FREDERICK J. BRADY.....SUPPLIANT ; 1891

AND Jan. 19.

HER MAJESTY THE QUEEN.....RESPONDENT.

Petition of right—Demurrer—Personal injuries received on public work —Negligence of Crown's servant—Liability of Crown therefor.

The suppliant alleged in his petition that on a certain date he was driving slowly along a road in the Rocky Mountain Park, N.W.T., when his buggy came in contact with a wire stretched across the road, whereby the suppliant was thrown from the buggy to the ground and sustained severe bodily injury. He further alleged that the Rocky Mountain Park was a public road of Canada under the control of the Minister of the Interior and the Governor-in-Council, who had appointed one S. superintendent thereof ; that S. had notice of the obstruction to travel caused by the wire and had negligently failed to remove it, contrary to his duty in that behalf ; and that the Crown was liable in damages for the injuries so received by him.

The Crown demurred to the petition on the ground that the claim and cause of action were founded in tort, and could not be maintained or enforced.

Held, that the petition disclosed a claim against the Crown arising out of an injury to the person on a public work resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties and employment, and therefore came within the meaning of 50-51 Vic. c. 16 s. 16 (*c*), which provides a remedy in such cases.

DEMURRER to a petition of right for personal injury sustained by the suppliant through the alleged negligence of one or more servants of the Crown.

The demurrer to the petition admits the following among other allegations therein contained :—

That the Rocky Mountain Park of Canada, and the road thereof on which the suppliant sustained the injuries complained of, is a public work under the control and management of the Minister of the Interior and the Governor-in-Council, who, in or about the month of

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December, 1886, appointed one George A. Stewart Superintendent thereof as an officer or servant of the Crown.

That the said Stewart on or about the 1st day of January, 1887, entered upon his duties as such Superintendent, since which date he has continued to act in that capacity, and that under him were employed subordinate officers and servants of the Crown.

That the construction, maintenance, care, repairs and control of the road mentioned, and other Park roads, and the removal of any obstruction to traffic thereon, were each within the scope of the duties or employment of the said Stewart, as such Superintendent, or of his said subordinate officers, or Crown servants, or some of them.

That on or about the 8th of September the road mentioned was obstructed by a wire which was stretched or lying across the same, and that before that date the said Park Superintendent Stewart, or his said subordinates, or some of them, had, or had received, due notice of such obstruction, which constituted a danger and menace to persons travelling upon said road, but that the said Stewart, his subordinates or some of them whose duty it was to thereupon remove the said wire, neglected to remove, and negligently refrained from removing, the same, and that in the evening of the said 8th of September, 1888, the suppliant was driving slowly in a buggy in and along said road when the buggy or its wheels came suddenly in contact with the said wire, of which the suppliant was unaware, whereby the buggy was lifted off the ground and the suppliant thrown violently out upon the said road, and sustained severe bodily injury.

November 4th, 1890.

Hogg, Q.C. in support of demurrer :

The Rocky Mountain Park was set apart under the

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authority of the Act 50-51 Vic. c. 32. It contains some 260 square miles, and is reserved as a public park and pleasure-ground for the benefit, advantage and enjoyment of the people of Canada. In section 4 of the Act the purposes for which the park was to be maintained are set forth.

I submit that no action will lie against Her Majesty upon the grounds alleged in the petition of right. In the first place, there is no duty imposed on the Minister of the Interior or the Crown by the statute creating the park, to either build or maintain roads. The duties of the Minister of the Interior, and of the Crown, must be derived entirely and exclusively from the words of the statute, and if no obligation such as the one set up by the suppliant is to be found there, it is not to be called into existence outside of the statute. Any duties imposed upon them are duties arising under the specific words of the Act. The position of the Crown with reference to the maintenance of this park is the same as that mentioned by the learned Chief Justice with respect to Government railways in the *Queen* v. *McLeod* (1). The duties of the Crown as owner of the park are simply those of an ordinary owner not holding himself out as liable for accident or injury to persons frequenting the same.

(Cites *Cracknell* v. *The Mayor of Thetford* (2); *Metropolitan Railway Company* v. *Jackson* (3); *Holliday* v. *St. Leonard's* (4); *Smith on Negligence*) (5).

Again, this is really an action against the Crown for the negligence of its servants in placing on, or allowing to be placed on, one of the roads of the Park certain wire which was a menace and danger to persons using

(1) 8 Can. S. C. R. p. 25.
(2) L. R. 4 C.P. 629.
(3) 3 App. Cas. 208.
(4) 11 C.B.N.S. 192.
(5) P. 70.

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such road. On this point my contention is based on the well known principle that there is no remedy against the Crown in tort. The maxim that the "King can do no wrong," with all its significance in actions of tort, need not be discussed at great length here. The servants of the Crown may be personally liable, but there is no action against the Crown. (Cites *Viscount Canterbury* v. *The Queen* (1); *Tobin* v. *The Queen* (2); *Langford* v. *The United States*) (3). The latter is an American case very much in point showing what the law is in the United States in regard to similar actions against the Government of that country. (Cites *MacFarlane* v. *The Queen* (4); *The Queen* v. *McLeod* (5); *Clode on Petition of Right* (6); *Dicey on Parties to Actions*) (7).

There can be no serious argument put forward that this action will lie under *The Petition of Right Act* of 1876. There is no liability on the part of the Crown in this case unless it is created by *The Exchequer Court Act*, 50-51 Vic. c. 16. Now, my contention is that section 16 of that Act does not create any liabilities that were not in existence at the time of the passing of the Act. The jurisdiction of the court is enlarged but no new obligations or liabilities are created. Any defence to a petition of right that could have been set up prior to the Act of 1887 coming into force is still available to the Crown. *The Petition of Right Act* is still in force. There are no express words in the new Act to take away any rights accruing to the Crown under *The Petition of Right Act.*

Under the Act 33-34 Vic. c. 23 s. 2. the Official Arbitrators or some one of them might have had referred to them for investigation and report, and

(1) 12 L.J. Ch. 281.
(2) 16 C.B.N.S. 310.
(3) 101 U.S.R. 341.
(4) 7 Can. S.C.R. 216.
(5) 8 Can. S.C.R. 1.
(6) P. 53, *et seq.*
(7) Pp. 23, 24.

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also for award, claims for injury to the person or property occurring on a public work. Now there is nothing to show that, while the Arbitrators had the jurisdiction to report or award damages, the Minister or the Crown was bound to pay them. That was entirely left to the good-will of the Crown. There was no liability created against the Crown for the payment of such damages, and the same contention holds good as against section 16 (*c.*) of 50-51 Vic. c. 16. The reasonable view to take of the whole of sec. 16 is that the legislature merely intended to give the court jurisdiction to hear and determine any claims of the species indicated in such section, if such claims existed in law and were triable before the Act came into force. There is no case reported that will show any extension of liability on the part of the Crown under 33-34 Vic. c. 23. Take clause (*a*) of the 16th section of 50–51 Vic. c. 16, and all other clauses except (*c*), and we find they deal with questions of liability that were decided and established before the passing of the Act. I would also refer in this connection to *The Interpretation Act*, R. S. C. c. 1 s. 17 sub-sec. 46, and to some cases at common law upon the question of the Crown's rights being invaded or affected without express words to that effect. (Cites *Maxwell on Statutes* (1), *Endlich on Statutes* (2), and *Chitty's Prerogatives*) (3). Section 16 is simply a jurisdiction conferring section, and nothing more. It was not intended to affect the rights of the Crown, and if it were, it must be shown in that section, or else it must be shown that the liability was existing at the time the statute was passed. (Cites the *Henrich Björn case*) (4).

This is a statute which provides for procedure only.

(1) Sec. 161.
(2) Sec. 161.
(3) Pp. 382, 383.
(4) 11 App. Cas. 270,—Lord Watson at page 278 and Lord Bramwell at page 281.

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The statutes upon which the cases in Australia and the Straits Settlement were founded were statutes of entirely different character. (Cites and comments upon the decisions in *Cookney* v. *Anderson* (1), and *Drummond* v. *Drummond*) (2). Now it may be argued that in the case of *Farnell* v. *Bowman* (3), the Privy Council laid down the general principle that actions *ex delicto* can be brought against any Colonial Government. But it must be borne in mind that this case was decided upon a statute entirely different from ours. It not only provides a remedy against the Crown in such a case as the present, but also creates a liability. It is not a statute which merely confers jurisdiction, but goes further and actually describes the nature of the liability.

Chrysler, Q. C. *contra* :—It must be admitted at the outset that prior to the passing of 50–51 Vic. c. 16 such a case as this could not have been maintained by petition of right, and, therefore, the whole question necessarily depends upon the construction of that statute. It is necessary for us to look at the old rules of construction of statutes in order to understand the real meaning of the statute in question. (Quotes the rules of construction in *Maxwell on Statutes*) (4).

To ascertain what was the law before the Act was passed we need not go back further than the case of *Viscount Canterbury* v. *The Attorney-General* (5), wherein the argument of counsel was directed largely to a consideration of the meaning of the legal maxim: "The King can do no wrong." It was argued in support of the petition of right, which was founded on damages arising from the negligence of the Crown's servants, that the only reason existing prior to that case why such an action could not be maintained against the Sovereign depended upon the technical

(1) 1 DeG. J. & S., p. 365.
(2) L. R. 2 Ch. App. 32.
(3) 12 App. Cas. 643.
(4) P. 27.
(5) 1 Phil. 306; 12 L. J. Ch. 281.

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ground that the King could not issue process against himself. In other words that the liability of the Crown for the torts of its servants always existed, but such liability could not be enforced because there were no means provided by the law for such enforcement. The judgment of Lord Lyndhurst is a compendium of modern learning upon the subject. Now I submit that neither in this case nor in any previous one, neither in case law nor statute law, do we find it expressly stated that the Crown shall be liable to the suit of a subject founded either in contract or tort. All the cases down to the present time show that the sole foundation of the Crown's immunity from actions of tort is the absence of remedy,—the reason being that the Sovereign, by fiction at common law, was always present in the courts of justice and could not be asked to adjudicate upon his own case. There have been many statutory infringements upon the operation of that doctrine from time to time, and, coming down to the case before us, by *The Exchequer Court Act*, s. 16 (*c*) a remedy is expressly provided for it, and as long as we have the remedy I submit, upon the grounds I have before stated, that there is no doubt about the Crown's liability in the premises. Then, again, it has been advanced in support of the demurrer that the King can do no wrong, and that any action founded on the facts set up in this petition should have been brought against the Crown's servants whose negligence caused the accident. The explanation of the maxim given in *Broom's Legal Maxims* (1) shows that the Crown's liability always existed, but by means of a legal fiction the agents or officers of the Sovereign were made liable instead of the Sovereign himself. The Crown is always supposed to do justice, but heretofore there were no means of obtaining redress against the Crown available to the subject in such a case

(1) P. 51, *et seq.*

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as this. By *The Exchequer Court Act* s. 16 (*c*) that remedy is provided, and our petition of right is well founded. (Cites *Tobin* v. *The Queen* (1) . *Thomas* v. *The Queen* (2) ; *The Queen* v. *McLeod* (3) ; *Farnell* v. *Bowman*) (4). I submit that the case of *Farnell* v. *Bowman* is on all fours with this case. The legislative re-enactment upon which the decision is founded provided that "Any person having or deeming himself to have any "just claim or demand whatever against the Govern- "ment of this Colony may set forth the same in a peti- "tion to the Governor praying him to appoint a nominal "defendant in the matter of such petition, &c," and upon such appointment the case shall be proceeded with as therein provided. There is no serious distinction to be drawn between the legal effect of the words "any just claim or demand whatever against the "Government of this Colony," used in that enactment, and the words "every claim against the Crown," employed in *The Exchequer Court Act*, s. 16 (*c*). Indeed if anything is to be said on that point, our statute is to be read more strongly against the Crown than the New South Wales Act, and, further than this, there was an express provision in that Act safe-guarding the Crown's prerogative. In our statute there is no such saving clause, and while there are no express words saying that the Crown shall be liable, I submit that the recognition of such liability is implied by the creation of the remedy. As the case of *Farnell* v. *Bowman* appears in the reports it meets all the requirements of our case. It supports my contention that the immunity of the Crown from actions in tort depends altogether upon a question of practice, and that practice is altered, so far, at least, as this case is concerned, by *The Exchequer Court Act*, 1887.

(1) 16 C. B. N. S. 310.
(2) L.R. 10 Q.B. 31.
(3) 8 Can. S. C. R., Judgment of Fournier J., at p. 29.
(4) 12 App. Cas. 643.

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In the *Queen* v. *Williams* (1) the clause of the 37th section of the New Zealand Crown Suits Act, upon which that case was decided against the Crown, is given at length. It reads as follows: " A wrong or damage independent of contract, done or suffered [by or under authority of the Crown] in, upon, or in connection with a public work, &c." I submit that this language is almost the same as section 16 (*c*) of *The Exchequer Court Act*, 1887.

From the very title of the Act 50-51 Vic. c. 16 we must assume that Parliament intended to enact a change in the old law. That title is worded:

> An Act to amend " The Supreme and Exchequer Courts Act," and to make better provision for the trial of claims against the Crown.

The title is part of the Act, and should be looked at to determine its meaning in case of doubt. (Cites *Coomber* v. *The Justices of Berks*) (2).

The question may be asked is there a fund in Canada to respond a judgment obtained in a case like this? I submit that the payment of any amount that may be awarded against the Crown in this suit is provided for by section 15 of *The Petition of Right Act* (3) which is in force to-day.

Then, with regard to section 21 of *The Petition of Right Act*, which was a provision for safe-guarding the Crown's prerogative in Canada, this section has been expressly repealed by the last clause of schedule B. of *The Exchequer Court Act*, and there is no substituted provision in such behalf to be found in the repealing Act. In view of this fact, the court cannot read into the repealing Act any general provisions respecting the Crown's rights to be found in the *The Interpretation Act*. The court should only look at the repealing clause, when its meaning is plain

(1) 9 App. Cas. at p. 433.
(2) 9 Q. B. D. 17., Grove, J. at p. 26, and Huddleston, B. at p. 32.
(3) R.S.C. c. 136.

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and unambiguous, to ascertain the intention of the legislature. (Cites *Attorney-General* v. *Lamplough* (1), Bramwell L.J. (2) and Brett, L.J. (3)). I submit that the plain wording of section 16 (*c*) of *The Exchequer Court Act* covers this case. It is true that there is no declaration to be found in the statute that the Crown should be liable in such a case as this, but I rely on the premises I have already advanced to have that question determined by the court in favor of the subject. (Cites *Maxwell on Statutes*) (4). In fact, in no one of our statutes which give the subject a remedy against the Crown is there any mention made of the Crown's liability. Nothing to this effect can be found in *The Official Arbitrators Act* (5), *The Government Railways Act* (6), or in the Expropriation Acts. In such matter the legislature uniformly proceeds upon the theory that the Crown will do justice and right.

Finally, the grounds upon which the suppliant's action is based are properly the subject of a petition of right. Section 21 of *The Exchequer Court Act* provides that any claim against the Crown may be prosecuted by petition of right.

It is contended on behalf of the Crown that unless the Crown is specially mentioned in the statute it is not bound thereby. My answer to that is that the Crown is expressly mentioned in the statute. What can be more explicit than the words "every claim against the Crown" to be found in section 16? (Cites *Attorney-General of the Straits Settlement* v. *Wemyss* (7); *Mersey Docks Trustees* v. *Gibb* (8); *Gilbert* v. *Corporation of Trinity House* (9); *White* v.

(1) 3 Ex. Div. 214.
(2) At p. 227.
(3) At p. 231.
(4) Pp. 286-303.
(5) R.S.C. c. 40.
(6) R.S.C. c. 38.
(7) 13 App. Cas. 192.
(8) L.R. 1 H.L. 93.
(9) 17 Q.B.D. 795.

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Hindley Local Board (1) ; *Bathurst* v. *McPherson* (2) *Hammersmith Railway Company* v. *Brand*) (3).

Lewis, following on the same side, contended that the provisions of *The Interpretation Act* respecting the Crown's rights should not be imported into *The Exchequer Court Act* because the latter Act expressly repealed the provisions safe-guarding the prerogatives contained in *The Petition of Right Act* (4). Furthermore, as *The Exchequer Court Act* is a remedial one, it should receive such fair and liberal construction as will best attain the object of the legislature in passing it,—that object being simply, as declared in the title, "to make better provision for the trial of claims against the Crown."

Hogg, Q.C. in reply :

There is nothing in this Act to take away the right of the Crown to set up any defence which might have been set up under *The Petition of Right Act*. The effect of section 16 is simply to give the court a right to hear and determine such claims as are mentioned therein whenever there is a liability on the part of the Crown therefor. It may be very properly said that it is legislation looking forward to possible modifications of the Crown's rights by Parliament in the future ; but it cannot be said that such modifications are to be found in the section itself or in any part of the Act. The whole point in the case is simply this : Does the statute in question in any way extend the doctrine of *respondeat superior* against the Crown ? I submit that it does not. (Cites *Re Nathan* (5) ; *The Sanitary Commissioners of Gibraltar* v. *Orfila, et al.*) (6).

(1) L.R. 10 Q. B. 219.
(2) 4 App. Cas. 256.
(3) L.R. 4 H.L. 171.
(4) R.S.C. c. 136 p. 21.
(5) 12 Q.B.D. 461.
(6) 15 App. Cas. 400.

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Reasons for Judgment.

BURBIDGE, J. now (January 19th, 1891) delivered judgment.

For the reasons that I have given in the case of *The City of Quebec* v. *The Queen* (1), I am of opinion that the petition discloses, within the meaning of the Act 50-51 Vic. c. 16, s. 16 (*c.*), a claim against the Crown arising out of an injury to the person on a public work resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment, and that there should be judgment for the suppliant on the demurrer to the petition, and with costs.

Demurrer overruled with costs.

Solicitors for suppliant: *Stewart, Chrysler & Lewis.*

Solicitors for respondent: *O'Connor, Hogg & Baldersom.*

(1) 2 Ex. C. R. 252.