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*June 12.
*June 26.

EMMA RYDER (SUPPLIANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING (RESPONDENT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Negligence—Common employment—Defence by Crown—Workmen's Compensation Act.

The Manitoba Workmen's Compensation Act does not apply to the Crown. Idington J. dissenting.

In Manitoba the Crown as represented by the Government of Canada may, in an action for damages for injuries to an employee, rely on the defence of common employment. Idington J. dissenting.

APPEAL from a judgment of the Exchequer Court of Canada(1), dismissing the petition of the suppliant.

The suppliant sued as administratrix of the estate and effects of her son, one William Edward Ryder, deceased, and for the benefit of the brothers and sisters of the said deceased as well as of herself, claiming the sum of $5,000 damages for the loss and damage which she and various brothers and sisters of the deceased had sustained by reason of his death.

The deceased, William Edward Ryder, met his death on the 20th April, 1903, while in the employment of the Department of Public Works of Canada by an accident which occurred at the launching of a tug named "Sir Hector," the property of the Government of Canada.

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*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

(1) 9 Ex. C.R. 330.

The said tug was used in connection with certain dredging operations carried on by the Department of Public Works at the mouth of the Red River in the Province of Manitoba, and had been hauled out of the water for repairs on to the bank of a slough, part of the Red River.

On the said 20th of April, 1903, preparations were being made for launching the "Sir Hector" under the direction of Robert Francis Sweet, a dredge master in the employ of the Dominion Government, who was entrusted with the operation by Zepherin Malhoit, the resident engineer of the Department of Public Works in charge of the dredging operations.

Mr. Sweet had under him a foreman named John Davis, who was the foreman in charge of the launching, and about ten other men, including the deceased William Edward Ryder, were engaged under the foreman John Davis in the launching.

While the preparations were still going on the vessel, by some accident, was prematurely launched, and John Davis, the foreman, and William Edward Ryder, were caught and crushed to death under her side as she moved down to the water.

The court gave judgment that the suppliant was not entitled to the releif sought by her petition of right.

Fred. Hope for the appellant. The Crown cannot rely on the defence of common employment, as the accident was due to a defective system. *Webster* v. *Foley* (1); *Brown* v. *Leclerc* (2).

Under the Exchequer Court Act a provincial statute may apply to the Crown, though the latter is not named therein. The Workmen's Compensation Act

(1) 21 Can. S.C.R. 580. (2) 22 Can. S.C.R. 53.

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of Manitoba so applies. *Letourneux* v. *The King*(1); *The Queen* v. *Martin*(2); *Penny* v. *The Queen*(3); *McDonald* v. *The King*(4).

Newcombe K.C., Deputy Minister of Justice, for the respondent.

The judgment of the majority of the court was delivered by:

NESBITT J.—This action was brought for the death of a servant of the Crown while engaged in the work of launching the Dominion steam tug "Sir Hector," at or near Selkirk, in the Province of Manitoba. The judge of the Exchequer Court stated the defences as follows:

1. That the accident did not occur on a public work.
2. That it was not caused by negligence.
3. That the negligence complained of (if any) was that of a fellow servant of the deceased, and the Crown is not liable therefor.
4. That the Workmen's Compensation for Injuries Act (Manitoba) sec. 1, ch. 178, does not apply to this case.

The learned judge dealt only with the third and fourth defences, and I understood in the argument it was agreed that if we were against the conclusions he arrived at in reference to the third and fourth defences we should express no opinion on the very debatable questions involved in the first two defences referred to, but should remit the case for determination to the trial court.

In my view the cases of *City of Quebec* v. *The Queen*(5); *The Queen* v. *Filion*(6); *The Queen* v. *Grenier*(7); and *Letourneux* v. *The King*(1); establish the doctrine that the Crown is liable to any person

(1) 33 Can. S.C.R. 335.
(2) 20 Can. S.C.R. 240.
(3) 4 Ex. C.R. 428.
(4) 7 Ex. C.R. 216.
(5) 24 Can. S.C.R. 420.
(6) 24 Can. S.C.R. 482.
(7) 30 Can. S.C.R. 42.

suffering injury in person or property or any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, such redress being sought for in the Court of Exchequer.

The liability is created according to those cases by the statute itself, and evidence that such injury resulted on a public work from the negligence of an officer or servant while acting within the scope of his duties, etc., is all that is necessary for the proof of the plaintiff's case. The action lies in law by force of the statute. It assumes, according to the reasoning contained in those cases, that the Crown can be guilty of negligence creating liability if such negligence is that of an officer or servant. It does not, however, deprive the Crown of the defences open; see *The Queen* v. *Martin*(1).

What defences (at the date of the statute) would then have been open to an employer guilty of negligence? Since the decision of *Priestley* v. *Fowler*(2), it has been the established law of England that the employer could answer to his servants' negligence that such negligence was a risk assumed by the employed and so arose the doctrine known as "common employment." I have dealt so fully with the authorities in the recent case of *Canada Woollen Mills* v. *Traplin* (3), that I need not reiterate. The statute does not take away this defence from the Crown. The Workmen's Compensation Act was passed not to create any new right of action, but to take away certain defences which were open under the authorities to the employer. The Manitoba statute does not purport to apply to the

(1) 20 Can. S.C.R. 240. (2) 3 M. & W. 1.
(3) 35 Can. S.C.R. 424.

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Nesbitt J.

Crown even as represented in Manitoba, and in my view until the Crown is deprived by competent authority of such defence it is still open to it. I think this must have been the view of the Chief Justice of this court in the *Filion Case*(1), else the latter part of his judgment in that case is unexplainable, also his language in the *Grenier Case*(2), at p. 51. Appellant's counsel argued that this defence was not open, as he claimed the Crown would be liable in the cases where an employer would be, namely, for defective system or non-supply of adequate materials or proper machinery. I express no opinion as to what might be held in a proper case. Many considerations arise *pro* and *con*. This is not defective system. At the highest it is a negligent isolated act of the superintendent in not properly staying the boat, so that it slipped when the blocks were removed. I would dismiss the appeal.

IDINGTON J.—The question raised by this appeal is whether or not the Exchequer Court Act, 50 & 51 Vict. ch. 16, sec. 16, created a liability or merely constituted a jurisdiction in the Exchequer Court to determine in regard to claims for or in respect to which liability existed already or might thereafter be created. It is as follows:

> The Exchequer Court shall also have original jurisdiction to hear and determine the following matters:—
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> (a) Every claim against the Crown for property taken for any public purpose; (R.S.C. ch. 40, sec. 5).
>
> (b) Every claim against the Crown for damages to property injuriously affected by the construction of any public work; (R.S.C. ch. 40, sec. 6).
>
> (c) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment; (R.S.C. ch. 40, sec. 6).

(1) 24 Can. S.C.R. 482. (2) 30 Can. S.C.R. 42.

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(d) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council; (R.S.U.S. sec. 1059(1)).

(e) Every set-off, counterclaim, claim for damages, whether liquidated or unliquidated, or other demand whatsoever, on the part of the Crown, against any person making claim against the Crown. (R.S.U.S. sec. 1059(2).)

Shortly after this enactment came into force Sir Henry Strong, then Chief Justice of this court, in a most luminous and comprehensive judgment, if I might be permitted to say so, in *The City of Quebec* v. *The Queen*(1), dealt with this question.

I cannot do better than adopt the exposition of the law as given in that judgment from pp. 426 to 430 of 24 Can. S.C.R., as applicable to the case now in hand. It reads as follows:

This subsection (d) which gives jurisdiction to the Exchequer Court to hear and determine "every claim against the Crown arising under any law of Canada" would indubitably and upon the direct authority of two recent decisions of the Privy Council, if the words "under any law in Canada" were eliminated, have the effect of giving a remedy to the subject against the Crown in all claims for damages for *torts* or *delicts*. In the case of *Farnell* v. *Bowman*(2), an appeal from New South Wales, it was held that the Government of that colony was liable to be sued in an action *ex delicto* under a statute providing "that any person having or deeming himself to have any just claim or demand whatever against the Government" might set forth the same in a petition to the governor, upon which petition a certain prescribed procedure being followed judicial relief might be obtained as in the case of an ordinary action between subject and subject. In this judgment it is said with reference to the proper construction of the statute: "Thus unless the plain words are to be restricted, for any good reason, a complete remedy is given to any person having or deeming himself to have any just claim or demand whatsoever against the Government. These words are amply sufficient to include a claim for damages for a tort committed by the local Government by their servants."

In the case of the *Attorney-General of the Straits Settlement* v.

(1) 24 Can. S.C.R. 420. (2) 12 App. Cas. 643.

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Wemyss(1), the words of an ordinance authorizing a remedy by petition of right against the Crown for tortious acts were in words even more opposite to the case before us; these worde were: "Any claim against the Crown for damages or compensation arising in the colony shall be a claim cognizable under this ordinance."

The Judical Committee in their judgment make the following observations upon the meaning of this provision:—"Their Lordships are of opinion that the expression "claims against the Crown for damages or compensation" is an apt expression to include claims arising out of *torts*, and that as claims arising out of contracts and other classes of claims are expressly mentioned, the words ought to receive their full meaning. In the case of *Farnell* v. *Bowman*(2), attention was directed by this committee to the fact that in many colonies the Crown was in the habit of undertaking works which in England are usually performed by private persons, and to the consequent expediency of providing remedies for injuries committed in the course of these works. The present case is an illustration of that remark. And there is no improbability, but the reverse, that when the legislature of a colony in such circumstances allows claims against the Crown in words applicable to claims upon *torts*, it should mean exactly what it expresses."

These two cases have a two-fold application here, first as shewing that the words "any claim against the Crown" are sufficiently comprehensive to include *torts*, more especially as the 15th section makes express provision for the case of claims arising from contracts; secondly, these judgments of the Privy Council lay down a rule or canon for the construction of colonial enactments by which the remedy of the subject against the Crown is enlarged, which it is the duty of this court to apply, as far as possible, to the Acts of Parliament now under consideration.

It being then established by the cases cited that the language of section 16, sub-section(d) "every claim against the Crown" is to have the wide construction before stated applied to it, which would include claims for damages arising *ex delicto*, we are next to inquire whether any and what restriction on the meaning which would be thus attributable to the expression in question, if it had stood alone, is imposed by the words "arising under any law of Canada," which immediately follow.

It may be said that these are words of limitation which confine the clause to claims in respect of which some pre-existing law had imposed a liability on the part of the Crown. Again, it may be said that a "law of Canada" necessarily means not only some prior law of Canada, but must also exclusively refer to statute law. In support of this last proposition it might be said that there is no general common law prevailing throughout the Dominion of Canada,

(1) 13 App. Cas. 192. (2) 12 App. Cas. 643.

that each of the several provinces possesses its own private common law, and that the common law of the territories not included within any of the provinces depends on the enactments of the Dominion Parliament. This may be true, and is a necessary incident and result under every system of federal government where the several provinces or states forming the confederation have each its own separate and different system of private law. This has been recognized as a necessary consequence under the federal constitution of the United States, and that for a reason which would be equally applicable to Canada. It can make no difference that all the provinces, save one, derive their common law from that of England; the circumstance that the private law of one province, that of Quebec, is derived from a different source, makes it impossible to say that there is any system of law, apart from statute, generally prevalent throughout the Dominion. No inconvenience can result from this, since every case which could arise would be provided for by the law of some one or other of the provinces.

Were I obliged to determine this question of construction as one on which the decision of this appeal depended I should probably come to the conclusion that the clause in question ought not to be so interpreted as to exclude claims in respect of *torts* and *delicts*, not referable to any prior statute of the Dominion, but being such as would, under the law of any of the provinces of Canada, have entitled parties to relief as between subject and subject. Taking the rule so clearly and emphatically laid down by the Privy Council in the cases before cited as a guide which we are bound to follow, it would appear to be proper that a wide and liberal construction, what is called a beneficial construction, should be placed upon the language of the legislature; a construction calculated to advance the rights of the subject by giving him an extended remedy. Proceeding upon this principle, we should, I think, be required to say that it was not intended merely to give a new remedy in respect of some pre-existing liability of the Crown, but that it was intended to impose a liability and confer a jurisdiction by which a remedy for such new liability might be administered in every case in which a claim was made against the Crown which, according to the existing general law, applicable as between subject and subject, would be cognizable by the courts. Further, I am of opinion that it would be right to hold that the words "law of Canada" did not mean exclusively a statute of the Dominion of Canada, but might be interpreted as meaning the law of any province of Canada which would have been appropriate for the decision of a particular claim in respect of a *tort* or *delict* if it had arisen between subjects of the Crown. It would not, I think, be taking any unwarrantable liberty with the language of the legislature so to interpret the words "any law of Canada," for in a non-technical and popular sense the laws of the several provinces of Canada are laws

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of Canada, and the rule laid down by the cases before cited requires us to give the terms used the most favorable and comprehensive construction possible.

Mr. Justice Gwynne, in the same case, recognized almost as distinctly, though not using express words to that effect, that this legislation created a liability as well as established a jurisdiction. The judgment of the court in that case, by reason of the facts in the opinion of the court falling short of bringing the case within the Act, even if it were to be assumed capable of the construction that it created a liability, left no binding decision in accord with the opinions thus expressed. The head-note in the report is in accord with the opinions expressed, but obviously is misleading in this regard if taken as the decision.

A few months later, in *The Queen* v. *Filion*(1), the majority of this court decided that the Crown, at all events as to the Province of Quebec, had become liable for the negligence of its officers in a case within the Act. Chief Justice Strong and the late Mr. Justice Gwynne clearly treated the case as if liability had been created as well as jurisdiction given by this Act.

The Chief Justice and Mr. Justice Sedgewick assumed that that had been decided in the former case. Mr. Justice Gwynne does not refer to the former case, but is most explicit in his language in expressing the opinion that the Act created a new liability and that thereby the Crown had become responsible, for he says:

> I am of opinion that the language of the above Dominion statute is sufficient to give the persons suffering injury in person or property or any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, a right to redress, even though they may have had none before, such redress being sought for in the Court of Exchequer.

(1) 24 Can. S.C.R. 482.

Mr. Justice Sedgewick, whilst adopting the opinion of Mr. Justice Gwynne in the former case, incidentally points out that in Quebec the doctrine of *collaborateur* did not obtain as it had in England.

This adoption of the principle thus reached and acted upon, I think, binds us now. It has been recognized in many cases since, needless to refer to, except in the case of *Letourneux* v. *The King*(1), where the present Chief Justice of the court delivering the judgment of the court (from which only Mr. Justice Davies dissented, although, I take it, not on the ground of the principle I have referred to being wrong, but on other grounds) expressly says:

> By section 23 it was enacted that any claim against the Crown may be prosecuted by Petition of Right, and sections 15 and 16 give exclusive original jurisdiction to the Exchequer Court so that this action lies in law. Such is the jurisprudence of this court as finally settled by *The Queen* v. *Filion*(2).

And again he says:

> And upon the authority of *The Queen* v. *Filion*(2), under sections 16, 23 and 58 of the Exchequer Court Act, this right of action cannot be controverted.

This is important not only as the deliverance of the majority of the court, but as coming from the present Chief Justice, who had originally dissented from the rest of the Court in the case of *The Queen* v. *Filion* (2).

Because of the result having been reached in this indirect way, I have set forth at length the process of reasoning and facts so that what was meant, and what follows, may be better understood.

The way in which Sir Henry Strong puts the matter when he implies, rather than says, that the whole of the sub-sections must be read as parts, of which

(1) 33 Can. S.C.R. 335. (2) 24 Can. S.C.R. 482.

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each depends for its operative force upon the reference by the sub-section (d), to the "law of Canada," may lead to different results from following that on which the late Mr. Justice Gwynne apparently puts it as resting, for each class of injury or compensation, upon each independent sub-section respectively giving a right and a remedy appropriate thereto.

The case of *Attorney-General of the Straits Settlement* v. *Wemyss*(1) seems expressly in point as upholding the latter view, and applicable here, and the necessity for relying upon the Manitoba Workmen's Compensation for Injuries Act need not in that way be resorted to.

The Crown is, by the other way, made liable whensoever and wheresoever the negligence of a servant would have rendered a private individual master liable therefor.

I think it must be taken in either case as the result of this history that it has been deliberately determined after full consideration that, in the words of Sir Henry Strong already quoted:

> The act was intended to impose a liability and confer a jurisdiction by which a remedy for such liability might be administered.

If the question should be again agitated and be determined differently from the result about to be declared in this case, the final consideration may call for a determination of the exact legal results that I am not called upon to decide.

The Workmen's Compensation Acts in Manitoba and in Ontario and elsewhere have restrictions upon the amount to be recovered, and otherwise. These restrictions would probably be inoperative if the liability as well as remedy is created independently of any

(1) 13 App. Cas. 192.

provincial legislation and merely by force of sub-section (*c*) itself.

It may be that by a consideration of the whole legislation under review and having regard to the object aimed at, of removing the historical distinction in favour of the Crown and the desirability of removing a distinction in results derivable from intrinsically the same relations under another or different form the way may be found to interpret so as to effect these objects.

The policy of this section 16 (as a group or as independent sub-sections) of the Exchequer Act is, clearly, to put the relation between the Crown and its subjects, and all issues springing therefrom, in regard to the several matters dealt with by such legislation, upon the same footing as between subject and subject.

This result may not be exactly obtained by adopting either of such interpretations as I have adverted to.

No canon of construction is violated, however, in adopting either. The modern trend of legislation seems in accord with some such construction.

I do not understand that the opinion of the majority of the court now denies this principle of liability as having been created by the Act and as still existing.

It would seem rather as if they found such limitations of the liability as to exclude servants, suffering from the negligence of fellow-servants, from the benefits of the Act, unless where brought within its beneficial operations by reason of special legislation or the state of the law at the time of the enactment under consideration.

I am unable to concur in this.

I cannot think that the suggestion to look upon the

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doctrine of common employment simply as a defence is a sound one.

With great respect I am bound to say that the suggestion seems to me to spring from a misconception of and misapplication of the legal principles involved.

At least ever since *Priestley* v. *Fowler*(1), it had been, until remedied by legislation, English law that no action would lie against the master for injuries arising from the negligence of a competent fellow-servant.

There was by that case, if not before, held to be an implied contract that the suffering servant had assumed that responsibility and risk and that the master had not to answer for the others of his servants in that regard.

It is not a matter of defence such a payment; as accord and satisfaction; as release; or as the Statute of Limitations, which had to be pleaded in bar.

If sued by a servant for negligence of a competent fellow-servant, the master could plead "not guilty," but required no other defence. Sometimes, even before the modern loose system of pleading, pleas can be found (where the declaration had not truly and explicitly set the facts forth), in answer to such a declaration alleging that the accident arose from the neglect of such a fellow-servant, but in cases where the facts and cause of action had been properly set out in the declaration and were not complicated with other considerations such as the incompetence of the fellow-servant or like consideration, a demurrer or the simple plea of "not guilty," would have been all that was required. See *Deverill* v. *The Grand Trunk Railway Co.*(2), and *Degg* v. *Midland Railway Co.*(3).

(1) 3 M. & W. 1.
(2) 25 U.C.Q.B. 517.
(3) 1 H. & N. 773.

Hence when the Employers' Liability Act in England and the Workmen's Compensation Acts of Ontario, Manitoba and elsewhere came to be enacted, each of them proceeded not by removing a defence, but by creating a liability.

So far as the cases covered by sub-sec. (c), sec. 16, now in question, are concerned, the liability of the Crown was created thereby and unlimited if no other legislation, local or general, imposed a barrier.

I think the appeal should be allowed and the matter referred back to the Exchequer Court for trial or completion of trial.

Appeal dismissed with costs.

Solicitors for the appellant: *Heap & Heap.*
Solicitor for the respondent: *E. L. Newcombe.*