1919
November 29.

IN THE EXCHEQUER COURT OF CANADA.

IN THE MATTER OF THE PETITION OF RIGHT OF

ALEXANDER MAVOR,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Exchequer Court Act, section 20—Damages—Officer or Servant of the Crown, meaning of—Discretion of Minister—Prescription—Interruption.

Held,—An action will not lie against the Crown represented by the Dominion Government for damages alleged to be due to improper condition of a portion of a highway which the Dominion Government had no statutory obligation to maintain.

2. That a Minister of the Crown is not an officer or servant of the Crown within the meaning of section 20 of the *Exchequer Court Act.*

3. That the Court will not review the decision of a Minister of the Crown in the exercise of his statutory discretion.

4. Where on its face a petition of right is prescribed the suppliant will be permitted to make proof of the date on which it was filed with the Secretary of State to establish that prescription was thereby interrupted.

Quære—Will the fact of the Crown represented by the Dominion Government having contracted and partly paid for the building of part of a highway and that such work was done under the supervision of one of its engineers make the highway, *quo-ad hoc,* a public work within the provision of section 20 of the *Exchequer Court Act?*

PETITION of Right to recover from the Crown damages alleged to be due to improper maintenance of the King Edward Highway, near the City of Montreal.

Tried before the Honourable Mr. Justice Audette at the City of Montreal, on the 20th day of November, 1919.

Mr. Surveyer and *Mr. Bond* for suppliant.

Mr. Sullivan for respondent.

The facts of the case are fully set forth in the reasons for judgment of the honourable Judge which follow:

AUDETTE, J., now (29th November, 1919) delivered judgment.

The suppliant, by his Petition of Right, seeks to recover the sum of $330.00 for alleged damages resulting from an accident he met with on the King Edward Highway, on his return trip in his automobile, a large special Maxwell, an old car, from La Prairie to the City of Montreal, on the 1st day of July, 1916.

To properly understand the facts of the case, it is important to refer to the plan filed herein as Exhibit "A" wherefrom it would appear, that at the time in question, the suppliant was travelling from south to north, from what is marked on the plan "plank road" which runs practically due south and north. Arrived at the point "A", the suppliant turned to the left, climbed the small hill, 1 in 5, that lies between A and D, when he contends that, at the point marked with a (X) cross, he encountered with the front right wheel, a boulder the size of his head. At the foot of this hill (or slope) he put on more gas, climbed to the top, but when he came to turn to the right at the point marked D, he contends he was unable to do so, his machine refusing to answer—she would not turn. He however succeeded in turning her and brought her at stand still at the point marked G, about a foot or a foot and a half from the edge of the embankment to the left. At that point, having stopped his machine, his steering gear being on the

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right, he leaned over to the left over two young girls of 12 and 18 years respectively who were to his left on the front seat and realized that there was between 18 and 12 inches to the edge of the embankment, where he contends the soil suddenly gave way under his left wheels and the machine toppled over down the small embankment.

It must be noted that in the course of his travel from the plank road to the place where the accident happened, from point A to G, that he was not travelling on his side of the road. He was indeed travelling on the left or the wrong side of the highway and very much so, if it is considered that his right wheel struck the alleged boulder at the point marked with a cross on the plan. However, in the view I take of the case it becomes unnecessary to comment upon this point.

It is well to note we have no direct evidence that the machine went wrong as a result of striking the boulder in question. Being asked if he could swear the boulder did damage her, he answers: "No more than the car would not turn after she struck it". It is all surmise and conjecture as to whether or not the machine went wrong from striking the boulder, or whether it went wrong from any other reasons. The boulder was not noticed by anybody else,—although some witnesses were questioned on that point. The piece of road from A to D is stoned or macadamized, stated as not too good but not too bad.

As a result of the accident a claim is made for the sum of $200 for damage to his car. The suppliant, being a mechanic, attended to these repairs himself personally, and the amount claimed is more in the nature of a guess than an actual expenditure for labour and material.

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With respect to the doctor's bill, the evidence is very unsatisfactory. He says he generally pays about $20 to $30 a year for his doctor's bill and that came in as part of the usual doctor's bill and he charges $100. The cost of removal of the motor has been satisfactorily established at $30.

At the opening of the trial, I drew the attention of the parties that the case was on its face prescribed, the accident having occurred on the 1st July, 1916, and the Petition of Right being filed on the 16th July, 1917, one year and fifteen days after the accident. Having allowed the suppliant to establish by some evidence when the case was filed with the Secretary of State, under the Provisions of section 4 of the *Petition of Right Act,* R.S.C. 1906, ch. 142, evidence was supplied whereby it appears that the petition was left with the Secretary of State on the 6th June, 1916. Following the numerous decisions in this Court on that point, it is found that such lodging of the Petition of Right, with the Secretary of State, under the section above mentioned, interrupted the prescription from that date.

Approaching the question on its legal aspect, it is quite apparent that it is an action against the Crown sounding essentially in tort or damages, and that, apart from breach of contract and under statutory authority, such an action would not lie against the Crown.

The suppliant, to succeed, must bring his case within the ambit of section 20 of the *Exchequer Court Act* as I have already said in the case of *Hopwood v. The King*[1]. If he seeks to rest his case under sub-section "B" of section 20. . . . . I must

[1] (1917), 16 Can. Ex. C. R. 419, at 421. 39 D. L. R. 95 at 97.

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answer that contention by the decision in the Supreme Court of Canada in *Piggot v. The King*,[1] where His Lordship, the Chief Justice of Canada, says: "Paragraphs (a) and (b) of section 20 are dealing with questions of compensation not of damages.

"Compensation is the indemnity which the statute "provides to the owner of lands which are com-"pulsorily taken under, or injuriously affected by "the exercise of statutory powers."

Therefore it obviously follows that the present case does not come under sub-sections (a) and (b) of section 20.

Does the case come under sub-section (c) of section 20 repeatedly passed upon by this Court and the Supreme Court of Canada?

To bring the case within the provisions of sub-section (c) of section 20, the injury to property must be: 1st. On a public work; 2nd. There must be some negligence of an officer or servant of the Crown acting within the scope of his duties or employment; 3rd. The injury must be the result of such negligence.

It is contended that because the Crown did expend some money for the building, under contract, of the King Edward Highway at the place in question and under the supervision of a Government engineer, that it has become a public work of Canada, relying upon the decision in the case of *Coleman v. The King*.[2] Without passing upon this point let us consider whether the second requirement has been complied with. I may say that there is not a tittle of

[1] (1916), 53 Can. S. C. R. 626; 32 D. L. R. 461.
[2] (1918), 18 Can. Ex. C. R. 263; 44 D. L. R. 675.

evidence upon the record establishing that there was any officer or servant of the Crown whose duties or employment involved the care or maintenance of the road in question. From this fact, it will necessarily follow that there was not any negligence of any officer or servant of the Crown acting within the scope of his duties whose negligence could have caused the accident.

There is no evidence on the record to show that the Crown was in any manner, under any obligation to maintain the road in question in good repairs and as was decided in the case of *McHugh v. The Queen* [1], in respect of a bridge built by and at the expense of the Dominion Government where there was no officer or servant of the Crown in charge of the same, that such duty could not be ascribed to the minister himself who is not an officer or servant of the Crown within the meaning of section 20 of the *Exchequer Court Act.* Moreover the Court has no jurisdiction to sit on appeal from exercise of any statutory discretion given to the minister. *Harris v. The King* [2]; *Municipality of Pictou v. Geldert* [3]; *Sanitary Commissioners of Gibraltar v. Orfila* [4].

In the result it is quite clear, that this action which is essentially one in tort or for damages, in the nature of *quasi delicto,* will not lie against the Crown at common law, and in the absence of any statute making the Crown liable in such a case, the action will not be maintained.

The suppliant has failed to bring the facts of this action within the provisions of section 20 of the *Ex-*

1 (1900), 6 Can. Ex. C. R. 374.
2 (1904), 9 Can. Ex. C. R. 206.
3 [1893] A. C. 524.
4 (1890), 15 App. Cas., 400.

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chequer Court Act. There is no evidence that the injury complained of in this case resulted from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. The *onus probandi* was upon the suppliant and he has failed to discharge such obligation. He has not proven his case.

Therefore the suppliant is not entitled to any portion of the relief sought by his Petition of Right herein.

Judgment accordingly.

Solicitors for suppliant: *Atwater, Surveyer & Bond.*

Solicitor for respondent: *John A. Sullivan.*