

IN THE MATTER of the Petition of Right of

1907  
 April 15.

WILLIAM MONTGOMERY, A LUNATIC, BY WILLIAM MONTGOMERY, } SUPPLIANT ;  
 THE COMMITTEE OF HIS ESTATE AND PERSON. ... }

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Tort by Crown's servants—Diversion of flowing water—Liability—Amendment of Petition of Right—Practice.*

The suppliant, by his petition of right, alleged, in substance, that the Crown, through the Minister of Railways and Canals, and his servants, agents and employees, having no right to do so, had diverted the water of a certain brook, which flowed through his property in the parish of Dalhousie, N.B., and used the same for supplying the engines and locomotives of the Intercolonial Railway and vessels in the harbour of Dalhousie.

*Held*, that the suppliant's action was laid in tort, and a petition of right would not lie therefor.

Upon an application by the suppliant to amend his petition the court declined to grant the same until a draft of the proposed amendments was submitted, and the court had an opportunity of considering how far it was necessary for the suppliant to depart from his original petition.

PETITION OF RIGHT for damages for the diversion of a water-course.

April 8th, 1907.

The arguments of a motion for judgment by the Crown upon certain points of law raised by the defence was now heard.

*E. L. Newcombe, K.C.*, in support of motion ;

*F. A. Magee*, contra.

THE JUDGE OF THE EXCHEQUER COURT now (April 15th, 1907) delivered judgment.

It appears from the Petition of Right that the suppliant has been for a number of years seized in fee simple of certain lands and premises in the Parish of Dalhousie, in the County of Restigouche and Province of New Brunswick, through which a brook known as the Ship Yard brook flowed; that on the 15th day of October, 1887, he and his wife surrendered to the Crown two parcels of such lands for the purposes of the Intercolonial Railway. What those purposes were is not distinctly shown, but it is perhaps a fair inference that one parcel was acquired by the Crown for the permanent way of the Dalhousie branch of the Intercolonial Railway; and the other parcel in connection with a supply of water for the use of the railway at that place; for it is alleged that by virtue of the surrender mentioned the Crown became a riparian proprietor on the Ship Yard Brook, and in the description of one parcel of land there is mention of a reservoir, and there is also an express grant to the Crown of a right to take up and repair water pipes at any time it might be considered necessary. The substance of the suppliant's complaint is that the Crown through the Minister of Railways and Canals, and his servants, agents and employees, having no right to do so, had diverted the water of the said Brook and used it in supplying water to the engines and locomotives of the Intercolonial Railway and in supplying and furnishing water to vessels in the harbour of Dalhousie; and he claims damages in respect of water used for such engines and locomotives in the sum of nine hundred dollars, being at the rate of fifty dollars per year for eighteen years; and for water supplied to such vessels the sum of seven hundred and fifty dollars, that is a sum of fifty dollars yearly for fifteen years.

It is objected to this petition that the action is laid in tort, and that no cause of action for which a petition will lie is disclosed; and it appears to me that the objection is well taken.

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What the Minister of Railways and Canals and his agents and servants are alleged to have done has either been done lawfully in the exercise of his statutory powers (R. S. C. 1906, c. 143, s. 3, ss. (b) and (f) or wrongfully, as being in excess of or outside of the statute. In the latter case the person who committed or authorized the commission of the wrong would be liable therefor, but the Crown would not be liable, and no petition of right could be maintained for the alleged wrongful act. On the other hand, if what was done was lawfully done under the statute the suppliant would not be entitled to any damages excepting those for which the statute makes provision; and there is no provision for such damages as are claimed in this petition.

At the argument of the points of law raised by the statement of defence, counsel for the suppliant asked leave to amend. I shall not dispose of that application at present. I should like first to have an opportunity of considering the proposed amendments, and of seeing how far it is necessary for the suppliant to depart from the present petition. But I reserve to him leave to apply for such amendments as he proposes to make, a draft thereof to be presented when the application is made.

There will be judgment for the respondent, with costs upon the points of law raised by the statement of defence. The suppliant has leave to apply to amend upon payment of costs, a draft of the proposed amendments to be submitted at the time the application to amend is made.

*Judgment accordingly.*

Solicitor for suppliant: *W. A. Mott.*

Solicitor for respondent: *E. L. Newcombe.*

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