IN THE MATTER of the Petition of Right of

THE WESTERN ASSURANCE COMPANY..... ..... ..... } SUPPLIANTS; 1909 May 28.

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Public work—Accident to vessel using canal—Negligence—Affirmative proof —Primâ facie case.*

*Held*, that in order to bring himself within the remedy provided by section 20 (c) of R. S. 1906, c. 140, a party must prove affirmatively that there was negligence on the part of some officer or servant of the Crown; to show merely that an accident had occurred is not sufficient to establish a *primâ facie* case of negligence. *Dubé* v. *The King* (3 Ex. C. R. 147) followed. *McKay's Sons et al.* v. *The Queen* (6 Ex. C. R. 1) referred to and explained.

PETITION OF RIGHT for damages arising out of an accident to a scow while using the Lachine Canal.

The facts are stated in the reasons for judgment.

March 11th, 1909.

The case came on for hearing at Montreal.

*E. Lafleur*, *K.C.* and *C. A. Pope* for suppliants.

*J. L. Perron*, *K.C.* and *R. Taschereau* for the respondents.

After the evidence was closed and the case partly argued, on motion of Mr. *Lafleur*, counsel for the respondent consenting, the case was reopened for the taking of further evidence at Montreal on the 6th May following.

May 6th, 1909.

*C. A. Pope* for the suppliants;

*R. Taschereau* for the respondent.

Mr. *Pope* contended that the evidence shewed a clear case of negligence actionable under *The Exchequer Court*

1909

THE WESTERN ASSURANCE CO. v. THE KING.

Argument of Counsel.

*Act.* The evidence as to the cause of the accident is uncontroverted. The Crown invited the suppliants to use the canal, and the accident shows that there was negligence in not keeping the canal free of logs. (Cites secs. 19 and 20 of *The Exchequer Court Act*; *City of Quebec* v. *The Queen* (1); *Mackay's Sons et al.* v. *The Queen* (2).) The suppliants are entitled to all damages suffered, including the cost of surveying the bottom of the scow. (Cites *Cedar Shingle Company* v. *Rimouski Assurance Company* (3).)

Mr. *Taschereau* contended that affirmative evidence of negligence was necessary on the part of the suppliants; it could not be presumed from the fact of an accident having happened. The remedy was statutory, and the negligence must be brought home to some officer or servant of the Crown while in the discharge of his duty.

Mr. *Pope* replied, citing sec. 16 of the *Canal Regulations*, and *Maxwell on Statutes* (4).

CASSELS, J. now (May 28th 1909) delivered judgment.

The petition of right is filed by the suppliants claiming the sum of $1,035.04 against the Crown for injury occasioned to the scow *Dominion No.* 2, while in the Lachine Canal, by a submerged log which penetrated through the barge causing it to sink.

The barge was at the time of the sinking the property of the Dominion Bridge Company. The suppliants had insured the scow, and after investigation of the loss paid the claim, and have been subrogated to the rights of the Dominion Bridge Co.

The petition was based on two grounds. That portion of the petition (par. 5) claiming damages by reason of the *Turret Crown* having struck the scow was abandoned by counsel for the suppliants at the opening of the trial.

(1) 24 S.C.R. 420.
(2) 6 Ex. C.R. 1.
(3) Q.R. 2 Q.B. 379.
(4) 4th ed. p. 360.

1909

THE WESTERN ASSURANCE CO. v. THE KING.

Reasons for Judgment.

The case came on for trial at Montreal on the 11th March, 1909 and the evidence was closed.

Mr. *Lafleur* relied on the case of the *Acadia*: *Mackay's Sons et. al.* v. *The Queen* (1). The judgment in that case was an oral judgment, and might lead to the impression that the suppliant might succeed in an action without proof of actual negligence. The facts in that case when the record is examined shew that there was actual negligence on the part of an officer of the Crown committed by such officer while acting within the scope of his duty.

On mentioning my doubt as to the correctness of this decision as reported, without the facts of the case being considered, Mr. *Lafleur* asked to have the case reopened, and counsel for the Crown not objecting, leave was given the suppliant to adduce further evidence, and by consent of counsel the trial was adjourned until the 6th May, 1909, when further evidence was adduced and argument concluded.

There is but little dispute as to the main facts, or as to the amount of damages. The only difference as to the amount of damages is as to the right of the suppliants to add to the claim for damages the expense the suppliants incurred in investigating the claim of the Dominion Bridge Co.

Zepherin Clement was captain of the scow *Dominion No.* 2 when the accident occurred. He was proceeding from Montreal to Lachine in tow of the tug *Le Fred*, the scow being lashed to the side of the tug. The scow was 100 feet in length and 26 feet in width. She was laden with coal, about 300 tons, and was drawing about six feet of water. The scow and tug left the lock at Cote St. Paul about six o'clock. From this point to the bridge at La Cote St. Paul is about six miles. Having arrived at the bridge, a sunken log pierced the side of the scow

(1) 6 Ex. C.R.I.

1909

THE WESTERN ASSURANCE CO. v. THE KING.

Reasons for Judgment.

causing her to sink. It is stated and not contradicted that this log was about 15 inches in diameter at the upper end. It is admitted that the log in question was so far below the level of the water at the time of the accident as to be invisible to the eye.

The case for the suppliants is based on the fact that about three days before the accident in question a scow called the *Champlain* was struck by a log similar in appearance to the log in question, about two acres further west than the place where the accident in question happened. The scow *Champlain* was also owned by the Dominion Bridge Co.

Sigouin was in charge of the scow *Champlain*, and reported the fact as to the *Champlain* being struck by the log to the officials of the Dominion Bridge Co. No one considered it of consequence to notify those in charge of the canal of a dangerous log being in the canal.

The argument for the suppliants is that the Crown is liable because the fact of a log dangerous to navigation should have been known to the officers in charge of the canal.

Clement, the captain of the scow *Dominion No.* 2, states in the course of his evidence that at the time of the accident he was having the following conversation with his brother-in-law, who was with him on the barge, viz :

" Tout d'un coup on rencontre le billot-là de la lock qui descendait la semaine dernière,' j'ai dit : 'Tout d'un coup on le rencontre et on frappe pareil '. Mon beau-frère dit : ' Cela ne serait pas rien' ; on le disait, mon beau-frère était assis sur ce qu'on appelle un cabestan qui tourne."

And again speaking of the log, he says :

" Il pouvait être à peu près deux, trois pieds d'eau par-dessus parce qu'on ne le voyait pas. Qui aurait vu le billot on aurait dit ' voilà un billot ', on aurait pas été

capable de s'en empêcher quand on peut voir une affaire de même, quand le billot a *ressout* à travers du chaland."

He did not report to the canal officials the fact of there being a log.

At the time the barge *Champlain* was struck the log was apparently visible bobbing up and down. At the time of the accident on the 23rd May, 1904, three days later, the log was invisible. When it sank, if the same log, is not shown.

It is sworn to by Mr. O'Brien, the superintendent or overseer of the Lachine Canal that he had no knowledge of the fact of the log being in the canal. That no one informed him of the fact. He also states that had he been informed it would have been his absolute duty to remove it. The written regulations produced have no bearing on the case.

In order to succeed the suppliants must bring their case within the provisions of Section 16, sub-sec. (*c*) of 50-51 Vict., Ch. 16.

They must prove :

(1) That the suppliants suffered injury in person or to property on a public work.

(2) That the injury resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.

See *Ryder* v. *The King* (1); *The King* v. *Armstrong* (2).

In the case of *Dubé* v. *The Queen* (3), it is laid down that the suppliant must prove affirmatively that there was negligence. The fact of the accident is not sufficient to establish a *primâ facie* case of negligence.

Mr. *Pope* relied strongly on the reasons of Sir Henry Strong, C. J., in the case of *The City of Quebec* v. *The Queen* (4), but this opinion was not concurred in by a majority of the Court.

(1) 36 S. C. R. 462.
(2) 40 S. C. R. 229.
(3) 3 Ex. C. R, 147.
(4) 24 S. C. R. 420.

1909

THE WESTERN ASSURANCE CO. v. THE KING.

Reasons for Judgment.

I think the suppliants have failed to prove a case of negligence as required by the statute, and the petition is therefore dismissed with costs.

*Judgment accordingly.*

Solicitors for suppliant: *Lafleur, McDougall, Macfarlane and Pope.*

Solicitor for respondent: *E. L. Newcombe.*