THE TORONTO RAILWAY COMPANY (DEFENDANTS)..... } APPELLANTS;

1919
*Nov. 18
*Dec. 22.

AND

ALEXANDER HUTTON (PLAINTIFF).. RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

"Workmen's Compensation Act," 4 Geo. V. ch. 25 (Ont.)—Injury to employee—Compensation from Board—Election—Right of action.

The Ontario "Workmen's Compensation Act" provides that a workman injured in course of his employment and thereby entitled to bring an action against a person other that his employer, may claim compensation under the Act from the Compensation Board or bring such action. If he elects to claim under the Act, and the compensation is payable out of the accident fund, the Board is subrogated to his rights, and may maintain an action in his name, against the wrongdoer. H., driver of a bread wagon in Toronto, was injured by a collision with a street car and elected to claim, under the Act, compensation payable out of the accident fund which was awarded and paid for a time. He then brought an action against the Toronto Ry. Co. and, after the trial, he obtained an order from the Board allowing him to withdraw his election.

Held, affirming the judgment of the Appellate Division (45 Ont. L.R. 550; 49 D.L.R. 216), that his right of action was not barred.

Per Anglin J.—H. should have obtained an order from the Board authorizing him to bring the action and the proceedings on the appeal should be stayed until such order is filed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), varying the judgment at the trial in favour of the plaintiff by directing that the damages awarded should be paid to the Compensation Board to be dealt with under the Act.

The only question for decision on this appeal is whether or not the plaintiff's right of action was barred

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 45 Ont. L.R. 550; 49 D.L.R. 216.

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by his election to claim compensation under the "Workmen's Compensation Act." The proceedings on his claim so far as they affect that question are stated in the head-note.

Dewart K.C. and *Hodgson* for the appellants. There is no doubt that the plaintiff elected to claim from the Board. See *Scarf* v. *Jardine* (1), at pages 360-1; *Oliver* v. *Nautilus Steam Shipping Co.* (2).

Having so elected his right of action against the wrongdoer is gone. *Huckle* v. *London County Council* (3); *Codling* v. *Mowlem & Co.* (4).

Proudfoot K.C. for the respondent.

THE CHIEF JUSTICE.—This was an action brought by the plaintiff against the railway company to recover damages for injuries received by him from the negligent running of the defendant's railway and in which the jury assessed $2,500 as the damages and found "excessive speed" of the car as the negligence.

During the trial, it came out in evidence that plaintiff had elected before beginning his common law action to claim compensation under the "Workmen's Compensation Act," whereupon after the jury had been discharged the defendant applied for and obtained leave to add a plea to its other defences that such election had released the defendant from any right of action against it in respect of the injuries he sustained and that his claim for such damages was barred by the provision of the Act.

An appeal from the judgment entered by the trial judge on the jury's findings was taken to the Appellate Division, but the only point raised and argued

(1) 7 App. Cas. 345.
(2) [1903] 2 K.B. 639.
(3) 27 Times L.R. 112.
(4) [1914] 2 K.B. 61; 3 K.B. 1055.

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on the appeal there and afterwards on appeal to this court was as to the effect of the plaintiff's election and whether it barred plaintiff's right to recover in this action.

The Appellate Division based its judgment, the reasons for which were stated by Mr. Justice Hodgins, upon the fact

> that the only right given to the Board by the election is that of subrogation

and when once that has arisen

> the person possessed of the cause of action can do nothing to prejudice the person subrogated.

He further stated that

> the situation created by the election spoken of in the statute and its consequences cast no additional burden upon the wrongdoer nor any which differs in any way from that which he has brought on himself by this wrongful act. He has no concern with the dealings of the Board and the claimant and, unless he is prejudiced, he has no right to complain. In this case the respondent's cause of action is not divested: it exists still in him, but, if enforced by him, it must be for the benefit of the Board if he has signed an election.

As a result, he stated

> that the dismissal of the appeal should be preceded by a direction that the amount of the judgment should be paid to the Board to be dealt with by them in due course.

With these conclusions of the Divisional Court I am in full accord.

I agree with the reasons stated by my brothers Idington and Mignault which I have had the opportunity of reading and considering for dismissing the appeal to this court.

If the plaintiff had obtained the express authority of the Board to bring the action or a ratification subsequently of his having brought it, that, in the view I take of the legal effect of an election under the "Compensation Act," would have been a sufficient answer to defendant's amended plea, because I am

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clearly of the opinion that such an election cannot and does not discharge a wrongdoer whose negligence has caused damage to another or afford any defence to such an action as the plaintiff's.

I cannot, however, accede to the conclusion reached by my brother Anglin that proceedings in the action should be stayed until plaintiff had obtained and filed an authorization of the Board for the bringing and maintenance of the action with the consequence that the plaintiff should be deprived of his costs on this appeal.

There are no merits in the appeal. It rests entirely upon what under the circumstances must be called a technical point, and in my judgment the direction in the judgment appealed from,

> that the amount of the judgment should be paid to the Board to be dealt with by them in due course

amply protects the defendant from any of those injustices which the ingenuity of counsel has conjured up as possible consequences of the absence of express authorization or ratification of the bringing and maintenance of the action by the plaintiff.

I may add that I do not assent to the assumption of the appeal court that the power of the Board to sue in its own name is necessarily given to it by virtue of the subrogation. On the contrary I incline to think that such a suit or action must be in the name of the party injured to whose rights the Board by virtue of his election is subrogated.

IDINGTON J.—The respondent recovered judgment for injuries caused him, whilst in the employment of the Canada Bread Company as a driver, by negligence of the appellant.

For these injuries he would have been entitled to

compensation under the provisions of the "Workmen's Compensation Act," of Ontario.

The appellant discovered at the trial that respondent had signed a document purporting to elect to receive from the Board administering said Act, such compensation as he would be entitled to under the provisions of said Act.

That election, even assuming it to have been operative and effectual, would neither bar nor extinguish the right of action herein in question, but would entitle the Board to continue the action if it so chose.

Sec. 9, sub-sec. 3, of the Act is as follows:—

(3) If the workman or his dependents elect to claim compensation under this Part the employer, if he is individually liable to pay it, and the Board if the compensation is payable out of the accident fund shall be subrogated to the rights of the workman or his dependents and may maintain an action in his or their names against the person against whom the action lies and any sum recovered from him by the Board shall form part of the accident fund.

The employer concerned herein was not individually liable and hence his rights are eliminated from consideration herein.

The Board under such circumstances became the beneficiary and entitled to proceed in respondent's name to recover the damages for the benefit of the accident fund.

Moreover this sub-section expressly declares that the Board shall be subrogated to the rights of the workman.

The rights of the workman at the time when discovery was made of the alleged election were in law to recover herein and the respondent a mere trustee of the Board.

Instead of adding the Board as a party to the action to make all this clear and instantly effective as I submit might, and perhaps should, have been

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done, there was adopted a rather roundabout series of unnecessary steps, which, however, resulted in the court of appeal modifying the terms of the judgment so as to render it clear that the recovery was on behalf of and for the Board.

The matter should have ended there.

The appellant never had any concern in the question of who was to get the money and was only concerned to have all doubt removed as to the possibility of its being called upon in another action using the respondent's name to re-open the litigation.

This it cannot, in face of its resolution put on record herein, purporting to revoke the election made by the respondent, now by any pretence attempt.

No doubt it was a proper shrinking from the risks of litigation that led to its adopting the course it did, instead of expressly adopting and ratifying the proceedings, as I hold it was entitled to have done.

The election made was something with which appellant had no concern, for that neither helped nor hindered it in any way.

And if those relying upon the doctrine quoted from Lord Blackburn's judgment in the case of *Scarf* v. *Jardine* (1), at pages 360-1, will examine the quotation put forward, they will find not only that that able and accurate judge's accurate expression of the law not only fails to help appellant in the case of such an election as this was, but, even in a proper case, the election only becomes helpful when

> communicated to the other side in such a way as to lead the opposite party to believe that he has made his choice.

The election here in question was something between respondent and the Board which in no way altered the rights or obligations of appellant and never

(1) 7 App. Cas. 345.

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was communicated to it, the opposite party in question herein.

And as the delimitation of rights given the Board by the subrogation which the Act expressly gives and defines, requires the application of the proceeds receivable thereby to go to the accident fund, it is to be regretted that through inadvertance the sum of $352.00 was deducted, presumably from what the verdict should have been.

The appeal should be dismissed with costs.

DUFF J.—The decision of this appeal turns upon certain provisions of the Ontario "Workmen's Compensation Act," that is to say, of sub-secs. 1, 2, 3, 4 of sec. 9, 4 Geo. V., ch. 25, and these provisions are in the following words:—

9. (1) Where an accident happens to a workman in the course of his employment under such circumstances as entitle him or his dependents to an action against some person other than his employer the workman or his dependents if entitled to compensation under this Part may claim such compensation or may bring such action.

(2) If an action is brought and less is recovered or collected than the amount of the compensation to which the workman or his dependents are entitled under this Part the difference between the amount recovered and collected and the amount of such compensation shall be payable as compensation to such workman or his dependents.

(3) If the workman or his dependents elect to claim compensation under this Part, the employer, if he is individually liable to pay it, and the Board if the compensation is payable out of the accident fund, shall be subrogated to the rights of the workman or his dependents and may maintain an action in his or their names against the person against whom the action lies and any sum recovered from him by the Board shall form part of the accident fund.

(4) The election shall be made and notice of it shall be given within the time and in the manner provided by sec. 7.

The accident in respect of which the action was brought occurred on the 17th April, 1918. On the 12th of May the plaintiff made a claim upon the Workmen's Compensation Board for compensation under the Act and on that day executed a document

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by which he professed to elect to claim compensation from the Board and to forego for the benefit of the Board all rights of action against third parties arising out of the accident. The plaintiff's claim was allowed by the Board and compensation was awarded to him as from the 17th April, the date of the accident, and for some months was paid, the first payment having been made on 22nd May. The present action was brought on 20th June, 1918.

The action was tried in December, 1918, and judgment was given on 18th December against the appellants and after this date certain proceedings were taken by which in effect the Board professed to grant permission to the plaintiff to pursue for his own benefit any right of action he might have against the defendants, notwithstanding his election, and for that purpose giving permission to plaintiff to withdraw his election. It is not disputed that the action was in fact instituted by the plaintiff without the permission of the Board and on his own initiative and for his own benefit.

The appellant company contends that the plaintiff conclusively elected to claim and accept compensation from the Board and that by force of the statutory provisions quoted above the plaintiff's right to recover reparation from the appellant company became beneficially vested in the Compensation Board and that the plaintiff's action (admittedly as already mentioned instituted on his own behalf) cannot be maintained. The Appellate Division has rejected this view of the effect of sec. 9 and I concur with this conclusion.

In sum my view of sec. 9 is this: Its subject matter is the reciprocal rights of the claimant on the one hand and the employer and Compensation Board on the other. The effect of the section may perhaps

be more conveniently considered with reference to the case of the employer. As between the employer and the claimant then, the claimant is entitled to choose one of two alternatives. He may claim compensation or he may elect to pursue his remedy against the third party. If he elects to claim compensation, the employer becomes subrogated to the claimant's rights against the third person; in other words, he becomes entitled to enjoy the benefit of them and may enforce them in the name of the claimant. But all this is intended to be and is a disposition as to the rights of the employer and the claimant *inter se*. A dispute may arise upon the point whether or not an election has taken place within the meaning of the enactment, but that is a matter to be settled as between employer and claimant. No other party is interested except, of course, a party claiming through one of them.

After the claimant has elected to claim compensation and to give the employer the benefit of his action, it is still open to the employer to allow him to withdraw his election and no third party is entitled to intervene.

This view is beset with no difficulties in point of interpretation. The argument advanced on behalf of the appellant rests upon a view of the effect of the word "subrogated" in sub-sec. 3 which makes it equivalent to "transferred." But that is not the necessary meaning of the word "subrogated" which points merely to the enjoyment by the party entitled to the subrogation of the rights affected by it. In this view of sec. 9 the third party is amply protected. The term "subrogation" in one very important field of its application in the law of insurance does not confer upon the person enjoying the benefit of subrogation the right to take proceedings in his own name.

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King v. *Victoria Ins. Co.*(1); *Simpson* v. *Thomson* (2). It seems a reasonable construction to read the words

may maintain an action in his or their names

as explanatory of the preceding phrase, "their names" obviously relating back to "dependents." This construction finds no little support in the circumstance that the notice of election provided for in sub-sec. 4 of sec. 7 is a notice only to the employer or to the Board.

It follows, of course, that the transactions between the Board and the plaintiff are transactions to which for the purpose of this litigation the appellant company is a stranger and that they do not afford any answer to the respondent's claim in the action.

The appeal should be dismissed with costs.

ANGLIN J.—The effect of sec. 9 of the "Workmen's Compensation Act" (4 Geo. V. (Ont.), ch. 25), is neither to extinguish the workman's cause of action upon his making an election to claim compensation under that statute nor to vest his right of action in the Workmen's Compensation Board, but rather to transfer to the Board the right to control any action brought or to be brought in the workman's name. The Board is subrogated to his rights and empowered to use his name for the purposes of suit. I doubt whether it can sue in its own name as appears to have been thought in the Appellate Divisional Court.

While, therefore, an absence of authorization of it by the Board is not a defence to the plaintiff's action, it affords in my opinion a ground upon which that action, carried on without the sanction of the Board, should, upon the application either of the Board itself or of the defendant, be stayed until

(1) [1896] A.C. 250 at p. 254. (2) 3 App. Cas. 279.

such an authorization has been obtained and filed with the court in order to prevent possible abuse of its process. Sub-sec. 1 of sec. 9 gives the workman the right either to claim compensation or to bring his action. Read with sub-sec. 3, in the light of sub-sec. 2, however, the effect of this provision would seem to be not entirely to deprive him of the right to sue when he has claimed compensation, but to suspend his right to prosecute an action until the sanction of the Board to his doing so has been secured.

Both the Board and the defendant are interested in the action of a man who has claimed compensation being under the control of the Board. Although the appellant asks the dismissal of this action on the ground that under the statute the cause of action is vested in the Board, I think we may not unfairly consider an application for a stay as included in the relief it seeks.

Had the Board granted in the terms in which it was made the application of the plaintiff's solicitors of the 8th of January, 1919,

> for a consent by the Board ratifying all proceedings that have been taken or may hereafter be taken in this action by or on behalf of the plaintiffs,

tardy as it would have been, I should have been disposed to accept such an authorization as sufficient to warrant allowing the proceedings to be carried to completion. The defendant would thereby have been given all the protection to which it was entitled. But the Board instead of taking that course sought to put the plaintiff, for the purposes of this action, in the same position as if he had not claimed compensation under the statute, at the same time seeking to reserve under his election to claim such compensation its own right to maintain an action against the present

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defendant should the plaintiff's action fail. I cannot think it was competent for the Board to take that course. But whether it was so or not, the document of the 13th February, 1919, signed on its behalf by its secretary is not an authorization of the plaintiff's action nor a ratification or adoption of it. On the contrary, it is a very plain intimation that the plaintiff's action must be treated as entirely his own and not as authorized by, or under the control of, the Board.

In my opinion proceedings in the action should be stayed to enable the plaintiff to procure and file an authorization of the Board substantially in the terms of his solicitor's application of the 8th of January. Upon such authorization being filed the appeal should be dismissed but without costs.

BRODEUR J.—I concur with the Chief Justice.

MIGNAULT J.—The sole grounds of appeal of the appellant company—which, on the jury's verdict, was condemned to pay $2,500.00 to the respondent—are based on sec. 9 of "The Workmen's Compensation Act" (Ontario), 4 Geo. V. ch. 25.

At the trial it was disclosed that the respondent had elected to claim compensation under the Act, his election being in the following terms:—

> Whereas on or about April 17, 1918, I, Alexander Hutton, employed by Canada Bread Co., of Toronto, received injuries by accident arising out of and in the course of my employment, as follows:—Compound fracture of the leg. And whereas it is alleged that such accident and injuries were caused by the negligence or wrongful act or breach of duty of some person or persons other than my said employer.
>
> Now, therefore, I, the said claimant, do hereby elect to claim compensation for said injuries under the provision of Part I. of "The Workmen's Compensation Act" (4 Geo. V., ch. 25, Ontario), and I hereby forego any and all my right or rights of action whatsoever against such third party or parties in respect of such accident and injuries, it being understood that by this election the Workmen's

Compensation Board is subrogated to all my rights, rights of action and remedies which otherwise I would have against such third party or parties in respect of said accident and injuries.

The appellant contends that this election of the respondent is a complete discharge in its favour. I take it that it does not amount to a discharge, but rather that its effect is that the respondent subrogated the Workmen's Compensation Board to any right which he had against the appellant. Moreover, in my opinion, such an election must be read with sec. 9 in order to determine its legal effect.

There was some discussion as to the construction of sec. 9, but upon full consideration it appears to me that this section has not the meaning which the appellant puts on it, and which would in such a case vest the right of recovery solely in the Board.

In no way can sec. 9 be considered to be enacted for the benefit or protection of the wrongdoer. It starts out by stating that the injured party, who has by law, and independently of the statute, a right of action

against some person other than his employer,

may, if entitled to compensation under the Act claim such compensation or bring such action.

Then if the action is brought and less is recovered and collected than the amount of the compensation to which the workman or his dependents are entitled under the Act, the difference, between the amount recovered and collected and the amount of the compensation under the Act, shall be payable as compensation to the workman or his dependents.

If the workman or his dependents elect to claim compensation under the Act, the employer (if individually liable to pay it) and the Board (if the compen-

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sation is payable out of the accident fund) are subrogated to the rights of the workman or his dependents,

and may maintain an action in his or their names against the person against whom the action lies, and any sum recovered from him by the Board shall form part of the accident fund.

While following, although not very closely, the language of the statute, I think I have indicated its meaning. It is clear that the election to claim compensation under the Act does not discharge the wrongdoer, for sub-sec. 3 expressly says that the employer or the Board may maintain an action against him in the name of the workman or of his dependents. And sub-sec. 4, as to the notice of the election to claim compensation under the Act, shews that the election is without any effect *quoad* the defendant, for notice must be given to the employer or to the Board and never to the wrongdoer. The subrogation mentioned in sub-sec. 3—and perhaps a better word than subrogation could have been used, for at first this term gave me some difficulty—gives the employer or the Board the control of the action of the workman or of his dependents, but does not divest him or them of their right of action against the wrongdoer, or give the latter the right to treat the election to claim compensation under the Act as a discharge from liability. This election does not ensure the granting of compensation by the Board, and therefore it cannot have been intended that by itself it would bar any action against the wrongdoer.

So far there appears no serious difficulty, but the appellant having amended its statement of defence at the close of the trial in order to claim that the respondent's election to take compensation under the Act barred his action against the company, the respondent after the judgment applied to the Board to

obtain its consent ratifying all proceedings that had been taken or might be taken in this action by or on behalf of the plaintiff.

The Board thereupon made the following order:—

In the matter of Claim 74319—Alexander Hutton and—

In the matter of an action in the Supreme Court of Ontario, between Alexander Hutton, plaintiff, and the Toronto Railway Company, defendant.

Upon the application of the plaintiff made unto the Workmen's Compensation Board on Tuesday, the 14th day of January, 1919, and upon hearing counsel for both parties.

The Workmen's Compensation Board hereby consents and agrees that, for the purposes of the said action, the said plaintiff be permitted to withdraw his election to claim compensation from the said Board, and for the said purposes the said Board hereby releases and assigns to the said plaintiff as from the date of the said election all its rights and title to proceed against the said defendant for the cause of action involved therein, provided that, in the event of the said plaintiff's action failing by reason of the right to bring such action being vested in the said Board, and not in the said plaintiff, the said Board is to be entitled to bring such action as it would have been entitled to bring if this consent and agreement had not been given.

The Board's consent as given goes beyond the relief applied for, and erroneously assumes that the election to claim compensation under the Act vested in the Board any right of action against the wrongdoer, and it unnecessarily purports to assign to the respondent a right of action which he had not lost, the only effect of his election being that the control of his action passed to the Board. I do not therefore think that the Board's order can in any way help the appellant.

The Appellate Division varied the judgment of the learned trial judge so as to order that the appellant do pay to the Workmen's Compensation Board the damages recovered by the respondent, to be dealt with by it pursuant to the "Workmen's Compensation Act." The respondent has not cross-appealed and the appellant appears to me without interest to com-

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plain of this modification of the judgment. By paying the damages according to the judgment it will be discharged from any possible claim either by the respondent or by the Board. The whole ground of its appeal to this Court was that the election of the respondent to claim compensation under the Act barred his action, and in that the appellant fails, so that in my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Dewart, Harding, Maw & Hodgson.*

Solicitors for the respondent: *Proudfoot, Duncan, Grant & Gilday.*