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THE CORPORATION OF THE CITY OF QUEBEC..... } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Injury to property on a Public Work—Negligence of Crown's officer or servant—50-51 *Vic. c.* 16. *s.* 16 (*c.*)—33 *Vic. c.* 23—*Liability—Remedy.*

The Crown is liable for an injury to property on a public work occasioned by the negligence of its officer or servant acting within the scope of his duty. That liability is recognized in *The Exchequer Court Act*, s. 16 (c), but had its origin in the earlier statute 33 Vic. c. 23.

2. Prior to 1887, when *The Exchequer Court Act* was passed, a petition of right would not lie for damages or loss resulting from such an injury, the subject's remedy being limited to a submission of his claim to the Official Arbitrators, with, in certain cases after 1879, an appeal to the Exchequer Court and thence to the Supreme Court of Canada.

3. It is not the duty of an officer of the Crown to repair or add to a public work at his own expense, nor unless the Crown has placed at his disposal money or credit with instructions to execute the same. He must exercise reasonable care to know of the condition in which the public work under his charge is, and he must report any defect or danger that he discovers. It does not follow from the fact that a public officer does not discover a defect in, or a danger that threatens, a public work under his charge, that he is negligent. To make the Crown liable in such a case it must be shown that he knew of the defect or danger and failed to report it, or that he was negligent in being and remaining in ignorance thereof.

The Sanitary Commissioners of Gibraltar v. *Orfila*, 15 App. Cas. 400 referred to.

The injury complained of by the suppliants was caused by the falling of a part of the rock or cliff below the King's Bastion at the citadel in Quebec, in the year 1889. The falling of the rock was caused or hastened by the discharge, into a crevice of the rock, of water from a defective drain, constructed and allowed to become choked up while the citadel and works of defence were under the control of the Imperial authorities, and before they became the property of the Government of Canada. The existence of this drain

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and of the defect was not known to any officer of the latter Government, and was not discovered until after the accident, when a careful enquiry was made. In the year 1880 an examination of the premises had been made by careful and capable men, one of whom was the city engineer of Quebec, without their discovering its existence or suspecting that there was any discharge of water from it. The surface indications, moreover, were not such as to suggest the existence of a defective drain. The water that came out lost itself in the earth within a distance of four or five feet, and might reasonably have been supposed to be a natural discharge from the cleavages or cracks in the cliff itself.

Held, that there was no negligence on the part of any officer of the Crown in being and remaining ignorant of the existence of this drain and of the defect in it.

Quære, whether the place where the accident happened was part of the public work?

Semble, the Crown may be liable although the injury complained of does not actually occur on, *i.e.* within the limits of, a public work.

MOTION for nonsuit upon the ground that suppliants had failed to make out a *primâ facie* case within the allegations contained in their petition of right (1).

By their petition of right the suppliants alleged as follows:—

1. "That for a number of years past, Your Majesty has been and still is proprietor in possession of the lots of land known by the Nos. 2263, 2304, 2305, 2306, 2307, 2308, 2312, 2313, 2314, 2315, 2316, 2320, 2321, 2322, 2323 and 2327 on the official cadastre for Champlain ward of the said city of Quebec."

2. "That the said lots form a high, steep and rocky cliff extending from the place commonly called "Dufferin Terrace," southward to opposite the citadel, with a short slope at the foot thereof, along a street called Champlain street."

3. "That the said Champlain street has been opened there and used by the public for over a century."

"3*a*. The lots of land herein above mentioned and

(1) NOTE.—This case came before the court at a previous date by way of demurrer. For the report thereof see 2 Ex. C. R. 253.

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described by the cadastral numbers form part of the citadel of Quebec, are used, and have, for a long time previous to the facts herein alleged, been used by Her Majesty as a work of defence and fortifications, and are and were a public work of Canada."

"3*b*. As such works of defence and public works and fortifications, the said lots were and, for a long time previous to the facts herein alleged, have been under the special care and superintendence of certain of Her Majesty's officers, servants and employees, whose duty it was to keep the said lots in a good state of repair, and who were charged with doing all the necessary work and acts to maintain the said lots in such a manner as to render them useful as works of defence without rendering them dangerous to surrounding private property."

"3*c*. In the exercise of their duties and acting within the scope of their authority, Her Majesty's said officers, servants and employees have, within ten years previous to the facts herein alleged, continuously and without interruption, negligently and carelessly done divers other works and acts, and have done carelessly and negligently other works and acts by which the solidity of the cliff or rock was greatly impaired from time to time, and by reason of which finally a portion of the said cliff or rock, as hereinafter alleged, gave way and fell into the said Champlain street."

"3*d*. While so acting in the exercise of their duties and within the scope of their authority, Her Majesty's said officers, servants and employees, who were, as aforesaid, bound to maintain the said cliff, rock, fortifications and public work in a good state of repair and usefulness to the country as a work of defence, and at the same time in a state of safety for the surrounding private property, while they were, as aforesaid, doing acts which greatly, from day to day, impaired the

solidity of the said rock or cliff, negligently omitted to do any acts or take any precautions to guard against slides or the falling of the said rock or cliff or portions thereof unto the surrounding property."

"3*e*. The falling of the said large portions of rock, as hereinafter mentioned, is completely due to the acts, faults, commissions and omissions of Her Majesty's said officers, servants and employees, in the exercise and fulfilment of their duties as such."

4. "That during the last ten years, your Majesty's officers, servants and employees, in the exercise and fulfilment of their duties as such, have negligently and carelessly done and caused to be done, and have done and caused to be done negligently and carelessly to the said cliff certain works which have had the effect of breaking the flank side thereof."

5. "That your Majesty's officers, servants and employees, in the exercise and fulfilment of their duties as such, negligently and carelessly continued the daily firing of guns over the said cliff after it was apparent that such firing contributed to the splitting of the rocky surface of the said cliff."

6. "That during the last ten years, your Majesty's officers, servants and employees have negligently failed to do to the said property the proper and convenient and necessary works to prevent it from becoming dangerous, and also to prevent accidents from the sliding of pieces of rock."

"7. That owing to carelessness, want of precautions and gross negligence of your Majesty's officers, servants and employees in the exercise and fulfilment of their duties as such in doing works which ought not to have been done and in not doing what was necessary to be done to prevent the said property from becoming dangerous, it is now averred that on or about the nineteenth day of the month of September, one thousand

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eight hundred and eighty-nine, a very large portion of rock fell from the flank-side of the said rock or cliff, and breaking into pieces formed an enormous heap which totally blockaded the said Champlain street on a considerable length and rendered almost impossible the communication between the southerly and the northerly portions of the said street."

"8. That the said Champlain street is the only street running between the said cliff and the river St. Lawrence, and that at the place where the accident occurred the space between the said street and the river St. Lawrence is so narrow that there is no interval left between the said street and the wharves on the beach of the said river St. Lawrence."

"9. That since the nineteenth day of September last the said Champlain street has remained obstructed by the said heap of stones and rock."

"10. That the said city of Quebec has in the said street under the said heap of stones its water and drainage pipes, and that in the case of breakage of the said pipes, or of necessity to replace or repair the same, the presence of the said heap of stones would occasion to the city of Quebec expenses amounting to a considerable sum of money."

"11. That to protect the said part of the street and its surroundings against the return of similar accidents in the future, it would be preferable to leave where it is the said heap of stones, and to make round Champlain street to the east of the said heap of stones, and to remove the said water and drainage pipes into the new line of the street."

"12. That immediately after the accident your Majesty's officers, servants and employees were made aware of the state of things aforesaid, and were requested by the said city of Quebec to afford means to meet the emergency."

"13. That your Majesty's officers, servants, and employees, in the exercise and fulfilment of their duties as such, have neglected and refused to make the works urgently necessitated by the said accident; the said city of Quebec has been obliged to make for the said works certain expenditures for the payment and reimbursement of which it has a right of action against your Majesty."

"14. That to clear near and around the said heap of stones what was necessary to clear at once, in order to prevent other damage, and to make a temporary road, the said city of Quebec has expended a sum of six thousand and five hundred dollars."

"15. That your Majesty's officers, servants and employees have been summoned to remove from the said Champlain street the stones and other stuff fallen from your property, and to put the said street in its former state, but your Majesty's officers, servants and employees have unjustly refused to do so."

"16. That should the said heap of stones be left upon the street, and the said Champlain street run eastward thereof, that would cost about as follows, to wit: To remove and replace the said water and drainage pipes as aforesaid, a sum of five thousand dollars; for the cost of land or right of way for the new part of the said Champlain street, twenty thousand dollars; to make the said street, including the cost of a retaining wall on the river side, eight thousand dollars."

"17. That the said city of Quebec has a right of action against Your Majesty to enforce the removal from the said Champlain street of the said stones, earth and other stuff fallen as aforesaid from the said property of your Majesty upon the said street, and to have it declared by the said court, that, in default of clearing the said Champlain street at the said place and of putting again the said street in the same state and condition as it

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was before the said accident, it shall be the right of the said city of Quebec to cause to be made, at the costs and expenses of your Majesty, the necessary works for that purpose, unless your Majesty should prefer to pay to the said city of Quebec the sum of thirty-three thousand dollars to enable the said city to purchase the land required for the opening of a new portion of Champlain street, and replace therein the said water and drainage pipes, and all other necessary works appertaining thereto."

"18. Your suppliants, therefore, humbly pray that, for the reasons and considerations aforesaid, it may be ordered by this honourable court that the said city of Quebec is entitled to receive and to be paid and reimbursed by your Majesty the sum of six thousand and five hundred dollars expended as aforesaid, and that your Majesty shall, within such time to be specified by the said order, remove and cause to be removed from the said Champlain street, in the said city of Quebec, all stones, earth or other materials or things which have, on or about the nineteenth day of September last (1889), fallen upon the said street from the property of your Majesty as aforesaid, and to put the said street in the same state and condition as it was before the accident aforesaid, and that in default of so doing by your Majesty, it shall be the right of the said city of Quebec to remove all the said obstructions at the costs and expenses of your Majesty; and should your Majesty declare at once your desire to leave all the said obstructions in the said street so as to run the said street eastward of the same, that your Majesty be adjudged to pay to the said city of Quebec the said sum of thirty-three thousand dollars for the causes and reasons aforesaid, the whole with costs."

To the petition the following defence, in substance, was pleaded by the respondent:—

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"2. Her Majesty's Attorney-General admits the truth of the allegations contained in the 2nd and 3rd paragraphs of the amended petition of right."

"3. Her Majesty's Attorney-General denies the truth of all the other paragraphs of the said amended petition of right."

"4. Her Majesty's Attorney-General denies that the lots of land in the first paragraph of the amended petition are or ever were a public work of Canada, as alleged in paragraph 3*a* of the petition, and further denies that there is or ever was any duty incumbent upon Her Majesty or upon her officers, employees or servants to do any work upon or in respect to the said lots of land for the purpose of keeping them in repair, or for any other purpose, as is alleged and set out in paragraph 3*b* of the amended petition."

"5. In answer to paragraphs 3*c*, 3*d*, 4, 6 and 7 of the amended petition, Her Majesty's Attorney-General says, that any work which may have been done by Her Majesty's officers, employees or servants upon or in respect to the said lots of land was so done and performed with the view to support and strengthen the rock on the said cliff, and did not in any way tend or contribute to loosen the rock or facilitate its fall."

"6. Her Majesty's Attorney-General, in answer to the allegations contained in the fifth paragraph of the amended petition, says that the daily firing of guns from the citadel at Quebec over the said cliff was and is a lawful and proper act on the part of Her Majesty's officers, servants and employees, and that they, in the discharge of their duty, duly and properly fired the said guns without any negligence or carelessness on their part, and Her Majesty's Attorney-General, while denying that the said firing of guns in any way contributed to the splitting of the rocky surface of the cliff as alleged, says that even if the said firing had such effect,

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Her Majesty cannot be rendered liable for the injury to the the suppliants which, it is alleged, happened by reason of the falling of rock from the said cliff."

"7. Her Majesty's Attorney-General for a further defence to the said petition of right says that the slide of rock from the said cliff was a fortuitous event and was the result of the natural position, wear and deterioration of the said rock, and was not the result or effect of any act of commission or omission on the part of Her Majesty's officers, employees or servants in connection with the said lands."

"8. Her Majesty's Attorney-General further says that the suppliants though well aware of the decay and deterioration of the said rock, contrary to their duty in that respect, neglected to take the proper precautions to protect their street and property against any slides or falling of the said rock, in consequence whereof and by reason of their negligence and carelessness, portions of the rock on the said cliff were allowed and permitted to fall and come upon the said Champlain street in the petition mentioned which is the claim and cause of complaint of the suppliants herein."

"9. For a further defence to the said petition of right Her Majesty's Attorney-General says that the injury alleged to have been suffered by the suppliants, and the claim and cause of action set out in the said petition is the blocking up of a portion of Champlain street in the city of Quebec with a large quantity of rock which, it is alleged, fell or slid from the cliff adjacent to the said street, through the negligent acts of the officers, employees and servants of Her Majesty in the performance of their duty or through the negligent omission to perform works and acts which it was their duty to perform; but Her Majesty's Attorney-General alleges that if any action will lie against Her Majesty for damages resulting from the negligence of Her

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officers, servants or employees while acting within the scope of their employment, which is not admitted but denied, it will only lie where the injury to property has happened on a public work, and Her Majesty's Attorney-General says that as the injury complained of by the suppliants in their petition of right happened on the said Champlain street in the city of Quebec, which is not a public work of Canada, no action will lie against Her Majesty therefor, and the same benefit from this objection is claimed by the said Attorney-General as if he he had formally demurred to the said petition of right."

The case was tried at Quebec, on November 2nd, 3rd and 4th, 1892.

Casgrain, Q.C. (A.-G. P.Q.), *Pelletier*, Q.C. and *Flynn*, Q.C. for the suppliants;

Cook, Q.C., *Pentland*, Q.C. and *Hogg*, Q.C. for the respondent.

At the conclusion of the suppliants' evidence, *Hogg*, Q.C. for the respondent moved for a nonsuit:—

It has not been shown that the part of the cliff from which the rock and débris fell is a public work, or part of a public work, and, therefore, the suppliants have not made out a *primâ facie* case. Nor has it been shown that there was any negligence on the part of any of the employees of the Crown. There was no indication on the surface of the existence of a choked drain, alleged to have been the cause of the accident. (Cites *The Sanitary Commissioners of Gibraltar* v. *Orfila*) (1). There is no officer, so far as the evidence shows, who is charged with the duty of superintending this work, and the case is, therefore, without the scope of the provisions of section 16 (c) of 50-51 Vic. c. 16. There is no officer employed by the Crown whose duty it

(1) 15 App. Cas. 400.

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was to discover such defects as might have existed in this drain. Mr. Baillairgé was employed by the Crown for the special purpose of making a report upon the state of the premises (and it will be admitted that no better man could have been engaged for the purpose) and he made a most skilful examination, and his report exonerates the Crown from all imputation of negligence.

Now, as to the position of the suppliants in respect to claiming a remedy under the statute 50-51 Vic. c. 16. The accident happened, it is true, since the passage of the statute, but its cause must be traced to a date prior to the Act, and there is no retroactive effect to be given to such Act. (Cites *The Queen* v. *Martin*) (1).

Cook, Q.C. following:

No case has been made out that would show liability even between subject and subject. No authority can be cited either from the French or English law to show that the owner of a cliff or hill of rock is bound to prop it up to keep it from falling.

Again, it is not a public work where the slide occurred. Looking at the French version of the provisions of section 16 (c) of 50-51 Vic. c. 16, the construction in favour of the Crown is still stronger than in the English version: it must be *sur un ouvrage public.*

There was no employee acting within the scope of his duties or employment, and guilty of negligence therein; there was no special officer whose duty it was to oversee, and who had charge of, these premises. The principle involved in this case is discussed in *Mersey Docks Trustees* v. *Gibbs* (2).

Again, the drain was not visible, nor was its condition at all apparent to the Crown's officers or servants. A charge of negligence cannot be successfully based upon such a state of affairs

(1) 20 Can. S. C. R. p. 240. (2) L.R. 1 H.L. 93.

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Pelletier, Q.C. for the suppliants: It is satisfactorily proved that the *locus in quo* is a public work. It has also been established that the Crown had been notified of the dangerous character of the premises before the occurrence of the slide. It is true that the filling of the crack in the cliff was done in a proper way, but no body ever went down one of the man-holes to see if they were in good or bad order. (Cites *The Queen* v. *Williams*) (1). The witness Baillairgé made his report as an engineer acting at the request of the Crown, not as the city engineer. It is quite possible he never went near the King's Bastion. Had he been there and seen the grating he would have undoubtedly been led to discover the drain and its defective condition. It was his duty to inquire where all the water coming from the trenches was going. It was also his duty to examine the rock outside the citadel. The Crown, however, did not put into effect the suggestions he did make. It would be a natural inference to draw from the fact that the outlet of the drain was not working that the body of the drain had become defective.

Flynn, Q.C. following:

There are two kinds of negligence, one of *omittendo* and the other of *committendo*. If the accident was the result of a *cas fortuit*, then it was a matter of *omittendo*, the ommission to do something that should have been done. This defect in the drain has had the effect of changing the whole nature of things on the property. It is no justification for the Crown to say it was not aware of the defect. (Cites Art. 553 C.C.L.C.) Servitudes are apparent or not apparent. This drain is a servitude not apparent. The law puts on the shoulders of the Crown the responsibility of the accident. (Cites *Sirey: Recueil des lois et arrêts*, 1856) (2). Between adjoining owners, the one holding the land on the

(1) 9 App. Cas. 418. (2) Pp. 470, 471, 472.

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higher level would be responsible for injury arising to his neighbour from something done or happening on his land. It is established by the evidence that a certain branch of the Militia Department has charge of the public military works and fortifications. The statute (1) entrusts the Minister of Militia with the care and management of such premises. It is not necessary that a special officer, under the Minister, be shown to have had charge of this drain. The Government bought this property in 1877 and took it subject to all its appurtenances. There was a drain upon it which was defective, and they are responsible for the damages thereby caused. (Cites *Jones on Negligence of Municipal Corporations*) (2).

The maxim that the "King can do no wrong" has practically no bearing upon this class of cases now. We have no longer a prerogative Government.

It is in the interests of justice that the case be proceeded with.

Hogg, Q.C. in reply: There is no obligation upon the Government to keep an officer constantly employed in superintending this drain. The suppliants have failed to make out a *primâ facie* case upon the evidence produced.

BURBIDGE, J.—I am of opinion that the case has not been made out and that the motion must prevail.

The petition is brought to recover damages for injuries to the suppliants' property caused by a landslide from a portion of the cliff or rock on which the citadel here is constructed.

Now, I think there can be no doubt that the citadel itself is a public work. That depends, of course, upon the construction of a number of statutes. You will

(1) R.S.C. c. 41, secs. 4 & 6. (2) P. 292.

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find the definition in *The Public Works Act*, 1867, *The Official Arbitrators' Act*, and in *The Expropriation Act* in *The Revised Statutes*, and also in *The Expropriation Act* of 1889; and there may be other Acts in which it is declared that works of defence and fortification are public works.

But whether or not the portion of the property where the accident occurred is part of a public work in this sense may be open to some question. I shall, however, assume for the purposes of this case that it is a public work; that the place where the injury occurred is part of the works of defence, and therefore a public work.

As counsel have stated, I have held in the demurrer in this case that for an injury to property on a public work, resulting from the negligence of its officer or servant while acting within the scope of his duty, the Crown is liable. Undoubtedly that liability is recognized in *The Exchequer Court Act*, in section 16, clause (c); but it is not my view, and I do not agree with Mr. Cook, that the liability was created by that statute. Clearly, it was recognized; but it appears to me that it rests upon the earlier statute of 1870, the statute 33 Vic. c. 23, which relates to the Official Arbitrators, and which, for the first time, allowed the submission to them of a claim against the Crown for death or injury happening on any public work.

Mr. Cook is quite right in saying that the word "negligence" first occurs in the statute of 1887; but in my view the words there used limit rather than enlarge the liability of the Crown, if it be not true that they do not do anything more than define a limitation implied in the Act of 1870.

I also agree with Mr. Cook that prior to the passing of *The Exchequer Court Act* there was in such a case no remedy against the Crown by petition of right.

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That is settled by *McLeod's Case* (1) and *McFarlane's Case* (2); but, at the same time, the subject injured had a remedy by a submission of his claim to the Official Arbitrators. It is said that that was a proceeding which the Crown allowed to go on or not as it saw fit, but the same may be said of a reference to this court; and if you will examine the statutes, you will see with respect to this class of cases—and now I am distinguishing them from the case in which the reference was for report only—the cases were submitted for hearing and determination. To hear and determine is all that any court can do. There is also this additional fact, that from 1879 to 1887 there was an appeal from the Official Arbitrators to the Exchequer Court, and from the Exchequer Court to the Supreme Court; and both courts were seized of the case as completely as they could be seized of any other case. And I do not know how proceedings of that kind can be said to differ in any way from proceedings in this court by reference of the claim against the Crown.

For these reasons I do not accept Mr. Cook's view, that the liability of the Crown, in a case such as this, rests upon *The Exchequer Court Act;* and, therefore, I need not follow him through the conclusions which he drew from that proposition.

With reference to the contention that there can be no liability where the injury does not happen on a public work, I have only to repeat what I said during the argument, that the construction seems to me somewhat narrow. It would, I think, exclude cases which come within the meaning of the statute. Take, for instance, the case which was mentioned of the blasting of a rock on a public work, where it happened that through the negligence of an officer some one was injured beyond the actual limit of the public work.

(1) 8 Can. S. C. R. 1. (2) 7 Can. S. C. R. 216.

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Could it be fairly contended that the injured person could not maintain his claim because he was not at the time on the public work?

But without being understood to express a considered opinion upon that question, which, I have no doubt, will be argued fully in the court of appeal, I will dispose of it for the present in the suppliants' favour.

That brings us to the question of negligence; and so far as misfeasance is concerned, I do not think there has been any case made out. The only witness who pretended to say that the works executed for the protection of the cliff were improperly done was Michael Costello. I believe he said that he did his work well, but he thought what was done contributed to the accident rather than prevented it. I do not attach much importance to Costello's opinion, in view of the other evidence that we have of witnesses who were undoubtedly capable of speaking upon the matter; and I am satisfied on that ground that the measures which were taken were neither imprudently undertaken nor negligently carried out. I was not on this point pressed very much by Mr. Pelletier or Mr. Flynn to find that there was any actual misfeasance, and, speaking for myself, I do not think there was any. I think the works undertaken, so far as they went, were works which were proper in themselves and were carried out with reasonable care. As to that, there is another thing to be borne in mind, and that is, that the works which were constructed did not, under the evidence as presented, contribute in any way to the accident.

The accident, so far as the evidence goes, was occasioned or at least hastened by the discharge of the water from the drain which has been so much spoken of.

Now, this drain was built very many years ago, while the property was in charge of the War Depart-

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ment and when the Crown was represented by the Imperial authorities. For anything they did then, the Crown in the right of Canada cannot be held liable. I have no right, sitting in this court, to take into consideration any act done by any officer of the Imperial Government with reference to the work in question. I think, also, the evidence shows that the choking up occurred during the time the War Department was in occupation and before the property came into the possession of the Crown as represented by the Government of Canada, which, in respect of a large portion of the property, occurred in 1877, by virtue of the statute 40 Vic. c. 8, and, in regard to the rest of the property, by the deed from the Honourable John Hearn in 1880.

With reference to the question of non-feasance, I agree with the view which Mr. Hogg and Mr. Cook put forward, that no officer of the Crown is under any duty to repair or to add to a public work at his own expense, nor unless the Crown has placed at his disposal money or credit with instructions to execute the repairs or the addition.

In that sense there is no evidence here of any officer who was charged with any such duty, and being so charged, neglected to perform his duty. The truth of the matter is, with regard to the drain, that no one knew of its existence until after this accident had occurred and minute inquiry was made into its causes. And it seems to me that the suppliants must fail, unless there was some officer or servant of the Crown whose duty it was to know of the existence of this drain, of its choking up, and to report the fact to the Government, and who was negligent in being and remaining in ignorance of the drain and of the defect.

Now, so far as the Minister of Militia was concerned, Mr. Flynn pressed the argument strongly that he had a duty under the statute in respect of works of defence

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and fortifications generally, and consequently in respect to this drain; but it would be unreasonable to expect that the Minister of Militia should himself come upon the ground, in the administration of the affairs of his Department, and cause the drain to be dug up and examined. He would only do this through his officers. Therefore, I do not see any reason to charge him with ignorance of a defect which was never reported to him by any officer who was under him. There is some evidence that the commandant of the citadel had general charge of the property; but I shall refer to that matter later. Apart from this evidence of the general charge of the commandant, there is no evidence, I think, of any person who had any duty in this respect, unless it was Mr. Baillairgé, or Captain Imlah; and they had no duty, except in respect of the examination and report which they were asked to make in 1880.

Assuming that Mr. Baillairgé and Captain Imlah were officers or the servants of the Government in respect of their employment to make their examinations and reports, it is quite clear that they failed to discover the existence of this drain and the defect that was in it. But there is no question raised in this case of the capacity of either of these gentlemen or of their carefulness. I think there is nothing to suggest that any better men could have been sent to do the work. In addition to his employment, Mr. Baillairgé had the interest of a citizen of Quebec and of the city engineer of Quebec; and I cannot conceive that any person could have been sent who would have been more likely to exercise reasonable and proper care, or who was more capable of exercising reasonable and proper care, than Mr. Baillairgé. It is quite clear, I think, that there were at the time no indications on the ground which would lead him to suspect that there was a defective

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drain discharging its waters into the inner crevice and accelerating the accident which unfortunately happened in 1889.

Now, I think the same can be said with regard to Captain Imlah, although we have not so much evidence with regard to his employment and to his duty to make a minute search and inquiry; but I think there is nothing to suggest that either of these gentlemen were careless in making the respective examinations to which I have referred.

I take it, that although there is some evidence of the discharge of water at the place where the drain was broken, discovered subsequently to the happening of the accident, that previous thereto and before special attention had been directed to it, the discharge was not sufficient to suggest to any one that there was a broken drain there. It was said by one of the witnesses that all the water that came out of it lost itself in the earth in four or five feet; and situated, as it was, any one might have believed that the water was a natural discharge from the cleavages or cracks in the rock of the cliff.

For that reason, I think there were no such indications as would make it the duty of either Mr. Baillairgé or Captain Imlah—assuming that they were officers charged with this duty—to make a further investigation and examination of this drain and to open it up and see what its condition was. It does not follow from the mere fact that they did not discover the defect that they were negligent. That is settled by the case of *The Sanitary Commissioners of Gibraltar* v. *Orfila* (1), and in the view which I take of the evidence, I am satisfied that neither of these gentlemen were negligent of their duty in that respect.

(1) 15 App. Cas. 400.

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Then, as to Colonel Montizambert. Take it that as commandant, having general charge of the fortifications and works of defence here in Quebec, he had a duty to know of and report upon any danger that might arise to threaten the stability of the rock at the place where the accident happened, there is no evidence that he neglected or failed in his duty. I think that in order to fix him with such negligence as the Government would have to answer for, it must be shown that he knew of, and failed to report the defect in the drain, or that he was guilty of negligence in not being aware of its existence.

In regard to the first, it has not been suggested that he knew of the defect; and in reference to his ignorance of its existence, I do not think one could expect or exact from him a greater degree of responsibility or care than would be exacted of Mr. Baillairgé or Captain Imlah on the occasions on which it was their duty to make an examination of the premises.

I am led, therefore, to find in this case that Colonel Montizambert has not been guilty of any negligence, which, under the statute, would make the Crown liable.

Now, entertaining these views of what seems to me to be the merits of the case, I have not thought it worth while to allow the case to proceed. I am satisfied that all the questions of law—and there are important questions of law involved in the case other than those I have discussed—will on the appeal which, I assume, will be taken, be fairly raised and presented for determination.

Motion allowed, costs to follow the event.

Solicitors for the suppliants: *Baillairgé & Pelletier.*

Solicitors for the respondent: *O'Connor, Hogg & Balderson.*