IN THE MATTER OF the Petition of Right of

ELIZABETH JOHNSON.....SUPPLIANT; 1911 [March 15.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public Work—Injury to the person—Fatal accident to workman—Negligence—Evidence—Statement of witness before the Coroner's Inquest—Inadmissibility.

On the trial of a petition of right for damages against the Crown, arising out of an accident on a public work, whereby the suppliant's husband was killed, the plaintiff sought to read and put in evidence the statement of a deceased witness who had been sworn and gave evidence before the coroner at the inquest into the death of the suppliant's husband some five years before the trial of the petition. At this inquest the Dominion Government was not represented by counsel, or otherwise, and had no opportunity of cross-examining the witness whose statement was so tendered.

Held, that in the absence of an opportunity on the part of the Dominion Government to cross-examine the witness before the coroner, his evidence was inadmissible.

Sills v. *Brown* (9 C. & P. 601) considered and not followed.

The evidence on the whole case showing that the accident was solely due to the negligence of the deceased in attempting to climb upon a swing-bridge while it was in motion, the petition was dismissed.

PETITION OF RIGHT for damages arising out of an accident to a workman on the Welland Canal.

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

March 7th, 1911.

The case now came on for hearing at Welland.

F. Morison, for the suppliant, applied for leave to read and put in evidence the statement of a witness, now deceased, who had given evidence before the coroner at the inquest into the death of the deceased. The Crown was not represented at the inquest. He relied

1911

JOHNSON v. THE KING.

Argument of Counsel.

on *Sills* v. *Brown* (1). He also cited Boys on Coroners (2); the *Canada Evidence Act*, section 10; section 20 of *The Exchequer Court Act*; *Filion* v. *The Queen* (3); *Ryder* v. *The King* (4); *Williams* v. *Birmingham Battery* (5); *Smith* v. *Baker* (6).

T. D. Cowper for the respondent contended that the evidence before the coroner tendered on behalf of the suppliant was inadmissible. The case of *Sills* v. *Brown* has been criticized by Taylor in his work on Evidence and other text writers of authority, and has not been followed by recent cases. He cites Taylor on Evidence (7); Phipson on Evidence (8); Russell on Crimes (9). In the case *Reg.* v. *Rigg* (10), Smith, J. refused to admit evidence before the coroner when the prisoner was not present. (Cites Roscoe's Nisi Prius Evidence (11). The facts in evidence disclose that the sole cause of the accident was the carelessness of the suppliant's husband in attempting to climb upon the swing-bridge while it was in motion, and the petition ought to be dismissed.

CASSELS, J. now, (March 15th, 1911) delivered judgment.

The petition of right is filed on behalf of the widow of Aaron Johnson, in his lifetime a carpenter on the Welland Canal. On the 30th April, 1906, the said Aaron Johnson while working at the Allanburg Bridge, met with an injury which resulted in his death on the 8th May, 1906.

On the 9th of May, 1906, J. W. Schooley, coroner for the County of Welland, summoned a jury with a view to enquiring as to the death of Aaron Johnson.

(1) 9 C. & P. 601.
(2) 4th ed., p. 290.
(3) 4 Ex. C. R., 134.
(4) 36 S. C. R., 473.
(5) [1899] 2 Q. B., 338.
(6) [1891] A. C. 325.
(7) 9th ed. vol. 1, p. 340.
(8) 3rd ed. pp. 400, 401.
(9) 7th ed. vol. 3, p. 2245.
(10) 4 F. & F. 1085.
(11) 18th ed., p. 201.

1911

JOHNSON v. THE KING.

Reasons for Judgment.

At the trial before me at Welland, application was made on behalf of the suppliant for leave to read the evidence of one Edward Smith, who was sworn and gave evidence before the coroner. I reserved judgment in order to consider the question of the admissibility of this evidence. Counsel for the suppliant and respondent have since the trial filed with me written arguments in favor of and against the granting of the application. I am of opinion that the evidence is not admissible. It is alleged that Edward Smith died within a few days previous to the trial. This fact is not disputed. The proceedings at the trial were conducted by both counsel in a liberal manner, and it may possibly be that outside of the legal question strict proof has not been furnished on behalf of the suppliant to enable her to have the evidence received, if admissible. If hereafter it is desired to appeal from my judgment, and any objection is taken on this head, I give liberty to the suppliant to file affidavits, if so advised, in order to put her in a correct position. I hardly think, however, this will be necessary.

Counsel for the suppliant relies upon the case of *Sills* v. *Brown*, a case decided in 1840. It is reported in 9 C. & P., at page 601. In the report of the case it is stated that the witness had been examined before the coroner on the enquiry concerning the death of the plaintiff's son, and since his examination had gone abroad. It was proposed on the part of the defendant to read his deposition taken on oath before the coroner. This was objected to on the part of the plaintiff. Coleridge, J. was of opinion that under the circumstances the deposition ought to be admitted, and being properly proved it was read in evidence. This case has not been approved of. In *Regina* v. *Rigg*, (1), which was a case of manslaughter, it appearing

(1) 4 F. & F. 1085.

1911

JOHNSON v. THE KING.

Reasons for Judgment.

that a witness was too ill to be examined on the trial of the prisoner, it was proposed by the prosecution to put in evidence the deposition of the witness taken before the coroner. Smith, J., refused to admit it on the ground that it was taken in the absence of the prisoner.

Reference may be made to Phipson on Evidence, (1); Taylor on Evidence, (2); Odgers on Evidence, (3); and Boys on Coroners, (4).

The Crown as represented by the Dominion had no opportunity of cross-examining this witness Smith.

I think the suppliant entirely fails in the proof of her case. It is quite clear from the evidence that the unfortunate man Aaron Johnson, the deceased, moved towards the bridge in a northerly direction, and was getting up while the bridge was in motion, his foot slipped and thereby the accident happened. If he had waited as he should have done until the bridge came to a stop, the accident would not have occurred. The witnesses John C. Johnson, William Scott and Frederic Edgar gave their evidence in a manner which satisfied me that they were speaking the truth. They are all respectable men so far as I could judge. The only evidence against their statements is that of one Edward Doherty. His statement is that instead of the accident occurring within three or four feet of the northerly side, that it occurred three or four feet towards the south side. Doherty at the time of the accident was between 14 and 15 years of age. The accident occurred five years previously to his giving his testimony. The witnesses on the part of the Crown had reason to locate the place of the accident, as on the deceased crying

(1) 4th ed., 1907, p. 449.
(2) 10th ed., 1906, vol. I, pp. 371-72.
(3) Canadian ed. by Russell, p. 334.
(4) 4th ed. p. 291.

1911

JOHNSON v. THE KING.

Reasons for Judgment.

out they went to his aid and helped him to the bank. Doherty's evidence is not very positive. He is asked asked by Mr. Morison, counsel for the suppliant, this question:—

"Q. Now you have heard the evidence of Mr. Johnson who says this man was injured about two or three feet from the north side of the abutment? What do you say as to that?

A. Well, it was on the south side I think."

Doherty is, I think, mistaken. The petition must be dismissed—and if the Crown asks for it, with costs.

Judgment accordingly.

Solicitors for suppliant: *Staunton, O'Heir & Morison.*

Solicitors for respondent: *Harcourt & Cowper.*