BETWEEN:

ALBERT DUBOIS AND ANTOINETTE DUBOIS ..... } SUPPLIANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1933
Nov. 25, 30.
1934
June. 1.

Crown—Responsibility—Public Work—Jurisdiction—Exchequer Court Act —Petition of Right Act

Specially equipped motor cars, owned by the Government of Canada, are employed by the Radio Branch of the Department of Marine, in the detection and elimination of radio inductive interference. Two employees of the Radio Branch were returning to Ottawa in such a car, from a tour of inspection, when they stopped the car on one side of the travelled road to wipe the windshield which had become clouded due to weather conditions. An oncoming car, in which the son of the suppliants was a passenger, collided with the Government car, and he was killed.

Held: That the government owned motor car, in occupation and control of the government employees on the occasion in question, was a "public work" within the meaning of s. 19 (*c*) of the Exchequer Court Act, c. 34, R.S.C. 1927.

2. That the government employees in the said car were, at the time of the collision in question, officers or servants of the Crown acting within the scope of their duties or employment upon a public work, within the meaning of the said section of the Exchequer Court Act.

3. That the Court has jurisdiction to entertain the action.

The meaning of public work, within the Exchequer Court Act, and the liability of the Crown in tort, discussed.

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PETITION OF RIGHT by the suppliants claiming damages against the Crown for the death of their son caused by the alleged negligence of servants of the Crown while employed on a public work.

The case was heard on points of law only, before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

Charles Morse, K.C., and *E. G. Gowling* for the suppliants.

F. P. Varcoe, K.C., for the respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT, now (June 1, 1934) delivered the following judgment:

This is in form a petition of right wherein the suppliants claim against the Crown the sum of $5,000 on account of the death of one Albert Dubois Jr., due, it is alleged, to the negligence of certain servants of the Crown. The case is one of considerable importance.

There is in the Department of Marine at Ottawa, what is known as the Radio Branch, and one important work carried on by this Branch, from coast to coast in Canada, is the detection and elimination of radio inductive interference. The extent of this particular work may be gathered from the Introduction to a Bulletin issued by that Branch in 1932, entitled "Radio Inductive Interference," and from which it appears that over thirty thousand sources of radio interference have been investigated. The varied and important activities of the Radio Branch may be gathered from its Annual Reports, and the Radiotelegraph Act, Chap. 195 R.S.C. 1927.

In the investigation of radio inductive interference specially equipped motor cars owned by the Government of Canada are employed by the Radio Branch. In October, 1931, such a car, allocated for such work in the district surrounding Ottawa, was being used on a regular inspection tour for the detection of radio inductive interference, one Pollard being the radio electrician and investigator, and one Langlois the driver, both being regularly employed by the Radio Branch of the Department of Marine;

Pollard and Langlois were on this occasion returning to their headquarters at Ottawa, from Fitzroy Harbour, when, towards the close of the afternoon, darkness, rain and fog rendered driving conditions so bad, that they were obliged, while nearing the village of Britannia, to stop the car on one side of the travelled road in order to wipe the windshield. An oncoming car, in which Dubois the deceased was a passenger, collided with the Government car with fatal results to Dubois. The suppliants allege that the collision and fatality were due to the negligence of Pollard and Langlois.

We are not presently concerned with the allegation of negligence against those in charge of the Government car. The immediate matters set down for decision are points of law, and they are, (1) whether the Government owned motor car in occupation and control of the persons mentioned on the occasion in question, was a "public work" within the meaning of sec. 19 (*c*) of the Exchequer Court Act, Chap. 34, R.S.C. 1927, and (2) whether Pollard and Langlois were, at the time of the collision in question, officers or servants of the Crown acting within the scope of their duties or employment upon a public work, within the meaning of the same section.

Prior to the year 1887, when the Act constituting the Exchequer Court as a tribunal apart from the Supreme Court of Canada was passed, there was no remedy against the Crown in tort, according to the decisions of the Supreme Court of Canada in the cases of *McFarlane* v. *The Queen* (1), and *McLeod* v. *The Queen* (2). The parentage of the present sec. 19 (*c*) of the Exchequer Court Act is to be found in sec. 16 (*c*) of the Act of 1887, and it in turn came over from the Official Arbitrators Act. In the case of the *City of Quebec* v. *The Queen* (3) Burbidge, J., went very fully into the origin of the jurisdiction of the Exchequer Court in respect of actions for injuries to persons or property arising from negligence of servants of the Crown, on a public work. It might be of interest to follow in brief outline the trend of decisions in cases of this kind since the establishment of the Exchequer Court. In the case just cited the City of Quebec claimed it had sustained

(1) (1882) 7 S.C.R. p. 216. (2) (1882) 8 S.C.R. p. 1.
(3) (1891) 2 Ex. C.R. 252, p. 261.

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damages from rock falling from the Citadel on one of the streets below. While dismissing the petition Burbidge J., expressed the view that "the injury must happen on or in connection with a 'public work.'" That interpretation was regarded as too liberal by the Supreme Court of Canada. In second case launched by the City of Quebec (4) Burbidge J., though finding that the facts did not establish negligence, expressed the view that to refuse jurisdiction to entertain a claim for damages where the injury happened beyond the actual limit of the public work would be a narrow construction of the statute. But on appeal (5) the majority of the Supreme Court of Canada seem to have negatived that view. In *Letourneux* v. *The Queen* (6) Burbidge J., reaffirmed his view expressed in the second City of Quebec case, but he followed the ruling of the Supreme Court of Canada in that case, yet in the *Letourneux case,* the Supreme Court of Canada, on appeal, allowed damages for negligence, although the alleged injury to property did not occur on a public work; Burbidge J., I think, makes it abundantly clear in his judgment in the *Price* case (7), that the injury did not occur on a public work. Then later followed the case of *Paul* v. *The King* (8), in which it was held that a steam-tug owned by the Crown while engaged in towing an empty scow back from the dumping grounds, but still at a considerable distance from the place where the work of dredging was being carried on, collided with another vessel, and it was held that the collision and injury resulting had not occurred on a public work. These cases show that some judicial doubt existed as to the limits to which assertion of the prerogative might be made in a defeat of the claims of the subject.

Then, in 1917, the Canadian Parliament recognizing, I assume, that the construction placed by the courts upon sec. 16 (*c*) of the Exchequer Court Act would work an injustice in many cases, changed the wording of that section so as to include cases where the negligence and injury occurred off the public work, and the present sec. 19 (*c*)

(4) (1892) 3 Ex. 164.

(5) (1894) 24 S.C.R. 420.

(6) (1900) 7 Ex. C.R. 1, p. 7.

(7) (1906) 10 Ex. C.R. 105 at p. 137.

(8) (1904) 9 Ex. C.R. 245; (1906) 38 S.C.R. 126.

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was enacted. Then, some time subsequent to the enactment of the present ss. (*c*) of s. 19, there came the case of *Schrobounst* v. *The King* (1). In that case I held the Crown liable even though the negligence and injury complained of occurred off a public work; there the suppliants were in a vehicle standing at the curb of a public street when they were run into by a motor truck, the property of the Crown, employed in carrying workmen to a public work under construction, some distance from the scene of the injury. This judgment was affirmed on appeal, by the Supreme Court of Canada. In delivering the judgment of the court Mr. Justice Mignault interpreted the words "upon any public work" as referable to the "employment" and not the "presence" of the negligent servant of the Crown on a public work. The interpretation adopted by the courts in the Schrobounst case was followed in *Mason* v. *The King* (2), and that case practically overruled the *Paul* case. In the *Mason* case the injury was to property and was occasioned by a tug boat hired by the Crown and engaged in towing scows loaded with dredged material from the scene of the dredging operations which were being carried on by the Crown.

There is no definition of a "public work" in the Exchequer Court Act, and in interpreting that term resort is frequently had to other Acts of the Parliament of Canada in which the same expression is used. Sec. 3 (*c*) of the Public Works Act defines "public work" as "any work or property under the control of the Minister". Sec. 10 (*c*) provides for "public works" being placed under the control of some other Minister or Department. And the cases have consistently treated transferred control as not affecting the character of the "public work". Sec. 2 (*d*) of the Expropriation Act states that a "public work" means and includes an enumerated list of works or properties, and embraces all other property which now belongs to Canada, and also the works or properties acquired, constructed, extended, repaired or improved at the expense of Canada. In the case of The *Wolfe Company* v. *The King* (1), Mr. Justice Duff said in this connection

(1) (1925) Ex. C.R. 167; (1925) S.C.R. 458.

(2) (1933) Ex. C.R. p. 1; (1933) S.C.R. 332.

(1) (1921) 63 S.C.R., 141.

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"The term 'public work' is defined in at least two statutes, the Public Works Act and the Expropriation Act. In the Public Works Act it includes the 'public buildings', 'property * * * * repaired and improved at the expense of Canada.' And by definition in the Expropriation Act it also includes in the same terms 'the public buildings' and 'property repaired or improved at the expense of Canada'. The definitions of the term 'public work' to be found in these two statutes (they are substantially, if not quite the same) have immediate statutory effect only in the interpretation of the enactments in which they are found; but they may very properly be resorted to for the purpose of throwing light upon the meaning of the same phrase found in another enactment with no legislative interpretation expressly attached to it. Prima facie it appears to me that the meaning of the phrase in the Exchequer Court Act is no less comprehensive than that to be gathered from these two definitions."

While I agree that the meaning of the term "public work" in the Exchequer Court Act should not be less comprehensive than that to be gathered from the definitions of the same term in the two Acts mentioned, yet, I am inclined to the view that the term "any public work" as used in the Exchequer Court Act was intended to be even more comprehensive than the same term as used in the Public Works Act, or in the Expropriation Act, though in the former Act the definition of "public work" is very broad indeed, because it includes not only "property" but "work". I doubt if the legislature intended that the term "any public work" in the Exchequer Court Act, no legislative interpretation being attached to it, was intended to be limited to what "public work" was intended to mean in the Public Works Act, and particularly in the Expropriation Act. I think the term "any public work" in the Exchequer Court Act, is to be interpreted in a common sense way, and, I think it means any work carried on by the Crown to serve the public with some necessity or convenience which is required by the public as such, and which requirement is made available by a parliamentary vote of public moneys. It was, I think, the deliberate intention of the legislature to create a liability against the Crown where injury or death occurred to any

person, owing to the negligence of any officer or servant of the Crown, acting within the scope of his duties upon any public work, of any kind. The mind of the legislature was, I think, primarily directed to the subject matter of the injury or death of a person, or injury to property, and not to the character of the "work," or the place where the alleged injury occurred, except that the injury must have occurred in connection with a public work. The intention was, I think, to place the Crown under the same liability as the subject in respect of claims arising from injury or death negligently caused by employees upon any public work; it is difficult to believe that the legislature intended to differentiate between an injury or death occurring in connection with one kind of public work and that on another class of public work. The legislation was in response, I assume, to a public demand to place the Crown in the same position as the subject in respect of what in the sense of the public would be regarded as a "work" carried on by the Dominion Government. I need hardly state that every employee of the Government of Canada is not engaged upon a "public work" in the sense intended by the Exchequer Court Act. The word "public" in association with the word "work" occasions no difficulty; the difficulty in cases of this kind is to determine what is a "work" and if the offending Crown servant was employed upon a "work". But I shall return to this point later.

In the *Wolfe* case, which I have already cited, it was suggested by some members of the court, that sec. 20 (*c*) —now sec. 19 (*c*)—should be interpreted in the light of the meaning to be attached to 20 (*b*), because of their juxtaposition. With the greatest respect I must say I am unable to appreciate the reasoning upon which that view is founded. Subsection 19 (*c*) refers to "any public work" while s.s. 19 (*b*) relates to a very limited number of "public works," namely, those which by reason of their construction or operation have injuriously affected other adjacent property. I do not think that sec. 19 (*c*), is to be interpreted by reference to sec. 19 (*b*), and I think it may be stated with confidence that such was never intended by the legislature.

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My attention was directed to several American cases as illustrative of the construction placed upon the words "public work," by the Supreme Court of the United States and other courts of that country, but I shall refer to one of them only. In the case of *Title Guaranty and Trust Company* v. *Crane Company* (1), the issues involved the right of parties who had delivered labour and materials to a company which was under contract to build a ship, to recover as materialmen under an Act of Congress which exacted from contractors for a public work a bond for the faithful performance by them of the contract, and the Act also empowered any person who furnished labour and material used in the construction and repair of any public work to intervene as claimants in a suit against the Guarantee Company on the bond supplied by the contractors. The work in question was the construction of a steamship for the United States Government. The ship was in course of construction only and had not been delivered over to the Government, but the Act provided that after the first payment to the contractors so much of the ship as was then built would belong to the Government. In the course of his judgment, which was the judgment of the Supreme Court of the United States, Mr. Justice Holmes said:—

> Of course public works usually are of a permanent nature and that fact leads to a certain degree of association of the notion of permanence and the phrase. But the association is only empirical, not one of logic. Whether a work is public or not does not depend upon its being attached to the soil; if it belongs to the representative of the public it is public, and we do not think that the arbitrary association that we have mentioned amounts to a coalescence of the more limited idea with speech, so absolute that we are bound to read "any public work" as confined to work on land.

Undoubtedly Holmes J. used the phrase "representative of the public" as denoting the Government.

Mr. Morse argued that any public service was in itself a "public work," and with that I agree, that is, if the service is in reason and sense, a "work" within the intendment of the Exchequer Court Act. In the Public Works Act, "public work" means "any work" or "property" under the control of the Minister, that is, the work is "public" because it is under the control of the Crown. "Public work," "property" and "any work" in that

(1) (1910) 219 U.S. 24.

Act are synonymous. It will be observed that the courts have so far departed from the former notion of "public work" meaning only a physical thing being constructed, for a public purpose, by and at the instance of the Crown, as to recognize its incorporeal significance, for example, labour to maintain existing public property, or some public service such as the postal service. The practical question here arises whether the elimination or correction of radio inductive interference, a work carried on throughout the whole of Canada, is not a public service that constitutes a "public work." The Government of Canada licenses, as I understand it, all broadcasting stations, and all the numerous users of radio reception devices, and therefore the service rendered by the Radio Branch in attempting to correct radio inductive interference is a service rendered to a very large section of the public at the expense of the country. It is a work carried out by skilled persons with the aid of specially equipped motor cars. I cannot see why such a service should not properly be designated as "a public work," or even "property," just as would a telegraph line owned and operated by the Government, and telegraph lines are, I think, referred to in sec. 9 of the Public Works Act as "property" and as a "service." The motor car here was the "property" of the Crown, and was employed or in use at the time of the accident, by its servants, for the purpose of maintaining or improving a public service controlled and administered by the Crown, and the equipped motor car was one of the appurtenant means or instrumentalities for correcting radio inductive interference. Now, I think a public service of this nature is a "public work," and I think also that any physical instrumentality (such as the specially equipped motor car in this case) owned, equipped and used by the Crown, in carrying out a public service of such a character, is a "public work" within the meaning of the Exchequer Court Act.

Then I was referred to a line of decided cases where, for example, post office buildings owned by the Crown, and a Dominion Park, really public services, have been held to be public works within the meaning of the Exchequer

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Court Act. In *Brady* v. *The Queen* (1), it was held on demurrer, that the Rocky Mountain Park was a public work of Canada, and a person who was injured on one of the roads in the Park by reason of a wire negligently stretched across a road therein, was held to be entitled to recover damages against the Crown. In *Leprohon* v. *The Queen* (2), Burbidge J., expressed the opinion that a post office building owned and occupied as such by the Crown, was a public work, within the meaning of the Public Works Act. In *Keegan* v. *The King* (3) Audette, J. held that a post office building owned and occupied by the Crown was a public work. The case of *Johnson* v. *The King* (4) was one where horses, which were under hire to the Dominion Government, were lost owing to the negligence of the Crown's servants engaged in constructing for the Crown, the Atlin-Quesnelle telegraph line. There were two aspects of the case considered by the court, first the liability of the Crown under the contract of bailment, secondly the liability of the Crown for the loss of property by negligence of its servants on a public work. On the latter point Burbidge J., was of the opinion that the telegraph line in course of construction was a public work; I must say regarding that aspect of the case, it is difficult for me to conceive of any other conclusion being reached. In the case of *Brebner* v. *The King* (5) Audette, J. held that a barn, at Kingston, belonging to and under the control of the Department of Militia and Defence, not under the control of the Minister of Public Works, was a public work. These cases go to show that a "public work" includes public services, properties or buildings, wherein is administered one of the public services of Canada, at the expense of Canada, and excludes the popular idea or notion that a "work" is necessarily something constructive or permanent, in the material sense.

Mr. Morse advanced the proposition that the Government car in this case was a "building," apart from its being property owned by the Crown, and therefore a "public work" within the definition laid down by Anglin J., in the case of the *La Compagnie Generale d'Entreprises Publiques* v. *The King* (6), and later affirmed by him in

(1) (1891) 2 Ex. C.R. 273.
(2) (1894) 4 Ex. C.R. 100 at p. 106.
(3) (1915-17) 16 Ex. C.R. 412.
(4) (1903) 8 Ex. C.R. 360.
(5) (1913) 14 Ex. C.R. 242.
(6) (1917) 57 S.C.R. p. 527.

the *Wolfe* case. He referred to definitions of "building" supplied by Lexicographers. The Oxford English Dictionary defines a "building" as a "structure" and "structure" as a fabric or framework of material parts put together. In Widdifield's "Words and Terms Judicially Defined" the author defines a building as a "structure" or "edifice" erected by the hand of man composed of natural material as stone or wood, and intended for use or convenience. The author then quotes in support of his definition the case of *Carr* v. *Fire Insurance Association* (1), in which fixed and movable machinery, shafting, boilers, etc., were included in the word "building" as between mortgagor and mortgagee. I am rather disposed to agree with the author's definition of a "building" but not in the relevancy of the decided case cited by him to support his definition. In the American case of *Caddy* v. *The Interborough Rapid Transit Company* (2), a railroad car was held to be a structure or building, and an employer was held to be liable to the plaintiff for an accident occurring because the car was not properly provided with a scaffold on which the plaintiff could work. I was also referred to a series of English cases establishing the meaning of the word "building," as understood by the English Courts, though I must at once point out that a structure may be a "building" under one Act, and it may not be the same thing under another Act. In *Hanrahan* v. *Leigh-on-Sea* (3), an old railway car converted into a building was held to be a building as it originally stood. In *Long Eaton Recreation Grounds Company* v. *Midland Railway Co.* (4), it was said by Collins M.R. that a railway embankment could be covered by the word "building," and that a building was not necessarily limited to a structure of bricks and mortar. In *Brown* v. *Corporation of Leicester* (5), a wooden structure used as a show case was held to be a building within the meaning of the Public Health Act, 1888, which required the consent of the urban sanitary authority before erecting a house or building. These cases rather show that a "building" covers a wide field of "structures" great and small. If it be necessary to say

(1) (1888) 14 O.R. 487.
(2) (1909) 195 N.Y. 415 at p. 420.
(3) (1909) 2 K.B. 257.
(4) (1902) 2 K.B. 574 at 587.
(5) (1893) 67 L.T. 686.

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that the motor car in question here is covered by the word "building," I see no reason for saying that it cannot, to use the language of Collins M.R. in *Long Eaton Recreation Grounds Company* v. *Midland Railway Co.*, just cited. I cannot avoid the conviction that the work here rendered by the Crown for the public benefit, with property or means owned and controlled by the Crown, through servants employed by the Crown, a work or service made possible by moneys voted by parliament, constitutes a public work within the meaning of the Exchequer Court Act, and falls within the principle laid down in the *Schrobounst* case. The car here was not merely a means of transportation for the radio electrician and investigator engaged in the work of correcting radio inductive interference, it was in its entirety a necessary means and instrumentality for performing that particular work. Without this mobile and specially equipped instrumentality the Radio Branch would not have been able to locate, and remove or mitigate interferences with radio reception, with the desired speed and satisfaction. True, the radio investigator might carry out this work without a motor car, but that was not the means in vogue, or the means adopted by the Radio Branch. I find it impossible to say that the equipped car was not as much a part, or as closely connected with the service or work which the Radio Branch was conducting from Ottawa, as was the motor truck transporting workmen to the Welland Canal in the *Schrobounst* case. It matters not that the radio service was carried on voluntarily by the Government. Burbidge J. disposes of any argument on that point in the *Leprohon* case (*supra*), wherein he stated that it did not make any difference in respect of liability that the Government postal service was carried on without any profit. The portion of the Government building used by the officers and employees of the Radio Branch for the correction of radio inductive interference, is as much a public work as a post office building is for the conduct of the postal service. A post office building is merely a structure of convenience wherein mail is received and distributed, or from which the same is forwarded. It could hardly be argued that the Crown would not be liable, if its own motor car used in conveying mail from a post office to a train, owing to

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the negligence of its servant, injured or killed a person while en route. It is a sound rule of statutory construction, that the language of a statute is generally extended to new things which were not known and could not have been contemplated by the legislature when it was passed. In *Attorney-General* v. *Edison Telephone Co.* (1) a telephone was held to be a telegraph under the old Telegraph Act of 1863 and 1869 although the telephone was not invented or contemplated in 1869; and in *Taylor* v. *Goodwin* (2), a bicycle was held to be a carriage. Let us assume that instead of the particular work here carried on by the Crown, the correction of radio inductive interference, it was an ordinary telegraph service owned and operated by the Government of Canada. Now, if servants of the Crown were engaged in repairing or replacing telegraph poles, or removing something that interfered with the functioning of the telegraph wires, and negligently a pedestrian was killed, or some property was injured, I can hardly conceive it to be successfully contended, that the accident had not occurred on a public work. In substance I see no distinction between a telegraph service and a radio service. As between subject and subject, any injury negligently caused by the driver of a motor car is actionable, and the only question for decision here is whether the work being carried on by Pollard and Langlois was a "public work" within the meaning of the Exchequer Court Act. The conclusion that I have arrived at is that this question must be answered affirmatively; that this court has jurisdiction to entertain the petition in question; and that Pollard and Langlois were servants of the Crown engaged upon a "public work," and at the material time were acting within the scope of their duties.

Mr. Morse raised two other points to which I think I should make reference, as this case is most likely to go to appeal. The first point I shall deal with very briefly. Mr. Morse argued that the English Judges of the last century misread the ancient precedents of petitions of right when they held that these precedents only disclosed that the Crown was liable for breach of contract and not for torts. He referred to Sir William Holdsworth's monu-

(1) (1880-81) 6 Q.B.D. 244. (2) (1879) 4 Q.B.D. 228.

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mental work, and this author seems to think that under the old common law a tort, for example a disseisin by the King, was redressible by petition of right, and that a petition lay for a chattel wrongfully taken, and the contention seems well supported by historical data. Holdsworth and other legal historians supporting this view may be perfectly correct and it is probably true that historical research in the ninteenth century was in its infancy in this field, and much data now available was unknown to the Judges of that time. It may be that in the well-known case of *Thomas* v. *The Queen,* the Judges erred in their understanding of and misread the opinion of Lord Somers in the equally well-known Bankers' case, and that the case of Viscount Canterbury was decided on a wrong theory of master and servant liability. There is no doubt a great weight of influential opinion against the principle that a petition of right will not lie against the Crown in tort. This is evidenced by the fact that some of the British Dominions have by statute declared the Crown liable in tort. In England, in 1921, a committee composed of distinguished members of the English Bar, was appointed by Lord Birkenhead, then Lord Chancellor, to consider the position of the Crown as litigant; in 1927 they submitted a draft Bill dealing with the matter and in which it was proposed to make substantial changes in the law. The Bill proposed that Crown proceedings were no longer to be by way of Petition of Right but were to be proceeded with in the same manner as an action in the High Court between subjects; that the Crown was to be liable in tort, and liable for the wrongful acts of its officers in the same way as a private principal was liable for the acts of his agent. The Bill has not yet been submitted to Parliament, but the delay in doing so has been the subject matter of criticism. However, for about a century the courts of binding jurisdiction have held that a petition of right does not lie against the Crown, in tort, except where the rule has been modified by statute. By that principle and these precedents I feel bound, and it is for other courts to decide that the ancient precedents have been misunderstood, and erroneous decisions reached, by the English Courts of the nineteenth century particularly, in respect of the liability of the Crown in tort.

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The other point raised by Mr. Morse is quite substantial and to me a novel one, and on its face would seem to have merits. Briefly the point is that the Canadian Petition of Right Act is more than procedural, that it is substantive, and that thereunder, and without relying on the provisions of the Exchequer Court Act, a petition of right lies against the Crown, in tort.

I now proceed to state Mr. Morse's argument on this point as I understood him to present it. In 1876 the Dominion Parliament enacted a Petition of Right Act, which closely followed the English Act of 1860. The Supreme Court of Canada, in the well known cases of *McFarlane* v. *The Queen* and *McLeod* v. *The Queen, supra,* followed the English cases which decided that as the English Petition of Right Act gave no remedy to the subject that was not available before, there was no remedy by petition for tort. That argument, Mr. Morse stated, was a perfectly valid one in the Canadian courts until the Act of 1887 was passed, separating the Exchequer Court from the Supreme Court, but not afterwards. That Act (Schedule B) repealed sec. 21 of the Petition of Right Act, and the repealed section was in part as follows:—

21. Nothing in this Act contained shall,—

(1) Prejudice or limit otherwise than is herein provided, the rights, privileges or prerogatives of Her Majesty or Her Successors; or

(2) Prevent any suppliant from proceeding as before the passing of this Act; or

(3) Give to the subject any remedy against the Crown,—

(*a*) in any case in which he would not have been entitled to such remedy in England under similar circumstances, by the laws in force there, prior to the passing of an Act of the Parliament of the United Kingdom, passed in the session held in the twenty-third and twenty-fourth years of Her Majesty's reign, chapter thirty-four, intituled "An Act to amend the law relating to Petitions of Right, to simplify the proceedings and to make provisions for the cost thereof."

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Then, it was argued, that without this saving clause, if we find in our Petition of Right Act competent words to create a liability against the Crown for tort, then the suppliants here are not confined for their remedy to sec. 19 (*c*) of the Exchequer Court Act.

Sec. 2 ss. (*c*) of the Petition of Right Act reads thus:—

> Relief includes every species of relief claimed or prayed for in a petition of right, whether a restitution of any incorporated right or a return of lands or chattels or payments of money, or damages, or otherwise.

Sec. 5 enacts the Exchequer Court shall have "exclusive original cognizance of such petitions." Sec. 10 implements these provisions by enacting that the judgment on the petition shall be that the suppliant is not entitled to any portion, or that he is entitled to the whole or some specified portion of the relief sought by his petition, and upon such terms and conditions if any, as are just. A condition precedent, of course, to any proceeding under the Act, is that the fiat be granted.

Mr. Morse then contended that the use of the word "damages" was alone sufficient to cover a claim against the Crown for injury arising out of the negligence of its servants; that word is defined in Osborne's Law Dictionary as "compensation or indemnity for loss suffered owing to a breach of contract or of tort." The phrase "damages or compensation" used in an Ordinance of the legislature of the Straits Settlement, regulating suits against the Crown in that Crown colony, was held by the Privy Council, in *Attorney General of the Straits Settlement* v. *Wemyss* (1) to cover a claim by petition of right for damages suffered by the suppliant in respect of land by reason of certain works executed by the Government in front of his land which cut off his access to the water, a tort. In that case Lord Hobhouse stated: "When the legislature of a colony in such circumstances allows claims against the Crown in words applicable to claims upon torts, it should mean exactly what it expresses." Their Lordships held that the expression "claim against the Crown for damages or compensation" was an apt expression to include claims arising out of torts. They also held that liability followed on a grant of jurisdiction. See also

(1) (1888) 13 A.C. 192.

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Farnell v. *Bowman* (1). In the case under discussion, did the legislature intend by the elimination of sec. 21 of the Petition of Right Act, to grant a larger or an unlimited range of remedies to the subject as against the Crown?

It was further urged by Mr. Morse as a logical consequence of his line of argument which I have outlined, that as the Petition of Right Act gave the subject relief in a claim for "damages," which embraces an action in tort, against the Crown, that the suppliants here had another arrow to their bow and that was the following. By Sec. 19 of the Exchequer Court Act the Court is given exclusive original jurisdiction in respect of a group of designated claims, and one of them is defined in ss. (*d*) as follows:—

> Every claim against the Crown arising under any law of Canada, or any regulation made by the Governor in Council.

With this foundation Mr Morse contended that the Petition of Right Act did not protect or preserve the prerogative, but rather destroyed it, by reason of the elimination of sec. 21 of the Petition of Right Act, and that that Act is not now procedural only but creates a liability against the Crown in cases of "damages" which implies a tortious act, and that jurisdiction is given to the Exchequer Court in such cases. The recital to the English Petition of Right Act shows that it was intended to be procedural only, as also does the proviso to sec. 7 which reads:—

> Provided always, that nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act.

This was in effect the same as sec. 21 in the Canadian Petition of Right Act prior to its repeal in 1887. The English Act was so drafted as to make it fairly clear that the same was intended to be a procedural statute only, and was not intended to enlarge the remedies of the subject against the Crown, but the Canadian Act has no recital suggesting it was merely procedural, and there is no express provision to the effect, after 1887, that the Act was not intended to give to the subject new remedies against the Crown. The two Acts in this particular are in singular contrast.

(1) (1887) 12 A.C. 643.

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Now, I must say, that the contention of Mr. Morse appears quite impressive, having in mind the literal language of the Petition of Right Act. If the contention of Mr. Morse is a sound one, then its effect is that in all cases sounding in tort the prerogative is non-existent, a principle not hitherto recognized by our courts in Canada, and in such circumstances the Exchequer Court would seem to have jurisdiction to entertain any claim in tort, brought by petition of right, against the Crown. Now, is there any vulnerable point in this seemingly very formidable argument of Mr. Morse's? The draftsman of the Exchequer Court Act evidently thought that sec. 21 of the Petition of Right Act, as it stood in 1887, would be in conflict with sec. 16 (*c*) of the proposed Exchequer Court Act of 1887, unless repealed, as the latter section to some extent modified the common law and granted to the subject some remedies not available under the common law.

There are just two avenues of approach to the question which Mr. Morse has raised. If he is correct in saying that the Canadian Petition of Right Act is not merely procedural, but gives to the subject a remedy against the Crown in tort, which was non-existent prior to 1887, then that is the end of the argument, at least that is my first impression. Now what is there to be said against that view? Was sec. 16 of the Exchequer Court Act of 1887 intended to fill, in a modified form, the place of the repealed sec. 21 of the Petition of Right Act? The former Act enlarges the common law remedies of the subject against the Crown, but it would not appear to be so comprehensive as to completely alter the common law rule in respect of the Crown's liability in cases of tort. On the other hand, the Petition of Right Act appears to contemplate that a petition of right would lie in all claims for "damages," which would include any case of damages arising from any tortious wrong. If the former statute were alone to be looked at, then the Exchequer Court has jurisdiction only in claims of tort against the Crown in the cases mentioned in the present sec. 19 of the Exchequer Court Act.

The point for decision is a very interesting one. For forty-five years and more the Petition of Right Act has been regarded in Canada as merely procedural. The Ex-

chequer Court Act of Canada (1887), which amended the Supreme and Exchequer Courts Act, bears the title "An Act to amend the Supreme and Exchequer Courts Act, and to make better provision for the trial of claims against the Crown." The word "provision" in this title merely relates, I think, to the establishment of a court apart from the Supreme Court for the trial of claims against the Crown. My impression is that the repeal of sec. 21 of the Petition of Right Act, and the enactment of sec. 16 of the Exchequer Court Act, 1887, now sec. 19, must be considered together, in interpreting the effect of the Petition of Right Act as it now stands, and sec. 19 of the Exchequer Court Act. It is to be remembered also that the Exchequer Court is given exclusive jurisdiction in the claims enumerated in sec. 19 of the Exchequer Court Act. I doubt if the legislature intended by the repeal of sec. 21 of the Petition of Right Act to extend to the subject the same remedies against the Crown as prevail between subject and subject—though it might very properly have done so; I am inclined to the view that sec. 16 of the Exchequer Court Act (1887) was to fill the place of the repealed section, and that did not mean the entire elimination of the common law rule in respect of claims against the Crown but rather a modification of such rule, in case of the subject. That expresses presently my best judgment in the matter. On the whole, I feel obliged to hold that the contention of Mr. Morse in this regard fails.

In the result, it is my opinion that the suppliants must succeed upon the law points submitted for determination, and costs will follow the event.

Judgment accordingly.