1915

December 10.

IN THE EXCHEQUER COURT OF CANADA

IN THE MATTER OF PETITION OF RIGHT OF

JOHN PIGGOT & SON,

SUPPLIANTS;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Crown—Negligence—Tort—Injury to "property on public works"—Jurisdiction—R. S. C. 1906, *c.* 140 *sec.* 20 *s. s.* (*b. and c.*) *Costs—Amendment.*

1. Except where so provided by statute, the Crown is not liable for wrongs committed by its servants. Section 20, S.S. (c) of the *Exchequer Court Act* (R.S.C. 1906, c. 140) imposes such liability when the injury is to a person or property on any public work and results from the negligence of any officer or servant of the Crown. When the thing injured is not on any public work, no liability exists, even though it arose out of operations connected with such work.[1]

2. The present action being for damages alleged to be due to the acts of officers and servants of the Crown by the explosion of dynamite on an adjoining property does not come within the scope of sec. 20 (b) of the said Act which gives jurisdiction to this Court "to hear and determine every claim against the Crown for damage to property 'injuriously affected' by the construction of any public work."

3. Where the pleadings raise a question of law, which, if decided in favour of the party raising it would dispose of the case, without going to trial and he fails to apply to have it so decided, the Court will exercise its discretion as to costs and direct the payment of a fixed sum in lieu of taxed costs, such sum to be based on what the taxed costs would be, had the case been disposed of on such argument before trial.

Semble (a) In as much as a Petition of Right cannot be filed without the fiat of the Crown being first obtained, the Court will not allow same to be amended by setting up a new and substantive right of action without the permission of the Crown being first obtained therefor.

REPORTER'S NOTE.—[1] Since the cause of action in this case arose and since the decision of the case, Section 20, S. S. "C". of the Exchequer Court Act, was amended. (See 7-8 Geo. V. ch. 23. S. 2.)

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Statement of Facts.

PETITION OF RIGHT taken to recover, from the Crown, damages caused to the dock and piling ground of the suppliants, and alleged to be due to the works of the crown's servants and officers, when constructing a large dock on adjoining property, and to the explosion of dynamite thereon.

The suppliants were the owners of certain dock and piling ground near Windsor, on the Detroit River, Province of Ontario.

In the course of the Fall of 1912, the respondent was constructing a dock in the immediate vicinity of the property of the suppliants. During the late Fall dynamite was used to blow away the crib work which had been placed along the river bed, near the property of the suppliants. In the following Spring, when the suppliants placed their cargoes upon this dock, it collapsed and a considerable quantity of the lumber floated away and was lost. Suppliants alleged that the damage was due to the operations carried on by the government in the construction of their dock and by undermining suppliants' dock, and the Petition of Right was taken to recover from the Crown for the damages so alleged to have been suffered.

Suppliants by their Petition of Right, paragraph 2 allege: "That the said Petitioners are the owners of lots numbers one and two in Block 'A' in the City of Windsor according to plan No. 76, together with the water lots lying in front thereof, and for the purposes of their said manufacturing business constructed upon the said lots and water lots a large dock of about 200 feet frontage and about 50 feet in width reaching to the channel bank of the Detroit River, and used said dock and grounds for the pur-

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pose of discharging their lumber and other material from the boats carrying the same, and also for the purpose of carrying reserved stock."

Paragraph No. 3. "That in or about the month of July last past the Government of the Dominion of Canada was proceeding to construct a large public dock about 100 feet east of the said lands and premises of the petitioners and in the course of the construction of the said dock used large quantities of dynamite for blasting purposes and so negligently carried on blasting operations in connection with the said work as to so injure the crib work and other sub-structure of the said dock that the same collapsed, seriously damaging the said dock and projecting into the river a large quantity of valuable lumber, a considerable portion of which was entirely lost."

The operations of the Crown were not on any part of the property of suppliants and no part of suppliants' property was taken by the Crown.

The case came on for trial before the Honourable Sir Walter Cassels at London, Ont., on Friday, December 10th, 1915.

Mr. Rodd for suppliants;

Mr. Meredith, K.C., and *Mr. Fleming,* K.C., for respondent.

Argument of Counsel.

Mr. Rodd argued that the facts of this case gave jurisdiction to the court, both under sub-section C and sub-section B of section 20 of the *Exchequer Court Act*. That the property where the public work was going on was adjoining suppliants; that the damage to suppliants' property was due to the explosion of dynamite on the public work; that the court should read into the article, after the word

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"on" the words "or near." That the case also fell under sub-section B of section 20 of the *Exchequer Court Act*. "Every claim against the Crown for damage to property 'injuriously affected' by the construction of any public work." That it was not only where lands were taken by the Crown or expropriated by it that this article came into operation. That the present case was analogous to the case where a man digs on his property and takes away the lateral support of his neighbour's wall. He does not intend to do wrong, but wrong is done; that the case of *Chamberlin v. The King*[1] could be distinguished from this case; and that there was no limitation, to section 20 (b), as a *sine qua non;* that any part of the property of the suppliants must have been taken before it can be said to be injuriously affected. This is not the interpretation to be placed on the language of the statute.

He claimed also the right to amend his petition, in as much as the fiat, having been granted, was in effect a submission by the Crown that the damages should be assessed by the Court and was an admission that suppliants had a right of action. The granting of a "fiat" by the Crown was in effect a declaration by it that it was quite content, if we had been injured, to have the matter adjusted. They in substance, say "you may try that out in Court."

The Court was of opinion there was no jurisdiction in the matter, and, an adjournment was granted to permit suppliants' counsel to consider the advisability of discontinuing before going further. After adjournment, Mr. Rodd stated that he was asking the Court to read into section 3 of his petition what could be established in evidence, and asked the Court

[1] (1909), 42 Can. S.C.R. 850.

to consider whether or not the words "on a public work" may not be interpreted to mean so near the public work as to be injured by something which is done upon the public work.

Counsel for the Crown were not called on, and judgment was rendered from the Bench.

Per Curiam. (December 10th, 1915.)

The cause of action is contained in paragraph 3 of the Petition (printed above). It is an action of tort pure and simple, and no action for tort lies against the Crown, except when so provided by Statute.

Section 20, subsection (c) of the *Exchequer Court Act,* (R.S.C. 1906, c. 140) reads as follows:

"The Exchequer Court shall have exclusive orig-"inal jurisdiction to hear and determine: (c) Every "claim against the Crown arising out of any death "or injury to the person or to property on any pub-"lic work."

In the case of *Chamberlin v. The King*[1] the Chief "Justice of the Supreme Court says at p. 353: "In a "long series of decisions this Court has held that the "phrase 'on a public work' in section 20 sub-section C of the *Exchequer Court Act* must be read, to bor-"row the language of Mr. Justice Duff, in *The King* "*v. Lefrançois,*[2] 'as descriptive of the locality in "which the death or injury (that is injury to pro-"perty) giving rise to the claim in question occurs,' "and that to succeed the suppliant must come within "the strict words of the statute. In this case the pro-"perty destroyed by fire, previous to and at the time "of its destruction, was upon the land of the sup-

[1] (1909), 42 Can. S.C.R. 350.
[2] (1908), 40 Can. S.C.R. 481.

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"pliant, some distance from the right of way of the "Intercolonial Railway and was not property on a "public work. As to the objection that this question "was not raised in the Court below, I refer to *Mc-"Kelvey v. LeRoi Mining Company.*[1] If questions "of law raised here for the first time appear upon "the record we cannot refuse to decide them where "no evidence could have been brought to affect them "had they been taken at the trial. The point was "taken by the pleadings if not urged at the argument "below."

Sir Louis Davies says: (p. 352)

"This was an action brought in the Exchequer "Court on a claim for damages arising out of the "destruction of the property of the suppliants "claimed to have been caused by sparks from the "smoke stack of an Intercolonial Railway engine.

"The property destroyed was previous to and at "the time of its destruction upon the land of the "suppliant some distance from the right of way of "the railway and was not property on a public work.

"The learned Judge, Mr. Justice Cassels, who de-"livered the judgment of the Court of Exchequer, "had not heard the witnesses, who had given their "testimony before the late Judge Burbidge.

"The suppliants were desirous to avoid the ex-"pense of a rehearing and with the assent of the "respondent the case was fully argued before Mr. "Justice Cassels on the evidence taken before Mr. "Justice Burbidge.

"The learned Judge found as a fair conclusion "to be drawn from the evidence that the fire orig-"inated from a spark or sparks emitted from the "engine, but he was unable to find that it was caused

[1] (1902), 32 Can. S. C. R. 664.

"through any defect in the engine for the existence "of which and the failure to remedy which the "Crown could be held liable for the losses claimed. "On this appeal the jurisdiction of the Court of Ex- "chequer over the claim in question was challenged "and denied by Mr. Chrysler, his contention being "that such jurisdiction was limited to claims against "the Crown arising out of injuries to the person or "property on a public work, and did not extend to "injuries happening away from a public work, al- "though caused by the operations of the Crown's "officers or servants. The cases in which the ques- "tion has already come before this Court for con- "sideration were all referred to.

"We are all of the opinion that the point has al- "ready been expressly determined by this Court, "particularly in the case of *Paul v. The King*[1]. In "that case the majority of the Court held after the "fullest consideration that clause (c) of the 16th "section"—that is the same as this is—"of the *Ex- "chequer Court Act,* which alone could be invoked "as conferring jurisdiction, only did so in the case "of claims arising out of any death or injury to the "person or property *on any public work* resulting "from the negligence of any officer or servant of the "Crown while acting within the scope of his duties, "claims for injuries not within these words of the "section and occurring not on, but away from, a "public work, although arising out of operations "wheresoever carried on, were held not to be within "the jurisdiction conferred by the section.

"With the policy of Parliament we have nothing "to do. Our duty is simply to construe the language "used, and if that construction does not fully carry

[1] (1906), 38 Can. S.C.R. 126.

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"out the intention of Parliament, and if a wider and "broader jurisdiction is desired to be given the Ex- "chequer Court, the Act can easily be amended.

"Under these circumstances we must, without ex- "pressing any opinion upon the conclusions of fact "reached by the learned Judge, dismiss this appeal "with costs."

That seems to be absolutely the same as this case.

After this case the Statute was amended, but they confined it to the Intercolonial and the Prince Edward Island Railway, they did not extend it, and it just rests where it was when the *Chamberlin* case was decided so far as this particular case is concerned, and in the *Chamberlin* case they make no distinction between injury to persons and injury to property.

Mr. Rodd: The evidence would show in this case, that in 1912 these blasting operations were carried on in the month of October. I have told your lordship how the cribwork extended along the whole front.

HIS LORDSHIP: Yes, I understand.

Mr. Rodd: The dock then was finished. Before they had completed their work they had reached a point some twenty or thirty feet from suppliants' dock from which there were some cribwork timbers still sticking up. Then in the early part of 1913 the Government proceeded to construct another building between the dock which had been constructed and the suppliants' dock, coming within four feet of our property, and in the doing of that work pulled out or blasted or took away or in some manner wrenched away the timbers connected with our cribwork which still extended beyond our dock itself. So

that after having completed all of their work they had taken away from the cribwork which had supported our dock that which was necessary to hold it up.

HIS LORDSHIP: There is no allegation of that in the Petition and the Court will not allow a Petition of Right to be amended by setting up a new and substantive right of action. By so doing, after the fiat has been granted, it would be really arrogating to itself what is the right of the Minister and it would be interfering with his jurisdiction. Any technical amendments in furtherance of the main claim have always been allowed, but I have no power to allow such amendment as this to be made, and therefore suppliant is bound by allegations contained in clause 3 which is the whole cause of action.

Mr. Rodd: We will show their property was injuriously affected, and that if their action was entirely one of tort, such as to come within the *Chamberlin* case, that then the granting of the fiat would be absolute nonsense.

HIS LORDSHIP: Fiats, in a way, are not nonsense. True the Crown, at Ottawa, has always proceeded on a liberal basis in granting fiats. The policy in Ottawa is like the policy in England, if a person thinks he is aggrieved and wants to come into Court they do not withhold a fiat. In many cases where fiats have been granted the Statute of Limitations was pleaded.

Suppliants then submit their claim is under subsection (b) of section 20 as well.

This reads as follows: "Every claim against the Crown for damage to property injuriously affected by the construction of any public work."

This section does not apply.

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The words "injuriously affected" mean injuriously affected by reason of the construction of any public work. That is to say the construction of the work either takes a piece of the land or affects the land. A man's lands may be injuriously affected by the construction of a public work and he would be entitled to damages. That is to say, suppose your right of access is cut off. The Crown is expropriating something from you, it is taking something that belongs to you. It does not actually take a piece of your property. Supposing the Crown in the performance of a public work steps in and takes a little corner of your property, that lets in a claim for damages to your property, and also lets in a claim of a personal character, that is, it lets in a claim for loss of business profits, and so on. On the other hand, if the Crown does not take any portion of your land you may still have a remedy as far as injury to your land is concerned, but you do not get the other. It is always the taking away of something, taking away your right of way, raising the road in front of your property so as to affect your land.

The action will be dismissed.

As to costs, if when the application was made to fix date of trial, the pleadings had been put before the Court it would have been ordered that the question of jurisdiction raised thereby should be argued before going to the expense of trial.

As the Crown sat back and failed to apply to have this question of law disposed of, the Court will exercise its discretion as to costs, and will only allow a lump sum of $100.00 in lieu of taxed costs being prac-

tically the amount they could have had taxed, on an action dismissed after hearing argument on questions of law.

Judgment accordingly.

Solicitors for suppliant: *Rodd, Wigle* and *McHugh.*

Solicitors for respondent: *T. G. Meredith,* K.C.