NICK NYKORAK (*Defendant*) .....APPELLANT;

AND

THE ATTORNEY GENERAL OF CANADA (*Plaintiff*) ..... RESPONDENT.

1962

*Feb. 5, 6
Mar. 26

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Master and Servant—Injury to member of the armed forces of Canada—Action per quod servitium amisit by Crown—Whether action lies under s. 50 of the Exchequer Court Act, R.S.C. 1952, c. 98—Validity of s. 50.

An action was brought on behalf of the Crown to recover damages in respect of the loss of the services of a member of the Canadian armed forces, due to the defendant's negligence. The Attorney General succeeded at the trial and on appeal. The defendant appealed to this Court on two grounds: (i) that the action *per quod servitium amisit* does not lie at the suit of the Crown under s. 50 of the *Exchequer Court*

*PRESENT: Kerwin C.J. and Taschereau, Locke, Judson and Ritchie JJ.

1962

NYKORAK v. A. G. OF CANADA

Act, R.S.C. 1952, c. 98, which establishes the master and servant relationship between the Brown and a member of the armed services, and (ii) that the section is beyond the powers of the Parliament of Canada.

Held: The appeal should be dismissed.

Per Kerwin C.J. and Taschereau, Judson and Ritchie JJ.: As far as members of the armed forces are concerned it was decided in *The King v. Richardson*, [1948] S.C.R. 57, that s. 50 of the *Exchequer Court Act* does entitle the Crown to bring the *per quod* action for disbursements for medical and hospital expenses and pay and allowances. *Attorney General of Canada v. Jackson*, [1946] S.C.R. 489, referred to.

With the present use of mechanized vehicles by the military forces, the public interest required that the Crown should be in the same position as any other master for the torts of its servants committed in the course of their employment. If the Crown was to assume this responsibility to the public, there was every reason to insist on a reciprocal right of recovery for expenses incurred as a result of injury to the statutory servant and legislation of the nature of s. 50 came squarely under head 7 (militia, military and naval service and defence) of s. 91 of the *British North America Act*, notwithstanding the fact that it might incidentally affect property and civil rights within the province.

Per Locke and Ritchie JJ.: The question as to the right of the Crown to recover for the loss of services of members of the armed forces of Canada must be taken to have been determined in *The King v. Richardson, supra. Taylor v. Neri* (1795), 1 Esp. 386, referred to.

To declare the nature of the relationship existing between the Crown and members of the armed forces for any or for all purposes is legislation in relation to the matters within the exclusive jurisdiction of Parliament under head 7 of s. 91 of the *British North America Act* and, accordingly, *intra vires*. This does not depend upon any such ground as that to do this is necessarily incidental to the powers of Parliament under head 7: it is a direct dealing with the matter within such powers.

Section 50 does not purport to create a direct and specific right in the Crown but simply purports to place the Crown in a recognized common law relation, and its rights are those arising from that relation under the rules of that law. The relation of master and servant existed between the Crown and soldiers and non-commissioned officers of the armed forces, whose employment is authorized and regulated by the *National Defence Act* within the ordinary meaning of these expressions, prior to the enactment of s. 50 and the section does nothing more than declare that to be the case. This was not to say that such relationship supports an action *per quod*: but that it does was decided by the judgment of this Court in *Richardson's* case.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Macfarlane J. for the Crown in an action *per quod*. Appeal dismissed.

M. M. McFarlane, Q.C., and *G. S. Cumming*, for the defendant, appellant.

[1] (1961), 35 W.W.R. 110, 28 D.L.R. (2d) 485.

C. R. Munro, and *J. D. Lambert,* for the plaintiff, respondent.

The judgment of Kerwin C.J. and of Taschereau, Judson and Ritchie JJ. was delivered by

JUDSON J.:—The Attorney General of Canada sued the defendant for expenses incurred by the Crown as a result of a motor car accident in which a soldier was injured. The defendant was found wholly to blame for the accident. The expenses were $867.45 for medical and hospital treatment and $563 for the soldier's pay and allowances paid by the Crown during his period of incapacity. The soldier himself recovered damages for his personal injuries and that question is not involved in the appeal. The Attorney General succeeded at the trial and on appeal[1] and the defendant now appeals to this Court on two grounds, namely, that the action *per quod servitium amisit* does not lie at the suit of the Crown under s. 50 of the *Exchequer Court Act* and that the section is beyond the powers of the Parliament of Canada. The section reads:

> For the purpose of determining liability in any action or other proceeding by or against Her Majesty, a person who was at any time since the 24th day of June, 1938, a member of the naval, army or air forces of Her Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

It was enacted following the decision in *McArthur v. The King*[2], in which a claim against the Crown under s. 19(*c*) of the *Exchequer Court Act* had been rejected on the ground that a soldier whose negligence was in question was not a servant of the Crown. The meaning of s. 50 is plain. It legislates away the *McArthur* decision and it also applies to proceedings brought by the Crown. In both cases the member of the armed forces is deemed to be a servant of the Crown.

The argument now put forward is that the legislation has succeeded in imposing liability on the Crown on the ground of a master and servant relationship but has failed in its attempt to enlarge the rights of the Crown because it still does not make the soldier into the kind of servant for loss of whose services the *per quod* action will lie. It is unnecessary here to repeat the detailed historical surveys

[1] (1961), 35 W.W.R. 110, 28 D.L.R. (2d) 485.
[2] [1943] Ex. C.R. 77, 3 D.L.R. 225.

1962

NYKORAK v. A. G. OF CANADA

Judson J.

of this form of action which are to be found in *Attorney-General for New South Wales v. Perpetual Trustee Co. (Ltd.)*[1], and *Commissioner for Railways (N.S.W.) v. Scott*[2] As far as members of the armed forces are concerned it was decided in *The King v. Richardson*[3], that s. 50 does entitle the Crown to bring this action for disbursements for medical and hospital expenses and pay and allowances. This decision was foreshadowed in *Attorney-General of Canada v. Jackson*[4], where the Crown's claim failed only because the soldier himself, as a gratuitous passenger, had no cause of action against the driver of the car in which he was a passenger. That is all that these cases decide but they are conclusive of the present case. The result follows on the plain meaning of the enactment which merely says to a wrongdoer that it is not cheaper to injure a soldier than a civilian because the Crown assumes to look after a soldier during his period of disability.

The constitutional argument is that s. 50 of the *Exchequer Court Act* does not deal with the relations between the Crown and a soldier in such a way as to bring the matter within head 7 of s. 91 and that it is legislation in relation to matters falling within subss. 13 and 16 of s. 92 of the *British North America Act*. The submission is that the true nature of the legislation is to create a legal relationship between the Crown and a member of the services for the purpose of conferring civil rights of action upon the Crown and upon third persons, and that the creation of the relation of master and servant provided in the section is not necessary to the exercise of full legislative power over militia, military and naval service and defence.

There can be no question of the Crown's right to assume liability for the conduct of a member of the armed forces based upon a relationship of master and servant. The only possible constitutional objection to s. 50 must be to the imposition of liability upon a member of the public in the circumstances of the *Richardson* case. The only previous mention of this matter is in the judgment of Kellock J. in the *Jackson* case, *supra,* at p. 496, where he expressed the

[1] [1955] A.C. 457, 1 All E.R. 846.
[2] (1959-60), 33 A.L.J.R. 126.
[3] [1948] S.C.R. 57.
[4] [1946] S.C.R. 489, 2 D.L.R. 481.

opinion that the legislation was within s. 91(7). He followed *Grand Trunk Railway of Canada v. Attorney-General of Canada*[1], where Dominion legislation in relation to the terms of employment imposed by railway companies within Dominion jurisdiction upon their employees was upheld as being a law ancillary to railway legislation notwithstanding the fact that it affected civil rights within the province.

The appellant's argument in this case seems to me to be unduly restrictive of Parliament's exclusive jurisdiction under s. 91(7). Military forces cannot operate now in this day of mechanization without using all the means of communication that are available. They do not operate in isolation in camps or on routes over which they have exclusive use. They are part and parcel of the everyday life of the country. With this use of mechanized vehicles, the public interest requires that the Crown should be in the same position as any other master for the torts of its servants committed in the course of their employment. If the Crown is to assume this responsibility to the public, there is every reason to insist on a reciprocal right of recovery for expenses incurred as a result of injury to the statutory servant and legislation of this kind comes squarely under head 7 of s. 91, notwithstanding the fact that it may incidentally affect property and civil rights within the province. It is meaningless to support this legislation, as was done in the *Grand Trunk* case, on the ground that it is "necessarily incidental" to legislation in relation to an enumerated class of subject in s. 91.

It is also of some significance that the Attorney-General of British Columbia, although duly notified, did not appear in the proceedings in the provincial courts and that when, pursuant to an order of the Chief Justice of Canada, notice was served on the Attorney-General of each province, none of them chose to intervene in this Court.

I would dismiss the appeal with costs.

The judgment of Locke and Ritchie JJ. was delivered by

LOCKE J.:—This action was brought on behalf of the Crown to recover damages in respect of the loss of the services of Corporal E. E. Sims of the Royal Canadian Air

[1] [1907] A.C. 65, 76 L.J.P.C. 23.

1962

NYKORAK v. A. G. OF CANADA

Locke J.

Force, due to the negligence of the appellant. Sims was serving at the Royal Canadian Air Force station at Sea Island where he was employed as an airframe mechanic.

As a member of the armed forces of Canada his relations with the Crown and his duties as a soldier were subject to and regulated by the provisions of the *National Defence Act*, R.S.C. 1952, c. 184, and regulations made under that statute. Section 50 of the *Exchequer Court Act*, R.S.C. 1952, c. 98, provides that, for the purpose of determining liability in any action or other proceeding by or against Her Majesty, a person who was at any time since June 24, 1938, a member of the naval, army or air forces of Her Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

That portion of the section which refers to actions against the Crown appears to have been added as an amendment to the Act following the decision in *McArthur v. The King*[1], in which the President of the Exchequer Court had held that a member of the non-permanent active militia of Canada on active service was not an officer or servant of the Crown, within the meaning of s. 19(*c*) of the *Exchequer Court Act*, R.S.C. 1927, c. 34. That decision did not afford any reason for the reference in the amendment to the status of such persons for the purpose of determining liability in an action brought by the Crown.

In my opinion, the question as to the right of the Crown to recover for the loss of services of members of the armed forces of Canada, such as Sims, must be taken to have been determined by the judgment of this Court in *The King v. Richardson*[2]. There the soldier for the loss of whose services the action was brought was a second lieutenant who was injured in a motor vehicle accident. In the Exchequer Court[3], O'Connor J. decided that the action did not lie at the suit of the Crown for the loss of the services of a member of the armed forces. That decision was reversed by the unanimous decision of this Court. It is, however, said that a contention advanced by the appellant in this matter, that the action *per quod servitium amisit* is restricted to cases where the servant is employed in a

[1] [1943] Ex. C.R. 77, 3 D.L.R. 225. [2] [1948] S.C.R. 57, 2 D.L.R. 305.
[3] [1947] Ex. C.R. 55, 4 D.L.R. 401.

menial or domestic capacity, was not considered. The authority for this argument is the decision of Chief Justice Eyre in *Taylor v. Neri*[1], which has been referred to with approval in the Court of Appeal in *Inland Revenue Commissioners v. Hambrook*[2]. Eyre C.J. is reported to have said in that case that the person whose services were said to have been lost and who was a hired singer was not a servant at all.

I have examined the case and the factums in *Richardson's* case in this Court and while it is true that *Neri's* case is not mentioned in either factum the subject was canvassed extensively in the factum filed on behalf of the Crown and dealt with at length in the judgments delivered in this Court, and the question should be taken to be concluded.

The appellant's contention that s. 50, in so far as it declares that members of the armed forces shall be deemed to be servants of the Crown for the purpose of determining liability in actions brought by Her Majesty is *ultra vires,* is, in my opinion, ill founded.

This question was raised in this Court in the case of *Attorney-General of Canada v. Jackson*[3], but in that matter it was unnecessary to decide the point since the action for the loss of the services of a soldier on active service failed on the ground that the soldier himself had no right of action against the defendant. The question was, however, discussed by Kellock J. who considered that the section could be supported under head 7 of s. 91 of the *British North America Act.* Militia, military and naval service and defence under that heading are declared to be within the exclusive legislative authority of Parliament.

In my opinion, to declare the nature of the relationship existing between the Crown and members of the armed forces for any or for all purposes is legislation in relation to the matters within the exclusive jurisdiction of Parliament under head 7 and, accordingly, *intra vires.* This does not depend, in my view, upon any such ground as that to do this is necessarily incidental to the powers of Parliament under head 7: it is a direct dealing with the matter within such powers.

[1] (1795), 1 Esp. 386, 170 E.R. 393. [2] [1956] 2 Q.B. 641, 3 All E.R. 338.
[3] [1946] S.C.R. 489, 2 D.L.R. 481.

1962

NYKORAK
v.
A. G. OF
CANADA

Locke J.

As pointed out by Kellock J. in *Richardson's* case (p. 67), the section does not purport to create a direct and specific right in the Crown but simply purports to place the Crown in a recognized common law relation, and its rights are those arising from that relation under the rules of that law. I am of the opinion that the relation of master and servant existed between the Crown and soldiers and non-commissioned officers of the armed forces, whose employment is authorized and regulated by the *National Defence Act* within the ordinary meaning of these expressions, prior to the enactment of s. 50 and that that section does nothing more than declare that to be the case. This is not to say that such relationship supports an action *per quod:* but that it does is decided by the judgment of this Court.

The earlier decision of this Court in *Larose v. The King*[1], dealing with the status of a member of the militia established under the *Militia Act,* R.S.C. 1886, c. 41, turned upon considerations which do not apply in the present matter.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Cumming, Bird & Purvis, Vancouver.

Solicitor for the plaintiff, respondent: E. A. Driedger, Ottawa.