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Dec. 7.

IN THE MATTER OF THE PETITION OF RIGHT OF

OLIVER JOHNSON.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Contract—Bailment—Hire of horses for construction of public work—Loss of horses—Negligence—Liability—Demise of Crown—50-51 *Vict. c.* 16, *sec.* 16 (*c*).

1. Where the suppliant's goods are in the possession of an officer or servant of the Crown under a contract of hiring made by him for the Crown, the obligation of the hirer in such a case is to take reasonable care of the goods according to the circumstances, and the hirer is liable for ordinary neglect. Where there is a breach of the hirer's obligation in such a case the Crown is liable under the contract of its officer or servant.

2. The suppliant entered into a contract with the Crown, through an officer of the Department of Public Works, to supply certain pack horses, with aparejos and saddles, for the purposes of construction of the Atlin-Quesnelle Telegraph line, at the sum of $2 per horse for each day the animals were so employed. It was not practicable, as the suppliant knew at the time of making the contract, to carry food for the horses along the line of construction, and it was necessary to turn the horses out to graze for food. As the season advanced and the character of the country in which the line was being constructed changed, the grazing failed, with the result that the horses died or were killed to prevent them from starving to death. It appeared that the aparejos and saddles were not returned to the suppliant. There was a time during construction when the horses could have been taken back alive, and no prudent owner of horses would have continued them on the work beyond that time. The officer of the Crown in charge of the work, however, deemed that the interests of construction were sufficiently urgent to justify him in sacrificing the horses to the work.

Held, that having regard to the circumstances, the hirer had acted imprudently in continuing the horses on the work after the grazing failed, and the Crown was liable therefor.

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3. Wherever there is a breach of a contract binding on the Crown a petition will lie for damages notwithstanding that the breach was occasioned by the wrongful acts of the Crown's officer or servant. *Windsor and Annapolis Railway Co.* v. *The Queen* (11 A. C. 607) referred to.

4. The Crown is liable in respect of an obligation arising upon a contract implied by law. *The Queen* v. *Henderson* (28 S. C. R. 425) referred to.

5. An action arising out of a contract for the hire of horses to be used in the construction of a public work of Canada lies against the executive authority of the Dominion, and is not effected or defeated by the demise of the Crown.

Semble:—That the loss sustained by the suppliant in this case was an "injury to property on a public work" within the meaning of clause (c) of the 16th section of *The Exchequer Court Act*.

PETITION OF RIGHT for damages for an alleged breach of contract whereunder the Crown hired certain horses from the suppliant to be employed in the construction of the Atlin-Quesnelle Telegraph line.

The facts of the case are stated in the reasons for judgment.

October 12th and 13th, 1903.

The case was tried at Vancouver, B.C.

A. E. McPhillips, K.C. for the suppliant, contended that the contract entered into between the suppliant and the Crown was one of bailment for hire. The Crown as bailee was bound to take reasonable care of the horses and return them when the period for which they were employed was at an end. (Cites *Beal on Bailments* (1); *Oliphant on Horses* (2). It was not the conduct of a prudent man to continue the horses on the works, as Mr. Rochester, the Crown's officer, did, after the grazing failed. It was owing to this breach of contractual duty that the loss was sustained by the suppliant. The Crown must answer for the breach arising through the act of its officer or servant.

(1) P. 218. (2) 5th ed. pp. 246, 247.

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F. W. Howay, for the respondent, argued that the case was a simple one. If it were an action sounding in negligence, it did not come within the jurisdiction clauses of sec. 16 of *The Exchequer Court Act*. If, on the other hand, suppliant relies upon contract, there was no agreement to return the horses. The suppliant knew the hazardous nature of the work in which they were employed, and he must be presumed to have taken the risk of the loss of the animals when he agreed to hire them. The *gravamen* of the action is negligence or misconduct, and the doctrine of *respondeat superior* cannot be invoked.

A. E. McPhillips, K.C., in reply, said that the suppliant relied wholly upon the contract for relief.

THE JUDGE OF THE EXCHEQUER COURT now (December 7th, 1903,) delivered judgment.

The petition is brought by the suppliant to recover (1) money alleged to be payable by the Crown to the suppliant for the hire of certain horses, harness and sleighs by him let to hire to the Crown, for the purpose of transporting supplies for the construction by the Crown of the Atlin-Quesnelle Telegraph line; and (2) damages for the loss of certain horses, harness, sleighs, *aparejos* and saddles let to hire by the suppliant to the Crown for such purpose, and lost through the negligence of the Crown's servants.

That there was a contract for the hire by the Crown of the suppliant's horses for the purpose mentioned is not denied; though as will be seen, there is some conflict of evidence as to what the express terms of that contract were. The defences set up are in substance: First, with respect to the hire of the horses, that the suppliant's claim was satisfied and discharged by payment; Secondly, with respect to the harness and sleighs, that they were re-delivered to the suppliant;

and Thirdly, with respect to the claim for the loss of the horses and other things mentioned through the negligence of the Crown's servants:—

(1) That the injuries complained of did not arise on a public work;

(2) That they did not result from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment;

(3) That if they resulted from such negligence, the negligence was that of the suppliant himself;

(4) That in any event the Crown is not liable for the negligence of its servants; and

(5) That the claim, if any, having arisen in the reign of Her late Majesty, is not maintainable against His Majesty the King.

On the 31st of March, 1900, the suppliant, by a letter addressed to Mr. J. B. Charleson, offered to furnish eight or more spans of horses, harness and sleighs to freight from the mouth of Pike river along the Atlin-Quesnelle Telegraph line for as long a time as required at the rate of six dollars per day for each team, from the 2nd of April until the return of the horses to Atlin. The board of the teams and teamsters and the wages of the latter were to be paid by Mr. Charleson; and the suppliant undertook to drive a team himself and to assume all responsibility for any accident that might happen to the horses. Mr. Charleson was at the time in charge of the construction of the public work mentioned, and the letter was delivered to Mr. John G. Rochester for him; Mr. Rochester being his assistant on the work. This offer was accepted, and the contract thereby created continued in force until the 28th of May following. After that date pack horses had to be used for transporting supplies for the work, it being no longer possible to use sleighs for that purpose. Such of the suppliant's horses as were

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not suitable for use as pack animals were sent back to Atlin with their harness and sleighs; and it was arranged between Mr. Rochester, acting for the Crown, and the suppliant that the remainder of the suppliant's horses should be employed thereafter as pack animals at two dollars per day. The suppliant contends that this was a mere modification of the existing contract of hiring with respect to the rate per day to be paid for the horses. Mr. Rochester on the other hand says that a new contract was made under new conditions, the terms of which were that the suppliant would be paid two dollars per day for each horse for each day that the horses worked as pack animals. I accept Mr. Rochester's evidence as giving the correct view of what took place, and find the facts to be as he stated. The harness and sleighs that had, while there was sleighing, been used with the horses that afterwards were let to hire as pack animals, were piled up and left on the line of construction; and thereafter, and until the 8th of September following, the suppliant was employed in looking after the pack trains, which included a large number of horses besides his own, some belonging to the Crown and others hired by the Crown from other persons.

The suppliant knew in a general way the conditions under which his horses were being used, and some of them would from day to day or from time to time come under his personal observation. It was one of the necessities of the case that the horses should, while employed as pack animals, be turned out to graze and in that way get their food. It was not practicable to carry food for them. That was known to the suppliant, and was no doubt in the contemplation of both parties at the time of hiring. Of the manner in which his horses were used, and of the conditions under which they worked and were fed, the suppliant made

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no complaint while he was on the work. Neither does it appear that there was during that time any good cause or ground of complaint, although a number of the horses died or were lost. On the 8th of September, on account of his wife's illness, the suppliant left the work, leaving such of his pack horses as were then alive, in Mr. Rochester's charge. At that time the country in which the horses were being used afforded grazing for the horses; but very soon thereafter the conditions changed greatly. As the season advanced and the character of the country in which the line was being constructed changed, the grazing failed, with the result that the horses died, or were killed to prevent them from starving to death. There was a time, it appears, though the exact time is not definitely given, at which the work could have been discontinued and the horses taken back alive. But Mr. Rochester thought that the work of construction was sufficiently urgent and pressing to justify him in sacrificing the horses to the work. He did that with the horses that the Crown owned, and he did it also with those that were hired of the suppliant

With reference to the hire of the horses and their outfits, I find that the suppliant has been paid all that he is entitled to.

With respect to the harness and sleighs used when the supplies were being forwarded by sleighs, we have seen that some of them were sent back to Atlin; and no doubt the suppliant had a right under the contract of the 30th of March, 1900, to have all of them taken back with the horses using them, and to be paid for the hire of the horses, harness and sleighs until they reached Atlin. But the suppliant saw fit to make a new arrangement that was not compatible with the return to Atlin of the harness and sleighs in question. He could not reasonably expect to let his horses to hire

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as pack horses, and at the same time have them go back to Atlin with the harness and sleighs. That was not practicable if the horses were to be used as pack animals on the work then under construction, and under the circumstances, there was, it seems to me, nothing to be done other than what was done, namely, to leave the harness and sleighs on the line of construction, and in that the suppliant must be taken to have acquiesced. He was, I think, a consenting party to what was done; and after he let his horses to hire as pack animals the harness and sleighs that had previously been used with them were, it seems to me, at his own risk, and the Crown is not liable for the value thereof.

With respect to the pack horses and the *aparejos* and saddles that were used with them, the responsibility of the hirer was to take reasonable care of them according to the circumstances, and he was answerable for ordinary neglect. It is suggested that as the Crown was in this case the hirer of the horses the case is different, but for the present it will be convenient to assume that there is no difference. Taking the case as it would stand between subject and subject, it was the duty of the hirer in the present case to see that the horses had such food as the circumstances admitted of, and not to continue them on the work when it was evident that the grazing would fail and the horses perish. No prudent owner would, under ordinary circumstances, do that. Nor as against the suppliant is it any answer to say that the work was pressing. That may justify the Crown's officer for sacrificing the horses to the urgency of the work, but it is not a good answer to the owner. If the horses had to be sacrificed it should be at the hirer's expense, not at the expense of the owner. The suppliant left the work before these conditions arose, and he was not a party,

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or consenting in any way, to what was done or omitted to be done, and he is in no respect responsible for the loss of the horses that died or were killed because they were kept at work on the line of construction after the grazing failed. For the damages that happened because that was done the hirer is, I think, responsible. It was suggested that the suppliant had been paid a large sum for the hire of his horses, so large presumably that he could well afford to lose them in the end. That may be, and it is no doubt the fact that considerable sums of money would have been saved if these or other pack horses had at the outset been bought instead of being hired. But these, it is needless to state, are considerations that in no way affect the case. The suppliant has been paid what was bargained for and no more; and it makes no difference that the bargain was to him a profitable one. That circumstance in no way releases the hirer from his duty or obligation to take reasonable care, according to the circumstances, of the thing hired. In this case there was, I think, a breach of that duty or obligation.

That brings us to one of the issues raised in the answer to the petition, namely:—Is the Crown answerable for the damage resulting from that breach of duty or obligation? And the answer to that question will be in the affirmative if one comes to the conclusion either, (*a*) that such breach constituted a breach of a contract binding on the Crown; or (*b*) that the injury complained of arose on a public work and resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment. Otherwise the answer should be in the negative.

The case of *Brown* v. *Boorman* (1), decided by the House of Lords in 1844, is an authority for the pro-

(1) 11 C. & F. 1.

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position that wherever there is a contract, and something is to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the party injured may recover either in tort or in contract; see also *Stevenson* v. *The Queen* (1). See also *Tattan* v. *Great Western Ry. Co.* (2); *Bigelow on Torts* (3); *Underhill on Torts* (4); and *Bullen on Leake's Precedents* (5). In the case of *The Coupé Co.* v. *Maddick* (6), an action to recover damages for injuries to a carriage and horse hired by the defendant, arising from the negligence of the defendant's coachman, it was held by Cave and Charles, JJ. that the plaintiffs' remedy was by action on the contract. But the authorities are not all one way; and a distinction is drawn between the breach of a general duty arising from the relations of the contracting parties, and a breach of an express term of the contract. *Corbett* v. *Packington* (7); *Legge* v. *Tucker* (8); *Turner* v. *Stallibrass* (9). And the difficulties presented in such cases are, I think, increased when one of the parties to the contract is the Crown, and the breach of duty or obligation arises from the negligence of its servant. In *Queen* v *McFarlane* (10), Mr. Justice Strong, citing *Gibbons* v. *U. S.* (11), *Seymour* v. *Van Slyck* (12), and *U. S.* v. *Kirkpatrick* (13), stated that the doctrine that the Government is not liable for the wrongs inflicted by their officers on citizens is not confined to an exoneration from liability for the torts of its agents and servants; but is carried so far as to exonerate the Crown or Government from

(1) 2 W. W. & A'B. 176.
(2) 2 El. & El. 844..
(3) (Ed. 1903) pp. 24 & 25.
(4) (7th ed.) pp. 51 & 62.
(5) (Ed. 1868) p. 170.
(6) [1891] 2 Q. B. 413.
(7) 6 B. & C. 268.
(8) 26 L. J. N. S. Ex. 71.
(9) [1898] 1 Q. B. 56.
(10) 7 S. C. R. at p. 242.
(11) 8 Wallace 269.
(12) 8 Wend. 403.
(13) 9 Wheat. 720.

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the non-performance of contractual obligations, when such non-performance or negligence consists in the omissions of public officers to perform their duties. And in *The Queen* v. *McLeod* (1) after referring to the reasons that he had given in McFarlane's case for holding that a petition of right will not lie against the Crown in respect either of tortious injuries or breaches of contract, caused by the negligence of its servants or officers, he adds that in the case of torts the maxim *respondeat superior* does not apply to the Crown, and in the case of contracts they are to be construed as though they contained an exception of the Crown for liability in respect of any wrongful or negligent breach by its servants. And again, in the case of *The Windsor and Annapolis Railway Co.* v. *The Queen* (2) in which a petition was brought for a breach of contract by reason of acts of the officers of the Crown done under its authority, that apart from such contract would have constituted a wrong only, he expressed the view that the Crown was not liable for the wrongful acts of its officers. But on the appeal in that case to the Judicial Committee of the Privy Council that view was not entertained, their lordships holding that in such a case a petition of right would lie, and that there is no distinction in that respect between breaches of contract occasioned by the omission of Crown officials and breaches due to their positive acts. This decision may, I think, be taken as determining that wherever there is a breach of a contract binding on the Crown a petition will lie for damages, notwithstanding that the breach was occasioned by the wrongful act of the Crown's servant. And it is clear, I think, that the Crown may be liable on an implied, as well as on an express, contract. In *The Queen* v. *Henderson* (3) the

(1) 8 S. C. R. 28.

(2) 10 S. C. R. 377.

(3) 28 S. C. R. 425.

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Crown was held liable to pay for goods purchased by its officer for the purposes of a public work, and it was pointed out how impossible it would be to carry on the public business of the country if the officers of the Government could not within their authority make contracts binding upon the Crown. In the present case neither Mr. Charleson's authority nor Mr. Rochester's to make the contract of hiring that has been referred to is called in question, and I am not, I think, going too far in concluding that such a contract involved all its usual terms and incidents, as well those that were expressed as those that arose by law upon the contract being entered into.

On the other branch of the case my first impressions were that the claim was not one of those defined in clause (*c*) of the 16th section of *The Exchequer Court Act*. The injury complained of resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment within the meaning of the provision referred to. But it seemed to me doubtful if the injury could with propriety be said to have occurred on a public work. On further consideration I am not satisfied that my first impressions were correct. For example, if the Crown hired a dredge to be used in dredging one of the canals that are public works of Canada, and while it was so in use on the public work it was injured through the negligence of the Crown's officer or servant acting within the scope of his duty or employment, would not the case come within the statute? Or if a steam shovel were hired by the Crown for use on a Government railway, and it was, through such negligence as has been referred to, injured or destroyed, would not a petition at the suit of the owner lie to recover such damages as he had thereby suffered. It seems to me that in such cases a petition would lie;

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and in what respect does such a case differ from the present where one hired his horses to be used in the construction of a Government telegraph line, and along the line of the work? On the whole it seems to me that one does not put too large an interpretation on the clause mentioned when he concludes that the injury to the suppliant's horses complained of in this case occurred or happened "on a public work" within the meaning of the statute.

Then with regard to the defence that the cause of action having arisen in the reign of Her late Majesty the petition is not maintainable against His Majesty the King, it seems to me that to give effect to such a defence would in a large number of cases defeat the intention and liberality of Parliament in providing the subject a remedy in such cases, and give rise to the anomaly that if the action had been commenced before Her late Majesty's demise, the petition would not be determined or abated (1), while if it had not been so commenced no petition could be maintained. The cause of action for which the petition is brought was in no sense personal to Her late Majesty; and the petition is brought against His Majesty for the reason only that the executive government and authority of and over Canada is vested in him. The action is, however, really against the Government of Canada, and any moneys that may become payable upon judgment on such petition is payable out of the Consolidated Revenue Fund of Canada (2). It is said to be a maxim in the English law that the King never dies; his political existence is never in abeyance or suspended (3). But the important consideration in the present case is, it seems to me, that the petition in reality lies against the executive authority of the Dominion, and

(1) 1 Edw. VII, c. 37. (2) 50 51 Vict. c 16, s. 47.
(3) Chitty's Prerog. of the Crown, p. 11.

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that there is no good reason of public policy or otherwise for holding that the subject's rights and remedies against that authority are affected or defeated by the demise of the Crown.

With respect to the damage it will be observed that while the suppliant lost some of his horses because they were kept on the work longer than was prudent, he received more for their hire than they would have earned if they had been sent out from the work in proper time; and that is a consideration that ought not to be wholly lost sight of. It is not, I think, possible to determine accurately from the evidence how many of the horses in question died or were lost from exposure to conditions which were in the contemplation of the parties to the contract of hiring; and how many were lost or destroyed because they were imprudently kept at work on the line of construction longer than they should have been. I think, however, if I take the number to be ten, and the value of each horse with its outfit to have been sixty dollars, making the damages six hundred dollars, the result will, under all the circumstances, be fair to both parties. With reference to the sum of sixty dollars for each horse and outfit, that is the price that Mr. Rochester, about the middle of September, paid to another person who had hired similar horses to the Crown for the same purpose, and who intending to return home proposed to take his horses with him.

There will be judgment for the suppliant for six hundred dollars and costs.

Judgment accordingly.

Solicitors for the suppliant: *McPhillips & Williams.*

Solicitor for the respondent: *F. W. Howay.*