HIS MAJESTY THE KING ..... APPELLANT;

AND

BESSIE MAY SNELL AND THE WORKMEN'S COMPENSATION BOARD OF THE PROVINCE OF BRITISH COLUMBIA (SUPPLIANTS) ..... RESPONDENTS.

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*Oct. 24
1947
*Feb. 4

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Negligence—Crown—Workmen's compensation—Damages—Death through accident caused by negligence of servant of the Crown (Dom.)—Action on behalf of dependents of deceased under Families' Compensation Act, R.S.B.C. 1936, c. 93, claiming damages against the Crown—Exchequer Court Act, R.S.C. 1927, c. 34 (as amended), ss. 19(c), 50A—Claim and acceptance, prior to the action, of compensation from the Workmen's Compensation Board of British Columbia—Question as to effect thereof on right of action or extent of recovery—Workmen's Compensation Act, R.S.B.C. 1936, c. 312, s. 11—Subrogation of the Board—Board a co-suppliant in the action.

The husband of S, while working in the course of his employment by one D, in the province of British Columbia, was the victim of an accident through which he died, which accident was caused by the negligence of a member of the Canadian military forces while acting within the scope of his duties or employment. S was awarded compensation for herself and her infant son by the Workmen's Compensation Board of British Columbia under the *Workmen's Compensation Act*, R.S.B.C. 1936, c. 312. She brought the present action (by petition of right) for the benefit of herself and her son under the *Families' Compensation Act*, R.S.B.C. 1936, c. 93, claiming damages against the Crown by virtue of ss. 19 (c) and 50A of the *Exchequer Court Act*, R.S.C. 1927, c. 34 (as amended in 1938, c. 28, and 1943, c. 25). S. 11 of said *Workmen's Compensation Act* provides for cases where an accident happens in such circumstances as entitle the workman or his dependents "to an action against some person other than his employer", and subs. 3 thereof provides in effect that, if a workman or dependent claims compensation from said Board, the Board shall be subrogated to the rights of the workman or dependent as against such other person. In the present action the Board was a co-suppliant, pleading its statutory right of subrogation, and also an equitable assignment in writing from S to it.

Held: The claiming and acceptance by S of compensation under said *Workmen's Compensation Act* did not bar her right to recover, nor affect the amount recoverable, from the Crown in the present action. S. 11(3) of that Act only affected rights as between the dependents and the Board. The direction by the Exchequer Court that the amount it awarded as damages to S should be payable to the Board and the amount it awarded as damages to her son should be paid into court to abide the Court's order, with liberty to the Board to apply for a declaration as to its rights, was unobjectionable.

Judgment in the Exchequer Court, [1945] Ex. C.R. 250, affirmed.

*Present:—Kerwin, Taschereau, Rand, Kellock and Estey JJ.

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APPEAL by the Crown from the judgment of the Honourable Mr. Justice Sidney Smith, Deputy Judge of the Exchequer Court of Canada (1), in favour of the suppliants against the Crown (in right of the Dominion of Canada) for damages.

The action was brought (by petition of right) for damages by reason of the death through accident of Bertram Snell who was, at the time of the accident, working in the course of his employment as a servant of one Dines, in the province of British Columbia. The accident was caused by negligence of a member of the Canadian military forces while acting within the scope of his duties or employment. The action was brought on behalf of the widow of the deceased and her infant son, under the *Families' Compensation Act,* R.S.B.C. 1936, c. 93, and amendments thereto. Prior to the action the widow had claimed and been awarded compensation for herself and her son by the Workmen's Compensation Board of British Columbia under the *Workmen's Compensation Act,* R.S.B.C. 1936, c. 312. The said Board was a co-suppliant in the action, pleading that it was subrogated, pursuant to provisions of s. 11 of the said *Workmen's Compensation Act,* to the claims of the dependents, and also pleading an equitable assignment in writing from the widow to it.

On behalf of the Crown it was alleged that in consequence of the election by the widow to claim compensation, and payment to and acceptance by her of the monthly award of the Board for herself and her son as compensation for the death of her husband, she had suffered no loss or damage in law which would entitle her to maintain an action against the Crown under s. 19(*c*) of the *Exchequer Court Act,* R.S.C. 1927, c. 24 (an alternative submission in the present appeal was that she had no claim except to the extent that the award to her under the *Workmen's Compensation Act* had not fully compensated her); that she had assigned her right of action and, as a result, was not entitled to maintain an action; that the provisions of the said *Workmen's Compensation Act* were not applicable

(1) [1945] Ex. C.R. 250; [1946] 1 D.L.R. 632.

to the Crown and that the suppliant Board could acquire no right of action against the Crown by subrogation under that Act.

The contentions of the parties are further stated in the reasons for judgment in this Court now reported.

By the formal judgment in the Exchequer Court it was ordered that the suppliants were entitled to recover from the Crown, as damages suffered by the widow the sum of $13,500 payable to the Board and by them to be dealt with in due course, and as damages suffered by the son the sum of $3,500 to be paid into court to the credit of the suppliants to abide the order of the Court, and that the Board be at liberty to apply to the Court for a declaration that the Board is by subrogation entitled to the said sum of $3,500 and to payment out to them of said sum.

W. R. Jackett for the appellant.

F. A. Sheppard, K.C. for the respondents.

KERWIN, J.—On September 29, 1943, Bertram Snell died in consequence of a collision between two motor trucks on a highway in the Province of British Columbia. The collision was occasioned by the negligence of Sapper Neufeld, a member of the military forces of His Majesty in the right of Canada, which negligence occurred while Neufeld was acting within the scope of his duties or employment. At the time, Snell was engaged in the course of his employment in driving a truck of his employer, one Dines, and the collision occurred between that truck and one owned by the Dominion Crown and driven by Neufeld. This Court has not had occasion to pass upon the judgment of the Exchequer Court in *McArthur* v. *The King* (1), where it was decided that a member of the Non-Permanent Active Militia of Canada on active service was not an officer or servant of the Crown within section 19(*c*) of the *Exchequer Court Act,* and it is not now necessary to do so as section 50A of that Act, as enacted by chapter 25 of the Statutes of 1943, provides:

50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and

(1) [1943] Ex. C.R. 77.

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thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

For another reason the date, June 24, 1938, is of importance, as it was then that chapter 28 of the statutes of that year was assented to, by which section 19(*c*) was repealed and re-enacted but with the omission of the words "on any public work" at the end thereof.

It has been authoritatively determined that section 19(*c*) not only conferred jurisdiction upon the Exchequer Court to adjudicate the classes of claims described but also that in such cases liability is imposed upon the Crown to respond in damages for the negligence of its officers or servants where, in like circumstances, such a liability would rest upon a subject corporation or individual according to the law of the province in which the claim arose as that law existed at the time when the *Exchequer Court Act* began to operate: *Canadian National Railway Co.* v. *Saint John Motor Line Limited* (1). Prior to June 24, 1938, even if Neufeld were an officer or servant of the Crown, a petition of right for such an occurrence as the one here in question could not have succeeded, since the negligence was not committed during Neufeld's presence on a public work: *The King* v. *Dubois* (2); *The King* v. *Moscovitz* (3). June 24, 1938, must, therefore, be taken as the date as of which the question must be determined whether in like circumstances a liability would rest upon a subject. At that time there was in force in British Columbia the *Families' Compensation Act,* R.S.B.C. 1936, chapter 93, whereby an action for damages for the death of Snell might be brought against the wrongdoer by and in the name of the widow for the benefit of herself and infant son. There was also in force the *Workmen's Compensation Act,* R.S.B.C. 1936, chapter 312.

A petition of right was accordingly brought against the Crown by the widow for damages for Snell's death. The accident having happened in such circumstances as entitled a workman's dependent to an action against some person other than the workman's employer, and the widow having claimed under the *Workmen's Compensation Act,* the

(1) [1930] S.C.R. 482, at 488.
(2) [1935] S.C.R. 378.
(3) [1935] S.C.R. 404.

Workmen's Compensation Board of British Columbia established thereby is, by virtue of subsection 3 of section 11, "subrogated to the rights of the workman or dependent as against such other person for the whole or any outstanding part of the claim of the workman or dependent against such other person." The Board also took an equitable assignment in writing from the widow. The Board was joined as a co-suppliant, not as a necessary party,—since the claim is that of the widow on behalf of herself and her infant son—but as a proper party.

The dispute of the claim is founded upon the facts that the widow had a right to claim compensation under the provisions of the *Workmen's Compensation Act* although she might choose not to exercise it; that she did make such a claim; that the Board ordered that certain monthly sums be paid to her for herself and for the son; and that these sums have been and are being paid. Although it is doubtful if the point is open on the pleadings, it was also argued that even if these circumstances did not defeat the present claim, the compensation awarded under the *Workmen's Compensation Act* should lessen *pro tanto* the sum awarded by the trial judge.

If the appellant's arguments were sound, they would apply as well between subjects as between the Crown and subject. It is well settled that it is only pecuniary loss for which compensation is to be paid under Lord Campbell's Act and legislation similar thereto, such as the British Columbia *Families' Compensation Act,* and that any pecuniary advantage a dependent has received from the death must be set off against her probable loss. In *Grand Trunk Ry. Co.* v. *Jennings* (1), the Privy Council decided, in an action under the Ontario *Fatal Accidents Act* as it then stood, that while the total amount of a life insurance policy need not as a matter of law be deducted from what would otherwise be payable as the pecuniary loss contemplated by the Act, the receipt of the insurance money was a proper circumstance to be taken into consideration. This has since been changed by statute in Ontario but not in British Columbia. In litigation between subjects, an action by the dependent of a workman whose

(1) (1888) 13 App. Cas., 800.

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death was caused by a third party would not be defeated by reason merely of the dependent's right to claim compensation under the *Workmen's Compensation Act*. If the dependent had claimed compensation, the Board, by subsection 3 of section 11, would have been "subrogated to the rights of the workman or dependent as against such other person for the whole or any outstanding part of the claim of the workman or dependent against such other person." It is not necessary to determine precisely to what the words "or any outstanding part" refer, but I am satisfied that they would not apply so as to reduce the claim of the dependent against a subject wrongdoer. The Board is subrogated to the dependent's rights against the third party and the Board's rights would not be defeated or curtailed by anything done by the dependent. That is, as between subjects, it seems clear that the wrongdoer could not successfully contend that the legislature intended that the receipt by a dependent of compensation under the *Workmen's Compensation Act* should be deducted from the sum otherwise payable under the *Families' Compensation Act*. If that were so, the subrogation of the Board to the dependent's rights would be illusory. Liability to the same extent attaches to the Crown.

Mrs. Snell is therefore entitled on behalf of herself and her infant son to damages. No question was raised as to the amounts allowed by the trial judge and nothing is said, therefore, as to the manner of their compilation. The petition of right being carried on at the instance of the Board, even if it were not a party, the judgment would still be in favour of the widow and infant. As between the Board and the widow and her son, the former is entitled to the amounts awarded and I think there is ample power in the Exchequer Court to direct, as has been done in this case, that the damages suffered by the widow should be payable to the Board, and that the damages suffered by the infant should be paid into Court for the benefit of all the suppliants to abide the order of the Court, with liberty to the Board to apply for a declaration that it is entitled by subrogation to the same sum and to payment out to the Board thereof.

The appeal should be dismissed with costs.

The judgment of Taschereau and Estey JJ., was delivered by

ESTEY J.—The late husband of the respondent, Bessie May Snell, was killed in a collision between a truck driven by himself, in the course of his employment, and an army vehicle driven by a soldier. Mrs. Snell applied for and received compensation under the *Workmen's Compensation Act,* R.S.B.C. 1936, c. 312.

This action is brought by the Workmen's Compensation Board of British Columbia and Mrs. Snell against the Crown in the right of the Dominion. The Board pleads an equitable assignment from Mrs. Snell to it and its right to subrogation under section 11(3) of the *Workmen's Compensation Act.*

The pleadings admit that the late Mr. Snell's death was caused by the negligence of the driver of the army vehicle and therefore that Mrs. Snell had an action against the Crown in the right of the Dominion by virtue of her position under the *Families' Compensation Act,* R.S.B.C. 1936, c. 93, and her consequent rights under section 19(*c*) and section 50A of the *Exchequer Court Act,* R.S.C. 1927, c. 34, as amended 1938 S.C., c. 28, and 1943 S.C., c. 25.

The Crown, however, contends that so far as Mrs. Snell is concerned, having received compensation under the *Workmen's Compensation Act,* she has either suffered no pecuniary loss, or alternatively has been fully compensated therefor and therefore has no cause of action, or in the further alternative that she is entitled to only the difference between what she has been awarded under the *Workmen's Compensation Act* and what may be found to be full compensation.

So far as the Workmen's Compensation Board is concerned, the Crown sets up a number of defences which may be summarized thus: that the Board suffered no pecuniary damage; the assignment is ineffective as against the Crown; and section 11(3) of the *Workmen's Compensation Act* does not give any remedy to the Board against the Crown in the right of the Dominion.

An examination of Mrs. Snell's position under the provincial *Workmen's Compensation Act* and under the sections of the *Exchequer Court Act* already referred to indicates

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that she had both a claim under the provincial Act and under the *Exchequer Court Act*. The contention here is that, having exercised her right and having accepted compensation under provincial legislation, that election on her part has barred her right to recover from the Crown in the right of the Dominion, if not completely, then to the extent that she has recovered compensation under that Act.

The position of one who elects under the *Workmen's Compensation Act* of Ontario was determined by this Court in *Toronto Railway Company* v. *Hutton* (1), where Mr. Justice Duff (later Chief Justice) stated at p. 421:

> 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*.

And at p. 422:

> 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 material provisions of the *Workmen's Compensation Act* of British Columbia here under consideration are to the same effect as those of the Ontario Act in *Toronto Railway Company* v. *Hutton, supra*. It follows, therefore, that the position of the party whose negligence caused the injury is unaffected by the provisions of the *Workmen's Compensation Act*.

The compensation under the statute is in no way a settlement of Mrs. Snell's claim for damages arising out of the negligence of the appellant. The basis for the compensation under the statute, that of "injury by accident arising out of and in the course of employment", is a much wider and different basis from that of a claim founded in negligence. A computation of the claim is also, as set out in the statute, quite different from that which would be followed in a negligence action. Moreover, the *Workmen's Compensation Act* provides in effect that the claim of Mrs. Snell at common law for damages continues and may be enforced. It therefore follows that the contention of the

(1) (1919) 59 Can. S.C.R. 413.

Crown that whatever damages Mrs. Snell may have suffered have been recovered and because thereof she has no further claim, is not tenable.

The statute does provide that, in the event of the party entitled to compensation accepting same, the Board is subrogated to or stands in the position of the party receiving compensation as against the party whose negligence caused the action. These are matters entirely between the party entitled to compensation and the Board. In this case both of these are parties to the action. It therefore becomes unnecessary to determine certain of the issues raised had the action been brought in the name of the Board only.

Both were parties to the action as framed and tried in the Exchequer Court. There the learned trial judge in his judgment directed how the funds received should be dealt with as between the Board, Mrs. Snell and her infant son. If the appeal otherwise failed, this disposition of the funds was not objected to.

The appeal should be dismissed and the judgment of the Exchequer Court affirmed.

RAND J.—In this case, the Dominion Crown, liable for the tort of its servant, claims a deduction from damages recoverable by the widow and child under the *Families' Compensation Act* of British Columbia, of the sums payable to them under the *Workmen's Compensation Act*. The contention is that the death statute is intended merely to maintain to the dependents the benefits they would have received if death had not ensued the accident, and that there must be taken into account all benefits that arise to them by reason of the death.

There is no doubt a distinction has been established between the effect on damages of such benefits in the case of injuries not causing death and those that result fatally. In *Bradburn* v. *Great Western Ry. Co.* (1), the court excluded evidence of moneys received under a policy of accident insurance, on the ground concisely stated by Pigott, B. in these words:

> He does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it.

(1) (1874) L.R. 10 Ex. 1.

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A different rule in death cases was first applied by Lord Campbell in *Hicks* v. *Newport, etc., Ry. Co.* (1), where he directed the jury to deduct from the aggregate sum found the amount of accident insurance accruing to the persons claiming. In *Grand Trunk Ry. Co.* v. *Jennings* (2), a further distinction was recognized between life and accident insurance, and it was held that the former should be regarded only to the extent that its payment may have been accelerated. This seems to rest on the view that the benefit of the accident insurance was a legal consequence of the act of the wrongdoer, that as death might never happen from accident, the act brought about, in a legal sense, not only the loss but the mitigation; but that in an insurance against death alone, only time separates the beneficiary from the benefit. The ruling as to accident insurance has been superseded, however, by an amendment to the English Act passed in 1908.

The question, then, is whether the rule applies to such a right as that to compensation under the Workmen's Act, and in my opinion it does not.

Section 11 of that Act is as follows:

11. (1) Where an accident happens to a workman in the course of his employment in 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 the workman or his dependents bring such action and less is recovered and collected than the amount of the compensation to which the workman or dependents would be entitled under this Part, the workman or dependents shall be entitled to compensation under this Part to the extent of the amount of the difference.

(3) If any such workman or dependent makes an application to the Board claiming compensation under this Part, the Board shall be subrogated to the rights of the workman or dependent as against such other person for the whole or any outstanding part of the claim of the workman or dependent against such other person.

(4) In any case within the provisions of subsection (1), neither the workman nor his dependents nor the employer of the workman shall have any right of action in respect of the accident against an employer in any industry within the scope of this Part; 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 Part, the Board may direct that the compensation awarded in such case shall be charged against the last-mentioned class.

(1) (1857) Reported in a note in 4 B. & S. 403.
(2) (1888) 13 App. Cas. 800.

It will be seen that the section deals specifically with the right of dependents under the Families' Act so as to create in effect a *quasi* indemnity and to subrogate the Board to the rights of the dependents when they have accepted compensation. But it is obvious that if such moneys can be deducted from the amount recoverable on the tort, the subrogation would be nullified. It would in fact reverse the plain purpose of the section and place upon the compensation fund *pro tanto* a primary liability. In the result, the Board at most would be entitled only to the excess of the claim against the wrongdoer over the compensation, the portion which equitably belongs to the dependents. The intention is clearly to preserve in full the cause of action, including damages, against the wrongdoer and to create a legal right in the Board to enforce it in the name of the dependents for the benefit of the compensation fund. Now the insurances held deductible were absolute in obligation; but the section, by importing that quality of indemnity, invests the right to compensation with a character outside of the category of benefits within the rule.

The Board is a co-petitioner and the judgment provides for the payment to it of the moneys recovered for the benefit of the widow. In the case of the child, the direction is to pay the sum recovered into Court with liberty to the Board to apply for a declaration of interest.

The effect of the statutory subrogation, a matter solely between the dependent and the Board, is to constitute the dependent a trustee of the right of action for the Board. The petitioners are, therefore, trustee and *cestui que trust.*

Whether or not that relationship raises in the Board an equitable right against the Crown, I do not find necessary to decide. The defence in this respect alleges simply that the Workman's Act is not applicable to the Crown, and that the Board "can acquire no right of action against the respondent by subrogation under the said Act", which I take to mean can create no legal right and to deny the competency of provincial legislation to affect a claim against the Crown given by a Dominion Act. But that leaves untouched the question whether the Crown is bound to recognize the beneficial ownership of such a claim. There

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is no doubt that many petitions of right have been presented and determined in chancery without challenge to the jurisdiction of the court to entertain them. The consideration that the remedies used by equity to enforce its decrees could not, by their nature, operate against the Crown is not present in a relation which permits the coercion of the court to be exercised upon a private person. The question is examined in chapter 11 of Clode on Petition of Right, where the instances in which petitions have been actually dealt with are enumerated. In an analogous case, *In re Rolt* (1), the petitioners were the assignees of a bankrupt contractor with the Crown, and I see no ground in principle why an interest of this nature should not be admitted against the Crown where it can be made effectual by a remedy operating upon the trustee: *The Queen* v. *Smith* (2), Strong J., at p. 66:

> Had the proof borne out this case, and had it appeared that the assignment was so limited, the suppliants would have been undoubtedly entitled to recover in respect of work actually performed by the original contractors, for such an equitable assignment would have been entirely free from objection, either upon the general law, or upon any provision contained in the contract, and the record would have been properly framed for relief upon such a state of facts.

Its convenience is obvious; to the Crown, the result is indifferent; it conforms to the equitable rule of concluding all features of a controversy in the one proceeding; and it secures the interest of a semi-public body.

I would, therefore, dismiss the appeal with costs.

KELLOCK J.—The contention of the Crown is that the dependents of the deceased, being entitled to compensation under the *Workmen's Compensation Act,* have no right of action under section 19(*c*) of the *Exchequer Court Act,* and alternatively, have no claim except to the extent that the amount awarded under the Compensation Act has not fully compensated them in respect of their claim under the *Families' Compensation Act.* It is further submitted in any event that the respondent Board has no claim at all under section 19(*c*) and that the *Workmen's Compensation Act* is ineffective to give it any.

(1) (1859) 4 DeG. & J. 44 (45 E.R. 18).
(2) (1883) 10 Can. S.C.R. 1.

It is, of course, well settled that the damage awarded under statutes of the nature of the *Families' Compensation Act* are limited to the pecuniary benefit which the dependents might reasonably have expected from the continuance of the life of the deceased. By reason of the provisions of section 19(*c*), the Crown becomes liable to pay such damages when the death has been caused in circumstances such as are here admittedly present.

Turning to the *Workmen's Compensation Act,* section 11 is as follows:

(1) Where an accident happens to a workman in the course of his employment in 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 the workman or his dependents bring such action and less is recovered and collected than the amount of the compensation to which the workman or dependents would be entitled under this Part, the workman or dependents shall be entitled to compensation under this Part to the extent of the amount of the difference.

(3) If any such workman or dependent makes an application to the Board claiming compensation under this Part, the Board shall be subrogated to the rights of the workman or dependent as against such other person for the whole or any outstanding part of the claim of the workman or dependent against such other person.

It is the submission of the Crown that the compensation provided by the above section is full compensation equivalent by the law of the province to the pecuniary value of the support the widow and her son would have received from the deceased and that consequently no loss has been sustained. The Crown further says that if the award is not by law full compensation, the Crown is liable only for any deficiency. The contention in effect is that the provision by way of Workmen's Compensation operates in ease of the tort-feasor. The Crown further says that section 11(3) canot confer any right upon the respondents as against the Crown.

It is said in answer by the respondents that while it is true that provincial legislation may not bind the Crown in the right of the Dominion *ex proprio vigore,* nonetheless the Crown may not take the benefit of the provisions entitling the dependents to compensation without reference

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to the terms upon which compensation is awarded, namely, the statutory subrogation of the Board to the rights of the dependents as against the wrong-doer.

It is said that where statutory rights are in question, as distinct from common law rights, *Crooke's Case* (1) is authority for the view that if the Crown, in order to establish rights it claims, must invoke the very statute which conditions those rights, the Crown is bound by the derogation, and reference is made to *Re Excelsior Electric Dairy Machinery Ltd.* (2) and to *Attorney General for British Columbia* v. *Royal Bank of Canada* (3), per Macdonald, J. A., at 294 and 297.

I do not find it necessary to pass upon the soundness of this contention, as I think the respondents are entitled to succeed upon the basis of their further contention, namely, that the relevant sections of the *Workmen's Compensation Act* are to be construed as affecting *inter se* the rights of the dependents and the Board only; *Toronto Railway Company* v. *Hutton* (4); and has no effect upon the liability of the Crown under section 19(*c*) to the person injured or his dependents.

In *Workmen's Compensation Board* v. *Canadian Pacific Railway Co.* (5), it was held that the rights given by section 8 of the then Act, 6 Geo. V, Cap. 77, constituted a statutory contract made with the workman for his benefit and for the benefit of members of his family dependent upon him. I think the principle of this decision is not limited to a case within section 8 where the accident happens outside the province, but applies equally to cases in which the accident takes place within the province. The relevant provisions of the statute here in question, R.S.B.C., cap. 312, are not materially different from the Act of 1916.

Hutton's case (6) was decided under the Ontario statute of which the corresponding provisions are not in essence dissimilar from those of the British Columbia statute. It was held in that case that an election to claim compensation under the Act did not bar the claim of the injured workman against the tort-feasor. In the language of

(1) (1691) 1 Shower K.B., 208.
(2) (1922) 52 O.L.R. 225 at 228.
(3) [1937] 1 W.W.R. 273.
(4) (1919) 59 Can. S.C.R. 413.
(5) [1920] A.C. 184.
(6) (1919) 59 Can. S.C.R. 413.

Mignault J., with whom the Chief Justice and Brodeur J. agreed, at p. 426, the subrogation effected by the statute "gives the * * * Board the control of the action", but does not divest the right of action from the workman or his dependents. The main contention of the appellant, therefore, in my opinion, fails.

The formal judgment directs recovery by both the Board and Bessie May Snell, payment to be made to the Board. It is objected that:

(*a*) the provincial legislation is incompetent to give the Board any right of action in its own name against appellant, and that,

(*b*) the assignment by Bessie May Snell to the Board is equally ineffective, as the right of action is *ex delicto* and therefore not the subject of assignment.

Mignault J., in dealing with a similar contention in *Hutton's* case (1), said at pp. 427-428:

> * * * the appellant appears to me to be without interest to complain 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.

In the present case, as in *Hutton's* case (1), the essential ground of the appeal and of the defence to the action was that the election of the respondent Snell to claim compensation barred the action. In my opinion, what happens with respect to the proceeds of the judgment as between the respondents in view of the discharge involved in payment, is a matter which, at this stage of the action, does not concern the appellant.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *F. P. Varcoe.*

Solicitor for the respondents: *W. S. Lane.*

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(1) (1919) 59 Can. S.C.R. 413.

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*Mar. 13, 14
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AND

RAYMOND QUINTON ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Indictment for attempted rape—Verdict of assault causing bodily harm—Appellate court substituting conviction of common assault—Appeal to this Court by the Crown—Conviction to be changed to that of indecent assault—Conviction for "included" offences under section 951 Cr. C.—Sections 72, 292(c), 300, 1016 Cr. C.

A jury, upon an indictment for attempted rape, returned a verdict of assault upon a female, causing actual bodily harm. Upon an appeal by the accused, the Court of Appeal held that an indictment for attempted rape did not include the offence for which he was found guilty, and the Court then substituted a conviction for common assault. The Crown appealed to this Court, asking that the substituted conviction be changed to that of indecent assault.

Held that the appeal should be dismissed.

Per the Chief Justice and Kerwin, Kellock and Estey JJ.:—The offence of indecent assault may be included in a count of attempted rape under section 951 Cr. C.; but, in this case, it was not open to the appellate court, in view of the finding of the jury, to substitute a conviction of indecent assault.

Per The Chief Justice and Estey JJ.:—The jury, in finding the accused not guilty as charged on the count of attempted rape, negatived the existence of the element of indecency and in effect found the accused not guilty of indecent assault. Therefore, the appellate court, so far as substituting one conviction for another under section 1016 (2) Cr. C., had no other course open to it than to substitute that of common assault.

Per Kerwin and Kellock JJ.:—Section 1016 (2) Cr. C. requires it to appear to the Court of Appeal on the actual finding that the jury "must" have been satisfied of facts which proved the respondent guilty of indecent assault.

Judgment of the Court of Appeal ([1947] O.R. 1) affirmed.

APPEAL by the Crown, upon leave to appeal granted under section 1025 Cr. C., from a judgment of the Court of Appeal for Ontario (1), allowing in part an appeal by the respondent from a conviction of having committed an assault upon a female causing bodily harm and substituting a conviction of common assault.

W. B. Common K.C. for the appellant.

Vera L. Parsons K.C. for the respondent.

*Present:—Rinfret CJ. and Kerwin, Taschereau, Kellock and Estey JJ.

(1) [1947] O.R. 1.

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The judgment of the Chief Justice and of Estey J. was delivered by

ESTEY J.:—The accused was indicted for attempted rape under section 300 of the Criminal Code. The learned trial judge instructed the jury that included in the count of attempted rape were the other offences of indecent assault, assault on a female occasioning actual bodily harm (sec. 292(*c*)), and common assault.

The jury returned a verdict of assault on a female occasioning actual bodily harm.

Upon an appeal by the accused the appellate court in Ontario held that an indictment for attempted rape did not include the offence of assault on a female occasioning actual bodily harm within the meaning of section 951. The learned judges of that court then substituted under sec. 1016(2) a verdict of common assault and imposed sentence of one year in reformatory.

The accused does not appeal but the Crown appeals to this court and asks that the substituted verdict of common assault be changed to that of indecent assault.

Leave to appeal was granted to the Crown on the basis that *Rex* v. *Stewart* (1) in which the Appellate Division in Alberta held that the offence of indecent assault is by virtue of the provisions of section 951 included in a count of attempted rape and, therefore, is in conflict with the decision of the appellate court of Ontario in this case.

The commission of the offence of rape includes an act of indecency, as stated by my Lord the Chief Justice in *Wright* v. *The King* (2):

> No doubt in a crime such as the one (rape) under consideration, the initial step might be stated to be an indecent assault, followed by the subsequent step which might be described as an attempt to rape * * *

Section 72 of the Criminal Code defines an attempt:

> Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not.

This section requires that one to be guilty of an attempt must intend to commit the completed offence and to have done some act toward the accomplishment of that

(1) (1938) 71 C.C.C. 206; [1938] 3 W.W.R. 631.

(2) [1945] S.C.R. 319, at 322.

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objective. That act must be beyond preparation and go so far toward the commission of the completed offence that but for some intervention he is prevented or desists from the completion thereof.

> Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it but acts immediately connected with it are. Parke B. in *Reg.* v. *Eagleton* (1), quoted by Lord Reading C.J. in *Rex* v. *Robinson* (2).

It is the existence of both the intent and the act in such a relationship that the former may be regarded as the cause of the latter. The intent unaccompanied by the act does not constitute a criminal offence.

In the early case of *Rex* v. *Scofield* (3), Lord Mansfield stated at p. 403:

> So long as an act rests in bare intention, it is not punishable by our laws: but immediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done; and, if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable.

This case is commented upon in Broom's Legal Maxims, 6th Ed. p. 305:

> It is a rule, laid down by Lord Mansfield, and which has been said to comprise all the principles of previous decisions upon this subject, that so long as an act rests in bare intention, it is not punishable by our laws; but when an act is done, the law judges not only of the act itself, but of the intent with which it was done; and if the act be coupled with an unlawful and malicious intent, though in itself the act would otherwise have been innocent, yet, the intent being criminal, the act likewise becomes criminal and punishable.

It appears from the foregoing that the intent may determine the criminal quality of the act. There is present in the offence of rape the intent to commit an indecent act. The same intent is required in the offence of attempted rape. In the latter that intent may be found from the nature of the act or from the conduct of the accused immediately associated with the commission of that act or indeed both. If such an intent be not present the offence of attempted rape is not committed. The act cannot be dissociated from the intent as evidence which caused the accused to do such act.

(1) (1855) Dears, 515, at 538.
(2) [1915] 2 K.B. 342, at 348.
(3) (1786) Caldecott's Rep. 397.

In *Rex* v. *Louie Chong* (1), the magistrate found the accused guilty of indecent assault and stated a case for the opinion of the appellate division in Ontario as to whether he was justified in finding the accused guilty of indecent assault, where the accused in taking hold of the girl did so in a manner that did not import indecency. At the same time, however, he offered her money to go with him for an immoral purpose. The judgment of the court written by Middleton J. affirmed the magistrate's conviction. His Lordship in delivering the judgment stated:

> It appears to me that an act in itself ambiguous may be interpreted by the surrounding circumstances and by words spoken at the time the act is committed * * *. It is in each case a question of fact whether the thing which was done, in the circumstances in which it was done, was done indecently. If it was, an indecent assault has been committed.

His spoken words which were part of his conduct evidenced the intention of the accused and determined the criminal quality of his act.

It would, therefore, appear that a count charging an attempt to commit rape would include the offence of indecent assault under section 951.

Though the offence of indecent assault is included in a count of attempted rape under section 951 it was not in this case, because of the finding of the jury, open to the appellate court to substitute a verdict of indecent assault. Section 951 provides that the

> accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved * * *

The learned trial judge explained to the jury the ingredients essential to find the accused guilty upon one or other of the four counts. Those of attempted rape and indecent assault require a finding of indecency, while that of actual bodily harm to a female does not. The jury in finding the accused not guilty as charged on the count of attempted rape negatived the existence of the element of indecency and, therefore, in effect found the accused not guilty of indecent assault.

Where an indictment contained three counts: (1) that the accused did unlawfully kill, under section 268; (2) grievous bodily harm, sec. 284; and (3) wanton or furious

(1) (1914) 23 C.C.C. 250.

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driving, sec. 285, the jury found the accused guilty of wanton or furious driving. Chief Justice Anglin stated at p. 47:

> In a case such as that at bar, that the jury had found that neither the whole offence charged in count No. 1 nor the whole offence charged in count No. 2 had been proved, is an intendment which we must make in support of the verdict.

And at p. 48:

> It was within the province of the jury to find that the offence charged in the third count was satisfactorily proven, but that, for reasons which we can only surmise and as to the validity or the adequacy of which we are not at liberty to inquire some essential element of each of the offences charged in the first and second counts respectively was, in their view, not established beyond reasonable doubt. *Barton* v. *The King* (1).

The jury in finding the accused guilty of assault occasioning actual bodily harm to a female negatived the existence of the element of indecency essential to the finding of a verdict of indecent assault. Therefore, the appellate court could not conclude "that the jury * * * must have been satisfied of the facts which proved him guilty of" indecent assault as required by section 1016(2) before it can substitute a verdict of guilty of that other offence. *Rex* v. *Hayes and Pallante* (2); *Rex* v. *Collins* (3).

In a case where the accused was found guilty of murder this court so satisfied was in a position to and did reduce the verdict to one of manslaughter. At p. 350 Chief Justice Duff:

> The finding makes it clear that the jury must have been satisfied of the facts necessary to constitute manslaughter, and we are, consequently, of opinion that the Court of Appeal would have authority under s. 1016 to substitute a verdict of manslaughter for the verdict of the jury and to pronounce sentence upon the prisoner. *Rex* v. *Hopper* (4); *Manchuk* v. *The King* (5).

The learned judges in the appellate court, because of the verdict of the jury, so far as substituting one verdict for another under section 1016(2), had no other course open to them than to substitute that of common assault.

The appeal should be dismissed.

(1) [1929] S.C.R. 42.
(2) (1942) 77 C.C.C. 195; [1942] O.R. 52.
(3) (1922) 17 Cr. A.R. 42.
(4) [1915] 2 K.B. 431.
(5) [1938] S.C.R. 341.

The judgment of Kerwin and Kellock J.J. was delivered by

KELLOCK J.:—This is an appeal by the Attorney General of Ontario, pursuant to leave granted under section 1025 (1) of the Criminal Code, from the judgment of the Court of Appeal for Ontario, dated December 13, 1946.

The present respondent was charged with attempted rape and on his trial before Schroeder J. and a jury was convicted of "assault upon a female occasioning actual bodily harm". The learned trial judge had charged the jury that they might convict as charged, or of indecent assault, or assault upon a female occasioning actual bodily harm or common assault or not guilty.

The respondent appealed in writing to the Court of Appeal and on the hearing of the appeal the court raised the question whether it was competent for the jury to return the verdict they had returned. It was held that such a verdict was not open to the jury and the court substituted a conviction of common assault, being of opinion that the jury by their verdict, in view of the learned judge's charge, had negatived indecent assault. Roach J.A., who delivered the judgment of the court, expressed disagreement with the decision of the appellate division of Alberta in *Rex* v. *Stewart* (1), by which it was held that, on a charge of attempting to have carnal knowledge of a girl under the age of fourteen, the accused might be convicted of indecent assault, under section 951 (1).

The Attorney General now appeals on the ground that the Court of Appeal was in error in holding that indecent assault is not an included offence in a charge of attempted rape. He asks that a conviction for indecent assault be substituted. We are not called upon otherwise to consider the judgment in appeal. Counsel for the respondent agrees with the submission of the appellant that the Court of Appeal was in error in the view taken with respect to indecent assault being included in the charge of the indictment here in question.

If common assault be an included offence in a charge of attempted rape as held by the Court of Appeal, and there can be no question but that such an assault would

(1) (1938) 71 C.C.C. 206.

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be an act within section 72, then such an act, though in itself ambiguous, may, interpreted by the surrounding circumstances, including words spoken at the time, amount to indecent assault; *Rex* v. *Louie Chong* (1). It is not necessary that the act constituting the assault be in itself indecent in its nature. If the assault, coupled with the intention required by section 72, is of such a nature as to constitute an attempt within the rule as laid down in *Rex* v. *Robinson* (2), such assault must necessarily be indecent; *Rex* v. *Louie Chong* (1). In other words, the crime of attempted rape progresses from assault through indecent assault to the complete crime. If the facts of the suppositious case referred to by Roach J.A. amount to the offence of attempted rape, the assault itself necessarily becomes indecent. This would appear to have been the view of the majority in *Wright* v. *The King* (3).

However, I agree with the Court of Appeal in the view that it was not open to that court, in view of the learned trial judge's charge and the verdict of the jury, to substitute a conviction for indecent assault. Section 1016 (2) requires it to appear to the Court of Appeal on the actual finding that the jury "must" have been satisfied of facts which proved the respondent guilty of indecent asault. The highest that Mr. Common puts his argument, and properly so, is that:

> It is quite possible that the jury might be under the erroneous impression that a conviction for assault occasioning actual bodily harm on a female was more serious than that of indecent assault.

That is not sufficient. I do not think that the Court of Appeal were required, in the circumstances here present, to come to the conclusion the statute requires.

I would accordingly dismiss the appeal.

TASCHEREAU J.:—I am of opinion that this appeal should be dismissed.

Appeal dismissed.

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(1) (1914) 32 O.L.R. 66.
(2) [1915] 2 K.B. 342.
(3) [1945] S.C.R. 319, at 322