

IN THE MATTER OF THE PETITION OF RIGHT OF
 ERNEST THERIAULT SUPPLIANT;
 AND
 HIS MAJESTY THE KING RESPONDENT.

1917
 Feb. 3

Negligence—Railways—Public work—Highway—Exchequer Court Act, sec. 20 (c.)

The suppliant while engaged measuring lumber on the King's highway was injured by a passing train of the Transcontinental Railway, and by his petition of right seeks to recover damages in respect of the same.

Held: An action in tort does not lie against the Crown, except under special statutory authority, and the suppliant to succeed must bring the facts of his case within the ambit of sub-sec. (c) of sec. 20 of the Exchequer Court Act. (R.S.C. 1906, c. 140). As the accident happened on the highway and not on a public work, as required by the Act, his action fails.

PETITION OF RIGHT to recover damages for injuries received as the result of a train on the Transcontinental Railway striking a cattle guard, which said cattle guard was broken and thrown into a pile of deals, which in turn struck the suppliant thereby severely injuring him.

The case was heard before the Honourable Mr. JUSTICE AUDETTE, at Fraserville, P.Q., January 16-17, 1917.

A. Stein, K.C., and D. Levesque, for suppliant; E. H. Cimon and L. Berubé, for respondent.

AUDETTE, J. (February 3, 1917) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of \$15,000 for damages suffered by him as the result of an accident which happened on October 23, 1914, while he was engaged in counting and measuring three-inch deals piled alongside the King's highway, which is crossed or intersected by the Transcontinental Railway.

The accident happened on October 23, 1914, and the petition of right was filed in this court on June 5, 1916, more than a year after the accident; but evidence was

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produced showing it had been left with the Secretary of State on October 13, 1915, thus interrupting prescription.

On the date of the accident, the railway was still in the hands of the contractors, and the lumber that the suppliant was then measuring had been by him sold to one Michaud, who in turn had sold it to the contractors of the railway.

When the survey was originally made for the right of way, the track intersected the highway diagonally running along the same for quite a space. To obviate such a dangerous crossing the railway expropriated some land and diverted the highway, in the manner shown upon plan, Exhibit "A," by crossing the railway at right angles from north to south, the whole in conformity with sec. 3 of The Expropriation Act and sec. 15 of the Government Railway Act. This new piece of road became part of the King's highway and dedicated to the public.

Although at the date of the accident the Government had not taken the railway off the hands of the contractors, however, by leave of the latter, a few Intercolonial Railway trains had carried some freight over it, and on the day of the accident a special train of three or four cars, drawn by an engine and manned by employees of the Intercolonial Railway travelled, after obtaining leave from the contractors, on an inspection trip with officials on board. It was when that train travelled down that the suppliant was engaged measuring the lumber, at about six feet from the track, that hearing the train coming he moved ten to twelve feet away from the track, when the accident happened. No one actually saw how the accident happened, but it is rightly surmised that the steps of the engine and tender struck the bracket or triangle piece of the cattle guard, threw it into the deals which were sent flying and a short while after the accident the suppliant was found unconscious, lying in the middle of the highway with ten to twelve deals over him. Hence the present action.

The action is in its very essence one in tort, and such an action does not lie against the Crown, except under special statutory authority, and the suppliant to succeed must necessarily bring the facts of his case within the ambit of sub-sec. (c) of sec. 20 of *The Exchequer Court Act*. In

other words the accident must have happened, 1st, *on* a public work; 2nd, There must be a servant or officer of the Crown who has been guilty of negligence while acting within the scope of his duties or employment; and 3rd, The accident complained of must have been the result of such negligence.

Assuming for the sake of argument, that the railway in question, before it had been taken over from the contractors by the Government, was a public work, yet that does not establish the suppliant's claim because it must be found as a fact—following and applying the decisions in the cases of *Chamberlin v. The King*;¹ *Hamburg American Packet Co. v. The King*;² *Olmstead v. The King*;³ *Piggott v. The King*;⁴ *Montgomery v. The King*;⁵ and *Despins v. The King*;⁶ that the accident did not happen on a public work. Having so found it is unnecessary to consider, among other questions raised at bar, whether or not the accident resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.

Having so found, judgment will be entered declaring that the suppliant is not entitled to any portion of the relief sought by his petition of right.

Petition dismissed.

Solicitor for suppliant: *Adolphe Stein.*

Solicitor for respondent: *Leo Bérubé.*

¹ 42 Can. S.C.R. 350.

² 33 Can. S.C.R. 252, 39 Can. S.C.R. 621.

³ 53 Can., S.C.R. 450, 30 D.L.R. 345.

⁴ 53 Can. S.C.R. 626, 32 D.L.R. 461.

⁵ 15 Can. Ex. 374.

⁶ *Post*, p. 256, 32 D.L.R. 448.