1913
March 10.

IN THE MATTER OF THE PETITION OF RIGHT OF

JOHN BREBNER.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public Work—Injury to the person—Liability of Crown for negligence—Trap on Premises—Fellow-servant.

The suppliant was employed by a contractor to deliver hay in a barn belonging to the Department of Militia and Defence at K. This barn was a public work of Canada, and the duty of receiving the hay there from the contractor was discharged by L, a servant of the Crown. The suppliant was invited by L. to go up into the loft to assist L. in storing the hay. There was a trap-door there, open at the time, the existence of which was not communicated by L. to the suppliant. The light from the front of the loft was cut off by the pile of hay on the left of the barn, and the rear where the suppliant was asked to assist in piling hay was dark. Whilst engaged in this work the suppliant fell through the trap, which was guarded only on the side opposite to that on which the suppliant was working.

1. That the suppliant was not on the premises as a mere licensee or volunteer, but on lawful business in which he and L. had a common interest.
2. That L. was guilty of negligence in not calling the attention of the suppliant to the existence of the trap, and that the Crown was liable for such negligence under the provisions of Section 20 of *The Exchequer Court* Act.
3. That the suppliant was not a fellow-servant of L., and was therefore entitled to recover for the negligence of the latter.

PETITION OF RIGHT for the recovery of the sum of $3,000 for alleged damages against the Crown for bodily injuries sustained by the suppliant in an accident whilst on public work of the Dominion of Canada.

The facts are stated in the reasons for judgment

February 11th, 1913.

The case was heard at Kingston, Ont.

J. L. Whiting, K.C., for the suppliant, argued that the facts shewed a clear case of negligence for which

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the Crown was liable under sec. 20 of *The Exchequer Court Act*. The *locus in quo* was a public work; the suppliant was invited to enter upon the premises by Love, who was a servant of the Crown; and it was through the negligence of the latter in leaving an unguarded trap-door open in a dark part of the building that the accident occurred. He cited *Beven on Negligence* (1); *Indermaur* v. *Dames* (2); and *Houghton* v. *Pilkington* (3).

G. M. Macdonnell, K.C., for the respondent, contended that the suppliant was warned of the existence of the trap-door by Love, and if the suppliant's deafness prevented him from hearing what Love said that was not the fault of Love.

Moreover, by accepting the work of assisting Love in stowing away the hay, the suppliant became a fellow-servant of the latter. The defence of common employment is open to the Crown in a case arising in the Province of Ontario. (*Ryder* v. *The King* (4).

The suppliant was a mere volunteer, and being injured in performing a mere voluntary service he cannot recover. (*Wright* v. *London and North Western Railway Co.* (5); *Degg* v. *Midland Railway Co.* (6); *Potter* v. *Faulkner* (7).

Mr. Whiting, in reply contended that it was established by the case of *Houghton* v. *Pilkington* (8) that where a person was on the defendant's premises by invitation for the common purpose of both parties, he could not be held to be a mere licensee or volunteer.

AUDETTE, J., now (March 10th, 1913) delivered judgment.

(1) 2nd Ed. pp. 450, 682.
(2) L. R. 2 C. P. 311.
(3) (1912) 3 K. B. 308.
(4) 9 Ex. C. R. 330; 36 S. C. R. 462.
(5) L. R. 1 Q. B. D. 252.
(6) 31 H. & N. 77.
(7) 1 B. & S. 800.
(8) (1912) 3 K. B. 308.

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The suppliant brought his petition of right to recover the sum of $3,000 for alleged damages suffered by him, resulting from the negligence of the officers or servants of the Crown, while acting within the scope of their duties and employment, when in the act of delivering, in the course of his delivery under contract, forage for the Active Militia, at the upper barn on Montreal Street, in the City of Kingston, a public work of the Dominion of Canada in the occupation of the said Militia.

It is alleged by the respondent that if the suppliant sustained any injuries they were either the result of his own negligence and want of care, or that they were caused by the negligence of a fellow-servant, and further generally denies all the suppliant's allegations.

The action arose under the following circumstances:

On the afternoon of the 11th of April, 1911, the suppliant was delivering, for contractor Donoghue, a number of loads of forage at the said upper barn,—a building under the control of the militia authorities, part of the barrack establishment and the property of the Dominion Government—when one Murray, who then was in the hayloft, came down, and Love, a private of the Army Service Corps, whose duty it was, as defined by the Officer Commanding, Major W. A. Simpson, to take delivery of the hay and distribute the same, asked for some one to come up and stow the hay—that he would not receive the hay if they did not come up and help. Then the suppliant who was engaged below in hooking the bales, went up from the load to the hayloft. The hay was being hoisted to the hayloft by means of a tackle, rope, and a horse. Love on behalf of the Crown was standing at the hayloft door receiving delivery of the bales and taking note of them. When the suppliant was up near Love, the suppliant says,

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and in that he is corroborated by witness Simpson, that Love, who was giving all the orders, told him to take a bale from the door and run it around to the back. The right side of the hayloft is partitioned off, but the left is all open, and at that time there was hay piled up to nearly as far back as the third post,—indicated on plan Exhibit No. 2. The suppliant did as he was told. The hay piled on the left absolutely obstructed the light which was coming from the front of the building, making that part at the back very dark. Brebner stowed the bale at the end, where it was very dark, and having never seen the trap or heard of its existence, walked into it and fell through to the lower floor, where he received the injuries complained of.

The suppliant says, and in that he is again corroborated by witness Simpson, that Love never told him there was a trap at the back, or warned him of its existence, —and Love contends he did. For the purposes of this case, judging from the general manner in which the evidence of these three witnesses was given, this Court has no hesitation in finding that no warning or notice was given.

The contract under which the hay was delivered has not been produced, but a copy of a subsequent contract was filed as Exhibit "B" with the understanding that it would be similar. It is also in evidence that such contract, as was in contemplation of the contracting parties at the time of signing the contract, calls for the delivery of the hay in the hayloft. One of the witnesses goes as far as to say that he often delivered hay for 15 to 16 years, under contractor Donoghue, and that it was the custom to deliver the hay at the loft at the expense of the contractor or vendor. The fact also that Love was alone representing the Militia authorities, goes to show that the Crown expected the

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hay delivered at the loft, as Love alone could not do it, and that Love even went as far as saying he would not accept delivery if they did not come up in the hayloft to stow the hay in it. It appears Love's work on the occasion consisted in checking the bales, taking note thereof and sending the "block" down.

Love says the farmers usually did stow the hay up in the hayloft, that he had no other help but these men, and he directed where he wanted the hay placed.

It is obvious, from the circumstances above set forth, that Love was guilty of negligence in not closing the trap, and that failing to do so, the next best thing would have been for him to give warning of its existence.

This case comes within section 20 of *The Exchequer Court Act* (1); and so far we have a "public work" within the meaning of *The Public Works Act* (2), and other Acts in which such expression is defined—*Leprohon* v. *The Queen* (3). Then we have an officer of the Crown, acting within the scope of his duties, who is guilty of an act of negligence which is the determining cause of the accident.

The only question now remaining to be decided is whether Brebner, under the circumstances, was a "fellow-servant," or "licensee," or "mere licensee."

The legal doctrine applicable to this class of cases is stated by *Beven on Negligence* (4), in the following words:

"Where a person is on premises of others, with their "assent, engaged in a transaction of common interest "to both parties, the owners of the premises are "liable for the negligence of their servants in the "course of the transaction."

(1) R. S. C. 1906, Chap. 140, sec. Sub-sec. (c).
(2) R. S. 1906, C. 39, sec. 3, Sub-sec. (c).
(3) 4 Ex. C.R. 100.
(4) 3rd, Ed. p. 682.

The leading case of *Indermaur* v. *Dames* (1), cited and discussed in *Beven on Negligence* (2), seems to settle the question beyond doubt. Willes, J. (3), dealing first with the definition of a customer, arrives at the conclusion that the customer is a person who goes upon the premises on business which concerns the occupier, and upon his invitation expressed or implied. And with respect to such a visitor he further says, he considers as settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know.

In the present case Love himself said it would be careless not to give warning. And here again it may be said, as in the case of *Smith* v. *Baker* (4), that the suppliant did not voluntarily undertake a dangerous employment with a knowledge of the risk. Love acting within the powers of superintendence and within the scope of his duties has been guilty of negligence in the manner above mentioned, and the Crown under the statute is liable therefor.

The suppliant was lawfully upon the respondent's property, with more than its assent, even at Love's request, engaged in a business in which both the suppliant and the respondent were interested. The trap in the hayloft, situate as it was in a dark portion of the loft at the back, was very dangerous, and Love, the Crown's servant, whose duty it was to have it closed, was derelict in his duty in leaving it open—or failing to shut it, he should have warned the suppliant. Under the circumstances, the Crown, the owner of the premises, is liable, under the *Exchequer Court Act*, for

(1) (1886) L. R. 1 C.P. 274.
(2) 3rd Ed. at p. 451.
(3) L. R. 1 C. P. 287.
(4) (1891) A. C. at p. 354.

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the negligence of its servant acting within the scope of his duties and employment in the course of the present transaction.

It would be idle to pursue this consideration any further, the authorities in support of the view taken by the Court are very numerous. When the suppliant is on the premises on lawful business in which both he and the respondent have an interest, and is injured, he should recover. *White* v. *France*, (1); *Lax* v. *Mayor and Corporation of Darlington*, (2) *Chapman* v. *Rothwell*, (3) and *Wilkinson* v. *Fairrie*, (4) *Beven*, (5); *Smith* v. *London and Saint Katharine Docks Co.*, (6) *Leprohon* v. *The Queen*, (7) *Cameron* v. *Nystrom*, (8) *Hatfield* v. *Saint John Gas Light Co.* (9).

The suppliant was not a fellow-servant and he is entitled to recover.

Coming to the question of damages. The evidence establishes that the suppliant was 65 years old at the time of the accident, which resulted in the fracture of the "neck" of the thigh bone, and a slight cut at the back of the head. He also hurt his back, more than his leg, he says, and loosened all of his artificial teeth. The doctor testifies that as the result of the accident the suppliant remains with the shortening of the injured leg by a little over one inch, and that he is unfit to carry on the work of his farm. He was an active man notwithstanding his years, at the date of of the accident, and he now looks older and cannot stand on his feet for any length of time. The suppliant accordingly, under the advice of the doctor, sold his farm and is living in the city, and has no other trade. He attends to his little garden, and the horse

(1) L. R. 2 C. P. D. 308.
(2) 5 Ex. D. pp. 28 and 31.
(3) (1858) El. Bl. & El. 168.
(4) (1862) 1 H. & C. 633.
(5) Op. cit. pp. 450, 451.
(6) L. R. 3 C. P. 326.
(7) 4 Ex. C. R. 113.
(8) (1893) A. C. 308.
(9) 32 N. B. R. 100; 23 S. C. R. 171.

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and cow kept by him. He was making on his farm between $700 to $1,200 a year.

Now in assessing the compensation to which the suppliant is entitled under the circumstances, while it is impossible to arrive at any sum with mathematical accuracy, consideration must be given to his age, which at the time of the accident was 65, to the fact that he had to give up his avocation of farming, and that his chances of employment for earning his living, in competition with others, has been greatly lessened and that his earning powers are rendered very small, his state of health, his expectation of life, and the income he was earning; not overlooking, on the other hand, the several contingencies to which every person in his walk of life is necessarily subjected, such, among others, as being unable to work through illness and so forth.

Under the circumstances the Court is of the opinion to allow the sum of $800, together with the doctor's bill, amounting to the sum of $35.00, and the expenses at the hospital and for the ambulance, amounting to $39.50, making in all the sum of $874.50, which the suppliant is entitled to recover, with costs, in full compensation for the damages resulting from the accident in question.

Judgment accordingly.

Solicitor for the suppliant: *J. L. Whiting.*

Solicitor for the defendant: *Donald McIntyre.*