IN THE MATTER OF THE PETITION OF RIGHT OF

1913
Oct. 11.

ANNIE CONROD, WIDOW OF THOMAS CONROD, DECEASED, AND OTHERS . . . .SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT

Public Work—Government Railway—Negligence of Crown's Servant—Fellow-servant—Common employment—R.S.N.S. cap. 178, sec. 10—Interruption of Prescription.

In the process of dismantling an old round-house on the Intercolonial Railway at Richmond Station, near Halifax, N.S., several gangs of labourers were employed at different kinds of work under several foremen. C. being primarily employed with a gang engaged in removing a portion of the track connected with the old round-house was lent by his foreman to the foreman of another gang engaged in setting up a crane on the railway property. Owing to the negligence of the foreman last mentioned in using a certain piece of machinery for the purpose, an accident occurred whereby C. was killed. In an action by the widow and minor children of the deceased,

Held, that the case having arisen in the province of Nova Scotia, and the negligence complained of being that of a fellow-servant of deceased, the Crown was entitled to raise the defence of common employment.

Ryder v. *The King* (9 Ex. C. R. 330;36 S. C. R. 462) discussed and followed.

2. The act of leaving a petition of right with the Secretary of State under the provisions of sec. 4 of *The Petition of Right Act* interrupts the prescription mentioned in sec. 10 of chapter 178,R.S.N.S., 1900.

PETITION OF RIGHT for damages arising out of the death of an employee of the Crown while working on the Intercolonial railway at Halifax, N.S.

The facts are stated in the reasons for judgment.

September 2nd, 1913.

The case came on for trial before the Honourable Mr. Justice Audette.

J. J. Power, K.C., for the suppliant;

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Argument of Counsel.

T. S. Rogers, K.C., and *T. F. Tobin*, for the respondent.

Mr. *Power*, K.C., argued as follows:—

In *The Queen* v. *Filion*, (1) it was held, affirming the decision of the Exchequer Court, that it was no answer to the petition to say that the injury was caused by a fellow-servant of the deceased.

[THE COURT.—That case was governed by the law of the Province of Quebec in which the doctrine of common employment has no place.]

The deceased was at the locus of the accident by invitation (2).

[THE COURT.—There is a long line of cases where the theory of "invitation" applies.]

The deceased was aware of all the risks and dangers of a common labourer, but there is no evidence that he knew that he was stepping into a place where he might be killed. He was not a volunteer, and he was not guilty of contributory negligence. He had a right to assume that what he was asked to do would not expose him to risk from any negligence of the foreman. *Davies* v. *Mann* (3); *Beven on Negligence* (4); *Broom's Common Law* (5.)

This case is governed by the case of *Miller* v. *The Grand Trunk* (6).

[THE COURT.—Do not forget that is a case also arising in the Province of Quebec.]

We say that it is the same in this province. *The King* v. *Armstrong* (7); *The King* v. *Desrosiers* (8).

[THE COURT.—It is not a common law action in the English provinces. It is under Art. 1056 of the Code in the province of Quebec.]

(1) (1894) 24 S. C. R. p. 482.
(2) Indermaur v. Dames (1867) 2 C. P. 311.
(3) (1842) 10 M. & W. 546.
(4) 2nd Ed. 1904, p. 469.
(5) (10th Ed. by Odgers) 860.
(6) (1906) App. Cas. 187.
(7) (1908) 40 S. C. R. 229 at p. 238.
(8) (1909) 41 S. C. R. 71.

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[Mr. *Rogers*.—It is an action given expressly to representatives and executors under Lord Campbell's Act in England. The claim for negligence through the deceased simply at common law did not survive, now it survives by statute. That is the law here.]

The plaintiffs are plaintiffs who are only suing as a class, in the name of the heirs and for their benefit. It is not a representative action. (1) *Seaward* v. *The Vera Cruz.*

[THE COURT.—Your contention is that if it falls within Lord Campbell's Act, the *Miller* case governs it?]—Yes. Lord Campbell's Act exists merely for the benefit of the widow and children; and so far as the damage in this action is concerned under the *Married Womens' Property Act* a creditor cannot touch a cent of the money.

[See *Gorton-Pew Fisheries Co.* v. *North Sydney Marine Ry. Co.*] (2).

Mr. *Rogers*, K.C., presented the following argument:—I was under the impression that Lord Campbell's Act did not confer a right of action as distinct from that which the deceased would have had if he survived. That has been my impression, and I am not satisfied yet without further consideration that such is not still law. *Read* v. *The Great Eastern Ry. Co.* (3) is a clear decision that Lord Campbell's Act did not give any new cause of action, but only substituted the right of the representative to sue in the place of the right which the deceased himself would have had if he had survived. (See also *Griffith* v. *Earl of Dudley* (4).

(1) (1884) 10 App. Cas. 59.
(2) (1910) 44 N. S. R. 493.
(3) (1868) L. R. 3 Q. B. 555.
(4) (1882) 9 Q. B. D. at p. 363.

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All the Quebec cases cited were brought under Art. 1056 of the Civil Code.

In the *Miller* case the court found there was nothing in the way of recompense or indemnity moving from the railway company itself. They were not even contributors. They were simply an insurance society, organized by the employees. But in this case the Intercolonial railway has contributed.

[THE COURT.—The *Grenier* case (1) was in your favour but it was overruled by the *Miller* case,—overruled to a certain extent.]

The *Grenier* case says that a contract of insurance by the Intercolonial Railway employees is not a notice or declaration within the meaning of the statute.

It is a recognized principle of our law now that a workman can contract with his employer to exonerate his employer, and such renunciation would be a renunciation under Lord Campbell's Act. Your lordship is bound by that part of the *Grenier* case which has not been overruled or dealt with by the Privy Council at all.

Because an accident happened there is no reason why there should be negligence. There can be danger and an accident consistent with the absence of negligence.

The point I am making is this, that the person who is responsible for negligence in this case, if there was any negligence, is a fellow-servant of the deceased, and therefore when the deceased undertook to help at this work it was a part of the contract with the employee that there should be no liability for injury or death. As a matter of fact they were all actually engaged in this work, both gangs of men.

(1) (1889) 30 S. C. R. 42.

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[THE COURT.—In the *Filion* case it was held they were fellow-servants, engaged in a general work common to them all.]

In this case they were laying the ground for new rails at Richmond. In the *Ryder* case, if my recollection is right, Nesbitt, J., goes further than I need go. (Cites *Robillard* v. *The King*) (1). In Nova Scotia we have a *Workmens' Compensation Act*, which does away with the defence of contributory negligence. They do not mention the Crown in that Act, but as it is a provincial enactment even if the Crown were mentioned it would mean the Crown in right of the province. But under the *Ryder* case there is no possible way by which the plaintiff can succeed in the absence of a Dominion statute naming the Crown, and depriving it of its right to plead common employment.

The question of common employment and what it means will be found in *Beven on Negligence* (2). The whole doctrine of common employment is dealt with there, and it is elementary law.

See also *Reugg's Workman's Compensation Act*, pp. 70, 162 and also at p. 232. He deals there with the maxim *Volenti non fit injuria.*

The case comes down to the three points for consideration; first the maxim *volenti non fit injuria*; secondly, the doctrine of common employment; and thirdly, the insurance release—whether it is good or bad.

[THE COURT.—Your plea of insurance might be a good plea to this action.]

We not only have the deceased's agreement prior to the insurance, but we have the subsequent release by the widow.

(1) (1908) 11 Ex. C. R. 271.

(2) 3rd Ed. Vol. I pp. 674 and 678.

That is our last plea, and it is a specific one. This is a receipt and discharge under seal. It is a document executed by the widow under seal. You must attack it by plea and get rid of it. Consideration is imported by the seal.

Mr. *Power*, K.C., in reply.—I will ask permission to amend the plea. The widow can scarcely read or write—and if there is going to be any effect made of that, it is over-reaching. I say further it was only a receipt for the insurance. This is a release without consideration. It is a mere insurance form. You cannot read any solemnity into it.

The *Armstrong* case (1) is authority for this proposition that payment of insurance will not discharge the Crown of its liability towards the deceased. We can set up that issue, and it can easily be tried as to whether the woman knew what she was signing. Whether she was over-reached. If that means a release of her action under Lord Campbell's Act, there is no consideration and I will ask leave to put a plea on the record, first, that there was no consideration for that agreement— and secondly, all necessary pleas to support it.

I should give evidence to support the pleas. I say these parties ought to be submitted to examination or cross-examination. The son and widow are here. And I suppose the Crown would have the right to call evidence.

[THE COURT.—This suggested opening of the case would mean another trial. The application is made after the case is closed. You have for some time had the whole thing before you.]

When they opened their case they said nothing about it, and they never put it forward until today, for the first time.

(1) (1908) 40 S. C. R. 229.

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[Mr. *Tobin*.—Mr. Power got an order for discovery in this case months ago, and I sent Mr. Power a copy of all of these documents in response. I think it was in April last.]

[THE COURT.—I am afraid I shall have to face the case as it stands.]

[Mr. *Rogers*.—Besides this, there was a contribution here by the Crown.]

I do not care whether there is a contribution or not. It is a personal action and the question of indemnity does not make any difference. I do not know that the mother has power to release the action. If she cannot release the childrens' claim she cannot release her own. The action cannot be severed. He cites *Armstrong's* case, (1); *Kimball* v. *Butler*, (2).

AUDETTE, J. now (October 11th, 1913) delivered judgment.

The suppliants, the wife and children of Thomas Conrod, the deceased, brought their petition of right to recover the sum of $10,000 as damages for the loss sustained by the death of the said Thomas Conrod, which happened while he was, with others, engaged in dismantling a crane.

The accident happened on the 11th September, 1911. James Cody, a carpenter employed at the I.C.R. repair shops, at Willow Park was sent to the old Round House at Richmond Station by his superior officer, to dismantle a crane of a special design, and place it on a car to be sent to the Willow Park shops. Currie and Baker were assigned as help to him. He then, with their help, erected sheer-legs or a tripod made of spruce scantling, 3 x 4 inches, fourteen feet long, with a spread of ten to twelve feet, and bolted

(1) (1908) 40 S.C.R. 238. (2) (1909) 45 C.L.J. 130.

at the top. To the top of the tripod was a chain to which was attached one of the two blocks. The tripod when completely erected was placed over the piece of casting to be lifted. It consisted of a long piece of casting between 5 to 6 feet long, and 10 to 12 inches on the sides, and weighing about 1,300 to 1,400 pounds. In the centre of this casting was a hollow into which was inserted a piece of iron, called by the witnesses, a pedestal of about 5 to 5½ feet.

The three men tried to lift the casting but were unable to do so—it was too heavy for them. Then Cody went over to Drysdale, the track-foreman, about 40 yards up the track and borrowed from him the assistance of four or five men, among whom was Thomas Conrod, the deceased. These men were placed at the rope to hoist and lower at Cody's command.

Cody remained with Currie at the casting, and ordered the men to hoist, and when the casting was hoisted out of the pedestal, to the full height of the latter, he, with Currie, pushed the casting off its centre of gravity to let it down alongside and outside of the pedestal. And as he gave orders to those at the rope to lower down, the whole tripod and casting went over and struck Conrod who had tripped on large stones which had been negligently left near the tripod, and was knocked down on his back with the casting on top of him. He only survived a few minutes.

The casting either caught, as it was being lowered down, on the side of the pedestal and canted over, so that with its weight off the centre of gravity and extending sideways, the tripod toppled over; or the casting may have been hoisted to the very top of the tripod, and when Cody and Currie were shoving it off of its centre of gravity, it caused the tripod to upset.

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Under the evidence, it must be found that the tripod was adequate to lift the casting plumb; but the moment the weight had to be shoved off its centre of gravity the tripod should have been guyed and this tribunal has no hesitation in finding on the question of fact, in favour of the suppliant, that there was negligence on behalf of the officer of the Crown, the foreman acting within the scope of his duties and employment on a public work, in not guying the tripod, or setting the legs solid to the ground, under the circumstances. The tripod was put up deliberately, the foreman was not pushed for time and there was negligence on his behalf is not using ordinary care and skill towards a person to whom he owed a duty of observing ordinary care and skill.

On the other hand there can be no doubt that the use of a tripod was the proper system to be used, and that the employees of the Crown had, at their disposal adequate materials to steady the tripod by guys or make the legs solid to the ground.

At the opening of the trial the attention of the suppliants counsel was by the Court called to the fact that on the face of the record the action did not appear to have been commenced within twelve months after the death of Conrod, as provided by section 10 of chapter 178, R.S.N.S. 1900. The accident having occurred on the 11th September, 1911, and the petition of right having been filed on the 30th October, 1912. Upon this point counsel satisfied the court by exhibiting a letter from the Department of the Secretary of State, bearing date the 29th August, 1912, acknowledging receipt of the petition of right. The leaving of a petition of right with the Secretary of State under

the provisions of Sec. 4, of *The Petition of Right Act* interrupts prescription. (1).

The Crown in bar to the present action, sets up the following pleas or defences, viz.:

1. There was no negligence.

That plea has already been disposed of.

2. If there was negligence, the accident was caused through the negligence of a fellow servant.

3. That the receipt, under seal, given by Annie Conrod, on the 25th September, 1911, for the sum of $250 in full satisfaction and discharge of all her claims and demands against the Insurance Association, and against His Majesty The King, His officers and servants, arising out of the death of her husband,—is a bar to the action.

4. That there was contributory negligence on behalf of the deceased, in stepping in the way.

As already said, the first plea has already been pronounced upon in favour of the suppliants.

Dealing now with the second plea: What is the doctrine of common employment? It is defined as follows, in Broom's *Common Law of England*, (2):

"The doctrine of 'common employment,' which was "enunciated in the case of *Priestly* v. *Fowler* (3) "still protects an employer from liability for "the negligence of his agents and workmen, "*if the action be brought at common law.* It may be "stated thus: Where the person injured and the person "who caused the injury are both workmen in the same "employment, even though they are in very different "grades of that employment and engaged in very

(1) Vinet v. The King, Audette's Ex. C. Prac. 2nd Ed. p. 183.

(2) 10 Ed. by Odgers, p. 860.

(3) 1837, 3 M. & W. 1.

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"different work, their common employer is not "responsible for the consequences of the injury." (1)

This doctrine does not obtain under the laws of the Province of Quebec, and Sir Frederick Pollock, in his work on the *Law of Torts* (2) comments upon it as follows: "With its soundness we are not here concerned. "It was not only adopted by the House of Lords for "England, but forced by them upon the reluctant "Courts of Scotland to make the jurisprudence of the "two countries uniform. No such doctrine appears to "exist in the law of any other country in Europe."

Were it not for the decision of the Supreme Court of Canada, on appeal from this Court, in *Ryder* v. *The King*, (3) it might be open to enquiry as to whether or not under the provisions of Sec. 20 of *The Exchequer Court Act*, the defence of common employment is open to the Crown in a case of negligence falling within the ambit of that enactment. It is true that under the provisions of sec. 8 of *The Petition of Right Act*, the Crown, by its defence to a petition of right may raise "any legal or equitable defences which would have been available if the proceedings had been a suit or action in a competent court between subject and subject," but the *Petition of Right Act* is a general enactment affecting procedure only and was passed more than twenty years before *The Exchequer Court Act of 1887*, which creates a right of action in positive and unqualified terms against the Crown for certain acts of negligence on behalf of its officers or servants. In such a case might not a repeal of any repugnant clauses of the procedure statute arise by implication?

(1) See also *Beven on Negligence*, 3rd Ed. Vol. I. p. 664; *The Petrel*, 1893, Prob. 324; *Farwell v. Boston Railroad Corp.* 4 Met. 49, and *Bartonshill Coal Co.* v. *Reid*, 3 Macq. H. L. C. 266. *Filion* v. The *Queen*, 4 Ex. C. R. 144 and 24 S. C. R. p. 482.

(2) 8th Ed. p. 99.

(3) 9 Ex. C. R. 330; and 36 S. C. R. 462.

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But as before stated, the question is concluded in this Court by the case of *Ryder* v. *The King* (*supra*) and *Robillard* v. *The King*, (1) and the enquiry remains therefore solely an academic one.

The defence of common employment has been made out in this case, and upon that ground alone, without entering upon the discussion of the other defences raised by the Crown, the suppliants must fail and be declared not entitled to any relief sought by their petition of right.

It may here be added, however, that the deceased Thomas Conrod was not guilty of contributory negligence. He had nothing to do with the erection of the tripod— all his work consisted of was to attend to the rope and to hoist or lower the casting. He must be presumed to have known nothing of the danger that might result in shifting the casting off its centre of gravity,—he had really nothing to do with that part of the work. Then when he hears the shouting to take care, he sees his companions running away, and in the excitement of the moment he also runs away, but is tripped by stones negligently left close to the tripod and falls to be then crushed by the falling casting. It is obvious he did not contribute to the accident. He had nothing whatsoever to do with the determining, the proximate cause, of the accident. Furthermore, all these men were employees of the Intercolonial Railway,—they were all engaged in clearing this railway yard, at Richmond, and they were obviously all fellow-servants.

A great deal of stress was laid in the course of the argument of this case on the point as to whether or not the action resulting from Art. 1056 of C.C.L.C. was identical with the action resulting under Lord

(1) 11 Ex. C. R. 272.

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Campbell's Act. On this point suppliant's counsel, who was contending for the affirmative, cited the case of the *Vera Cruz* (1) decided in 1884. But all that it was necessary to decide in the *Vera Cruz* case was whether a certain action was *in rem* or *in personam*. Later on, however, in 1892, the point in question was clearly settled in the cases of *Robinson* v. *Canadian Pacific Railway* (2) and *Miller* v. *Grand Trunk Railway*. (3). See also *Griffiths* v. *Earl of Dudley*, (4).

There will be judgment that the suppliants are not entitled to any portion of the relief sought by their petition of right.

*Judgment accordingly.**

Solicitor for the Suppliant: *J. J. Power.*

Solicitor for the Respondent: *T. F. Tobin.*

(1) (1884) 10 A. C. 59.
(2) (1892) A. C. 481.
(3) (1906) A. C. 191.
(4) 9 Q. B. D. 357, 363.

(*) EDITOR'S NOTE: Affirmed on Appeal to the Supreme Court of Canada, March 2nd, 1914.