1923
May 5.

MONTREAL TRANSPORTATION CO., LTD. ..... } SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Petition of Right—Loss of barge by explosion in Government Grain Elevator—Burden of proof—Application of maxim Res Ipsa Loquitur —Exchequer Court Act, section 20.

Held, where a suppliant by his Petition of Right claimed damages for the loss of a barge destroyed by an explosion in a government grain elevator, whilst it was being loaded with grain therefrom, and which explosion it alleged was due to the negligence of persons in charge thereof, the burden of proof is upon the suppliant, who must show affirmatively that there was such negligence.

The maxim *res ipsa loquitur* cannot be invoked to relieve the suppliant of the burden of proof in actions by Petition of Right charging negligence against officers or servants of the Crown under section 20, R.S.C. 1906, c. 140.

Dubé v. *The Queen* (1892) 3 Ex. C.R. 147; and *Western Assurance Co.* v. *The King* (1909) 12 Ex. C.R. 289 followed.

PETITION OF RIGHT seeking to recover $125,000 as damages for loss of suppliant's barge due to an explosion in Government Grain Elevator at Port Colbourne, whilst it was in dock for purposes of loading.

April 18, 19, 20, and 23 to 28 inclusively, 1923.

Case now heard before the Honourable Mr. Justice Audette at Toronto.

R. I. Towers, K.C. and *F. Wilkinson* for suppliant.

James E. Day, K.C. and *Fred. A. Day* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE, J. now (May 5th, 1923) delivered judgment.

The suppliants, by their Petition of Right, seek to recover the sum of $125,000 for damages alleged to have arisen from the disastrous explosion of the government grain elevator, at Port Colborne, Ont., in the year 1919. As the result of the explosion it is alleged that the barge *Quebec,* which was at the time being loaded with grain at the elevator dock, was sunk and destroyed.

The elevator in question was built by the Crown in 1908, enlarged in 1914 and had been in operation up to the date of the accident at about 10 minutes after one o'clock in the afternoon of the 9th day of August, 1919. It was of fireproof construction and of large capacity.

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Stating the facts of the case briefly, it appears that the loading of the barge had started that morning at about 11 a.m. and was proceeding most satisfactorily when at about twenty minutes to twelve, without any previous warning, Rambo, the assistant-shipper working on the ground floor, perceived dust issuing from the boot of No. 10 lofter. Surmising the boot was becoming plugged, he immediately ran and closed the valve or bin gate of bin No. 83 from which the conveyor was feeding No. 10 lofter, and thereafter ran and pulled the conveyor clutch, thereby stopping immediately any feed to No. 10. By the time he had pulled the clutch, which had to be untied, the conveyor was carrying no wheat and was empty—save, however, at the end, by the boot where wheat had already accumulated. There was a choke and the power was stopped. The choke was not apparent until it was too late to avoid it. The elevator had given entire satisfaction up to that day. There was nothing wrong that could be foreseen. There was no way to find the choke before it actually happened, but nothing was done to provoke it.

On prompt inspection by the electrician and the foreman it was ascertained, on reaching the motor gallery, that a motor had gone wrong and had heated. A fuse had blown and the motor was running on one phase, or two fuses, instead of two phases and three fuses. Later on it was found another fuse had also gone, it having worked for a short space of time on an arc.

When the men returned to the elevator after dinner, Pegato was sent to the lofter head for pails to be used in clearing the boot and on reaching the head he found smoke and heard a "roar like wind" in the casing of the lofter. It did make a roar like fire inside the casing and the lofter was not running. He at once gave notice to those associated with him in working the elevator. By ten minutes after one the lofter belt fell down the lofter, and the explosion took place.

One of the most reasonable causes of the accident, among the many causes suggested, at the trial, is that the power went down, two fuses burnt, and as a result the lofter belt slowed down in speed until it stopped and the pulley continuing to run, static electricity developed from the friction

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of the belt on the lagging of the pulley. The belt became heated, ignited, and burnt until it parted and fell raising the dust and the ignited end of the belt coming in contact with the dust, the explosion took place. The whole matter seems purely accidental and not the result of any negligence.

A mixture of grain dust and air submitted to ignition is a higher explosive than gun powder, as said at trial. Dust cannot be avoided in a grain elevator and the air is always present.

" Chokes " or " pluggings " as otherwise called, will from time to time happen in a grain elevator—there is nothing unusual in a choke. The evidence further establishes that elevator lofter belts will burn, break and fall, and such belts had fallen before in this very elevator as well as in the Maple Leaf Elevator on the adjoining pier.

The foreman testified that they never had a choke before, that they did not ascertain the cause of it and that they never had a choke from the overfeed by the conveyor to the lofter, and that all chokes, up to that time, had always caused noise when in the process of formation. Laughlin, a witness heard on behalf of the suppliants, says among other things, that many things will produce a choke in a grain elevator and that chokes may develop when the grain has nothing to do with it.

A number of causes have been assigned for developing a choke, such as: 1. Filling of garners; but that was not the cause here. 2. We are told that on one occasion the power went off, when two lofter motors were running—one loaded and one light. The loaded one came to a standstill and the light one continued to run. That caused a choke when the power was applied again to the loaded one. 3. A choke was also caused by the heating of the main bearings of the main pulley, on the top floor, when the lofter was carrying a full load. 4. A choke will develop when power goes off. 5. Foreign substance, such as a bag, a piece of wood, iron, etc., in the grain will also produce a choke. 6. Buckets may come off the lofter belt and stop operation. 7. The burning or blowing of fuses will also produce

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chokes; and fuses will blow from many causes. 8. Motors slowing down for any reason will also provoke a choke. 9. A slackening of the belt will have the same effect, etc., etc.

Have the suppliants discharged the onus placed upon them to prove their case? The onus was not discharged by the evidence adduced, limited as it was to inferences and conjectures. The evidence did not negative the possibility of the accident being occasioned by other causes which might just as reasonably, if not more so, be accepted as plausible, than that adopted and relied upon by the suppliants, that is to say, an overfeed from the conveyor to the lofter, notwithstanding the capacity of the conveyor was less than that of the lofter, a cause which, under the evidence, I discard.

When a plaintiff is forced to prove his case from presumptive or circumstantial evidence, such evidence in order to prevail should not only give rise to a presumption in favour of the plaintiff's contention, but should also exclude the possibility of the accident having been occasioned by any other causes than those relied upon by the plaintiff. *The Quebec and Lake St. John Ry. Co.* v. *Julien* (1); *The Montreal Rolling Mills Co.* v. *Corcoran* (2); *Beck* v. *C.N.R.* (3); *The King* v. *Nashwaak Pulp and Paper Co.* (4).

Conceding for the purpose of argument that the maxim *res ipsa loquitur* could apply to the case at Bar, the Crown has amply discharged the burden of proof cast upon it by the operation of the maxim. The evidence of Aikens and Rambo conclusively negatives any active or passive carelessness on their part which would amount to negligence; and the same observation applies to the evidence of Upper, Roach, Harvey and the other officers or servants of the Crown upon whose conduct it is sought to predicate negligence in this case.

But the maxim is wholly inapplicable here. *Dubé* v. *The Queen* (5); *Western Assurance Co.* v. *The King* (6).

(1) [1906] 37 S.C.R. 632.
(2) [1896] 26 S.C.R. 595.
(3) [1910] 13 W.L.R. 140.
(4) [1922] 21 Ex. C.R. 434.
(5) [1892] 3 Ex. C.R. 147.
(6) [1909] 12 Ex. C.R. 289.

See also Annotation, 23 Can. Ry. Cases 305; *Belway* v. *Serota* (1); *C.N. Ry. Co.* v. *Horner* (2); *Landels* v. *Christie* (3); 21 Hals. 439-445.

Be all this as it may, the present action is one for damages, in tort and apart from special statutory authority such an action does not lie against the Crown. The suppliants to succeed must bring their case within the ambit of section 20 of the Exchequer Court Act, as amended by 7-8 Geo. V, ch. 23, section 2.

To bring this case within the provisions of the Act the evidence must disclose: 1st, a public work; 2nd, officers or servants of the Crown employed on the public work; and 3rd, negligence of such officers and servants while acting within the scope of their duties and employment.

The two first requirements have been established, but the third is missing.

The officers and servants of the Crown, who were called as witnesses, gave their evidence in a manner that redounded to their credit in a very marked degree. The statements of each and every one of them were impressed not only with that measure of sincerity and truth which carries conviction with it, but were also marked by intelligence and clarity of speech not usually met with in men of their class—and they were confronted by ingenious theories of carelessness throughout. They were not confused by cross-examination of a most skilful character, but maintained a logical continuity of statement that was most gratifying to the court. I reject any imputations of negligence on behalf of the employees.

I cannot leave the consideration of this important case without observing that it has been conducted with great skill and ability by counsel for the respective parties. During the trial facts were developed which required much technical and scientific knowledge in relating them to the issues, and to this task counsel responded in the fullest way. I may say that the case served to remind the court of the truth of Sir Henry Finch's view that the sparks of all the sciences are taken up on the ashes of the law. And while I say this, I cannot refrain from adding that much

(1) [1919] 47 D.L.R. 621. (2) [1921] 61 S.C.R. 547.
(3) [1923] S.C.R. 39.

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of the industrious theorizing of counsel must be disregarded if the court is to arrive at a sound conclusion upon the facts of the case. From a most careful consideration of the voluminous evidence adduced by the suppliants in support of their claim, I cannot find that there are any facts upon which negligence as above indicated may be predicated.

Therefore there will be judgment declaring and adjudging that the suppliants have failed to prove their case and that they are not entitled to any relief sought by their petition of right.

Judgment accordingly