition of *immunité* benefiting the Crown as against its employees. It must be strictly construed. *Glengoil S. S. Co.* v. *Pilkington* (1); *Robertson* v. *Grand Trunk Railway Co.* (2); *Vogel* v. *Grand Trunk Railway Co.* (3); *Roach* v. *Grand Trunk Railway Co.* (4).

*The Solicitor General* argued that an unbroken line of decisions in the Province of Quebec from the earliest reports down to *Robinson* v. *The Canadian Pacific Railway Co.* (5) affirmed the doctrine that the rule of *respondeat superior* did not apply in the case of common employment. A settled rule of law ought not to be considered as set aside by the casual observations of two judges. In the case of *The Queen* v. *Filion* (6), Taschereau, J. dissents from the majority of the court, holding that the rule of *respondeat superior* did not apply to the Crown in such a case. Unless the suppliant can bring herself within the provisions of Art. 1053 C. C. she has no case. This Article provides a remedy for any stranger who suffers

(1) 28 S. C. R. 159.
(2) 24 Can. S. C. R. 611.
(3) 11 Can. S. C. R. 612.
(4) Q. R. 4 S. C. 392.
(5) M. L. R. 2 Q. B. 25.
(6) 24 Can. S. C. R. 482.

damage, but not in the case of injury suffered by a person resulting from the negligence of a fellow servant. This article must be construed strictly. *Sirey*, 38 no. 270; 39 no. 2432.

The wife, under the certificate issued by the insurance association, is a beneficiary, and so is a party to the agreement to waive all claims against the Government. *Farmer* v. *Grand Trunk Railway Co.* (1) is distinguishable on this ground.

If deceased had received indemnity from the association his discharge would have been valid. *Bourgeault* v. *Grand Trunk Railway Co.* (2); *Glengoil S. S. Co.* v. *Pilkington* (3). Arts. 13 and 990 C. C. L. C.

*J. Dunbar*, *Q.C.*, followed for the Crown, citing, *American and English Ency. Law* (4); *Bliss's Life Insurance* (5); *Smith on Negligence* (6); *Vogel* v. *Grand Trunk Railway Co.* (7); *Bourdeau* v. *Grand Trunk Railway Co.* (8); *Roach* v. *Grand Trunk Railway Co.* (9); *Abbott's Railway Law* (10).

By special leave *Mr. Pouliot* was next heard on behalf of the Crown. On the point of the deceased's insurance contract relieving the Crown from all liability, he cited *Dalloz*, 45, 126, Pt. II. As to the doctrine of common employment he cited *Morgan* v. *Vale of Neath Railway Co.* (11); *Tunney* v. *Midland Railway Co.* (12); *Fuller* v. *Grand Trunk Railway Co.* (13); *Hall* v. *Canadian Copper and Sulphur Co.* (14); 39 *Journal du Palais* (15); Art. 1384 French Civil Code; 1054 C. C. L. C. As to *quantum* of damages, he cited: *Pollock on Torts*, (16); *Cooley on Torts*, (17).

(1) 21 Ont. R. 299.
(2) M. L. R. 5 S. C. 249.
(3) 28 S. C. R. 156.
(4) 2nd ed. vol. 3, p. 1080 *et seq.*
(5) p. 734.
(6) p. 77.
(7) 11 Can. S. C. R. 612.
(8) 2 L. C. L. J. 186.
(9) 1 Man. R. 158.
(10) p. 388.
(11) L. R. 1 Q. B. 149.
(12) L. R. 1 C. P. 291.
(13) 1 L. C. L. J. 68.
(14) 2 L. N. 245.
(15) p. 12.
(16) 4th ed. p. 524.
(17) 2nd ed. sec. 274.

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*Mr. Stuart* replied.

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THE JUDGE OF THE EXCHEQUER COURT now (April 4th, 1899) delivered judgment.

The suppliant, Emely Grenier, brings this action for herself and for her infant children to recover damages for the death of her husband, Xavier Letellier, who was employed in his life-time as fireman upon the Intercolonial Railway, and who was killed in an accident that, on the 2nd of May, 1898, happened on that railway. At the time of Letellier's death there were two children living, issue of his marriage with the suppliant Emely Grenier, viz.: Martha, aged two years, and Alfred, aged nine months. Since his death another child has been born of the marriage, and has been made a party to this petition.

The matter having been referred to the registrar of this court for enquiry and report, and the parties upon that enquiry having agreed upon the facts, the registrar, under rule 163 of the general rules of the court, submitted a question of law arising thereon for the consideration of the court. That question coming on for hearing, it was agreed by all parties that the argument should be treated as a motion by the suppliant for judgment, and that judgment should be rendered on the facts as admitted by the parties.

The action is based in the first place on clause (*c*) of the 16th section of *The Exchequer Court Act* which provides that the Exchequer Court shall have exclusive original jurisdiction to hear and determine, amongst other things, 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 scope of his duties or employment. That section has frequently been the subject of con-

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sideration in this court and the Supreme Court of Canada, and it is now well settled that in cases falling within its terms a petition of right will lie against the Crown; and it has been suggested on more occasions than one that the Crown is liable if, in a like case, the subject would be liable. To meet that view of the statute the suppliant further relies on Article 1056 of the Civil Code of Lower Canada, which provides that in all cases where a 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 relations have a right, 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. It has been held that this provision of the Code gives a direct right of action to the widow and relations of the deceased person to recover the damages occasioned by the death from the person liable for the offence or quasi-offence from which it resulted, provided they can show, first, that the death was due to this cause; and, secondly, that the deceased did not during his lifetime obtain either indemnity or satisfaction for his injuries. *Canadian Pacific Railway Co.* v. *Robinson* (1).

It appears from the pleadings and admissions in the present case that the death of Letellier resulted from the negligence of servants of the Crown while acting within the scope of their duties or employment, and there is no doubt that in that respect the case is within the statute to which reference has in the first place been made. It is also conceded that it is in this court no answer to the petition to say that the injury was caused by the fellow servants of the deceased, it

(1) 14 S. C. R. 105; and, on appeal to the Privy Council, [1892] App. 488.

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having been decided that the doctrine of common employment has no place in the laws of the Province of Quebec (1). But it is argued for the Crown that by the law of Quebec in such a case there is no right of action where the injury or death is occasioned by the negligence of a fellow servant, and that the question as to whether common employment affords a good defence does not arise. I am not able to accept that view. It appears to me that it comes in the end to the same thing, and I think I must take it to be settled by the *Filion* case and the *Robinson* case that in the Province of Quebec there is, in the class of cases mentioned, a right of action notwithstanding the death or injury has been caused by the negligence of a fellow servant of the deceased.

In addition to the fact that the deceased and those through whose negligence he lost his life were fellow servants in the employ of the Crown, the admissions of the parties show that he was at the time of his death a member of an association known as the Intercolonial Railway Employees' Relief and Assurance Association, which is composed of the employees of Her Majesty in the railway service and to which they make certain contributions and from the funds of which certain allowances in accordance with the rules and regulations thereof are made to the members of the association in the case of accident or illness or to their families in case of death. To the funds of this association the Government of Canada contributes six thousand dollars annually, in consideration of which it was made a rule of the association that the Government should be relieved of all claims for compensation for injuries to or for the death of any member of the

(1) Per Strong, J. in *Canadian Pacific Railway Co.* v. *Robinson*, 14 S. C. R. 114; *Filion* v. *Queen*, 4 Ex. C. R. 134; *Queen* v. *Filion*, 24 S. C. R. 482.

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association. All permanent male employees of the railway are members of the association and contribute to its funds as an incident of their employment, and without any option or choice on their part; and the fees and assessments payable by them are deducted on the pay-roll from the amounts due to them for salary or wages. The object of the association is to provide relief to members while suffering through illness or bodily injury, and in case of death to provide a sum of money for the benefit of the family or relatives of deceased members. With reference to the insurance against death or total disablement there are three classes of members. In Class A the member when totally disabled, or his heirs or assigns, in case of death, are entitled to one thousand dollars; in Class B to five hundred dollars; and in Class C to two hundred and fifty dollars. Upon the death or total disablement of a member every surviving member pays an assessment proportionate to the amount of his insurance. Those in Class A pay four times as much as, and those in Class B twice as much as, those in Class C. In this way the amount to be raised is divided among and borne by the surviving members, and it is provided that the insurance money collected from death and total disability levies or assessments shall be paid to the person totally disabled, or to the person named by the deceased member. If no person is named it is to be paid to his widow, and if there is no widow, to the executors or administrators of the deceased member. Letellier belonged to Class C. He had received a copy of the constitution, rules and regulations of the association, and had signed the certificate of membership in force at his death, directing all insurance money accruing thereon to be paid to his wife. It is admitted that he was aware of the rules and regulations mentioned, but it is said that the admission was made through

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inadvertence, and I have been asked to strike it out. Receipts for copies of the constitution, rules and regulations of the association signed by the deceased are produced, and if the fact is material he must, I think, be taken to have been aware of them; and so I have not thought it necessary to decide whether I have or not the power to amend the admissions signed by the solicitors of the parties, or whether, granting the power, I ought in the present case to exercise it. It also appears that the suppliant Emely Grenier has been paid the sum of two hundred and fifty dollars, to which, under her husband's certificate of membership and the rules and regulations of the association, she became at his death entitled; and it is contended for the Crown that in view of these facts the present petition cannot be maintained.

To this contention two replies are made. In the first place in support of the petition reliance is placed, as has been stated, upon Article 1056 of the Civil Code of Lower Canada, and the case of *Robinson* v. *The Canadian Pacific Railway* (1), as showing that the suppliants have an independent and not a representative right of action, which is maintainable as the deceased did not in his lifetime obtain either indemnity or satisfaction for his injuries. And it is argued that this right of action is one which as against the suppliant the deceased could not discharge the Crown unless in his lifetime he obtained such indemnity or satisfaction; that he could not agree with the Crown in advance that it should be relieved from any such action by his widow and children.

Then, in the second place, it is said in support of the petition that any agreement to relieve the Crown from all claim for compensation for injury or death where the same arises, as it does here, from the negligence of

(1) [1892] App. Cas. 487, 488.

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a servant of the Crown would be bad under the 50th section of *The Government Railways Act*, and could not be invoked by the Crown in answer to the petition. That section, so far as it is material to the present case, provides that Her Majesty shall not be relieved from liability by any notice, condition or declaration in the event of any damage arising from any negligence, omission or default of any officer, employee or servant of the Minister, meaning, as I understand it, any one employed by the Crown and under the direction of the Minister of Railways and Canals. Prior to 1871 there was in the statutes of Canada no provision of law such as this applicable to any railway. In that year by the Act of Parliament 34th Victoria, chapter 43, section 5, sub-section four, of section twenty of *The Railway Act of* 1868 was amended by adding thereto, the following provision:—"From which "action the company shall not be relieved by any "notice, condition or declaration if the damage arises "from any negligence or omission of the company or "of its servants." The action to which reference is made was for the neglect or refusal of the company to do certain things incident to their business as carriers. The provision of section 20 of *The Railway Act of* 1868 applied to the Intercolonial Railway so far as it was applicable to the undertaking, and in so far as it was not inconsistent with or contrary to the provisions of *An Act respecting the construction of the Intercolonial Railway* (1). In the same way and with a like limitation section 25 of the Consolidated Railway Act of 1879, in which the provision cited from the Act of 1871 again occurs, was applicable to the Intercolonial Railway. This was followed by *The Government Railways Act*, 1881, the clause in question finding a place in the 74th section of that Act, in these terms:—"The De-

(1) 31 Vict. c. 38, s. 2 and 31 Vict. c. 13.

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partment [that is the Department of Railways and Canals] shall not be relieved from liability by any "notice, condition, or declaration in case of any "damage arising from any negligence, omission or "default of any officer, employee or servant of the "department." Then the provision occurs again in the 50th section of *The Revised Statutes*, chapter 38, (*The Government Railways Act*), now in force, in terms that have been mentioned. As applicable to railway companies the meaning and effect of the clause was discussed in *The Grand Trunk Railway Co.* v. *Vogel* (1) and in *Robertson* v. *The Grand Trunk Railway Co.* (2). In *Vogel's* case it was held by a majority of the court that the provision, as it occurs in the 25th section of *The Consolidated Railways Act*, 1879, prevented a railway company to which it applied from contracting itself out of liability for negligence; and in *Robertson's* case it was decided that the same provision in the *Railway Act*, 1888, (3) did not disable a railway company from entering into a special contract for the carriage of goods by which it limited its liability as to the amount of damages to be recovered for loss or injury to such goods arising from negligence. That is, that the company cannot contract itself out of all liability for negligence, but it may limit the amount for which in cases of negligence it will be liable. I take that to be the law as now established with respect to railway companies subject to *The Railway Act*, and as indicating the construction to be put upon the similar clause occurring in *The Government Railways Act*; for I entertain no doubt that it was the intention of Parliament in this matter to put the Crown in respect of Government railways on the same footing as a railway company.

(1) 11 S. C. R. 612. (2) 24 S. C. R. 611.
(3) 51 Vict. c. 29, s. 246 (3).

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Now, it is obvious that the money that the widow of the deceased received from the association to which he belonged was paid by the association and not by the Crown. and so far as the immediate payment was concerned it was a matter of no importance whether the Crown made an annual contribution to the funds of the association or not. By its rules the amount was to be raised by assessments leviable upon the surviving members of the association, and in the particular case any benefit that may have arisen from the Crown's contribution accrued to such surviving members and not to the deceased and his widow. The sum that she received from the assurance fund of the association cannot in any sense, I think, be said to be an indemnity or satisfaction from the Crown for the injury that caused the death of her husband. The benefit that he received from the Crown's contribution consisted in this that the assessments payable by him for the expenses of the association, and for the payment of other claims during his lifetime were presumably less than they otherwise might have been. In that way he may perhaps be said to have received in advance some "indemnity or satisfaction" against the accident or injury that caused his death; but it is doubtful if it falls within the true meaning of these words as used in Article 1056 of the Civil Code. But that question is of the less importance in the present case, because it seems to me that I am bound on the authority of *Vogel's* case to hold that the agreement to relieve from all claims for compensation on which the Crown relies is against the statute to which reference has been made, and cannot be set up in answer to the present action, the death of the husband and father having been occasioned by the negligence of the servants of the Crown.

Then in regard to the damages, it seems clear that the insurance money paid to the widow should be

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taken into consideration in assessing the damages to which she is entitled. In saying that, I do not wish to suggest that I entertain the view that in such cases as this the damages can be assessed with anything approaching mathematical accuracy. What one should strive to do is to give the suppliants such damages as will compensate them for the pecuniary loss sustained by the death of the husband and father; to make good to them the pecuniary benefits that they might reasonably have expected from the continuation of his life and which by his death they have lost. In doing that one has to take into account the age of the deceased, his state of health, the expectation of life, his employment, the wages he was earning, and his prospects; and on the other hand one is not to forget that the deceased in such a case as this must out of his earnings have supported himself as well as his wife and children, and that there were contingencies other than death, such as illness or the being out of employment, to which in common with other men he was exposed. All the surrounding circumstances are to be taken into account. In the present case the deceased was about twenty-seven years of age, in good health, employed as a fireman on the Intercolonial Railway and earning about four hundred dollars a year, with fair prospects of advancement in position and salary. Under all the circumstances I am of opinion to allow the widow the sum of one thousand seven hundred and fifty dollars, and the three children five hundred dollars each, making in all the sum of three thousand two hundred and fifty dollars, for which there will be judgment with costs. The question as to the disposition to be made for their benefit of the amounts awarded to the infant children is reserved.

*Judgment accordingly.*

Solicitor for the suppliant: *S. C. Riou.*

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