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April 16.

SINCENNES-McNAUGHTON LINES, LIMITED ..... } SUPPLIANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Crown—Negligence—Section 20 Exchequer Court Act—Article 1054 C.C. Res ipsa loquitur discussed.

The *J.B.K.* was proceeding down the Lachine Canal to Montreal. She had passed through Basin No. 1, into lock No. 1, where she was duly moored to the south bank. The gates between the Basin and the lock had been closed and the water in the lock was being lowered and let out through sluices. When the water in the lock was about on a level with the river below, and when the lower gates were about to be opened to let the steamer through, the upper gates gave way, releasing the water in the basin and causing the steamer to part her moorings and to break through the gates, and this on-rush of water caused damage to the suppliant's tug.

Held, That as it appeared, upon the evidence, that the breaking of the gates could only have occurred on the theory that the gates were not properly mitred by the servants of the Crown in charge thereof, the court should draw such inference of fact and find liability of the Crown for negligence under sec. 20, sub-sec. c of the Exchequer Court Act.

The applicability of Article 1054 of the Civil Code of the province of Quebec in actions such as this one against the Crown, and the maxim *res ipsa loquitur* discussed and commented upon.

Petition of right to recover damages for injuries caused to the tug boat *Virginia* by reason of the alleged fault of the servants of the Crown.

Montreal, March 10th, 1926.

Case now tried before the Honourable the President.

A. W. Atwater K.C., W. L. Bond K.C., and *L. Beauregard* for suppliant.

Aimé Geoffrion K.C. and *J. A. Prud'homme K.C.* for respondent.

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The facts are stated in the reasons for judgment.

MACLEAN J. now this 16th April, 1926, delivered judgment (1).

This is a Petition of Right, wherein the suppliant seeks damages for injuries caused its tug boat, *Virginia*, by the negligence and fault of the servants of the respondent it is alleged, and in the following circumstances.

On the night of August 29th, 1923, the steamer *John B. Ketchum 2nd*, 190 feet in length, was proceeding down the Lachine Canal on her way to the Harbour of Montreal and onwards. She had passed through Basin No. 1 and into Lock No. 1, which is 270 feet in length, where she was moored in conformity with the canal rules and requirements, on the south bank of the lock. The gates between the basin and Lock No. 1 having been closed, the lock was being emptied of water through the sluices of the lower gates, and when the water in the lock was about on a level with the water in the river or harbour below, and when the lower gates were about to be opened to allow the *Ketchum* to pass out of the lock, the upper gates gave way, releasing the body of water in the basin above which caused the *Ketchum* to part her moorings and break through the lower gates. This in the end caused the damage camplained of to the tug boat of the suppliant company. At the time of the accident the water in the basin was from 14 to 16 feet higher than in Lock No. 1. The south upper gate floated down through the lock, the north upper gate hung by the wall of the lock, but had passed over the sill. The suppliant's submission is that the breaking of the gates between the basin and the lock was due to the negligence of the respondent, in lowering the water in the lock, before the upper gates, that is the gates between the basin and the lock, were properly closed or mitred, which the respondent denies.

The gates are made of horizontal beams of heavy timbers tied together with steel beams, tie rods, etc., and each weighs from 40 to 50 tons. The upper gates, which are here particularly in question, each measure 31½ feet in height, by 28 feet in length, horizontally. They are two feet thick at the bottom, and upwards to a distance of 20

(1) An appeal has been taken to the Supreme Court of Canada.

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feet, the thickness of the remaining portion being about 20 inches. The mitre-sill consists of heavy timbers, 18 x 17 inches. It is well anchored into the masonry where it is screwed, bolted and concreted, and forms a V-shaped abutment several inches above the floor of the lock, and against which the gates abut when closed. The gates normally are above the flooring of the canal, and do not touch the bottom at any point, except at a point near the canal walls.

The gates are independently operated by electric motors, one on each side of the lock wall, and there is one operator for each motor. The valves at the bottom of the gates are also operated by electric motors, but jointly. The closing or bringing together of the ends of the gates is ordinarily called mitring. The horizontal pieces of timbers forming the gates are bevelled at the ends where the gates come together, and this bevelled end of a gate is usually referred to as the mitre of the gate. When the gates are brought together or mitred, they are not then straight across from wall to wall, but meet in a V-shape, pointing up against the current.

The question for decision therefore is what caused the upper gates to break, and the water to rush from the basin into the lock, if that is capable of ascertainment, and if ascertained whether the same was due to the negligence of the employees of the respondent.

Some of the possible causes of the accident may safely be eliminated. It was suggested, that the *Ketchum* in swinging on her moorings, moved astern and broke the gates. There is not a word of evidence to support this suggestion, and there is positive evidence against it. It could not, in my opinion, have happened without its being well known to several persons; and had it occurred, I have no doubt witnesses would have been available to clearly establish the fact. The captain of the *Ketchum* had just barely passed off the platform of the upper gates, crossing from the north side to the south side to join his boat, when the accident occurred. While on the platform, he was conversing with the lockmaster Sandilands. At the moment of the accident, Sandilands was just about to give the signal to open the lower gates. The upper south gate motorman was close to both his gate and the *Ketchum*.

Had the *Ketchum* swung astern against the gates it could not but have been observed by several persons. I find that there is nothing whatever to justify a serious consideration of this theory, and the suggestion of any such occurrence may be confidently dismissed. Then there is no evidence that the mitre sills were in the least injured; in fact the evidence is to the effect that after the accident they were found to be in good condition. There is no suggestion that the electric motors, operating the upper gates, were not in good order and properly functioning, immediately before the accident.

The gates were I think strongly built, and in good condition. The evidence is all that way. They had been in use for over a year, and had worked successfully. While there may have been slight repairs required during that time, and while at times the gates may not have worked without some minor difficulties, yet this would, I am satisfied, be traceable to the appurtenances of the gates or other causes, and not to the gates themselves. That type of gate had been in use here for fifty years. The suppliant suggested inferences from the fact that the gates in coming together, on the occasion in question, trembled more than usual. I think this was of common occurrence, and by itself would not be evidence of importance, although I do not say it may not have been in this instance, indicative of a condition of affairs, prevailing immediately prior to the breaking of the gates, and prophetic of the disaster.

There is only one remaining possible or probable cause of the breaking of the gates, and that is the improper mitring of the gates, which is claimed by the suppliant as the real cause, and this must be carefully considered. In the first place it should be stated that the foreman carpenter who saw the gates after the accident, says that the north gate which hung to the wall was broken from top to bottom at the mitre end, vertically, every timber being broken. He states also that the pressure must have gone from the south gate against the north gate, breaking the mitring of the latter gate. Col. A. E. Dubuc, Chief Engineer of the Department of Railways and Canals, and at the time of the accident, Superintendent of the Quebec canals, which included the Lachine Canal, gave evidence at the trial, and in a very frank manner. He stated that

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when the mitring is performed perfectly the gates are brought closely together vertically, or as close as masses of that type can be brought together, and rest against the mitre sill at the bottom. He stated that improper mitring, defective mitre sills, or the application of some external force, such as the *Ketchum* striking the gates, could alone account for the accident. With the gates in good condition, he could perceive of no other causes that would account for the accident. Granting that the gates were sufficiently strong to resist the pressure, the mitre sills in good condition, and that the *Ketchum* did not strike the gates, he said there remained only one cause, "something wrong with the mitring." He also testified that if the gates were 3 or 4 inches from coming together, he should be anxious as to the outcome, not only because of the opening between the vertical sections of the gate, but also from the fact that this would mean that the gates would be away from the sills, and with 13 or 14 feet of water against the gates, there would be a tendency for the water to rush under the gates which are three or four inches from the bottom. Both conditions existing, the witness said the effect of this pressure would be to lift the gates and tear them away, and the tendency would be to lift them first. He said also that if one gate was splintered from top to bottom at the mitre end, it would indicate that one gate was forced against the other with tremendous pressure, which could not happen if the gates were properly mitred.

Mr. R. A. Ross, a civil engineer, gave evidence to the effect that imperfect mitring would account for the damage or injury to the gates, and that if one gate overlapped another, the gate which was overlapped would tear the gate that was overlapping, and that in his opinion, the break in the north gate was due to improper mitring, and that the north gate was overlapping the south gate. In supporting this opinion he said:—

> We will consider these two leaves (the gates) a barn door, which closes against a sill at the bottom. You have 360 tons pressing at right angles on one gate, tending to close it, and 360 tons at right angles to the other gate. When the angles are properly mitred, the whole of the pressure acts on the mitring and across the whole surface of the whole gate from top to bottom. When the gates are not properly mitred one of them is pressing its sharp corner into the other; still with a pressure of 360 tons in each direction, and therefore one would expect that sharp corner would not only crush in the direction of the opposite gate, but would also tear the fibres of the wood apart.

Mr. Beaubien, another civil engineer, expressed a similar opinion as to the causes producing the breaking of the gates, and I need not enlarge upon the testimony of this witness.

It appears also from the evidence of the captain of the *Ketchum,* that on the night in question, and while crossing the upper gates, he engaged in conversation with the lockmaster, and while doing so, drew the attention of the lockmaster to the fact, that there was a flow of water greater than he had ever seen in his experience, at the mitring and that the latter said "Yes, there is a big leak." The upper gates had apparently not been working satisfactorily for a day or so, and it is clear from the evidence that they were reported the day before the accident, to the Acting Superintending Engineer by one of the lockmasters, and they were to be examined the next day. Some of the evidence would indicate that there was an opening of four or five inches vertically, and two or three inches wide at the top of the gates through which the water was pouring, but it is not clear how far under the water this extended.

After a consideration of the evidence I am of the opinion that the gates, between the basin and Lock No. 1 broke owing to improper mitring, by the servants of the respondent in charge of the same. This is shown, I think, by the fact of an unusual flow of water through the gates on the night in question. While the evidence is not very strong upon this point, yet it could hardly be possible to find the flow of water observed and remarked upon, unless the flow was beyond the usual amount. That there should be some flow might be expected, as it is usual and would cause no comment, but when the flow becomes the subject of remarks as it was here, it is I think a fair inference that the mitring was not reasonably complete. Further it is difficult to understand what else could bring about the breaking of the gates, if there had not been an unusual and improper flow of water between, or under the gates, or both, a condition easily and quickly corrected by remitring, and by closing if necessary the sluices of the lower gates. The conclusive evidence, however, in my opinion, that the gates were not properly mitred, inheres in the peculiar fracture or breaking of the mitre end of the north

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gate, which must have been caused by the great pressure of the mitre end of one of the gates, against the other. The vertical fracture of the north gate described by the foreman carpenter of the canal, and as disclosed by the photograph of the same, was only possible in my opinion when the relation of one gate to the other was as described by Ross and Beaubien. Perhaps, no one other condition, or class of evidence, could so effectively prove what caused the gates to break, as the character of the damage to the gates, and particularly the vertical fracture or break at the mitre end of the north gate. I am satisfied that the accident was due to the negligent mitring of the upper gates, and lowering the water in the lock before this was properly done, and that the accident causing the damage complained of, is to be attributed to this. I think therefore the suppliant must succeed.

Finding as I do, that the accident was attributable to the negligence of officers or servants of the respondent, within the meaning of sec. 20, s.s. (*c*) of the Exchequer Court Act, there would seem to be no occasion for me to discuss in any exhaustive way, legal principles generally applicable to negligence cases. However there were two points raised on the argument that might be mentioned. The first relates to the application of the provisions of Article 1054 of the Civil Code of the Province of Quebec, to cases in this court arising out of the negligence of officers or servants of the Dominion Crown, while acting within the scope of their duties or employment in that province. This point is obviously one of great importance, but as it has already been considered in cases of binding authority, no good purpose would be served by discussing it here, no matter what view I might venture to entertain concerning the conclusions arrived at in such cases. The second point to which some attention might usefully be given is as to whether the common law maxim *res ipsa loquitur* should be applied to the facts of the case before me. I do not think that this or any other maxim has any magical effect in solving difficulties that always occur in relating the facts of any case to the law. I am much impressed by what Erle J. said about the maxim *Sic utere*

tuo ut alienum non ladas in the case of *Bonomi* v. *Backhouse* (1).

> A party may damage the property of another where the law permits; and he may not where the law prohibits; so that the maxim can never be applied till the law is ascertained; and when it is, the maxim is superfluous.

In *Yarmouth* v. *France* (2) Lord Esher, M. R., speaking of the maxim *Volenti non fit injuria* said:—

> Personally I detest any attempt to bring the law into maxims. Maxims are invariably wrong, that is they are so general and large that they always include something which is not intended to be included.

Speaking of the maxim *res ipso loquitur,* itself, Lord Dunedin in the recent case of *Ballard* v. *North British Railway Company* (3) observed:—

> It is not, however, safe to take the remarks which have been made as to the principle of *res ipsa loquitur* in one class of cases and apply them indiscriminately to another class. This leads me to remark that truly there is no such thing as what the Lord Ordinary calls the "principle" of *res ipsa Loquitur.* The foundation of all actions of the kind we are considering must be negligence on the part of the defender, and whether the expression *res ipsa loquitur* is applicable or not depends upon whether, in the circumstances of the particular case, the mere fact of the occurrence which caused hurt or damage is a piece of evidence relevant to infer negligence.

Then the language of Mr. Justice Duff in delivering the judgment of the Supreme Court of Canada in the Exchequer Appeal of the *Montreal Transportation Company* v. *The King* (unreported), is quite pertinent here:—

> In the course of this case there appears to have been a good deal of loose discussion about *res ipsa liquitur,* a maxim which, when applicable merely asserts the existence of a presumption of responsibility arising from the state of facts proved—it would be more accurate to say, the existence of a *prima facie* case against the defendant. The provision of the Exchequer Court Act under which the present action is brought comes into play only on proof of negligence of some officer or servant in the execution of his duties "on a public work," and it may very well be that by reason of the conditions of responsibility expressed in the Statute, to establish a *prima facie* case under the Statute is often more difficult than the task of establishing such a case against a subject in the like circumstances.

On the whole I think it is unnecessary to debate in cases like the one at present before me, the applicability of this maxim when we have an authoritative rule of the common law, plainly and succinctly laid down for us in the well-

(1) [1858] El. Bl. & El. 622 at p. 643.

(2) [1888] 57 L.J. Q.B. 7 at p. 9.

(3) [1923] S.C. (H.L.) 43 at p. 53.

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known case *Scott* v. *London Dock Company* (1). There the plaintiff Scott sued the defendant company, for personal injuries sustained in an accident, due to the negligence of the defendant's servants, in operating a machine for lowering goods from a warehouse of the defendant company to the street. Erle C.J. delivering the judgment of the majority of the court said:—

> There must be reasonable evidence of negligence. . . But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

That undoubtedly is an exposition of the principle to be followed in cases of this kind, and I have no hesitation in adopting it.

There will be judgment for the suppliant on the issue of liability, and a reference to the Registrar for inquiry and report concerning the damages sustained by the suppliant as a result of the accident. The suppliant will have its costs of the action.

Judgment accordingly.