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*Oct. 10.

*Oct. 24.

HER MAJESTY THE QUEEN (DEFENDANT) ..... } APPELLANT;

AND

DAME EMILY GRENIER (SUPPLIANT) ..... } RESPONDENT,

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Government railway—Injury to employee—Lord Campbell's Act—Act 1056 *C. C—Exoneration from liability—R. S. C. c.* 38 *s.* 50.

Art. 1056 C. C. embodies the action previously given by a statute of the Province of Canada re-enacting Lord Campbell's Act. *Robinson* v. *Canadian Pacific Railway Co.* ([1892] A. C. 481) distinguished.

A workman may so contract with his employer as to exonerate the latter from liability for negligence, and such renunciation would be an answer to an action under Lord Campbell's Act. *Griffiths* v. *Earl Dudley* (9 Q. B. D. 357) followed.

In sec. 50 of the Government Railways Act (R. S. C. ch. 38) providing 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," the words "notice, condition or declaration" do not include a contract or agreement by which an employee has renounced his right to claim damages from the Crown for injury from negligence of his fellow servants. *Grand Trunk Railway Co.* v. *Vogel* (11 Can. S. C. R. 612) disapproved.

An employee on the Intercolonial Railway became a member of the Intercolonial Railway Relief and Assurance Association, to the funds of which the Government contributed annually $6,000. In consequence of such contribution a rule of the Association provided that the members renounced all claims against the Crown arising from injury or death in the course of their employment. The employee having been killed in discharge of his duty by negligence of a fellow servant.

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*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

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Held, reversing the judgment of the Exchequer Court (6 Can. Ex. C. R. 276) that the rule of the association was an answer to an action by his widow under Art. 1056 C. C. to recover compensation for his death.

The doctrine of common employment does not prevail in the Province of Quebec. *The Queen* v. *Filion* (24 Can. S. C. R. 482) followed.

APPEAL from a decision of the Exchequer Court of Canada (1) in favour of the suppliant.

The suppliant, Emily Grenier, brings this action on behalf of herself and her infant children to recover damages for the death of her husband, Xavier Letellier, who was employed in his lifetime as fireman upon the Intercolonial Railway, and who was killed in an accident on the 2nd of May, 1898, that happened on that railway.

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. 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 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."

In addition to the fact that the deceased and those through whose negligence he lost his life were fellow-

(1) 6 Can. Ex. C. R. 276.

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servants in the employ of the Crown, the admissions of the parties shows 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 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 members 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 or 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 was admitted that he was aware of the rules and regulations mentioned, but it was claimed that the admission was made through inadvertence. Receipts for copies of the constitution, rules and regulations of the association signed by the deceased were produced. It also appeared that the suppliant, Emily Grenier, had 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 was contended for the Crown that in view of these facts the petition could not be maintained.

To this contention two replies were made. In the first in support of the petition reliance was 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 Co.* (1), as showing that the suppliants have an independent and not a representative right of action, which was maintainable, as the deceased did not in his lifetime obtain either indemnity or satisfaction for his injuries. And it was argued that

(1) [1892] A. C. 481.

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this right 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 was 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 from the negligence of a servant of the Crown would be bad under the 50th section of the Government Railway 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."

The judgment of the Exchequer Court was based on the grounds that Art. 1056 C. C. gave a new cause of action to the widow which could not be affected by anything done by deceased in his lifetime, and if it could, that sec. 50 of The Government Railways Act precluded the defence founded on the rules of the insurance association of which deceased was a member. The Crown appealed.

Fitzpatrick Q.C. Solicitor General for Canada, and *Lafontaine Q.C.* for the appellant. Independently of statute the Crown is not liable for tortious acts of its officers or servants; *Canterbury* v. *The Attorney General* (1); *Tobin* v. *The Queen* (2); *Feather* v. *The Queen* (3) at page 295. The Petitions of Right Act did not alter the law in this respect; *The Queen* v. *McLeod* (4); *The*

(1) 1 Ph. 306.
(2) 16 C. B. N. S. 310.
(3) 6 B. & S. 257.
(4) 8 Can. S. C. R. 1.

Queen v. *McFarlane* [1); *City of Quebec* v. *The Queen* (2), at 423 *per* Strong C. J. The 16th section of the Act 50 & 51 Vict. ch. 16, did not create any liability where none formerly existed. Whatever was the intention of section 16, it must receive a uniform construction all over the Dominion; it was intended to operate in each part of Canada in precisely the same way and with precisely the same effect. Hence it is quite immaterial to consider the provisions of Article 1056 of the Civil Code of Quebec. The Judicial Committee seem to have considered, in the case of *Robinson* v. *The Canadian Pacific Railway Co.* (3), that in the Province of Quebec, the relatives of deceased have an independent and not a representative right. There is, therefore, no uniformity of provincial legislation to which the Dominion statute can reasonably be held to have had reference, and it becomes necessary, if the Dominion statute be held to have imposed a new liability, to determine, irrespective of the various provincial enactments, what is the nature of the claim arising out of death to which the Act refers, who may be the claimants, and what is to be the measure of damages. The determination of these questions, whatever it may be, must exclude claims in respect of which the deceased, had he survived, could have maintained no action.

Article 1056 of the Civil Code does not apply to the Crown. *Exchange Bank* v. *The Queen* (4); *Maritime Bank* v. *The Queen* (5) and authorities there cited; Chitty's Prerogatives of the Crown, 4 *et seq.*, and 25; *Attorney General* v. *Black* (6).

In all cases where the greater rights and prerogatives of the Crown come in question recourse must be

(1) 7 Can. S. C. R. 216.
(2) 24 Can. S. C. R. 420.
(3) [1892] A. C. 481.
(4) 11 App. Cas. 157.
(5) 17 Can. S. C. R. 657.
(6) Stu. K. B. 324.

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had to the public law of the empire as that alone by which such rights and prerogatives can be determined. *Attorney General* v. *Black* (1).

In *Monk* v. *Ouimet* (2), Dorion C.J. enunciated the rule that when the colony passed under the dominion of the Crown of England the maintenance of the civil law then in existence as guaranteed by treaty or altered by competent authority were in force and binding on the Crown except where the higher prerogatives are affected. The result will be the same if the principles of the French common law be held to apply. Burlamaqui, "Principes du Droit de la Nature et des Gens," vol. 4, 98 *et seq.* Vattel's Law Nations, Chitty's translation, 15 and 16.

Section 50 of the Government Railway Act (3) does not affect the right of the Crown to stipulate with its employees nor apply to relations between the Crown and its servants. That section does not, by its own terms and the context, extend beyond the case of carriage of goods by passengers.

The suppliant accepted the amount of the insurance upon the life of deceased, payable by the association, and is consequently estopped from setting up any claim inconsistent with these rules and regulations, and from maintaining this action.

The suppliant can have no right of action if the deceased himself never had such right, and any defence which would have been available against the deceased, had he survived, may be set up in this action. Such is the established rule in actions under Lord Campbell's Act. Addison on Torts, (8 ed.), 604 *et seq.*; *Griffiths* v. *The Earl of Dudley* (4). The deceased was a member of the Intercolonial Railway Employees' Relief and Assurance Association, and, in consider-

(1) Stu. K. B. 324.
(2) 19 L. C. Jur. 71.
(3) R. S. C. ch. 38.
(4) 9 Q. B. D. 357.

ation of an annual contribution, the Government was relieved of all claims for compensation for injury or death of any member. These rules were in force at the time of the accident and throughout the whole period of the employment of the deceased, and the contribution by the Crown had continued during the whole period. These facts constitute an agreement by the deceased with the Government by which he accepted the contribution and the advantages to which he might be entitled under the rules of the association in lieu of any claim for damages. He would, therefore, have been precluded from maintaining this action had he survived, and the suppliant is likewise precluded. As to the construction of this section reliance is placed upon the reasoning of Mr. Justice Strong in *Grand Trunk Railway Co.* v. *Vogel* (1), at pages 625 *et seq.* See also *Robertson* v. *Grand Trunk Railway Co.* (2), at pages 615 *et seq.*, and the *Glengoil Steamship Co.* v. *Pilkington* (3).

If the Crown be held bound by art. 1056 C. C., the arrangement between the Government, the association and the deceased constituted indemnity or satisfaction in the lifetime of the deceased within the meaning of that article; otherwise the case must be regarded as one in which the deceased never had any claim and therefore never could have obtained indemnity or satisfaction, in which case the article does not confer any cause of action upon the suppliant. See *Bourgeault* v. *Grand Trunk Railway Co.* (4).

The negligence causing the accident was that of the fellow servants of the deceased, and occurred in the course of their common employment, and on that account the Crown is not responsible.

(1) 11 Can. S. C. R. 612.
(2) 24 Can. S. C. R. 611.
(3) 28 Can. S. C R. 146.
(4) M. L. R. 5 S. C. 249

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Hogg Q.C. for the respondent. The action arose under arts. 1054 and 1056 C. C., and the Exchequer Court had jurisdiction to hear and determine the case under 50 & 51 Vict. ch. 16, sec. 16. Both the Supreme and the Exchequer Courts have applied the principle of the employer's responsibility for the acts of his overseers to Her Majesty in relation with Government employees as well as the maxim "*respondeat superior.*" *The Queen* v. *Martin* (1), per Patterson J. at page 250; *The Queen* v. *Filion* (2), per Gwynne J. at page 483; *The City of Quebec* v. *The Queen* (3).

The doctrine of common employment is no defence in the Province of Quebec; *Bélanger* v. *Riopel* (4); *Dupont* v. *Quebec Steamship Co.* (5); *The Queen* v. *Filion* (2).

Her Majesty cannot be relieved of any responsibility by any notice, condition or declaration; R. S. C. ch. 38, sec. 50; nor by contract even if there had been one. In the present instance, the right of action by the suppliant did not arise as a representative of her deceased husband, but is specially given to her independently, on account of his death, by Art. 1056 C. C., as there had been no indemnity or satisfaction to deceased in his lifetime. This was the ruling in *Robinson* v. *Canadian Pacific Railway Co.* (6). and in *Robertson* v. *Grand Trunk Railway Co.* (7), there was an express contract between the parties. See also *Grand Trunk Railway Co.* v. *Vogel* (8); *Lavoie* v. *The Queen* (9); *Farmer* v. *Grand Trunk Railway Co.* (10) per MacMahon J. at page 307, and Art. 1676 C. C. Contracts against such liability are against public policy;

(1) 20 Can. S. C. R. 240.
(2) 24 Can. S. C. R. 482.
(3) 24 Can. S. C. R. 420.
(4) M. L. R. 3 S. C. 198, 258.
(5) Q. R. 11 S. C. 188.
(6) [1892] A.C. 481.
(7) 24 Can. S. C. R. 611.
(8) 11 Can. S. C. R. 612.
(9) 3 Ex. C. R. 96.
(10) 21 O. R. 299.

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Roach v. *Grand Trunk Railway Co.* (1). The decision of this court in the *Vogel Case* (2) is binding; see *Ross* v. *The Queen* (3), referring to *The Queen* v. *McGreevy* (4).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—We are all of opinion that this appeal must be allowed. The Crown has admitted that the suppliant's husband lost his life by the negligence of persons in the employ of the Crown upon the Intercolonial Railway. This court has already held that the law of Quebec from which we must take our rule of decision in this case does not recognise the defence of common employment which prevails in English law. There is no use in referring to authorities on this point as we are bound by our previous decisions regarding it. *The Queen* v. *Filion* (5). Therefore unless the suppliant's husband had so contracted with the Crown as to relieve it from responsibility for his death by reason of the negligence of the servants of the Crown the judgment in favour of the suppliant now under appeal ought to be maintained.

That a workman may so contract with his employer as to exonerate the latter from liability for negligence for which the former would otherwise be entitled to recover damages cannot be disputed. Further that such a renunciation would be a sufficient answer to an action under Lord Campbell's Act is conclusively settled by authority. *Griffiths* v. *Earl of Dudley* (6). That the action given by Art. 1056 C. C. is merely an embodiment in the Civil Code, of the action which had previously been given by a statute of Canada re-enacting Lord Campbell's Act is too plain to require

(1) Q. R. 4 S. C. 392.
(2) 11 Can. S. C. R. 612.
(3) 25 Can. S. C. R. 564.
(4) 18 Can. S. C. R. 371.
(5) 24 Can. S. C. R. 482.
(6) 9 Q. B. D. 357.

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any demonstration and nothing in the judgment of the judicial committee in *Robinson* v. *Canadian Pacific Railway Co.* (1) controverts this proposition. It would follow therefore that the suppliant's husband by becoming a member of the Intercolonial Railway Relief and Assurance Association and thereby assenting to its rules and to the arrangement by which the Crown contributed $6,000 annually to the funds of the association, in consideration of which the association on behalf of its members renounced all claims against the Crown which might arise from the injury or death of any of its members, constituted a complete answer to the suppliant's petition. It must be acknowledged that if the deceased would, if he had survived, have had no claim for damages against the Crown, the suppliant can have none provided we are right in assuming this to be a proceeding to be governed by the law applicable to actions under "Lord Campbell's Act."

The Exchequer Court judge has, however, held that section 50 of the Government Railways Act is an answer to the defence founded on the agreement with the association.

That section is as follows:

> 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; nor shall any officer, employee or servant be relieved from liability by any notice, condition or declaration, if the damage arises from his negligence or omission.

The learned judge of the Exchequer Court relies upon the case of the *Grand Trunk Railway Co. of Canada* v. *Vogel* (2) as placing a construction upon this section conclusive in favour of the suppliant. *Vogel's Case* (2) was an action against the railway company for

(1) [1892] A. C. 481. (2) 11 Can. S. C. R. 612.

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damages caused by the negligence of the servants of the company in their capacity as common carriers of horses, and it was held that a clause in the Railway Act in similar terms to this did away with the effect of an agreement which the owner of the horses had signed and by which he had renounced his right to claim compensation for damages caused by the negligence of the servants of the company. For the reasons I gave in *Vogel's Case* (1) I am of opinion that a wrong construction of the clause in question in that case prevailed by the majority of a single voice. The terms of the clause in question in the Railway Acts were taken from the English Carriers Acts and were intended only to preclude the right of carriers by unilateral notices, declarations or conditions to which the owners of goods had not become expressly parties to exclude their liability as carriers. And it was not meant to apply to contracts entered into between the railway carrier and the persons whose goods were carried. It certainly had not in the Railway Acts any application to the case of passengers or employees but was restricted to the case of goods traffic.

Since the case of *Robertson* v. *The Grand Trunk Ry. Co.* (2) it would seem that *Vogel's Case* (1) can scarcely be considered as a binding authority; at all events I should not hesitate to reconsider it if a similar question arose.

There would seem to be good grounds for saying that as the clause in the Railway Act from which this section 50 of the Government Railways Act is borrowed, applied only to responsibility incurred in the carriage of goods, this section must also be so restricted. Be that as it may, however, I am of opinion that this, not being a case in its facts similar to *Vogel's Case* (1), we are free to construe section 50 inde-

(1) 11 Can. S. C. R. 612. (2) 24 Can. S. C. R. 611.

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pendently of its authority and so doing I can come to no other conclusion than that these words "notice, condition or declaration" do not include a contract or agreement by which a servant employed on the railway has renounced his right to claim damages from the Crown in the event of injury from the negligence of his fellow servants. I need not repeat the reasoning I used in *Vogel's Case* (1); shortly it is that the words "notice" and "declaration" can only apply to the unilateral act of the party giving the notice or making the declaration, and the meaning of the word "condition" by itself of doubtful import is determined to refer only to a unilateral proceeding by the words which immediately precede and follow it. This and the history of the legislation as regards common carriers in which these words were first used convince me that they do not apply in a case like the present. I would also refer to the late case of *Glengoil Steamship Co.* v. *Pilkington* (2), decided in this court in my absence, but in which I entirely agree.

The appeal must be allowed and the petition of right dismissed with costs.

Appeal allowed with costs.

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

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

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(1) 11 Can. S. C. R. 612. (2) 28 Can. S. C. R. 146.