

1887 HENRIETTA CREWE-READ, AD-
 *Feb. 17. MINISTRATRIX OF THE ESTATE OF } APPELLANT;
 *May 2. CHARLES CREWE-READ, DECEAS- }
 ED, (PLAINTIFF)

AND

THE MUNICIPALITY OF THE }
 COUNTY OF CAPE BRETON } RESPONDENTS.
 (DEFENDANTS)

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Militia Act—31 Vic. ch. 40 sec. 27—36 Vic. ch. 46—42 Vic. ch. 35—
 Disturbance anticipated or likely to occur—Requisition calling
 out Militia—Sufficiency of form of—Suit by commanding
 officer—Death of commanding officer pending suit—Right of
 administratrix to continue proceedings.*

The Act 31 Vic. ch. 40 sec. 27, as amended by 36 Vic. ch. 46 and 42
 Vic. ch. 35, requires that a requisition calling out the militia in
 aid of the civil power to assist in suppressing a riot, &c., shall be
 signed by three magistrates, of whom the Warden, or other head
 officer of the municipality shall be one; and that it shall express
 on its face "the actual occurrence of a riot, disturbance or
 emergency, or the anticipation thereof, requiring such service."

Held, that a requisition in the following form is sufficient:—

CHARLES W. HILL, Esq.,
 Captain No. 5 Company,
 Cape Breton Militia.

SIR,—We, in compliance with ch. 46 sec. 27, Dominion Acts of
 1873, it having been represented to us that a disturbance having
 occurred and is still anticipated at Lingan beyond the power of
 the civil power to suppress, You are therefore hereby ordered
 to proceed with your militia company immediately to Lingan,
 with their arms and ammunition, to aid the civil power in pro-
 tecting life and property and restoring peace and order, and to
 remain until further instructed.

A. J. McDONALD, Warden.
 R. McDONALD, J.P.
 J. McVARISH, "
 ANGUS McNEIL, "

*PRESENT—Sir W. J. Ritchie C.J., and Strong, Fournier, Henry
 and Gwynne JJ.

The statute also provides that the municipality shall pay the expenses of the service of the militia when so called out, and in case of refusal that an action may be brought by the officer commanding the corps, in his own name, to recover the amount of such expenses.

1887
CREWE-READ
v.
COUNTY OF
CAPE
BRETON.

Held, Strong J. dissenting, that where the commanding officer died pending such action the proceedings could be continued by his personal representative.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) setting aside a verdict for the plaintiff and ordering judgment to be entered for the defendant.

The facts upon which the appeal is founded are as follows :—

In March, 1883, a riot and disturbance occurred at Lingan in the county of Cape Breton beyond the power of the civil authorities to suppress or deal with. Thereupon three justices of the peace for the said county, of whom one was the Warden, by writing under their hands required the senior officer of the active militia present in the county to call out the active militia for the purpose of preventing and suppressing said riot and disturbance. Captain Charles W. Hill, to whom the requisition was addressed and who was then such senior officer, thereupon proceeded with his company to Lingan, on the 23rd of March, 1883.

The requisition was in the following form :—

“Charles W. Hill, Esq., Captain No 5 Company, Cape Breton Militia :

“Sir,—We, in compliance with chapter 46, section 27, Dominion Acts of 1873, it having been represented to us that a disturbance having occurred, and is still anticipated at Lingan, beyond the power of the civil power to suppress. You are therefore hereby ordered to proceed with your militia company immediately to Lingan, with their arms and ammunition, to aid the civil power in protecting life and property, and restor-

1887 ing peace and order, and to remain until further instructed."
 CREWE-READ

v.
 COUNTY OF
 CAPE
 BRETON.

(Signed by the Warden, &c.)

Subsequently, by a second requisition, an additional portion of the militia was called into active service and the entire force remained sometime at Lingan for the purpose of aiding the civil power in preventing riots and breaches of the peace.

The municipality having refused to pay for the maintenance of the militia during the time occupied in suppressing these riots, an action was commenced on the 12th of June, 1883, by Charles Crewe-Read commanding officer of the corps. In March, 1884, Lieutenant Colonel Crewe-Read died. On the 4th of November, 1884, a judge's order was obtained under the provisions of order xvii rule 4 of the rules of the Supreme Court of Nova Scotia, 1884, ordering that the proceedings in this action be continued between Henrietta Crewe-Read, administratrix of the estate of the said Charles Crewe-Read, as plaintiff, and the said Municipality of the County of Cape Breton as defendant.

The action was tried in November, 1885, before Mr. Justice Weatherbe without a jury who found all the issues in favor of the plaintiff and gave judgment for the plaintiff for the sum of \$4,999.85.

The defendant appealed to the Supreme Court of Nova Scotia, who reversed the decision of Mr. Justice Weatherbe on the ground that the requisition to the senior officer to call out the militia did not, in the opinion of the court, express on the face thereof the actual occurrence or anticipation of a riot or disturbance beyond the power of the civil authorities to suppress.

The plaintiff then appealed to the Supreme Court of Canada.

Burbidge Q.C. and *Borden* for the appellant. The question is whether the directions in the statute are

directory or imperative, and that depends on whether or not it was the duty of the magistrates to issue the requisition. If so, the statute is directory. See *Maxwell* on Statutes (1).

1887
CREWE-READ
v.
COUNTY OF
CAPE
BRETON.

As to the sufficiency of the form of the requisition. See *Halford v. Cameron's Coalbrook Steam Coal, &c., Ry. Co* (2); *Edwards v. Cameron's Coalbrook Steam Coal, &c., Ry. Co.* (3).

Drysdale for the respondents.

There is nothing in the requisition to show that the emergency contemplated by the act has arisen. The act requires that the actual existence of a riot or disturbance should be set forth, and that has not been done.

Then, what right has the administratrix to continue the suit on the death of the commanding officer? The statute names the officer to bring the action, but he only sues in virtue of his position. If this money is paid to the administratrix all the creditors of the estate could claim to participate in its distribution.

Burbidge Q.C. in reply, as to survivorship of the action cited *Lewin on Trusts* (4); *Williams on Executors* (5); *Imperial Statutes* (6); *Webb v. Taylor* (7); *Barnewall v. Sutherland* (8); *Atkins v. Gardner* (9); *Howley v. Knight* (10); *The King v. Chamberlayne* (11).

Sir W. J. RITCHIE C.J.—I think the requisition in this case was quite sufficient. It is in these words:—

CHARLES W. HILL, Esq.,

Captain No. 5 Company,

Cape Breton Militia:

Sir,—We, in compliance with ch. 46 sec. 27, Dominion Acts of 1873, it having been represented to us that a disturbance having occurred and is still anticipated at Lingan beyond the power of the civil power

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| (1) 2 Ed. pp. 452 and 459 to 470. | (6) 7 Geo. 4 ch. 46 sec. 9. |
| (2) 16 Q. B. 442. | (7) 1 D. & L. 676. |
| (3) 6 Ex. 269. | (8) 9 C. B. 380. |
| (4) 8 Ed. p. 221. | (9) 3 Cro. Jac. 159. |
| (5) 8 Ed. p. 792. | (10) 14 Q. B. 240. |

(11) 1 T. R. 103.

1887
 CREWE-READ
 v.
 COUNTY OF CAPE BRETON.
 Ritchie C.J.

to suppress, You are therefore hereby ordered to proceed with your militia company immediately to Lingan, with their arms and ammunition, to aid the civil power in protecting life and property and restoring peace and order, and to remain until further instructed.

(Signed,) A. J. McDONALD, Warden.
 R. McDONALD, J.P.
 J. McVARISH, "
 ANGUS McNEIL, "

The right to call out the militia in aid of the civil power arises in any case in which a riot, disturbance of the peace or other emergency requiring such service occurs, or is, in the opinion of the civil authorities mentioned in the act, anticipated as likely to occur, and in either case to be beyond the power of the civil authorities to suppress, or to prevent or deal with.

I do not think it is necessary either that the justices should have a personal knowledge of the riot or of the anticipation thereof, or that they should hold a judicial investigation to determine its existence, to require which would be practically to render, in many cases, the law entirely abortive. It is sufficient that the justices should be satisfied of the existence of a riot, or of the anticipation thereof. What is the fair reading of this order, but "that it having been represented to us, that is, made apparent to us, brought before our minds, that a disturbance had occurred and was still anticipated."

By acting on the representations made as expressed in the order, it must be assumed that they believed, and had reason to believe, that these representations were well founded, that the disturbance had occurred, and, in their opinion, was still further anticipated as likely to occur, because, unless such was the case, they had no right to make the order. The learned judge who tried the case says, "he had no difficulty as to the occurrence or anticipation of a riot," and, therefore, as to the necessity in this case of calling out the militia; and the Supreme Court could have had no difficulty on this point for the

learned judge who delivered the judgment of the court, commences the judgment by saying:—

1887

CREWE-READ

v.

COUNTY OF

CAPE

BRETON.

Ritchie C.J.

In March, 1883, a difficulty arose among the miners of Lingan which ended in a riot. Capt. Hill, of No. 5 Company, "Argyle Highlanders," who was then the senior officer of the active militia present in the county, on the requisition of the Warden of the municipality and three Justices of the Peace, ordered out his company of militia, and on the 22nd of March proceeded with it to Lingan in aid of the civil power.

The evidence clearly establishes that there was at the time a most serious riot with which the civil power was wholly inadequate to cope, and which, as a matter of fact, necessitated more men being sent to suppress it than at first were supposed necessary.

I think, it being established that a riot had actually occurred, and the evidence clearly showing that the aid of the militia was required for its suppression and for the preservation of the public peace, and the militia having been actually called out and having rendered the required aid in the interest of the municipality, it would be a very strained view of the law to say that the requisition, by reason of a mere technical informality, was illegal and of no effect and should not have been acted on by the militia authorities, and the municipality, though receiving the full benefit of the necessary aid thus afforded, should, by reason of such technical informality, be relieved from paying, and the burthen and consequences be cast either on the magistrates who issued the order, or the officer who called the men out, or the men who responded to the call.

Could it even have been contemplated by the Legislature that the officer to whom the order was transmitted was to obey or disobey as he might think it technically right, or the men to obey or disobey if, in their opinion, the requisition was not strictly right, and in the meantime was the riot to go on, and the civil force be overpowered, while the commanding officer and his men

1887
 CREWE-READ v. COUNTY OF CAPE BRETON.
 Ritchie C.J.

were either disobeying the order or settling this knotty technical objection? I think not; there being beyond all doubt a riot going on with which the civil power could not cope the necessity for an order calling in the aid of the military power existed and it was the duty of the justices to issue such an order; the militia authorities responded, so that the disturbances, through their instrumentality, were suppressed and further disturbances prevented; order was restored and the public peace preserved. And is the municipality to escape payment for such services, because, forsooth, on a hypercritical technical construction of the order issued it may be argued that the requisition was defective in not expressing with sufficient certainty the actual occurrence of a "riot, disturbance or emergency, or the anti-cipitation thereof," requiring such service?

In my opinion, the administratrix was properly allowed to continue the proceedings in this action.

As to actions for or against executors, the rule *actio personalis moritur cum personâ* has never been extended to such personal actions as are founded upon any obligation, contract, debt, covenant or any other duty to be performed, because all such actions survived; the maxim is peculiarly applicable to actions *ex delicto*.

Actions on a contract made with the deceased, or for a debt due to him, were always maintainable by the executors. This was a statutory obligation to pay money, a debt due by statute and therefore *ex quasi contractu* to which the rule of the common law, *actio personalis moritur cum personâ* does not apply, and such a liability is, in general, held to be in the nature of a debt by specialty within the statute of limitations. This must, I think, be treated as a statutory contract with the deceased, broken in his lifetime, a statutory chose in action which, on his death, became parcel of his personal estate in respect of which the administra-

trix representing the person of the intestate is, in law, the intestate's assignee, and so the rights and liabilities of the deceased passed, in respect to this right, to the administratrix by operation of law, and the amount, when recovered, would not be distributable as ordinary assets of the intestate's estate, but would be held and disposed of by the administratrix in precisely the same manner as it would have been by the intestate had it been recovered by him in his lifetime. I cannot distinguish this case, in principle, from *Bafield v. Collard* (1), which is thus stated in 1 Williams on Executors (2):—

1887
 CREWE-READ
 v.
 COUNTY OF
 CAPE
 BRETON.
 Strong J.

An action will lie for an executor or administrator upon a promise made to the deceased for the exclusive benefit of a third party. Thus, where A promised to B that if B would pay £50 to C. his son, who was married to D the daughter of A, that then he would pay £100 to D. his daughter at such a time. B. paid the £50 to C. and A failed in the payment of the £100. B. died intestate. E. his executor brought an action upon the case upon a sumpsit upon the promise made to B. the intestate, and it was adjudged that the action did well lie by the administrator although he should have no benefit from it if he did recover. Citing *Bafield v. Collard* (1).

Mr. Leake in his work on contracts (3) thus enunciates the same principle.

Where a contract was made between two parties that one of them should pay a sum of money to a third party, it was held that upon the death of the promisee his executor must sue, though for the benefit of the third party, who, being no party to the contract, was unable to sue in his own name. *Bafield v. Collard* (1).

It is very material to bear in mind in this case that if the present action is not maintainable, no other action could be sustained under the statute at the suit of any other person, for if the administratrix cannot maintain the action there would be no remedy, which the law will not suppose.

STRONG J.—The concluding part of the enactment

(1) Sty. 6 S. C. Aleyn 1.

(2) 2 Ed. p. 574, 8 Ed. p. 815.

(3) P. 1251-2.

1887 under which this action is brought (31 Vic. ch. 40 sec.
 CREWE-READ 27 as amended by 36 Vic. ch. 46 and by 42 Vic. ch. 35)
 v. is as follows:—

COUNTY OF
 CAPE
 BRETON.

Strong J.

Provided that the said pay and allowances of the force called out, together with the reasonable cost of the transport mentioned in section one of the Act passed in the 40th year of Her Majesty's reign and entitled: "An Act to make further provision for the payment of the active militia when called out in certain cases in aid of the civil power," may, pending payment by the municipality, be advanced in the first instance by order of the Governor in Council out of the Consolidated Revenue Fund of Canada, but such advance shall not interfere with the liability of the municipality and the commanding officer shall at once, in his own name, proceed against the municipality for the recovery of such pay, allowance and cost of transport, and shall on receipt thereof pay over the amount to Her Majesty.

I am of opinion that this provision does not authorize an action by the personal representative of the commanding officer. It does not create any statutory liability in favour of the commanding officer, but merely authorizes that officer to maintain an action on behalf of the crown to whom the money to be recovered belongs. It is of course out of the question to say that any privity of contract exists between the municipality and the commanding officer, and the only question is whether the proper construction of the statute is to consider it as creating a liability to pay to the officer, or a liability to pay to the crown with authority to the officer to sue on behalf of the crown, and I am clearly of opinion that the latter is the proper interpretation. There can be no doubt but that the Attorney General could maintain an information on behalf of the crown, the usual common law remedy for the recovery of debts due to the crown, which shows that the liability is to pay to the crown, to whom, indeed, the statute declares that any money received by the commanding officer shall at once be paid over. It therefore follows, in my opinion, that the personal representative of the commanding officer cannot sue. The money received would not be assets even at law, and this is the usual test as

to the right of the personal representative to maintain
 an action, and the statute does not confer any authority
 on the representative to sue on behalf of the crown.

1887
 CREWE-READ
 v.
 COUNTY OF
 CAPE
 BRETON.

Therefore the appeal should be dismissed with costs.

FOURNIER J.—I am in favor of allowing the appeal
 for the reasons given by the Chief Justice and Mr.
 Justice Gwynne.

Strong J.

HENRY J.—I would also adopt the view of the
 learned Chief Justice. He refers to the objection to the
 requisition as being technical. I am of opinion that the
 order was quite sufficient. The facts are to be decided
 by three magistrates, and when they give their order the
 commander of the troops is bound to obey. The law
 also provides that the commanding officer shall bring
 the action which he did in this case. He died pending
 the action and the statute in Nova Scotia provides that
 in all cases the personal representative can continue
 the proceedings. I agree with the learned Chief
 Justice that the suit was properly continued in the
 name of the administratrix.

I think it makes no difference where the money
 when recovered is to go. The effects of the estate are
 to be distributed according to law, and each person
 entitled to participate in the distribution has a right
 to ask the Court of Probate to award what is due to
 him. Under no circumstances could I imagine any
 difficulty in having the money applied to paying the
 men by the administratrix, and as the Government of
 the Dominion advanced the money the right to recover
 is, by the statute, transferred to it.

For these reasons I am of opinion that the appeal
 should be allowed with costs.

GWYNNE J.—This action was commenced and
 brought under the Dominion statute, 31st Vic. ch. 40

1887
CREWE-READ
 v.
 COUNTY OF
 CAPE
 BRETON.
Gwynne J

as amended by 36 Vic. ch. 46 and 42 Vic. ch. 35, by one Charles Crewe-Read in his life time, as having been the commanding officer of a body of active militia ordered out by the senior officer of militia in the neighbourhood to suppress a riot in the county of Cape Breton, in aid of the civil powers. The said Charles Crewe-Read having died pending the action, it has been continued by the present plaintiff as his personal representative under an order of the court in which the action was pending made for that purpose. Two objections have been taken to the plaintiff's right to recover in this action, neither of which is, in my judgment, entitled to prevail.

That a riot had taken place which was beyond the power of the civil authorities to suppress, and that the services of the militia were necessary in aid of the civil power in order to its suppression, and that a body of militia of which the original plaintiff was the commanding officer was ordered out by the senior officer of the active militia in the locality where the riot took place, are facts which are not now in dispute, but it is contended :—

1st. That the requisition in virtue of which the militia were so ordered out, although signed by the Warden and three Justices of the Peace of the county, did not in its form comply with the statute, and that, therefore, compensation for the services of the militia in suppressing the riot which could not otherwise have been suppressed cannot be recovered under the statute, and—

2nd. Assuming that the action could have been sustained by Charles Crewe-Read in his lifetime that it could not be continued by his personal representative, and that, therefore, for this reason the action cannot be sustained.

As to the first point, I am of opinion that the requisi-

tion was in its form sufficient to authorize the officer in command of the militia to order out a sufficient force to suppress the riot, and that for the services so rendered the militia employed were entitled to be paid under the provisions of the statute and to recover for such services in an action at the suit of the officer in command of the force employed.

1887
CREWE-READ
v.
COUNTY OF
CAPE
BRETON.
Gwynne J.

The statute enacts that:—

When the active militia or any corps thereof are so called out in aid of the civil power the municipality in which their services are required shall pay them when so employed the rates authorised to be paid for actual service to officers, non-commissioned officers and men, and one dollar per diem for each horse actually and necessarily used by them, together with an allowance of one dollar to each officer, fifty cents to each non-commissioned officer and man per diem, in lieu of subsistence, and fifty cents per diem in lieu of forage for each horse, and in addition shall provide them with proper lodging and with stabling for their horses; and the said pay and allowances for subsistence and forage, as also the value of lodging and stabling, unless furnished in kind by the municipality, may be recovered from it by the officer commanding the corps in his own name, and when so recovered shall be paid over to the persons entitled thereto.

Now it has long been settled that wherever a pecuniary benefit is given by a statute to an individual he may sue for it and recover (1).

In the old forms of action the suit might have been in assumpsit or in debt unless one or other form alone was specially given by the statute (2); and in Chitty on Pleading several forms of declarations in assumpsit in such cases are given. *Tilson v. Warwick Gas Light Co.* (3); *Carden v. General Cemetery Co.* (4); *Hopkins v. Mayor of Swansea* (5); *Miles v. Bough* (6); were actions in debt—and in *Reg. v. Hull & Selby Railway Co.* (7), it was held that as debt lay against

(1) Comyn Dig. — Action on 5 T. R. 130.

Statute A. (2)—E. Debt A. (9.) (3) 4 B. & C. 962.

Anon. 6 Mod. Rep. 27.

(4) 5 Bing. N. C. 253.

(2) 1 Chitty's Pleading, 7th Ed.

(5) 4 M. & W. 621.

p. 119; Bull. N. P. 129; *Rann v.*

(6) 3 Q. B. 845.

Green, Cowp. 474; *Peck v. Wood*,

(7) 6 Q. B. 70.

1887 the company for an amount to which they were made
 CREWE-READ liable by a statute a mandamus should not be granted.

v. Now upon the authority of the above cases an action
 COUNTY OF would have lain against the defendants at the suit of
 CAPE the several persons in the militia force which was
 BRETON.
 Gwynne J. employed to recover the amount which by the statute

is made payable to each, if the statute to avoid such multiplicity of suits had not given an action to the officer in command on behalf of all. In the action brought by him he was interested beneficially to the amount due to himself, and as to the remainder as a trustee for all the persons who were under his command on the occasion of the services being rendered. Under the old practice, the action, whether brought in assumpsit or in debt, was in its nature an action *ex contractu*; the statute created a contract between the municipality made liable to pay and the parties declared entitled to be paid. Of a like nature is the action still, although the forms of action have been done away with. The common law maxim therefore of *actio personalis moritur cum persona* does not apply, and the statute certainly has not made that maxim applicable. I cannot, therefore, doubt that the action which was by the statute vested in Charles Crewe-Read, and which was brought by him for his own benefit as to the amount made by the statute due and payable to himself, and as to the residue as a trustee for the others, was such a chose in action as, upon his death, passed to his personal representative just as would a cause of action for any other debt due and payable to testator or intestate. Indeed, if the amount which the statute has imposed as a debt due by the municipality and payable to the several persons who rendered the services in compensation of which the debt was imposed can not be recovered in the present action it cannot be recovered at all. It has been suggested

that it might be recovered by mandamus, but a mandamus, if granted, could only command the municipality to pay the person who alone was entitled to receive the amount payable by the statute; and if that person could not be represented by his personal representative, so that the mandamus could order the payment to be made to such representative, no mandamus could be granted. The circumstance that the Dominion Government has advanced the amount and paid the militia makes no difference, for the statute expressly enacts that such advance shall not interfere with the liability of the municipality, and the commanding officer shall at once in his own name proceed against the municipality for the recovery of such pay, allowances and cost of transport, and shall on receipt thereof pay over the amount to Her Majesty. Neither the nature of the liability nor of the action is at all changed. The action is still to recover a debt due for services rendered by the intestate and others under his command, but when recovered it is, by reason of the advance, affected by the statutes with a trust for Her Majesty. The appeal must, in my opinion, be allowed with costs and judgment be ordered to be entered for the plaintiff in the court below for the amount of the verdict with costs.

1887
CREWE-READ
 v.
 COUNTY OF
 CAPE
 BRETON.
Gwynne J.

Appeal allowed with costs.

Solicitor for appellant: *Wallace Graham.*

Solicitor for respondent: *Arthur Drysdale.*