1916

*June 5.
*June 19.

HOWARD HERBERT VICTOR OLMSTEAD (SUPPLIANT)..... APPELLANT;

AND

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

HOWARD HERBERT VICTOR OLMSTEAD AND WILLIAM ATCHISON OLMSTEAD (SUPPLIANTS)..... APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Public work—Damage to adjacent lands—Negligence—Liability of Crown—"Exchequer Court Act," s. 20—Litigious rights—Bar to action—"Rideau Canal Act," 8 Geo. IV., c. 1 (U.C.)—Limitation of actions.

The Crown is not liable, under sec. 20, sub-sec. (*c*) of the "Exchequer Court Act" (R.S.C., [1906] ch. 140), for injury to property by negligence of its servants unless the property is on a public work when injured. *Chamberlin* v. *The King* (42 Can. S.C.R. 350), and *Paul* v. *The King* (38 Can. S.C.R. 126), followed.

Per Fitzpatrick C.J.—Where property is purchased for the purpose of enforcing a claim against the Crown for injury thereto, such purpose constitutes a bar to the prosecution of the claim.

Per Brodeur J.—Section 26 of the "Rideau Canal Act," 8 Geo. IV., ch. 1 (U.C.), providing that any plaint brought against any person or persons for anything done in pursuance of said Act must be commenced within six months next after the act com-

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Anglin and Brodeur JJ.

mitted, applies to proceedings against the Crown though the Crown was not mentioned and no claim against it founded on tort could then be prosecuted. Idington J contra. Anglin J. dubitante.

APPEAL from the judgment of the Exchequer Court of Canada (1) dismissing the suppliants' petition of right.

The appellant, H. H. V. Olmstead, is the owner of rear half of lot number 5 in the 4th concession of the Township of Kitley in the Province of Ontario, and the appellants, H. H. V. Olmstead and W. A. Olmstead, are the owners of the lot number 4 in the said 4th concession of the Township of Kitley. The appellants' titles were proved at the trial, and no question as to them is involved in this appeal. The lands adjoin each other and border on Irish Creek which empties into the Rideau Canal about two and one-half miles below them.

At Merrickville, which is situate on the Rideau Canal about five miles below the junction of Irish Creek and the Rideau Canal, a dam was built as part of the construction of the Rideau Canal to control the waters thereof for navigation purposes.

At the time of the construction of the Rideau Canal a depth of about 5 feet 3 inches of water on the locksill at the Merrickville lock was established, which continued until 1890 when the depth was raised to six feet. The appellants' lands are not flooded when the water on the locksill does not exceed six feet.

During many of the years between 1890 and 1914 when the petitions of right were filed, the depth of the water on the locksill exceeded six feet whereby the appellants' lands were flooded, and a large portion of them was rendered useless. The appellant, when

(1) 16 Ex. C.R.

1916

OLMSTEAD v. THE KING.

acquiring the lands in question, acquired the rights of their grantors to claim damages for flooding which had occurred during the ownerships of such grantors.

The defences to the actions were the following:—

1. Acquisition of a right to flood by reason of the purchase from one Gideon Olmstead of his rights to do so as owner of a mill and mill dam on Irish Creek.

2. Prescription under the Acts relating to the Rideau Canal.

3. Prescription under the "Limitations Act" of the Province of Ontario.

4. Lost grant.

5. Non-assignability of the claims for damages which belonged to the appellants' grantors.

6. Obstructions in Irish Creek impeding the flow of the water.

The learned judge of the Exchequer Court held that the Crown had not established any prescriptive right to flood the appellants' lands, but he held that the appellants' rights of action were barred by the 26th section of 8 Geo. IV., ch. I. (U.C.), this statute being the original Act providing for the construction of the Rideau Canal.

The learned judge did not deal with any of the other defences raised by the Crown.

Sinclair K.C. for the appellants. Under sec. 20, sub-sec. (*c*) of the "Exchequer Court Act," the Crown is liable, if the cause of injury arises on a public work, though the property injured is not situate thereon. *Price* v. *The King*(1), *Letourneux* v. *The King*(2).

The limitation clause in the "Rideau Canal Act" could not apply to the Crown, which was under no

(1) 10 Ex. C.R. 105. (2) 33 Can. S.C.R. 335.

legal liability for a tort when it was passed. See *Philipps* v. *Rees*(1), *The Queen* v. *Yule*(2), at page 30

Smellie for the respondent.

THE CHIEF JUSTICE.—I think these petitions of right were properly dismissed and whilst agreeing with the reasons for judgment of the judge of the Exchequer Court I am disposed to think the judgment could be supported on more than one ground.

In particular I am of the opinion that it is a good defence to the suit that any such assignment of a right to bring it as set up is illegal. The lands were purchased by the petitioners as to part in the year 1904 and as to the rest in the year 1912, the petitioners by deeds of even date with the conveyances obtaining from the grantors what purported to be an assignment of the latter's rights to certain claims to recover from His Majesty compensation for flooding the lands since the 1st January, 1890. In the petitions of right it is alleged that the

> suppliants' said lands have during each year since and including the year 1890 been overflowed and flooded by waters of the Rideau Canal and have thereby been rendered entirely useless.

It is perfectly clear that what the petitioners purchased and intended to purchase was this so-called right to a claim to recover against the Crown.

The policy of the law has always been opposed to this trading in litigious rights and such transactions are to be discouraged in every possible way. They, of course, have nothing in common with assignments of debts and choses in action which by statute are now permitted.

Whilst the assignment of a right to litigation is forbidden as between subjects, the rule must apply

(1) 24 Q.B.D. 17. (2) 30 Can. S.C.R. 24.

1916

OLMSTEAD v. THE KING.

The Chief Justice.

with greater force in the case of the Crown, since the subject has no right to sue the Crown but can only present a petition of right. There being no such thing as a right to a claim to recover against the Crown, there can be no assignment of any such pretended right.

I think this constitutes not only a good legal defence, but also disposes of any merits the claims might be supposed to have.

The appellants have in the course of the proceedings set up a different claim from anything alleged in their pleadings. In their factum they say:—

> The appellants' lands are not flooded when the water on the locksill does not exceed 6 feet, * * *

Again

> It is established that the lockmaster at Merrickville was expressly instructed to hold only 6 feet of water on the locksill * * *
>
> The instructions to the lockmaster shew that any flooding that occurred resulted from the disobedience of the lockmaster who did not observe the instructions given to him.

This, however, is not sufficient to entitle the appellants to claim under sec. 20 (*c*) of the "Exchequer Court Act," for that section not only requires that the injury to the property should have resulted from the negligence of a Crown servant, but also that it should have occurred on a public work. According to the evidence Merrickville is 10 miles away.

DAVIES J.—I think this appeal must be dismissed with costs. I am unable to distinguish it from the cases of *Paul* v. *The King*(1) and *Chamberlin* v. *The King*(2), the decisions in which I think must govern in this case.

IDINGTON J.—I cannot agree with the view expressed by the learned trial judge that 8 Geo. IV., ch. 1, sec. 26, furnished a bar to this action.

(1) 38 Can. S.C.R. 126. (2) 42 Can. S.C.R. 350.

The point made by Mr. Sinclair that the Crown not being named in the section, and that indeed at the time when the Act was passed there could have been no relief sought against the Crown, seems well taken, and to put beyond doubt the possibility of the legislature having contemplated in passing the section in question that it should apply to anything but what it expresses.

Statutes of limitation are not to be extended beyond that which they plainly express. No case exactly in point has been cited nor have I been able to find any, but the converse cases of *Lambert* v. *Taylor*(1) and *The King* v. *Battams*(2), seem to illustrate the principles that should govern.

The claims seem to arise only out of isolated acts, where through the neglect of some one acting on behalf of the Crown, the waters in the Rideau Canal were raised beyond the six feet limit, which, if observed, would on the evidence produce no damage to the suppliants.

It does not appear to me that any such acts of non-continuous negligence, occurring at various times, could give any prescriptive right, especially when any claim of right in respect thereof is denied by respondent.

Nor does it appear to me on the facts that the instructions of the superintendent having been disobeyed and the acts being those of others employed by respondent neglecting their duty being the cause of damage, should furnish any defence herein.

It seems to me from the evidence that the record of these results should have come under the observation of some one in authority for whom the respondent should be held responsible.

I have not observed anything put forward in the

(1) 4 B.&C.138. (2) 1 East 298.

1916

OLMSTEAD v. THE KING.

Idington J.

argument shewing that due care had been taken to check such objectionable irregularities and their consequences.

Even if so existent I doubt the efficacy of such a defence.

The other members of the court have unanimously concluded that the appeal must be dismissed, and I, seeing no useful purpose to be served by me prosecuting my researches in this voluminous record to find out and determine in regard to that and other features of the case, must be content with remaining in doubt.

It may also be that the appellants are without any remedy but that falling within sub-section (*c*) of section 20 of the "Exchequer Court Act" put forward in the appellants' factum and the peculiarities of that sub-section may be held to be such as to give no remedy to them because the property damaged is not "on a public work."

This latter point was not taken or argued but has been forced on our notice in the *Piggot Case*(1) (argued this term. The case of *Chamberlin* v. *The King*(2), might also on argument have been found a bar to this action.

Under the circumstances I can only submit these considerations without assenting to or dissenting from the judgment to be delivered.

ANGLIN J.—As at present advised I gravely doubt whether section 26 of 8 Geo. IV., ch. 1 (U.C.), relied upon by the learned judge of the Exchequer Court, applies to a claim against the Crown. The plaintiff's claim, however, is for damages for injuries sustained through the negligence of a Crown servant in

(1) Page 458, *post*.

(2) 42 Can. S.C.R. 350.

carrying on a public work. The injury of which he complains did not happen on the public work. Section 20 (*c*) of the "Exchequer Court Act," therefore, does not confer jurisdiction on the Exchequer Court. *Chamberlin* v. *The King*(1), *Paul* v. *The King*(2). Since these cases were decided *Letourneux* v. *The Queen*(3), cannot be followed in such a case as this. In that case the full limitative effect of the words "on any public work" in sub-sec. (*c*) of sec. 20 would appear not to have been sufficiently considered. The suppliant points to no other provision giving him a right of action against the Crown.

BRODEUR J.—This is an appeal from the Exchequer Court which dismissed the appellants' petition of right.

It is claimed by the appellants that their properties were flooded by the waters of the Rideau Canal.

Several grounds of defence were urged by the respondent but the petitions were dismissed on the ground that the appellants' rights of action were barred by the statute providing for the construction of the Rideau Canal. By the 26th section of that statute (8 Geo. IV., ch. 1, in 1827), it was provided that any suit in damages against any person for anything done in execution of the powers conferred by that law should be brought within six months

after the act committed, or in case there shall be a continuation of damages, then within six calendar months next after the doing or committing of such damages shall cease and not afterwards.

When that Act was passed the right to sue the Crown did not exist.

In 1870 a law was passed authorizing the reference to official arbitrators appointed under the provisions of the Act of 1867 (31 Vict., ch. 12), of claims

(1) 42 Can. S.C.R. 350. (2) 38 Can. S.C.R. 126.
(3) 33 Can. S.C.R. 335.

1916

OLMSTEAD v. THE KING.

Brodeur J.

arising out of any death or any injury to person or property on any public work, provided (sec. 2) that nothing herein contained shall be construed as making it imperative on the government to entertain any claim under this Act.

In 1887 the "Exchequer Court Act" was passed and it was provided that those claims in damages against the Crown could be prosecuted by petition of right and exclusive jurisdiction thereon was given to the Exchequer Court.

It is contended by the appellants that the limitation enacted by the statute concerning the Rideau Canal would not apply to damages claimed against the Crown because no right of action existed against the Crown at the time the statute was passed.

At that time the action for damages suffered in respect of the canal could be instituted only against the contractors and the officers who may have caused the damages. If later on the liability was extended to the Crown then the provisions of the statutes would apply to the Crown as well as to the other persons.

The limitation section should benefit the Crown as well as the others.

It has been found by the court below that within the six months previous to the petitions of right no damages had been suffered by the appellants. Then they were barred from making any claim for damages against the Crown under the provisions of the 26th section of chapter 1 of 1827.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *R. V. Sinclair.*
Solicitors for the respondent: *Smellie & Lewis.*

[NOTE.—On the same day on which this case was decided judgment was given dismissing the appeal of *Pigott* v. *The King* on the ground that the property of the appellant was not on a public work when injured.]