

ANNIE CONROD AND OTHERS (PETITIONERS) ..... } APPELLANTS; 1914  
 \*Feb. 18, 19.  
 \*March 2.

AND

HIS MAJESTY THE KING (RESPONDENT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Right of action—Lord Campbell's Act—Death by accident—Action by widow—Accord and satisfaction.*

Where the death of a person is caused by the wrongful act, neglect or default of another an action for damages does not lie under Lord Campbell's Act unless the deceased could have maintained an action if death had not ensued.

C. was a temporary employee on the Intercolonial Railway and, as such, a member of the "Employees Relief and Insurance Association." By the rules of the Association the object of the Temporary Employees Accident Fund was to provide for members suffering from bodily injury and for the family or relatives of deceased members. Each member had to contribute to the fund and the Railway Department gave the annual sum of \$8,000 in consideration of which it was to be "relieved of all claims for compensation for injury or death of any member." C. was killed by a railway train and his widow was paid \$250 out of this fund. She then brought an action under "Lord Campbell's Act."

*Held*, affirming the judgment of the Exchequer Court (14 Ex. C.R. 472), that as by his contract with the Association C. could not have maintained an action had he lived the widow's right of action was barred.

**A**PPEAL from a judgment of the Exchequer Court of Canada (1), dismissing the petition of the appellant.

The suppliants, who were the wife and dependent children of Thomas Conrod, deceased, sought to re-

\*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

1914  
CONROD  
v.  
THE KING.

cover against the Crown under "Lord Campbell's Act" (R.S.N.S. 1900, ch. 178) ten thousand dollars damages for the alleged loss sustained by the death of the said Conrod on a public work, resulting from the alleged negligence of a servant of the Crown while acting within the scope of his employment.

The deceased was killed in the Intercolonial Railway yard at Richmond, near Halifax, on Sept. 11th, 1911, by the falling over of a tripod which had been set up by one James Cody, an Intercolonial Railway carpenter, for the purpose of dismantling a crane.

The Railway Department was enlarging the yard, laying new tracks, etc., and it was in connection with this work that the crane was being removed.

The alleged negligence was the failure on Cody's part to secure the tripod by guy-ropes or otherwise so as to make it safe for the intended purpose, the tripod having toppled over while the heavy part of the crane was suspended by a block and fall from the apex of the tripod, this heavy part falling against Conrod, who failed to get out of its way, causing the injuries resulting in his death.

The Crown denied that there was negligence and pleaded contributory negligence. The following other defences were also relied upon:—

(1) *Volenti non fit injuria.*

(2) That the negligence, if any, was that of a fellow workman.

(3) The deceased being a member of the I.C.R. Employees' Relief and Insurance Association, the Crown was relieved, by the rules and regulations of that Association, and by the deceased's agreement on becoming a member thereof, of all liability for the claim now being made.

(4) That the suppliant, Annie Conrod, had by release under seal dated September 25th, 1911, discharged the Crown from all claims and demands arising out of the death of her husband.

1914  
CONROD  
v.  
THE KING.

The trial judge found that the death of Conrod was caused through negligence of the foreman in charge of the work, but dismissed the petition on the ground that the latter was a fellow-servant of the deceased. The suppliant appealed to the Supreme Court of Canada.

*Power K.C.* for the appellants. The trial judge found all the facts in favour of the suppliant, held that the foreman was guilty of negligence and that there was no contributory negligence. He applied the doctrine of common employment and dismissed our petition on that ground only.

I respectfully submit that the learned judge took an erroneous view of the facts proved. The doctrine of common employment will not relieve the employer where the accident is caused by a defective system or lack of proper safeguards. *Canada Woolen Mills v. Traplin*(1); *Ainslie Mining and Railway Co. v. McDougall*(2); *Brooks, Scanlon, O'Brien Co. v. Fakkema*(3); *Canadian Northern Railway Co. v. Anderson*(4).

Then as to the effect of deceased's membership in the Railway Insurance Association.

The action under "Lord Campbell's Act" is separate from and independent of the estate of the deceased or any right the latter might have had if he had

(1) 35 Can. S.C.R. 424.

(3) 44 Can. S.C.R. 412.

(2) 42 Can. S.C.R. 420.

(4) 45 Can. S.C.R. 355.

1914  
CONROD  
v.  
THE KING.

lived. See *White v. Parker* (1); *Seward v. The "Vera Cruz"* (2); *Robinson v. Canadian Pacific Railway Co.* (3). And the release given by the widow is no bar. *The King v. Desrosiers* (4); *Miller v. Grand Trunk Railway Co.* (5).

*Rogers K.C.* for the respondent. *Ryder v. The King* (6), followed by the learned trial judge, is conclusive against the appellant. See also *Burr v. Theatre Royal* (7).

Deceased having contracted away his own right of action his widow's right is barred. See *Griffiths v. Earl of Dudley* (8). The cases cited by appellant's counsel hold that there is a substantial difference between the provisions of the Quebec Code and "Lord Campbell's Act" as to the right of action in case of death.

THE CHIEF JUSTICE.—I express no opinion as to the sufficiency of the apparatus or the qualification of the foreman or whether the claim could have been successfully maintained on the ground of negligence.

I regretfully come to the conclusion that the claim is barred by the release given by the appellant and which reads as follows:—

\$250.00

Received from the Intercolonial Railway Employees' Relief and Insurance Association the sum of two hundred and fifty dollars, which I hereby accept in full satisfaction and discharge of all my claims and demands against the said Association, and against His Majesty The King, His officers or servants arising out of the death of my husband, the late Thomas Conrod.

(1) 16 Can. S.C.R. 699.

(2) 10 App. Cas. 59; at p. 67.

(3) [1892] A.C. 481.

(4) 41 Can. S.C.R. 71.

(5) [1906] A.C. 187.

(6) 9 Ex. C.R. 330; 36 Can.

S.C.R. 462.

(7) [1907] 1 K.B. 544.

(8) 9 Q.B.D. 357.

It is submitted that this receipt or release is a complete discharge in so far as the claim is concerned. The circumstances under which this document was executed have not been, and could not be well, called in question, and I do not think that the suppliant was not fully aware as to the plain meaning of the words used.

1914  
CONROD  
v.  
THE KING.  
—  
The Chief  
Justice.  
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It appears upon the pleadings and admissions that the deceased was a member of the Intercolonial Railway Employees' Relief and Insurance Association, an incorporated society, to the funds of which the Government of Canada contributes annually the sum of six thousand dollars. One of the rules of the Association was that in consideration of such contribution of the Government to the Association, the Government should be relieved of all claims for compensation for injury or death of any member. The rules were in force at the time of the accident and had been in force throughout the whole period of the employment of the deceased, and the contribution by the Crown to the funds of the Association had continued during the whole period. The facts upon this point constituted an agreement by the deceased with the Government by which he agreed to accept the contribution and advantages to which he might be entitled under the rules of the Association in lieu of any claim for damages which he might have against the Government. He would, therefore, have been precluded from maintaining this action had he survived, and it is apparent that the suppliant was likewise precluded.

The suppliant, having accepted \$250, the amount of insurance on the life of deceased payable by the Association under its rules and regulations, is estopped from setting up any claim inconsistent with those

1914  
 CONROD  
 v.  
 THE KING.  
 —  
 The Chief  
 Justice.  
 —

rules and regulations, and, therefore, precluded from maintaining this action. *Clements v. London and North Western Railway Co.*(1); *Griffiths v. Earl of Dudley*(2). We were referred to the case of *Miller v. Grand Trunk Railway Co.*(3), but the terms of article 1056 of the Civil Code of Quebec, which was the foundation of the liability in that case, differ substantially from the provisions of "Lord Campbell's Act" and the Nova Scotia provincial statutes. The suppliant here has not an independent and personal right which the deceased could not, in his lifetime, have released.

The appeal should be dismissed with costs.

IDINGTON J.—The decision of this court in the case of *The Queen v. Grenier*(4) seems conclusive against the appellant's right to recover herein by reason of deceased having by terms of his employment agreed to release the Crown in consideration of the benefits to be received by the rules of the Intercolonial Employees' Relief and Insurance Association.

The appeal must be dismissed; and with costs if respondent insists thereon.

DUFF J.—The view I take of the terms under which the late Conrod was employed by the Department of Railways makes it unnecessary to express any opinion upon the question whether or not (the special stipulations of that contract apart) the appellants might have succeeded in this action. Thos. Conrod was required, according to the practice of the department, on entering on his employment, to become a member of

(1) [1894] 2 Q.B. 482.

(3) [1906] A.C. 187, at p. 191.

(2) 9 Q.B.D. 357.

(4) 30 Can S.C.R. 42.

the I.C.R. Employees' R. & I. Association, and to enter into an express agreement to be bound by the rules of the Association. These rules contain the following provisions:—

1914  
CONROD  
v.  
THE KING.  
Duff J.

Copy of Rules (1 and 3).

Intercolonial Railway Employees' Relief and Insurance Association.

Object.

The object of the Temporary Employees' Accident Fund shall be to provide for its members while they are suffering from bodily injury, and in case of death by accident, to provide a sum of money for the benefit of the family or relatives of deceased members. All payments being made subject to the Constitution, Rules and Regulations of the Intercolonial Railway Employees' Relief and Insurance Association, from time to time in force.

General.

1. Each and every temporary employee shall contribute to the funds of the Association one cent for each day or part of a day worked by him in the railway service, and in case of injury received while at such work, he shall receive medical attendance and medicine, and an allowance of \$3 a week, of six working days, during the time he is unable to work in consequence of the said injury, but such weekly allowance shall not be paid for a shorter period than one week or for a longer period than thirteen weeks in any one year; and in case death shall occur as the result of the said injury within thirteen weeks from the date on which the said injury was received, the sum of \$250 shall be paid to his widow, or failing his widow, to the executor or administrator of his estate.

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3. In consideration of the annual contribution of \$8,000 from the Railway Department 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 shall be relieved of all claims for compensation for injury or death of any member.

It is not disputed—indeed it is admitted—that the provisions of Rule 3 formed part of Conrod's contract of employment. The sum of \$250 for the payment of which Rule No. 1 provides, was duly paid to the appellant Annie Conrod. The effect of Rule No. 3 is, of course, effectually to bar any action under the provi-

1914  
 CONROD  
 v.  
 THE KING.  
 Duff J.  
 —

sions of the "Exchequer Court Act" against the Crown, by Conrod himself; and the only point susceptible of discussion is whether, notwithstanding that, the appellants can maintain an action for the loss occasioned by Conrod's death as his dependents under "Lord Campbell's Act." It seems to me to be unnecessary to cite authority to shew that no such action is maintainable. Section 3 of the Act as re-enacted in Nova Scotia, ch. 178, R.S.N.S., 1900, is as follows:—

Where the death of a person has been caused by such wrongful act, neglect, or default of another as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereto, in such case, the person who would have been liable if death had not ensued, shall be liable to an action of damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to a crime.

It seems too clear for argument that under this provision only such "wrongful acts, neglects or defaults" as would, "if death had not ensued have entitled the person injured to maintain an action and recover damages in respect thereto," can give rise to any right to recover compensation under this Act; and since no damages could have been recovered by Conrod, if death had not ensued, in respect of the negligence charged (because of the above quoted rule by which he was bound) it follows that the Act can have no application.

ANGLIN J.—As a condition of his engagement on the Intercolonial Railway the deceased Conrod had undertaken to relieve the Crown of all liability to him for injuries which he might sustain in the course of his employment. In *The Queen v. Grenier*(1) a con-



tract in the same terms was held to preclude recovery of damages for the death of the plaintiff's husband which had been occasioned by negligence of servants of the Crown. The decision in that case on this point is not affected by the judgment in *Miller v. Grand Trunk Railway Co.*(1). It is a condition precedent of the right of recovery under "Lord Campbell's Act" that the deceased must have had a right of action against the defendant for the injuries which caused his death. *British Columbia Electric Railway Co. v. Turner*(2).

1914  
CONROD  
v.  
THE KING.  
Anglin J.  
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The appeal, in my opinion, fails and must be dismissed with costs if insisted on.

BRODEUR J.—This is an action under "Lord Campbell's Act" which was re-enacted in Nova Scotia under ch. 178, R.S.N.S. 1900.

It was dismissed by the Exchequer Court on the defence of common employment.

I would be inclined to agree with the appellants that on that question of common employment they should succeed. But I hold that their claim fails on account of the contract existing between the deceased and the Railway Department in whose employ he was when he was fatally injured.

In virtue of that contract every temporary employee of the Intercolonial Railway is entitled in case of injury to receive a weekly allowance; and, if he dies, his widow receives \$250; and *the Railway Department is relieved of all other claims for compensation.*

Is the effect of such a contract to debar his widow and his heirs from claiming any other compensation than the one provided?

The appellants claim that their right of action is

(1) [1906] A.C. 187.

(2) 49 Can. S.C.R. 470.

1914  
 CONROD  
 v.  
 THE KING.  
 —  
 Brodeur J.  
 —

independent of the estate of the deceased and is for the exclusive benefit of the widow and children.

It had been decided, however, that in order to succeed the representatives of the deceased must prove and establish that he had an action against the wrongdoers at the time of his death.

If the deceased has settled his claim in his lifetime, no further action can be brought on his dying through the same injuries. *Read v. Great Eastern Railway Co.* (1). Or if he has made a contract with his employer not to claim compensation for personal injuries his widow and his children are bound by that contract and cannot claim under "Lord Campbell's Act." *Griffiths v. Earl of Dudley* (2).

The appellants have been relying in support of their contention on some Quebec cases; but our art. 1056 C.C., which gives a right of action to a widow, confers an independent and personal right of action on the widow and relatives of the deceased and not as in "Lord Campbell's Act" a right conferred on the representatives of the deceased only. Therefore, decisions under art. 1056 are not applicable to cases under "Lord Campbell's Act." *Robinson v. Canadian Pacific Railway* (3); *Miller v. Grand Trunk Railway Co.* (4).

The appeal should be dismissed on the ground that the deceased had agreed that his employer should be relieved of all other claims for compensation, except the \$250 which were paid to his widow.

*Appeal dismissed with costs.*

Solicitor for the appellant: *John T. Power.*

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

(1) L.R. 3 Q.B. 555.

(3) [1892] A.C. 481.

(2) 9 Q.B.D. 357.

(4) [1906] A.C. 187.