1914
Sept. 10.

IN THE MATTER OF THE PETITION OF RIGHT OF

DAME JUSTINE HUDON,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Government Railway—Contract between employee and I.C.R. and P.E.I. Employees Relief and Insurance Association, to release Crown of any liability—Receipt given in error.—Defence.

Suppliant's husband was killed in an accident on the Intercolonial Railway. Suppliant gave a receipt for the insurance money payable on his death to the Intercolonial and Prince Edward Island Railway Employees' Relief and Insurance Association and in full satisfaction and discharge of all her claims against the said Association, and against His Majesty The King, arising out of the death of her husband. Her attention was not called to this discharge embodied in the receipt, and the letter transmitting the form of receipt for signature did not mention it. Moreover it was in the English language, which she did not understand, and could not read when signing it.

Held that suppliant could not be taken to have assented to such condition; and it could not be set up as a bar to her recovery.

2. *Held*, applying *Miller* v. *The Grand Trunk Railway Co.* (1906 A.C. 187) that suppliant's right of action in this case under Art. 1056 C.C.P.Q. was a personal one and independent from that of her husband; and that any immunity from damages, or condition that might have been available as a defence to an action by her husband because of his being a member of an Insurance and Provident Society, was no bar to the suppliant's action after his death.

PETITION OF RIGHT for the recovery of damages against the Crown, arising out of the death of an employee of the Intercolonial Railway, on a public work, through the negligence of certain employees of the Crown.

The facts are set out in the reasons for judgment.

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

Jules Langlais and A. W. Potvin for the suppliant; *E. H. Cimon* for the respondent.

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

The suppliant brought her petition of right, both in her own name and as tutrix to her minor children, to recover the sum of $15,000. as alleged damages arising out of the death of her husband, Joseph Hudon, which, it is claimed, resulted from the negligence of the employees of the Intercolonial Railway, a public work of Canada.

The action is brought under the provisions of subsection (f) of Sec. 20 of *The Exchequer Court Act* (R.S. 1906, ch. 140, as amended by 9–10 Ed. VII, ch. 19).

The accident happened on the 14th January, 1913, and the petition of right was filed in this Court on the 14th April, 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 by 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 3rd December, 1913. Following the numerous decisions of 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.

Briefly stated, freed from numerous details, the accident happened under the following circumstances.

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On the 14th January, 1913, the deceased Hudon was engine-driver on the freight train No. 110, which was travelling east from Quebec to L'Islet. On arriving at L'Islet, shortly after one o'clock at night, the train was placed on the western siding, as shown on plan, exhibit No. 10. Green lights were placed at the rear of the van, and after the person in charge of the station had acquainted the conductor with different orders at hand, the latter instructed brakeman Riou to coal the engine, after the English mail train had passed. After the passage of that train, Riou placed the western semaphore at danger, and brakeman Jean uncoupled Hudon's engine which then travelled from the point "A" (see Plan Ex. No. 10) to "B." Riou opened the switch "B," leaving it open, with the red light of the switch at danger; and Jean opened the switch at "C," and the engine was then backed upon the main-line, and switch "C" was closed. The engine was then brought to the point marked "X" on the main-line, opposite the northern loading station, upon which were two cars loaded with coal wherefrom it was their intention to coal.

No sooner was the tender opposite the coal car and before even a single shovel of coal had been taken, Hudon's tender and engine were struck by the engine of the incoming train called the *Levis Special,* travelling from west to east. This Levis special is what is termed an irregular train—it is not on the time tables and travels, as all specials, upon order. In the impact of the collision, which then took place, Hudon was killed and Saindon, the fireman, of the Levis special seriously injured. An action has also been brought by Saindon, and reference will be made therein to the facts of the present case in disposing of his claim.

Now this Levis Special had met the English mail train, at Cap St. Ignace, the previous station, and LeBel, the engine driver of that train, says that, in compliance with the Rules and Regulations, at Cap St. Ignace, he concealed the head light of his engine, with a piece of sheet-iron in the usual manner, to let the English mail pass. Having started from Cap St. Ignace, for the next station, L'Islet—on his way thereto he realized he had forgotten to uncover his headlight, but did not remedy this defect and proceeded on to L'Islet without any headlight, and arrived without any warning whatever upon Hudon's engine in the manner and with the result above mentioned.

LeBel contends he sounded his whistle before coming in, but does not remember whether he rang the bell. He is the only one who says he did sound the whistle and although it is not of great importance in the view this court takes of the case, it must be found he is under misapprehension, because the five men—the two brakemen, Labbie, and the stoker—would have heard it, and no one but LeBel says so. Is it because it is customary for him to do so, that he testifies in this manner?

The night was fine and the track between Cap St. Ignace and L'Islet is perfectly straight and a powerful electric head-light can be seen from one station to the other, although the head-light on the Levis Special engine was only an oil lamp light, but a powerful one.

It is quite clear and obvious that had the head-light on this Levis Special engine been uncovered and lighted that the accident would have been averted, and that it would have been seen by some of the men engaged around the Hudon engine. The proximate and the determining cause of the accident is the want of any head-light on the Levis Special engine. Even if LeBel

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had failed to sound his whistle, his head-light would have been sufficient to warn Hudon and given him time to get out of the way.

A great deal of evidence has been adduced with respect to the western semaphore which was passed by this Levis Special on coming in to L'Islet. However, this cannot change the above finding on the question of fact.

The accident happened on the 14th, which was a Tuesday, and on the 11th, the previous Saturday, this semaphore had been reported defective, as not working and standing at danger. It was not reported repaired until the 18th—an unaccountable delay—but it has no bearing upon this case. It would, however, appear that the station master at L'Islet had neglected to report the repairs to the semaphore immediately after it had been so repaired.

From the evidence and especially from the testimony of both Marquis and Fortin, the acting station-master, it must be found that the semaphore had been repaired before the accident and that it was working all right on the night of the accident, as testified to by Fortin, who says he had worked it several times in the course of that evening, and Marquis who had ascertained, notwithstanding the evidence of LeBel to the contrary, that this semaphore was lighted and showing light at the time of the accident as he walked back to it at that time for that very purpose.

Even supposing the semaphore out of order, Rule 26 says that the absence of a signal at a point where one is usually displayed is to be taken as denoting danger. And Rule 75 is to the same effect.

This Levis Special, as already mentioned, was an irregular train (see rules 2 and 9) and under Rule 18 such trains must always be run upon the

assumption that another train *may be delayed and out of place.* Such train must approach all stations very carefully. Mr. Brassard, the chief train despatcher, a gentleman of 35 years' experience in the railway business, testifies that even if the semaphore had been repaired and no notice thereof given, LeBel, the engineer of the Levis Special, was bound to take great care in coming into L'Islet. He should have slackened his train, come in under control —adding, control means that he should be in a position to stop his train almost at once (de suite). And when the semaphore is at danger, as it was on the night in question, that a train cannot come in without sending a man to the station to give or receive a signal. Without order, neither of the two trains had a right of way over the other. The engine-driver of the Levis Special was guilty of gross and unpardonable negligence in coming in without any head-light. The least he could have done, knowing his head-light was concealed, would have been to get out of his engine at the western semaphore and uncover the head-light. Coming in under such circumstances he should have come in under perfect control, feeling his way, so to speak. The greater the danger, the greater the prudence is exacted and expected.

Now, it has been further contended there was contributory negligence on behalf of Hudon in that, among other things, —1st —That he had no red light at the back of his tender; 2nd—That he should not have gone on the main line to coal, but to the coaling platform; and 3rd—That he should not have travelled through the cut-out on to the main line, but should have gone to the end of the southern siding to the coaling platform.

Respecting the first count, it must be found that there is no evidence excepting that of LeBel establishing

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that there was no light at the rear of the tender; but other evidence to presume there was, because it is proved there was a red light at the back of the tender when they left Chaudiere. LeBel also asserted there was no red light at point "B," but such light was there.

Answering the second count, the evidence establishes that the moment he was protected by the semaphore at danger, he had no reason to expect anyone coming in as LeBel did.

And with respect to the third objection, it is established by Fortin, that the Marquis train was ahead of Hudon's train on the same siding, and that it left only after the accident. The necessary inference being that the cut out, which was the shorter way of the two to go to the coaling platform, was also at that time the only way available.

There was no contributory negligence.

The next question to be considered is whether the receipt given by Mrs. Hudon, the suppliant, for the insurance money paid to her is a bar to her recovery. This receipt is filed as exhibit "T," and reads as follows:

"$1,000.

"Received from the Intercolonial and Prince Edward "Island Railways Employee's Relief and Insurance "Association, the sum of one thousand xx/100 dollars, "which I hereby accept in full satisfaction and dis- "charge of all my claims against the said Association, "and against His Majesty The King, His officers or "servants, arising out of the death of my husband, "the late Joseph Hudon.

"Dated at Riv. du Loup, this 12th of August, 1913.

"Signed, Sealed and delivered Justine Hudon (L.S.)
"in the presence of widow of the late
" P. V. Begin, Joseph Hudon.
" Harvey W. Sharpe.

The receipt is given for $1,000, but the cheque actually paid Madame Hudon was only $945, the amount of $55 being deducted therefrom in payment of the accounts attached to exhibit "T." In the unreported case of *Blair v. The Association de Secours et d'Assurance, Intercolonial Railway,* Cimon J., on the 10th November, 1909, decided, among other things that the plaintiff, the widow of an employee of the I.C.R. killed in an accident on the said railway, was entitled to be paid her insurance money without having, as a condition precedent, to sign a receipt therefor relieving the Crown from any liability on account of the accident.

Under what circumstances was this receipt obtained and signed? On the 7th August, 1913, Mr. Paver, the Secretary of the Employees' Relief and Insurance Association, transmitted to P. V. Begin, the district Secretary of the Association at Riviere du Loup, a copy of a letter he addressed to Mrs. Hudon together with the form of receipt in question asking him to return the voucher to him after Mrs. Hudon has executed it, or signed it in the presence of either himself or some other railway official.

It will be noticed that Mr. Paver's letter to Mrs. Hudon does not call her attention to the condition he has placed in the receipt. He merely tells her that her husband was insured in class A for $1,000 and calls her attention to the deductions made from that amount. And he says, if you will sign the voucher, Mr. Begin will return it to me, and upon receipt of the same the cheque will be forwarded to your address by registered

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letter. Not a word said of the condition whereby the Crown is released of any liability which might arise from the death of her husband.

After Begin received this unsigned voucher, he went over to witness Wilson, who is the brother-in-law of Mrs. Hudon, and gave it to him, and asking him, without further explanation to have it signed by Mrs. Hudon on the line indicated by Begin. Wilson took exhibit T, the form of receipt, to Mrs. Hudon, and he told her to sign that document at the place indicated by Begin and that by doing so she was signing the receipt for her insurance money (qu'elle signait le reçu pour ses assurances). Wilson did not read the document to Mrs. Hudon, who, moreover, testified she did not understand a single word of English and that in all her life she had been to school but during nine months. Wilson says when Mrs. Hudon signed this receipt he was alone with her and her two young children.

Begin being handed back by Wilson this signed receipt transmitted it to Paver who in turn transmitted the cheque of $945 to Mrs. Hudon, who endorsed it and got it cashed.

Harvey W. Sharpe, whose signature appears as that of a witness attesting Mrs. Hudon's signature, being heard as a witness, says he was not present when Mrs. Hudon signed the receipt and that he placed his signature below that of Begin's as a matter of form.

Now both Begin and Sharpe were not present when Mrs. Hudon signed this document, and their conduct in this transaction, to say the least, is most reprehensible conveying deception by thus falsifying the receipt.

From the above it appears quite clearly that Mrs. Hudon did not agree when she signed that receipt "to "discharge the Crown from any liability arising out of "the death of her husband"—not knowing of the

clause she cannot have assented to it and "her mind "did not go with it" to use the language of Erle, C.J., in the case of *Rideal* v. *G.W. R.y Co.* (1). She never did agree to such a condition as embodied in the receipt which was so signed through the conscientious or unconscientious abuse of the opportunity which the situation afforded the several officers who had anything to do with it. Her mind was never brought to assenting to such a settlement as evidenced by exhibit "T," and her signature to this document was evidently brought about in such circumstances of unfairness as will entitle her to impeach and rescind this receipt as not embodying the true agreement between the parties. *B.C. Electric Ry. Co.* v. *Turner* (2).

It is of the essence of a contract that the written covenant shall embody the agreement contemplated by both contracting parties, and that any contract which through error or fraud, embodies what is not so contemplated is voidable and should be rescinded. It was clearly incumbent upon the officials to bring notice of this condition to Mrs. Hudon's attention. *Robinson* v. *Grand Trunk Ry* (3); *Bate v. Canadian Pacific Railway* (4).

The receipt was given in error, and under Art. 992, C.C.P.Q. it is null and void.

It is perhaps unnecessary to add, applying the decision of *Miller* v. *Grand Trunk Ry Co.* (5), that suppliant's right of action in the present case arises under Art. 1056 C.C.P.Q., giving her an independent and personal right not derived from her deceased husband, and that any condition which might be set up against him because he was a member of an insurance and provident society, a by-law of which afforded a defence to this action as against him, is no bar as

(1) 1 F. & F. 706.
(2) 49 S.C.R. 492, 493.
(3) 47 S.C.R. 622.
(4) 18 S.C.R. 697.
(5) (1906) A.C. 194.

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against her. See also *Desrosiers vs. The King* (1); *Armstrong vs. The King* (2).

Quantum.

It appears from Exhibit No. 4 that Hudon, at the time of his death was thirty years and six months old and it is admitted by both parties that he was then earning an average yearly salary of about $1,000.

In assessing damages in a case of this kind it is impossible to arrive at any amount with mathematical accuracy—but one should strive to give the suppliant such damages as will compensate her and her children 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 arriving at such amount one must take into account the age of the deceased, his state of health, his expectation of life, his employment, the wages he was earning and his prospects. On the other hand, consideration must be given to the fact that the deceased in such a case as the present one 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.

There will be judgment in favour of the suppliant for the sum of $4,500, out of which $2,500 will go to the widow personally and $1,000 to each of her two children, Gerard and Joseph. Costs will follow the event.

Judgment accordingly.

Solicitors for the suppliant: *Langlais and Potvin.*

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

(1) 41 S.C.R. 71.

(2) 40 S.C.R. 229.