HENRY CHING (PLAINTIFF) ..... APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT.

1943

*May 10.
*June 29.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Workmen's compensation—Negligence—Crown—Master and servant—Employee of Dominion Government injured in course of employment in Province of Alberta through negligence of servants of railway company, an employer in an industry within scope of Workmen's Compensation Act, Alta., 1938, c. 23—Action by said employee against railway company for damages—Question whether right of action affected by said Act, particularly s. 24 (6), or affected by dealings with and actions by Workmen's Compensation Board—Operation and effect of Government Employees Compensation Act, R.S.C. 1927, c. 30, as amended in 1931, c. 9.

Plaintiff, a resident of the province of Alberta, was employed by the Dominion Government as a postal clerk. While engaged in his duties on a railway mail car in defendant's train in said province, he was injured through negligence of defendant's employees. Certain forms in use in the administration of *The Workmen's Compensation Act*, Alberta, 1938, c. 23, were completed and sent to the Workmen's Compensation Board of the province. The Board paid plaintiff's medical and hospital expenses, charging at first the amount thereof to the Dominion Government's deposit with the Board, but later transferring the charge so that it was made, purportedly under the power given by s. 24 (6) of said Act, against the account of defendant, which was an employer in an industry within the scope of the Act. The Dominion Government continued payment of plaintiff's salary while he was off duty through his injuries, but later the said Board charged against defendant an amount equal to the compensation to which plaintiff would have been entitled had his salary not been paid, and (after getting completed a form of assignment by plaintiff) paid that amount to the Dominion Government. Plaintiff sued defendant for general damages. A defence was raised that, by force of s. 24 (6) of said Act, there was no right of action against defendant; that its only liability was under that section, and, by the Board's action in assessing against it the said expenses and compensation, defendant's liability had been discharged.

Held (reversing judgment of the Supreme Court of Alberta, Appellate Division, [1943] 1 W.W.R. 93): Plaintiff was entitled to maintain his action. His right of action was not destroyed by said s. 24 (6).

A consideration of said s. 24 (6), and the language and scheme of said Act as a whole, makes it clear that s. 24 (6) is dealing only with cases in which both the workman and his employer are bound by the Act; and the employer in this case, the Crown in right of the Dominion, is not so bound, and neither, then, is its employee. The designation, in Schedule 2 of the Act, of "employment by Dominion Government" as an employment to which the Act applies must be

*PRESENT:—Duff C.J. and Davis, Kerwin, Hudson and Rand JJ.

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taken, in view of s. 2 (*h*) (which in the definition of "employer" includes the Dominion Crown "in so far as the latter, in its capacity as master, may submit to the operation of the Act"), as implying the words "as an employer within the Act"; and until there is a submission under s. 2 (*h*) the Dominion Government is not such an employer, and s. 19 creating the right to compensation does not operate in favour of its employees. The enactment of the *Government Employees Compensation Act*, R.S.C. 1927, c. 30, as amended in 1931, c. 9, (hereinafter called the Dominion Act), had not the effect of a submission by the Crown under said s. 2 (*h*) of the *Workmen's Compensation Act* (hereinafter called the Provincial Act). What the Dominion Act does is to make full provision for the creation of rights in, and the payment of compensation to, Dominion Government employees; for the purpose of administration, either the existing machinery under the compensation laws of the various provinces, or new machinery set up under the Dominion Act itself, may be used; the authority given by the Dominion Act to the Provincial Board is strictly limited and the right of Dominion Government employees to compensation is unencumbered by a referential incorporation of provisions of the Provincial Act dealing with consequential matters; by s. 3 (1) of the Dominion Act, which gives a right to compensation to employees, it is the liability of the Dominion Government to pay and the amount of compensation which are to be determined, not the resulting effects upon collateral rights against third parties; to suggest that the enactment of a special code of provisions with the powers (as given in the Dominion Act) of carrying them into administration without reference to the provincial Board, is a submission in any sense of the term to a provincial Act constituting another code, is to disregard the precise and individual character of the Dominion enactment.

As to the contention that plaintiff by his dealings with the Board had so brought himself within the Provincial Act as to be estopped from asserting a right which that Act purports to have abolished: What plaintiff did was clearly under the procedure of the Dominion Act; the Board functioned as contemplated by that Act, and its forms were conveniently used to enable it to make the necessary determination of the Dominion Government's liability for and the amount of compensation; it was only the circumstance that an employer under the Provincial Act was legally responsible for the injury that gave rise to the questioning of those steps; and an erroneous assumption by the Board that all provisions of the Provincial Act were applicable to Dominion Government employees was no warrant for transmuting appropriate measures under the Dominion Act into like proceedings under the Provincial Act.

As to the contention that the Board had found that plaintiff, as an employee of the Dominion Government, was a workman under the Provincial Act and that such a finding, by s. 10 of that Act, was not open to question: In dealing with plaintiff the Board was acting not under the Provincial Act but as the administrator of the Dominion law; its assumption, therefore, that plaintiff was a workman within the meaning of s. 24 (6) of the Provincial Act and its action under said s. 24 (6) in relation to defendant were by reason of what it conceived to be the true effect of the Dominion enactment; but to action by the Board in that capacity said s. 10 has no application.

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APPEAL by the plaintiff from the judgment of the Supreme Court of Alberta, Appellate Division (1), dismissing his appeal from the judgment of Howson J. (2) dismissing his action, which was brought to recover from the defendant general damages for injuries received in an accident.

The plaintiff, a postal clerk employed by the Dominion Government, and residing at Calgary, Alberta, was, while engaged in his duties on a railway mail car in a train of the defendant railway company, injured by an accident which occurred on March 15, 1940, in the province of Alberta, through negligence of employees of the defendant.

The Dominion Government continued payment of plaintiff's salary while he was off duty through his injuries.

The District Director of Postal Services completed and filed with the Workmen's Compensation Board of Alberta a form "Employer's Report of Accident", and subsequently the plaintiff completed and sent to the Board a form "Workman's Report of Accident and application for compensation". The Board paid plaintiff's medical and hospital expenses, and charged the amount thereof against the Dominion Government's deposit with the Board, but later transferred the charge so that it was made, purportedly under the power given by s. 24 (6) of *The Workmen's Compensation Act*, Alberta, 1938, c. 23, against the account of the defendant, which was an employer in an industry within the scope of that Act. Later the Board charged against defendant an amount equal to the compensation to which plaintiff would have been entitled had his salary not been paid to him, and paid that amount to the Receiver General of Canada. Before making that payment the Board required from plaintiff an assignment in favour of the Receiver General and for that purpose sent a form to plaintiff, which was completed but not sent to the Board for a time, during which there was certain correspondence between plaintiff's solicitors and the Board. In that correspondence plaintiff's solicitors took the attitude that the services of the Provincial Compensation Boards are employed by the Dominion Government only to the extent contemplated by the Dominion *Government Employees Compensation Act* (R.S.C. 1927, c. 30, as amended

(1) [1943] 1 W.W.R. 93; [1943] 1 D.L.R. 134.
(2) [1942] 2 W.W.R. 73; [1942] 3 D.L.R. 749.

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by c. 9 of the Statutes of Canada, 1931); and that the latter Act does not contemplate any restriction upon the employees' rights of action; and that plaintiff was not bound by the limitations of the Provincial *Workmen's Compensation Act;* and, in sending the completed form to the Board, stated that it was sent on the express understanding that plaintiff had signed and was returning the form without prejudice to his contention that his rights against defendant were not in any way restricted by s. 24 of the last mentioned Act.

Plaintiff sued defendant for general damages, not including claim for loss of salary or medical and hospital expenses. Defendant denied that plaintiff had suffered damage, and also defended on the ground, dealt with and given effect to in the Courts below, that by force of s. 24 (6) of the said Provincial *Workmen's Compensation Act,* there was no right of action against defendant; that its only liability was under that section, and, by the Board's action in assessing against it the said expenses and compensation, defendant's liability had been discharged.

R. L. Fenerty for the appellant.

James McCaig K.C. for the respondent.

David Mundell for the Attorney-General of Canada, intervenant.

The judgment of the Court was delivered by

RAND J.—The facts of this appeal can be shortly stated. The appellant, a postal clerk, while engaged in his duties on a railway mail car, was injured in an accident in Alberta through the negligence of employees of the respondent. The appellant and the District Director of Postal Services submitted the usual reports of accident to the Workmen's Compensation Board of Alberta, which administers the *Government Employees Compensation Act* (ch. 30, R.S.C. 1927) as amended by ch. 9 of the Statutes of Canada, 1931. Payment of medical and hospital expenses was authorized by the Board but, as the appellant's salary, under the *Civil Service Act* and its regulations, was continued while off duty, no compensation was included. The amount of these expenses was charged against the funds of the Dominion

Government on deposit with the Board, as contemplated by section 3 (3) of the Dominion Act. Some time afterwards, following correspondence between the Board and the Officer in Charge of Compensation in the Department of Transport, the Board transferred the charge to the account of the respondent, purportedly under the power given by section 24 (6) of the Provincial Compensation Act. Still later the Board charged against the respondent an amount equal to the compensation the appellant would have been entitled to had his salary not been paid him, and issued a cheque for the same amount in favour of the Receiver General of Canada. The appellant then brought this action for damages other than those already dealt with. The respondent defended substantially on the ground that, by force of section 24 (6) of the Provincial Act, there was no right of action against the respondent; that the only liability of the latter was under that section and that, by the action of the Board in assessing against it the expenses and compensation mentioned, its liability had been discharged. The trial Judge upheld that defence and his judgment was affirmed on appeal.

Harvey, C.J.A., with whom Lunney, J.A., concurred, took the view that the Provincial Act, by force of its own terms, created a right to compensation in the appellant as a Dominion Government employee against the Accident Fund set up by the Provincial Act and that this was so, regardless of whether the Dominion Crown as employer had under section 2 (*h*) submitted to the Provincial Act, or whether the appellant was entitled to receive compensation under a Dominion enactment. From this it followed, under section 24 (6) of the Provincial Act, that no right of action had arisen against the respondent.

Ford, J.A., with Ewing, J.A., and Macdonald, J., concurring, based his opinion on a construction of the Dominion Act, which he held assimilated the rights of Dominion employees thereunder to those of employees generally within the Provincial Act, and from this the same conclusion followed that no right of action against the respondent had arisen. He was disposed to think also that the finding of the Board under section 10 (9) (*j*) of the Provincial Act, which defines the Board's exclusive jurisdiction, that the appellant was a workman under that Act, could not be challenged.

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The first ground is based upon the construction given to the opening words of section 72: "This Act shall apply to all classes of employment enumerated in the schedules hereto." Class 95 of schedule 2 is "Employment by Dominion Government". From this the conclusion is drawn that under section 19 rights in employees of that class arise absolutely and regardless of the position of the Crown in relation to the Act.

This view quite ignores the conditional application of the statute to the Crown as an "employer". Section 2 (*h*) in its definition of that term contemplates the inclusion of the Crown "in so far as the latter, in its capacity as master, may submit to the operation of the Act". To the extent, therefore, that the provisions of the statute deal with "employer" that submission, whatever its form, is a condition of their application, upon which, among others, section 51, expressly contemplating the assessment of the Crown, is intended to become, vis-à-vis that employer, operative.

But under section 72 it is the Act and not merely certain of its provisions that is to apply to the enumerated classes of employment; and when the schedule designates "Employment by Dominion Government" as a class it must be reconciled with section 2 (*h*). That reconciliation is quite apparent: "Employment by Dominion Government" implies "as an employer within the Act"; but until there is a submission under 2 (*h*), the Government is not such an employer and section 19 creating the right to compensation does not operate in favour of its employees.

A similar conclusion follows from the language of section 24 (6):

> In any case within the provision of subsection (3), neither the workman nor his dependents nor the employer of such workman shall have any right of action in respect of such accident against an employer in any industry within the scope of this Act; and in any such case where it appears to the satisfaction of the Board that a workman of an employer in any class is injured owing to the negligence of an employer or of the workman of an employer in another class within the scope of this Act, the Board may direct that the compensation awarded in such cases shall be charged against the last mentioned class.

Now the question is whether within that section there can be a workman whose employer is not bound by the Act. Does the first part of the subsection apply where only one right of action, namely, that of the workman, is

destroyed? It clearly cannot be taken that the subsection would remove a right of action from an employer to whom it gave no compensating benefit. But in that case, although the employer responsible for the wrong is released from liability to the workman, his class is not made responsible in the accounting adjustment; that takes place only when both employers are under the Act. These considerations make it clear that the subsection is dealing only with cases in which both the workman and his employer are bound by the statute and, as here, on the assumption underlying the first ground, the Crown is not so bound, neither then is the employee of the Crown.

That conclusion is not only consistent with but it seems to be required by the scheme of the Act as a whole. An examination of its provisions makes it evident that, with the possible exception of the special cases within section 22 (2), what are contemplated are workmen and employers both amenable to those provisions. The "workman" within the Act has his "employer" within the Act and, conversely, the "employer" his "workman". These correlative capacities are conceived as coexisting before rights vest in the one or obligations attach to the other.

There is, too, a necessary rejection given by the language of the Act to a construction that would create a right to compensation in a Dominion Government employee out of a fund to which his employer was not bound to contribute. General industry in Alberta was not visualized as the source of monies to meet the responsibility to its employees of that Government. The right to compensation, which, as Harvey, C.J.A., observes, is to be the substitute for the right of action against the wrongdoer, must be absolute and effective. Anything less would be an abortive declaration binding on neither the Dominion Crown nor the Accident Fund and quite incapable of being treated as the "right" intended as a substitute for the real right against the wrongdoer.

It is next contended that there has been a submission by the Dominion Crown under section 2 (*h*) by the effect of the Dominion enactment itself. What the latter does is to make full provision for the creation of rights in, and the payment of compensation to, Dominion Government employees. For the purpose of administration, either the existing machinery under the compensation laws of the

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various provinces, or new machinery set up under the Dominion Act itself, may be used; and if the questions arising in this case are examined in the light of an administration by a Dominion body or officer rather than by the Provincial Board, most of the difficulties encountered disappear. The authority given by the Dominion Act to the Provincial Board is strictly limited and, under the language of the principal section, the right to compensation is unencumbered by a referential incorporation of provisions of the Provincial Act dealing with consequential matters.

It may be useful here to set out the first subsection of section 3:

> (1) An employee who is caused personal injury by accident arising out of and in the course of his employment, and the dependents of an employee whose death results from such an accident, shall, notwithstanding the nature or class of such employment, be entitled to receive compensation at the same rate as is provided for an employee, or a dependent of a deceased employee, of a person other than His Majesty under the law of the province in which the accident occurred for determining compensation in cases of employees other than of His Majesty, and the liability for and the amount of such compensation shall be determined subject to the above provisions under such law, and in the same manner and by the same board, officers or authority as that established by such law for determining compensation in cases of employees other than of His Majesty, or by such other board, officers or authority, or by such court as the Governor in Council shall from time to time direct: Provided that the benefits of this Act shall apply to an employee on the Government railways who is caused personal injury by accident arising out of and in the course of his employment, and the dependents of such an employee whose death results from such an accident, to such an extent and such an extent only as the Workmen's Compensation Act of the province in which the accident occurred would apply to a person in the employ of a railway company or the dependents of such persons under like circumstances.

The important words are: "And the liability for and the amount of such compensation shall be determined * * * in the same manner and by the same board." It is the liability of the Dominion Government to pay and the amount of the compensation, the right to which is given earlier in the section, which are to be determined; not the resulting effects upon collateral rights against third parties. To suggest, therefore, that the enactment of a special code of provisions with the powers of carrying them into administration without reference to the Provincial Board, is a submission in any sense of the term to a Provincial Act constituting another code, is to disregard the precise and individual character of the Dominion enactment.

Ford, J.A., stresses the proviso to section 3 (1) and attributes to it an implication which, apparently, expands the scope of the words of reference to the Provincial Act to embrace in effect the whole of its substantive provisions including section 24 (6). What the proviso deals with is Dominion employees in the service of the Government Railways; and it does no more than limit their benefits to those enjoyed by employees of company railways. But the "benefits" of the Dominion Act are the various items of compensation; and neither this language nor any implication from it carries us into the field of the collateral provisions of the Provincial Act.

It is then urged that the appellant, by his dealings with the Board, has so brought himself within the Provincial Act as to be estopped from asserting a right which that Act purports to have abolished. What the appellant did was clearly under the procedure of the Dominion Act. Admittedly, the Board functioned as contemplated by that Act; the deposit of funds was made; it was aware the appellant was a Dominion Government employee; its forms were conveniently used to enable it to make the necessary determination of the liability of the Dominion Government for and the amount of compensation to which the appellant was entitled, a course doubtless followed in many cases; and it is only the circumstance that an employer under the Provincial Act was legally responsible for the injury that gives rise to the questioning of those steps. The evidence of the witness Rose indicates that the Board assumed all provisions of the Provincial Act to be applicable to Dominion Government employees but that misconception is no warrant for transmuting appropriate measures under the Dominion Act into like proceedings under the Provincial Act.

There remains the contention that the Board has found the appellant, as an employee of the Dominion Government, to be a workman under the Provincial Act and that such a finding, by section 10 of that Act, is not open to question.

But in dealing with the appellant, the Board was acting not under the Provincial Act but as the administrator of the Dominion law. Its assumption, therefore, that the appellant was a workman within the meaning of section 24 (6) of the Provincial Act and its action under that

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section in relation to the respondent were by reason of what it conceived to be the true effect of the Dominion enactment; but to action by the Board in that capacity, section 10 of the Provincial Act clearly has no application.

The judgments appealed from fully recognize that the appellant can lose his rights against the respondent only in virtue of legislation which, by express words or by clear implication, takes them away. The point of difference between us is that, in my opinion, there is no such clear implication. The appeal should, therefore, be allowed and the case remitted for an assessment of damages, with costs to the appellant throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Fenerty, Fenerty & Bessemer.*

Solicitor for the respondent: *James McCaig.*

Solicitor for the Attorney-General of Canada: *F. P. Varcoe.*