IN THE MATTER of the Petition of Right of

1905
June. 12.

THE NICHOLLS CHEMICAL COMPANY OF CANADA, LIMITED..... } SUPPLIANTS;

AND

HIS MAJESTY THE KING..... .....RESPONDENT.

Liability of Crown as common carrier—Loss of acid in tank-car during transportation—Contract—Negligence—Liability of Crown—Costs.

The Crown is not, in regard to liability for loss of goods carried, in every respect in the position of an ordinary common carrier. The latter is in the position of an insurer of goods, and any special contract made is in general in mitigation of its common law obligation and liability. The Crown, on the other hand, is not liable at common law, and a petition will not lie against it for the loss of goods carried on its railway except under a contract or where the case falls within the statute, under which it is in certain cases liable for the negligence of its servants (50-51 Vict., ch. 16, s. 16), and in either case the burden is on the suppliant to make out his case.

2. By an arrangement between the consignee of the acid in question and the Intercolonial Railway freight charges on goods carried by the latter were paid at stated times each month, and in case anything was found wrong a refund was made to the consignee. In the present case the consignee paid the freight on the acid amounting to $135.00, no refund being made by the Crown. This amount was paid to the consignee by the suppliant, and it claimed recovery of the same from the Crown in its petition of right. The evidence showed that by the arrangement above mentioned the freight was not payable on the transportation of the tank-car, but on the acid contained in the car, at the rate of 27 cents per 100 pounds of acid.

Held, that the Crown was only entitled to the freight on the number of pounds delivered to the consignee at Sydney, and that the balance of the amount paid by the consignee should be repaid to the suppliant with interest

3. That as the suppliant, while succeeding as to part of the amount claimed, had failed on the main issue in controversy, each party should bear its own costs.

PETITION OF RIGHT for the recovery of damages against the Crown for the loss of goods carried on a government railway.

The facts are stated in the reasons for judgment.

November 5th, 1904.

The case was now heard at Montreal.

P. Davidson, for the suppliant, contended that the respondent's servants were guilty of negligence from two points of view in the case. They were negligent in relation to the breaking of the discharge pipe of the tank-car; they were also negligent in not notifying the suppliant, or its agents, when they first discovered the leakage.

The fair inference is that having received the tank-car in good condition at St. John, N. B., they were guilty of negligence in their carriage or handling of the car. The accident happened through some person's negligence—*res ipsa loquitur*. *Beven on Negligence* (1).

Again, if the Crown's servants were not responsible for the breaking of the discharge-pipe, they were negligent in not preventing the loss. 5 Am. & Eng Ency. Law (2); *Canadian Pacific Railway Company* v. *Blain* (3). No proper means were taken after discovery of the leak to prevent further loss to the suppliant. *Taff Vale Ry Co.* v. *Giles* (4); *Great Northern Ry Co.* v. *Swaffield* (5); 9 *American Century Digest* (6); *Beck* v. *Evans* (7); *Beal* v. *South Devon Ry* (8).

The suppliant should have been notified by wire of the state of affairs as soon as leakage was discovered. *Dominion Bank* v. *Ewing* (9).

The suppliant is entitled in any event to a return of the money paid for freight. There must be a delivery to perfect the right to freight. *Angell on Carriers* (10);

(1) 2nd ed. vol. 1, p. 132.
(2) 2nd ed. pp. 242, 243 and cases there cited.
(3) 34 S. C. R. 74; 3 Can. Ry Cas. 143.
(4) 2 E. & B. 823.
(5) L. R. 9 Ex. 132.
(6) Sec. 537.
(7) 16 East 244.
(8) 3 H. & C. 337.
(9) 35 S. C. R. 133.
(10) pp. 269, 362.

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Macnamara on Carriers (1); 5 *Am. & Eng. Ency. of Law* (2).

H. Mellish, K. C., for the respondent, contended that the freight had been earned, paid for, and the money could not be recovered back. Fifty per cent. of it had been paid over to the Canadian Pacific Railway.

There was no contract of carriage between the Crown and the suppliant, nor between the Crown and the Canadian Pacific Railway Company. *Mytton* v. *Midland Ry Co*; (3) *Wood on Railways.* (4)

There was no negligence by the officers or servants of the Crown. They did what they could to stop the leak when discovered. The real cause of the loss was a latent defect in the valve or discharge-pipe; a defect which could not have been discovered by an exterior examination of the car.

Mr. Davidson, in reply, contended that the Crown by accepting the freight recognized the contract of carriage, and from the time the car came into the possession of the Intercolonial Railway a contractual relation existed between the suppliant and the Crown.

THE JUDGE OF THE EXCHEQUER COURT now (January 12th, 1905), delivered judgment.

The petition is brought to recover damages for the loss of a quantity of sulphuric acid shipped by the suppliant in a tank-car from Lennoxville, in the Province of Quebec, and consigned to the Dominion Iron and Steel Company, Limited, at Sydney, in the Province of Nova Scotia. The shipping-bill was issued by the agent of the Canadian Pacific Railway Company; and from Saint John, in the Province of New Brunswick, to Sydney, the point of destination, the car was transferred over the Intercolonial Railway.

(1) p. 94.
(2) p. 405.
(3) 28 L. J. Ex. 385.
(4) 2nd ed. vol. 3, p. 1926.

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The car belonged to the suppliant, and was one of a number used by it in carrying on its business. To it was attached a discharge-pipe by means of which the acid is drawn off when the car reaches its destination. That is the office of the pipe. If it is in good order and closed the acid contained in the tank will not run away, but it is not relied upon to retain the acid in the tank. That is done by a safety-valve fitted at the bottom of the tank and held securely in place, or intended to be, by a rod connecting with the dome of the tank. As long as the valve is in good condition and properly secured the acid will be retained in the tank, even if the discharge-pipe is open. The tank-car, in which the acid in question here was contained, was received by the Intercolonial Railway at Saint John in good condition, that is so far as its condition could be ascertained by any examination of it that could be made; but such an examination would not show whether the safety-valve was in place or not.

When the freight train, to which this tank-car was attached, was near West River station, about twenty-one miles east of Truro, the conductor of the train noticed that something was wrong with the discharge-pipe, that it was cracked or broken and that the acid was running away. Taking waste he tried to stop the leak, but the acid set fire to the waste and he could do nothing. He then telegraphed to Mr. Fraser, the car Inspector at Stellarton, and proceeded with his train to that place, where he arrived, according to his evidence, about six or seven o'clock in the evening. Mr. Fraser says that the pipe was not at that time leaking very much,—the acid "was dropping." After discovering the crack in the pipe he found, that by springing the pipe a little to one side the leak could be stopped; and this he did and fastened the pipe in this position with a rope. His examination he says took place between nine

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and ten o'clock, and after dark. The train then proceeded to New Glasgow, where the condition of this car was brought to the attention of Mr. Yorkton C. Campbell, the District Superintendent of the Intercolonial Railway of Sydney, Truro and Oxford Districts. Mr. Campbell says that the substance they had to deal with being what it was, there was nothing they could do except to get the car to its destination as soon as possible. He estimated the leakage at about a gallon an hour; and he thought the loss between New Glasgow and Sydney would be between ten and fifteen gallons. So he telegraphed to the Strait of Canso to transfer the car at once and to arrange for the train to be ready on the other side to take it through to Sydney. This was done, with the result that, some forty miles east of Point Tupper, matters became so bad that the pipe was broken off completely and had to be plugged up as best the conductor and his crew could do it. When the car arrived at Sydney only a few gallons of acid were left in the tank.

By its petition the company suppliant alleges, in the first place, that the Intercolonial Railway, having received the car and its contents at Saint John, New Brunswick, in good order and condition, undertook and agreed with the suppliant to deliver the car and its contents for and on account of the suppliant in like good order and condition at its destination, at Sydney, Nova Scotia. And, in the second place, it is alleged that the loss of the acid was due to the negligence of the respondent's servants and employees acting within the scope of their duties, who, having ascertained that the car was leaking, neglected and failed to take proper and reasonable means to arrest the leakage, as they should have done; or to notify either the consignor or consignee of said leak to enable either of these to at once arrest the leak and save the acid.

For the Crown both the contract and the alleged negligence are denied.

The only contract the suppliant has proved is that which is evidenced by the shipping-bill issued by the agent of the Canadian Pacific Railway Company; by the terms of which the company was not to be liable for leakage of any kind or loss of liquids arising from any cause whatever; and this provision, with others, was to apply to every carrier to whom the goods might be delivered for carriage as fully as to the company. Whether this provision is large enough in its terms to protect the company from a loss of liquids due to the negligence of its servants, or if so, whether in the present state of the decisions such a defence would be open to it or to the respondent, need not be inquired into here. The Crown does not rely upon any such defence. Its position is that there was no contract between the suppliant and it, and it does not seek to take advantage of this clause of the contract between the suppliant and the Canadian Pacific Railway Company. Such a provision would, however, in any event protect the company from loss arising from any cause other than from its own negligence or that of its servants, and it is immaterial in that aspect of it whether the case be regarded as one of contract or one of tort. In neither case could the suppliant recover from the Crown without showing that the loss resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.

Now with regard to negligence, I think it is reasonable to conclude that the discharge-pipe mentioned was broken by coming in contact with some obstruction. But there is nothing to show that that happened through the negligence of any officer or servant of the Crown. This pipe was placed below the platform of

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the car where it was more or less liable to come in contact with an obstruction upon the way. In the more modern form of such cars, the discharge-pipe is placed above the platform where it is much less exposed. Ordinarily of course there should be nothing upon or near the track or way with which a pipe situated as this one was would come in contact; but that might happen by accident, or by the act of some person not in the employ of the Intercolonial Railway, as well as through the negligence of some servant of the railway; and, in the two cases first mentioned, the officers and servants of the railway would not be negligent unless they failed to discover and remove the obstruction within a reasonable time. The fact that a pipe, situated as this one was, was found to be cracked or broken without anything to show how that happened is not, it seems to me, sufficient to sustain the suppliant's petition. The Crown is not in regard to liability for loss of goods carried in every respect in the position of an ordinary common carrier. The latter is in the position of an insurer of such goods, and any special contract made is in general in mitigation of its common law obligation and liability. The Crown on the other hand is not liable at common law, and a petition will not lie against it for the loss of goods carried on its railway except under a contract, or where the case falls within the statute under which it is in certain cases liable for the negligence of its servants (50-51 Vict., c. 16, s. 16), and in either case the burden is on the suppliant to make out his case.

It has been observed that the breaking of the discharge-pipe would not have resulted in the loss of the acid if the safety-valve had been in position and in good order. The suppliant's contention as to that is that the safety-valve was in good condition; that it had been placed in proper position and secured before

the car left its place of business, and that it had been dislodged, probably on the occasion when the discharge-pipe was broken. It is also part of its case that this displacement of the safety-valve took place without the safety-valve being broken or injured. But that does not seem to me at all probable. If it were in good repair and properly fitted and secured, I do not well see how it could be dislodged without being broken, and we may, I think, dismiss that view of the matter. But if it had been broken as well as dislodged evidence ought to be available to show that fact, and there is none. The car was returned to the suppliant, and if this safety-valve had been broken the fact would no doubt have been discovered. So we may, I think, dismiss that view of the case also. The only other view open is that the witness who says that the safety-valve was in good repair, and that he fitted it into its place and secured it in that position before the acid was shipped, is mistaken. I have no doubt that he thought, and still thinks, that he did what he says he did; but it is much more probable that he is mistaken as to that, than that the safety-valve could have been displaced without breaking or injuring it. There is of course no means now of ascertaining what the actual fact was; but the probability is that the safety-valve was not in proper position when the acid was shipped, and if that were the fact the company suppliant was, to that extent at least, responsible for the condition of affairs with which the servants of the Intercolonial Railway had to deal when the leak was discovered.

Now with regard to the means taken to prevent or minimize the loss of the acid, and the allegations that there was negligence in not taking proper means to that end, it is said in the first place that by removing the dome of the tank car the safety-valve could have

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been placed in its proper position. That of course is on the assumption that the safety-valve was in good order. But no one of those into whose charge this car passed would know that. If they had understood the construction of the car they would have had a right, in the first instance, to conclude that the leakage would be confined to the small quantity of acid that happened to be in the discharge-pipe; but afterwards when they found that the leakage continued, the natural conclusion would be that the safety-valve was broken or out of order. If they had understood the construction of the car they might, it seems, have removed the dome of the car to see if the safety-valve was broken or injured, or only displaced; but no one of them seems at the time to have been aware of the construction of the car, and I do not think that their ignorance in that respect is to be imputed to them as negligence. Then it is said that some one should have communicated with the consignor or consignee by telegraph to inform them, or one of them, of the state of affairs. That is an observation that would apply to Mr. Campbell, the District Superintendent at New Glasgow, if to any one. He admits that he could have done that; but adds that it would have been useless as far as the car was concerned. It was, of course, out of the question for him to hold the train while he communicated by telegraph with the consignor or consignee. He either had to hold the car at New Glasgow, and let the train proceed, or he had to hurry the car to its destination. At first I was inclined to think that Mr. Campbell had acted imprudently in allowing this car to proceed further than New Glasgow, without taking steps to have this leak stopped if that were possible; and in case he found that to be impossible that he ought then to have adopted some means to save the acid. But when one

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comes to consider what it was he had to deal with, and the improbability of there being at New Glasgow any suitable vessel to hold the acid in case the leak could not be stopped, it is not at all clear that he did not exercise a reasonable judgment in deciding to send this car to its destination as quickly as possible. No doubt the course he adopted turned out badly; but it is not certain that any other course which he might reasonably be expected to adopt would have turned out better; and if I am right in thinking that it is probable that the car in which the acid was carried was sent out without the safety-valve being placed and secured in its proper position, the suppliant must in the disposition of the case be taken to have contributed towards creating the emergency with which he had to deal. Under all the circumstances, I do not think that the facts of the case would justify a finding that Mr. Campbell was guilty of negligence in respect of the goods in question; and with regard to all the other servants of the Intercolonial Railway into whose charge the car passed, after the leak was discovered, there is no ground for imputing negligence to any of them. Each did, I think, the best he could under the circumstances in which he found himself.

By an arrangement between the Dominion Iron and Steel Company, the consignee of the acid in question, and the Intercolonial Railway, freight charges on goods consigned to the company were paid at stated times each month, and in case anything was found wrong a refund was made to the company. In the present case the consignee paid the freight on the acid, amounting to one hundred and thirty-five dollars, with a number of other items amounting in all to something over two thousand five hundred dollars; but no refund has been received from the railway. The amount was repaid to the company by the suppliant, and now forms part of

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its claim against the respondent. This matter was not much discussed, but it appears that the freight was not payable on the transportation of the tank-car, which, as has been noticed, was the property of the suppliant, and which was delivered at Sydney to its consignee; but it was payable, so far as I can make out the fact from the evidence before me, on the acid contained in the car, at the rate of twenty-seven cents for each hundred pounds of acid. The sum of one hundred and thirty-five dollars mentioned represents the freight at the rate mentioned on 50,000 pounds of acid at which the contents of the car seem to have been estimated, the actual quantity being, it appears, something more than that. Of the quantity shipped some eighty gallons only were delivered to the consignee. The weight of the acid delivered is said to be 1,440 pounds, and the freight on that would amount to $3.89. The balance of the $135 00 paid for freight ought, it seems to me, to be repaid to the suppliant, with interest from November 28th, 1902, the date on which the petition was left with the Secretary of State.

There will be judgment for the suppliants for one hundred and forty-five dollars and four cents. With respect to costs, the suppliant while succeeding as to part of the amount claimed, has failed on the main issue in controversy. But instead of attempting to apportion the costs it will, I think, be fair (certainly it will be more convenient and less expensive) to leave each party to bear its own costs.

Judgment accordingly.

Solicitor for the suppliant: *Peers Davidson.*

Solicitor for the respondent: *H. Mellish.*