IN THE MATTER OF THE PETITION OF RIGHT OF

ALPHEE SAINDON,

SUPPLIANT;

1914
Sept. 10.

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Railways—Accident—Prescription—Construction—Stipulation Relieving the Crown of liability—Insurance—Assessment of damages.

1. The lodging of a petition of right with the Secretary of State in compliance with the provisions of sec. 4 of the *Petition of Right Act* (R.S. 1906, ch. 142) will interrupt prescription within the meaning of Art. 2224 C.C.P.Q.

2. The suppliant, having been injured on a government railway, was paid sick allowances by an insurance association for nearly twenty-six weeks, and when the sick and accident pay-rolls were presented to him for signature, and when he signed them, there was in small print at the head of the column to which he affixed his signature as a receipt for such moneys, the following: "In consideration of the receipt by us of the sums set opposite our respective names, we do hereby release and discharge the Intercolonial Railway etc., from all claims for damages, indemnity or other forms of compensation on account of said disablement."

Held, that as no notice was given to the suppliant of such condition, and as his attention was never called to it, and that he signed the receipt without being aware of the same, it could not now be set up as a bar to his recovering.

3. Under a by-law (113) of such association, by the payment of $10,000 annually by the Railway Department to the association, it was provided that the Railway Department "shall be relieved of all claims for compensation for injuring or death of any member." But in the case of death or total disablement the Crown did not, under the rules of the association, contribute to the amount paid in respect thereof, such fund being made up by special assessment among the members.

Held, that as the Crown did not contribute to the indemnity in the case of death or total disablement, it could not avail itself of the immunity provided by the by-law in question.

4. In assessing damages the moneys paid to the suppliant under the sick allowance insurance should be taken into consideration, but the moneys paid under the provident fund should not be so considered in view of sec. 20 of 6-7 Ed. VII, ch. 22.

1914

SAINDON
v.
THE KING.

Reasons for Judgment.

5. In general in considering the question as to whether insurance money should be taken in account in assessing compensation in cases of accident, a distinction must be made between the case where a party himself is suing for injury either to his person or his property, and the case under Lord Campbell's Act and Art. 1056 C.C.P.Q. where the action is for the pecuniary loss caused by the death to the survivors. In the former case he has two distinct causes of action, one on contract with the insurance company and the other in tort against the wrongdoer. In the latter case it is the pecuniary loss caused by the death which forms the basis of the action and the measure of damages, and in this case alone the insurance money is to be taken into consideration.

PETITION OF RIGHT for the recovery of damages against the Crown, arising out of an accident to an employee of the Intercolonial Railway, on a public work, through the negligence of officers of the Crown. The facts of the case are stated in the reasons for judgment.

June 20th and 22nd, 1914.

The case was now heard before the Honourable Mr. Justice Audette, at Fraserville, P.Q.

E. Lapointe, K.C., and *A. Stein*, K.C., appeared for the suppliant, and *E. H. Cimon* for the respondent.

AUDETTE, J., now (September 10th, 1914) delivered judgment.

The suppliant brought his petition of right to recover the sum of $15,000.00 for alleged damages arising out of the bodily injuries suffered by him, which he claims resulted from the negligence of the employees of the Intercolonial Railway, a public work of Canada.

The suppliant suffered very serious bodily injuries, resulting in total and permanent disablement, by the accident, the details whereof are related in the case of *Hudon* vs. *The King*, (1), and by consent of the parties the evidence in the latter case was made common to the present case, so far as applicable.

The accident happened on the 14th January, 1913, and the Petition of Right was filed in this court on

(1) Reported infra, p. 320.

1914

SAINDON v. THE KING.

Reasons for Judgment.

the 14th of May, 1914—that is more than one year after the accident, a delay within which the right of action would be prescribed and extinguished under the laws of the Province of Quebec. However, it appears from the evidence that the Petition of Right was, under the provisions of sec. 4, of *The Petition of Right Act* (R.S. 1906, ch. 142) left with the Secretary of State, on the 2nd January, 1914 (see Exhibit No. 1). Following the numerous decisions in this Court upon this question, it is found that such deposit with the Secretary of State interrupted prescription within the meaning of Art. 2224, C.C.P.Q. This question has frequently been the subject of consideration in this court.

As a prelude to the discussion of the pleas at bar in this case, it may be said that for the reasons mentioned in the Hudon case, above referred to, the suppliant is entitled to recover, provided his right of action is not barred by any of the said pleas. The accident in question resulted from the negligence of an officer or servant of the Crown, while acting within the scope of his duties or employment on the Intercolonial Railway. It may be added that the suppliant is found not to have been guilty of any contributory negligence. In compliance with the duties assigned to him, between Cap St. Ignace and L'Islet stations, he was, as he should have been under the circumstances, discharging his duties as stoker, kept busy attending to his fire which had gone down while waiting at Cap St. Ignace for the passage of the trains which had the right of way over his.

From the date of the accident he was paid, by the Association, a sick allowance during a period close on to twenty-six weeks, as provided by Rule 49 of the said Association. And on the 1st of July following he

1914

SAINDON v. THE KING.

Reasons for Judgment.

was transferred to the Permanent Fund, ceasing from that day to belong to the Association and from receiving anything from it. From the date of his severance from this Association he thenceforth received $20 a month under the provisions of 6–7 Ed. VII, ch. 22, the Intercolonial and Prince Edward Island Railway Employee's Provident Fund Act.

While receiving his sick allowance from the Association, Saindon signed a receipt, on the sick and accident pay-rolls when the same were presented to him, and at the head of the column in which he so affixed his signature there is the following insidious clause, printed in small type reading as follows:—"In consid-"eration of the receipt by us of the sums set opposite "our respective names we do hereby release and forever "discharge the Intercolonial Railway, etc., from all "claims for damages, indemnity or other form of "compensation on account of said disablement." The pay-rolls are filed as exhibits C to H.

It is contended by the Crown that this receipt is a complete discharge and that the Crown is therefore relieved from any liability.

The evidence discloses that here again, as in the Hudon case, the suppliant's attention was never called to this clause when he signed the pay-rolls. He was not aware of it—did not read it—and whenever he so signed he says he was told "*Tiens, signez ici, et je signais*"—He adds, he never understood he was signing ("*une formule comme ca*")—a form like that, and he signed to get his cheque.

For the reasons already mentioned, upon an almost similar matter, in the case of *Hudon v. The King*, above referred to, it must be found that this printed form above the suppliant's signature is no bar to his recovery and that the receipt was obtained under such

circumstances of unfairness as would entitle him to recover. This clause with the release and discharge, was not in the mind of or contemplated by the suppliant when so signing. Ignorant of the terms of the release, the mind of the suppliant was never exercised with the question of whether he would or would not abandon any right or claim he might have against the Crown. It is the duty of the Court to guard claimants from improvident waivers of right made through ignorance. The rules of equity as administered in England, and the foundation principles of the civil law discountenance all such one-sided bargains.

The most that might be said is that the release and discharge so given are only for such time as is covered by the pay-roll, as it is weekly renewed in the same form and with the same release or discharge. When the release had been once signed, it was unnecessary to have it repeated—if it were not only by necessary inference for the period and the amount mentioned in the pay-roll. The amounts so paid should, however, be taken into consideration if he is to recover for the future.

It may be said here, as was said in the Hudon case, that it is of the essence of a contract that the written covenant should embody the agreement contemplated by the parties to the contract, and that any contract which, through error or otherwise embodies what is not so contemplated, is voidable and should be rescinded. The receipt, with its conditions, was given in error and under Art. 992, C.C.P.Q. it is null and void.

Saindon did not agree when he signed that receipt to release and discharge the Crown from any liability on account of his disablement. Unaware of the existence of that condition, he cannot have assented

1914

SAINDON v. THE KING.

Reasons for Judgment.

to it, and "his mind did not go with it," to use the language of Erle C.J. in the case of *Rideal v. Great Western Ry.* Co. (1), quoted by Mr. Justice Duff in the case of *British Columbia Electric Ry. v. Turner,* (2). The suppliant never agreed to such a condition as embodied in the receipt which was so signed through the abuse of the opportunity that the situation afforded some of the officers who had anything to do with it. He was unaware of it and his mind was never brought to assenting to such a settlement as evidenced by exhibits C to H, and his signature to this document was evidently brought about in such circumstances of unfairness as will entitle him to impeach and rescind the same. It is not the true agreement between the parties. Notice of this condition should have been brought to Saindon's attention. *Robinson v. Grand Trunk Ry.* (3) and cases therein cited.

The further and more substantial defence set up is that the suppliant, as a condition precedent to his employment on the Intercolonial Railway (see Ex. "A") became a member of the Intercolonial Railway Employees' Relief and Insurance Association. It is provided by By-law No. 113 of this Association that in consideration of the annual contribution of $10,000 from the Railway Department to the Association, the Railway Department, "shall be relieved of all claims "for compensation for injuring or death of any member," and the Crown therefore claims that the suppliant is barred from recovery.

Is this by-law, under the circumstances, a bar to the present action?

Is there any privity of contract between the suppliant and the Railway Department? The term

(1) 1 F. & F. 706.
(2) 49 S.C.R. 492.
(3) 47 S.C.R. 622.

"Railway Department" in the by-law, taking the part for the whole, must mean the Crown.

Is the agreement (Ex. "A") entered into by the suppliant whereby he binds himself to abide by the rules and regulations of the Association, a good and valid agreement? This agreement between the suppliant and the Association is one whereby the suppliant agrees with the Association to be bound by its by-laws, the effect of one of the said by-laws is to contract the Crown out of any liability. This is a contract between the suppliant and the Association to which the Crown is not a party. This Association is not incorporated. The suppliant as a member of this Association did not personally enter into such an agreement with the Crown—and if there is such a contract it is the Association which made such a contract with the Crown, before the suppliant joined the Association.

If the agreement to abide by the Rules and Regulations is a contract between the suppliant and the Association, there is no privity of contract in so far as the Crown is concerned, and it is in that respect *res inter alios acta*. This contract being between the suppliant and the Association whereby it is agreed between them to contract the Crown out of such liability, becomes illegal because it is in contravention of sec 4, Ed. VII, ch. 31, which forbids any such contract. It is tainted with illegality and clashes with the statute. What cannot be done directly cannot be done indirectly, and prohibitive laws import nullity. It is true that under sec. 16 of *The Interpretation Act* the Crown is not bound by a statute unless it is therein expressly stated that the Crown is so bound thereby—but the contract of Saindon is with the Association—the Crown is not a party to the same. If the Parliament of Canada in the interests of public

1914

SAINDON v. THE KING.

Reasons for Judgment

morality and fair dealing has enacted 4 Ed. VII, ch. 31, whereby it declares it illegal for any company to contract itself out of any liability, is it conceivable that the Crown in right of the Dominion would entrench itself behind such a plea when it is already illegal under the laws of the Province of Quebec? And moreover, it may be said that it is not a facultative contract, but unilateral and involuntary on behalf of Saindon, forced upon him under the menace of being dismissed from office or denied work if he refused to sign his application. (Exhibit "A".)

Then under the laws of the Province of Quebec (Art. 13, C.C.P.Q.) an agreement whereby one contracts for the immunity from the consequences of negligence is contrary to public order. One cannot contravene the laws of public order. It would be stipulating in advance against any responsibility resulting *ex delicto*. (See Art. 13, C.C.P.Q.) Can this, however, apply to the employees of the party thus contracting itself out of such responsibility. The French jurisprudence seems to answer that question in the negative. Sirey, 1874, 2, 285, cited in Menus-Moreau. See also Sourdat, "*Responsabilité*" I, (1); *Brasell* v. *Grand Trunk Railway Co.* (2). See also the case of the *Exchange Bank* v. *The Queen* (3), with respect to the legal interpretation to be placed upon the privileges of the Crown in the Province of Quebec, and how far the Crown is bound by the Codes of that Province.

There is no evidence of record establishing the Crown ever entered into such a contract as that recited in Rule 113. Mr. Paver, the Secretary of the Association since its early formation in 1890, says that the employees of the railway being desirous of forming a relief department, called different meetings among

(1) p. 679, No. 662, Series 11, p. 40. (2) R.J.Q., 11; C.S. p. 150.
(3) 29 L.C.J. 117; 8 L.C.J. 194; L.R. 11 A. C. 157.

themselves, made the rules and regulations in question, inclusive of rule 113, and after adopting them, they were submitted to the railway authorities who approved of them. Being asked if there existed an order-in-council or a written approval of these Rules and Regulations, he said the only written approval he ever saw was in a previous case, when Mr. Pottinger, who was then the General Superintendent, wrote to one of the lawyers who was managing the case, that they had been approved by the railway. He adds he never saw anything else except that letter. Can it be said that this could amount to a contract as between the Crown and the Association? A binding contract with the Crown must be made with some person having due authority to act on behalf of the Crown. This has not been established.

No vote appears to have been made by Parliament for any payment under Rule 113, and were it made it would not establish any contract or liability. (*Tucker* v. *The King*) (1).

No proof has been adduced showing any such contract by the Crown whereby it contracted under the terms of Rule 113.

Under the evidence the Association could not, by action, enforce the payment by the Crown of the $10,000 mentioned in Rule 113. There is no apparent contract upon which such an action could lie.

Furthermore the suppliant, as is shown by the evidence, after having been paid this sick allowance during a certain number of weeks, was transferred to the Permanent Fund—and this fund and the Association are two separate entities. This transfer was made, as provided by sec. 12, ch. 22, of 6-7 Ed. VII, and therefore "upon the approval of the Minister,

(1) 7 Ex. C.R. 362.

1914

SAINDON v. THE KING.

Reasons for Judgment.

"but subject to the Act" and to the rules and regulations of the Board (and the Board means the Board created under the Act). This transfer being made subject to the Act, necessarily falls under Sec. 20 thereof which reads as follows:

"20. Nothing in this Act and no action taken, "thing done or payment made by virtue hereof, "shall relieve His Majesty from liability in the "event of damage arising from the negligence, "omission or default of any officer, employee or "servant of the Minister."

Therefore, the inference is irresistible that the Crown intended to remove anything standing in the way of the suppliant from recovering under this statute of 6-7 Ed. VII, ch. 22. The transfer, under the authority of the Minister of the suppliant from the Association to the Statutory Permanent Fund is not consistent with an adherence on the part of the Crown to the condition in Rule 113 whereby the Railway Department would be relieved of all claim for compensation. *Peterson* v. *The Queen* (1). The moment the suppliant came under the Provident Fund he became subject to the statute regulating this fund, and anything in the rules of the Association clashing with this statutory enactment must disappear and the statute prevail.

The Association takes its existence under no statute, no letters patent, and might be considered as a mere partnership.

Under Rule 113, the annual contributions by the Railway Department is made in general terms to the Association. Rule 3 discloses the object of the Association which is two-fold. One is to provide relief to its members while suffering through illness or bodily

(1) 2 Ex. C.R. 67.

injury, and the other, in case of death to provide a sum of money for the benefit of the family or relations of the deceased member. The by-laws, distinguished from the rules dealing with the internal administration of the Association, may be said to be accordingly divided in these two different objects. Rules 49 to 85, deal with the sick allowance, and Rule 86 and following, deal with the insurance in case of death or total disablement of a member. There are three different funds, and the accounts for the same are kept entirely separate. (117.)

Under rules 94 and 95, upon the death or total *disablement* of a member in the insurance section, the surviving members are to be assessed as many rates of the class in which they are insured as will, in the aggregate, produce as nearly as possible the amount for which the deceased member was insured, the balance over being carried forward to the credit of the next ensuing levy. It is a scheme for mutual life insurance.

Assuming therefore all the by-laws to be valid, it must be found that, under the very rules of the Association the Crown does not contribute to the death and total disablement fund which is made up upon special assessment among the members, under rule 94, and therefore the insurance money does not proceed from the Crown, even in part. Moreover, the payment thus made for total disablement is independent and bears no relation to the tort or negligence governing the right of action herein. And in case of death, where the payment proceeds from the same fund as for total disablement, such payment would have to be made if the insured died of natural death.

The evidence does not disclose—and if it did it would amount to the same—whether the Crown

1914

SAINDON v. THE KING.

Reasons for Judgment.

recognizes any division by the Association of its contribution and that it so makes its contribution to the Association in general terms to be used as the Association pleases. But in accordance with the scheme contained in the rules of the Association, it appears clearly that the Crown does not contribute to the death and total disablement fund and the rules must be regarded as they stand. *Miller* v. *Grand Trunk Ry.* (1).

Therefore the contribution by the Crown does not stand as a bar to recovering in case of total disablement. It does not contribute to the insurance fund wherefrom payments for total disablement are taken. *The King* v. *Armstrong* (2); *The King* v. *Desrosiers* (3).

It is further enacted by sec. 60 of *The Government Railway Act* (R.S. 1906, ch. 36) that "His Majesty "shall not be relieved from any liability by any "notice, condition or declaration, in the event of any "damage arising from any negligence, omission of any "officer or servant of the Crown." In the case of *The Grand Trunk Ry. Co.* v. *Vogel* (4), it was decided by a majority of the Court that a provision to that effect prevented a railway company from contracting itself out of any liability for negligence; but in the case of *Robertson* v. *Grand Trunk Railway* (5) it was held that while the Company could not, under such a provision, contract itself out of any liability it could, by contract, limit that liability. How far such decision applies to this case, it is unnecessary to decide.

Quantum.

The suppliant, at the time of the accident, was caught under the engine and was getting badly burnt

(1) (1906) A.C. 194.
(2) 40 S.C.R. 229.
(3) 41 S.C.R. 71.
(4) 11 S.C.R. 612.
(5) 24 S.C.R. 611.

from the escaping steam and boiling water. His foot was badly crushed, yet holding to the leg by some flesh. From the knee to the ankle his leg was all burnt and the flesh had left the bone and, as he says, it was time to do something and get away. He pulled his leg out, leaving his foot in the ruins. From that time on he has been failing, little hope for his recovery being entertained. His leg was twice amputated, and the surgeon declares, as it is however obvious, that he remains permanently disabled, unfit for his usual work. The sums of $75 and $50 were charged for these two painful operations, an amount of $125, which seems quite reasonable under the circumstances.

It is admitted by both parties that the suppliant was earning, at the time of his death, the sum of $900 a year. It appears from exhibit No. 2, that Saindon at the time of the accident was in his 28th year, and—the evidence establishes he was enjoying good health and a strong constitution. He is married and is the father of two children.

The fact of Saindon obtaining in his lifetime indemnity or satisfaction for the damage resulting from the negligence of the officers of the Crown, under the provisions of *The Exchequer Court Act*, will thereafter be a bar to any action his heirs or assigns might hereafter take. *Miller* v. *Grand Trunk Ry.* (1).

In assessing the damages in a case of this kind the moneys paid the suppliant under the sick allowance insurance must be taken into consideration and applied in satisfaction *pro tanto* for the time such allowance was so paid.

Should the amount paid monthly to the suppliant under the Provident Fund be taken into consideration

(1) (1906) A.C. 191-194.

1914

SAINDON v. THE KING.

Reasons for Judgment.

in assessing the damages? The question must be answered in the negative.

In considering that doctrine a distinction must first be made between the case where a party himself is suing for injury either to his person or his property, and the case under Lord Campbell's Act and Art. 1056, C.C.P.Q., where the action is for pecuniary loss caused by the death to the survivors. In the latter case it is the pecuniary loss caused by the death "which is at once the basis of the action and the "measure of damages," and therefore the receipt of insurance money is a circumstance to be taken into consideration in estimating the pecuniary loss to the survivors." *Mayne on Damages.* (1).

In the former case, that is where the injured person himself sues, the law is different. He has in this case two distinct causes of action: one on contract with the insurance company in consideration of contributions and payments to the fund. For that contract he has paid money and given consideration and is entitled to enforce it even if he lets the wrongdoers go. The other cause of action he has is in tort against the wrongdoer for damages which he may enforce even if he lets the insurance money go. There is no reason why both cannot be enforced. *Millard* v. *Toronto Ry. Co.* (2) and the numerous cases therein cited. In the case where the injured person sues, the ground of the action is the wrong done to the individual—"The fact that he has "guarded by anticipation against such an event "neither diminishes the wrong itself nor the liability "of the wrongdoer to pay for it." *Mayne on Damages* (3); *Misner* v. *Toronto and York Radial R.W. Co.* (4).

Now, are the cases above cited to be distinguished from the present one because the fund from which the

(1) 8th ed. 495.
(2) 6 Ont. W.N. 519.
(3) 6th ed. (1899) p. 538.
(4) 11 O.W.R. 1064-1068.

1914

SAINDON v. THE KING.

Reasons for Judgment.

moneys which are monthly paid to the suppliant is one made by contributions from both the Government and the employees or the insured? The cases referred to by Mr. Justice Osler in *Misner* v. *Toronto & York Radial R. W. Co.* (*ubi supra*) are analogous to the present one, in that the fund was made up by joint contribution from the company and the injured.

There is in the present case an additional reason why the benevolent contribution to the Provident Fund made by the Crown under the Act (6–7 Ed. VII, ch. 22, sec. 4) should not be taken into consideration, and that is because sec. 20 of the same Act reads as follows:

> "Nothing in this Act and no action taken, thing "done or payment made by virtue hereof, shall "relieve His Majesty from liability in the event of "damages arising from the negligence, omission or "default of any officer, employee or servant of the "Minister."

Taking all of the circumstances of the case in consideration there will be judgment in favour of the suppliant for the sum of two thousand dollars together with $125 in payment of the surgical operations still owing by him, and costs.

Judgment accordingly.

Solicitors for the suppliant: *Lapointe & Stein.*

Solicitor for the respondent: *E. H. Cimon.*