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Mar. 2.

IN THE MATTER OF THE PETITION OF RIGHT OF

S. M. DAVIES..... SUPPLIANT;

AND

HER MAJESTY THE QUEEN..... RESPONDENT.

Highway—Agreement between Crown and city to maintain same—Negligence—Accident from ice—Liability—Public work—50-51 *Vict. ch.* 16, *sec.* 16 (*c*).

Under an agreement between the City of Ottawa and the Dominion Government, the latter undertook, amongst other things, to maintain an addition to the Sappers' Bridge over the Rideau Canal, built by the city and forming part of a public highway. On the 23rd February, 1898, the sidewalk on the said addition was in a slippery condition, and the suppliant in passing over it fell and sustained a fracture of one of her arms. She filed a petition of right seeking damages against the Crown under 50-51 Vict. ch. 16, sec 16 (*c*).

Held, that while it was the duty of certain employees of the Crown to go and see that the bridge was in a safe condition for pedestrians every morning, between six and seven o'clock, the suppliant upon whom the burden of proof of negligence rested, had not shown that they had failed in their duty on the morning of the accident.

2. In this climate it is not possible in winter to have the sidewalks of the highways always in a safe condition to walk upon; and negligence in that respect when it is actionable consists in allowing them to remain an unreasonable time in an unsafe condition.

PETITION OF RIGHT for injury to the person alleged to have arisen through negligence on a public work.

The case was heard before the Judge of the Exchequer Court on the 22nd January, 1900.

The facts are stated in the reasons for judgment.

A. E. Fripp, for the suppliant: It is submitted on behalf of the suppliant that the Crown is liable for

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the accident under the provisions of sub-section c. of sec. 16 of 50-51 Vict. ch. 16.

The facts show that the officer or servant of the Crown charged with the duty of keeping the Sappers' Bridge in a safe condition for pedestrians was negligent in the performance of his duty. The foreman, Leblanc, of the gang of labourers who was employed to remove the snow and ice, is the person whose negligence fixes the Crown with liability.

There is no doubt that the Sappers' Bridge is a public work of Canada, having been constructed by the Imperial authorities. (Cites 7 Vict. (P. C) ch. 11.) The city exercises no rights of ownership over it, and it is maintained by the Dominion Government. Even if the city exercised acts of ownership over it for some time in the past, that would not alter its character as a public work.

The weight of evidence is that the officer or servant of the Crown charged with the duty of removing the ice and snow had been negligent on this particular morning. The fact that ice in a dangerous condition is there between ten and eleven o'clock in the morning shows that he had not properly done his duty in respect to it earlier in the day. If the action were against the city, the city would be liable. (Cites *Corporation of Kingston* v. *Drennan* (1)).

E. L. Newcombe, Q.C. for the respondent: The evidence is that this bridge had been constructed by the Imperial Government at the time the Rideau Canal was built, and was afterwards maintained by the city down to 1885, when an agreement was entered into between the city and the Dominion Government whereby, amongst other things, the Government undertook to maintain the bridge upon certain conditions for the city. Now if the city had continued

(1) 27 S. C. R. at p. 54.

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to maintain that bridge, I submit that the Crown would not have been liable for the negligence of those *de facto* in charge of the bridge. The city would only be liable, if it were maintaining it, in pursuance of its common law obligation to maintain its highways If a bridge is built by a Government or a private individual which forms a connecting link between two ends of a street, and it is used by the public, the city is under common law obligation to keep the bridge in repair. Suppose that the Crown represents the city in respect of its liability to repair, it should not be held to a larger measure of liability that the city would be at common law. But it seems to me that there is a more radical question than this in the law of the case, and it is this: Suppose that for the sake of argument the Dominion Government had not fulfilled its obligations to the city under the arrangement of 1885, would a private individual have any action against the Government arising out of its breach of contract, although he may have suffered injury by reason of the Government not doing what it had undertaken to do? I submit that in such a case the proper remedy is for the injured person to proceed against the city, and then if he is successful, for the city to seek indemnity from the Government I submit that the whole tenor of the agreement is that it was contemplated that between the individual and the city, the city should be liable, the question of the Crown's breach of contract to be determined in a subsequent proceeding between the city and the Crown. (Cites Municipal Act of Ontario, R. S. O. 1897 c. 223, sec. 606.)

There is not only no evidence of "gross negligence" within the meaning of the Canadian cases, but there is no evidence of any negligence at all. The evidence shows that those in charge of the work of removing

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the ice and snow had been diligent in taking precautions against accident on this particular morning. Looking at the climatic conditions prevailing on that day, the omission to put sand on the street was not negligence. It had been snowing before the accident, and after snow it is not customary to put on sand. (Cites *Ringland* v. *The City of Toronto* (1); *Forward* v. *City of Toronto* (2); *Bleakley* v. *Town of Prescott* (3); *Corporation of Kingston* v. *Drennan* (4); *Derochie* v. *Town of Cornwall* (5)).

If the Crown is responsible for the maintenance of the bridge as a part of a highway it is responsible merely because the statute has imposed upon the Government the maintenance of it. As neither the words "misfeasance" or "nonfeasance" are mentioned in the statute, it must be taken that under 50-51 Vict. c. 16, s. 16 c. the Crown's liability is the same as that of a municipal corporation at common law. (Cites *Municipality of Pictou* v. *Geldert* (6); *Leprohon* v. *The Queen* (7).

Mr. Fripp replied.

THE JUDGE OF THE EXCHEQUER COURT now (March 2nd, 1900), delivered judgment.

The suppliant, whose husband is an inmate of an asylum, supports herself and her two daughters by her earnings as a canvasser for the sale of books. She is said to be a good canvasser and successful. On the 23rd of February, 1898, she fell on the Sappers' Bridge, in the City of Ottawa, and broke her left arm. The injury was a severe one, and will, it appears, be permanent. For damages for this injury she brings her petition.

(1) 23 U. C. C. P. 93.
(2) 15 Ont. R. 370.
(3) 12 Ont. A. R. 637.
(4) 27 S. C. R. 46.
(5) 24 S. C. R. 301.
(6) [1893] A. C. 524.
(7) 4 Ex. C. R. 100.

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It appears that apart from the expense to which she was put by reason of the injury, and the loss of time occasioned thereby, the injury interferes, to some considerable extent, with her work as a canvasser; and if she could maintain her petition she would, I think, be entitled to substantial damages

In any case of this kind the suppliant, to succeed, must bring her case within clause (*c*) of the 16th section of *The Exchequer Court Act*, which gives the court jurisdiction in respect of "every claim against "the Crown arising out of any death or injury to the "person or to property on any public work result-"ing from the negligence of any officer or servant of "the Crown, while acting within the scope of his "duties or employment." It is a debated question whether that part of Sappers' Bridge on which the accident occurred is a public work of Canada. This part of the bridge was built by the City of Ottawa, but is maintained by the Government of Canada under an agreement with the city. If it is a public work, it is such because of that agreement, and the spending of public money upon it. But assuming for the purposes of this case, without deciding the question, that it is a public work, the question arises as to whether or not the case is otherwise within the statute.

The fall which occasioned the injury of which the suppliant complains, was no doubt due to the slippery condition of the sidewalk at the time of the accident; and it is alleged that in permitting it to remain in that condition there was negligence on the part of certain men employed by the Government to keep the sidewalks under their charge in a state reasonably safe for persons to walk on it. These men are under the direction of witness Cyprien LeBlanc, who says that it is his duty to see that there is no

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accumulation of snow or ice on the sidewalks under his charge. When there is snow it is removed with a snow plough, and when there is ice they put sand on it. They go to the Sappers' Bridge every morning, he says, and if the sidewalk is slippery it is covered with sand. They take, he says, (and in that he is corroborated by the men under him) greater care than the city exercises in respect of the sidewalks under its control. Neither he nor any of the men under him can speak particularly of the 23rd of February, 1898, the day on which the accident happened; but he and they say that they went to the bridge every day, and if the sidewalk was slippery sand was put on it. Sometimes this was done more than once a day. In general it would appear that these men took all reasonable care to keep the sidewalks under their charge in a safe condition; but the evidence of Captain Shaver and some of the other witnesses leaves, I think, no room to doubt that at the time of the accident the sidewalk on Sappers' Bridge was in a slippery condition, and that there was no sand on it. There is, however, no evidence to show how long it had been in that condition. It was, it appears, the duty of the men who have been mentioned to go to the bridge on the morning of that day between five and seven o'clock, and to see if the sidewalk was in a state reasonably safe for foot passengers or not, and if that were needed to put sand on it. If there was evidence from which I ought to infer that the sidewalk was in the same condition that morning that it was at ten or eleven o'clock, then probably it would be reasonable to conclude that notwithstanding their usual carefulness, the men whose duty it was to keep this sidewalk in a safe condition had, on that day in some way, neglected their duty. On the 22nd of February nine inches of snow had fallen. That apparently had been

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removed. The 23rd was overcast, mild and with light snow. The maximum temperature was 33 degrees, the minimum 26 degrees. Captain Shaver says that it had snowed a little the night before and it was warm, moderate weather in the morning so that the snow was slippery. So that it is possible that the slippery condition in which the sidewalk was at ten or eleven o'clock of that day may not have existed earlier in the morning, when it was the duty of the men in charge to examine it. In this climate it is not possible always in winter to have the sidewalks in a safe condition to walk on. Negligence in that respect, where it is actionable, consists in allowing them to remain an unreasonable time in an unsafe condition.

The Crown if liable in such a case as this is not liable because there is any duty on it to keep the sidewalks in repair, for the neglect of which an action would lie. It is liable only when the case falls within the statute, that is when in some way the duty to keep the public work in repair or in a safe condition for travel has been imposed upon some officer or servant employed by it, who has been guilty of some negligence while acting within the scope of his duty or employment. In this case the burden of establishing negligence is on the suppliant, and I do not think she has made out a sufficient case.

The judgment of the court will be that she is not entitled to the relief sought by her petition.

Judgment accordingly.

Solicitor for suppliant: *A. E. Fripp.*

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