
BETWEEN:

MATTHEW McARTHUR.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1942
Nov. 23 & 24.
1943
Mar. 24.

Crown—Petition of Right—Exchequer Court Act R.S.C. 1927, c. 34, s. 19 (c)—"Officer or Servant of the Crown"—Legal status of a member of the Active Militia of Canada—Crown not liable for damages for personal injuries resulting from negligence of a member of the Canadian Active Service Force while acting within the scope of his duties.

Suppliant suffered injuries as a result of being struck by a motor vehicle owned by the Department of National Defence and driven by a member of the Canadian Active Service Force serving with the Royal Canadian Army Service Corps, who was engaged at the time in transporting soldiers' mail from Long Branch, where he was stationed, to Toronto, and army mail to the Headquarters of Military District No. 2 at Toronto.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

Suppliant seeks to recover damages from the Crown for such injuries suffered by him.

Held: That the term "officer or servant of the Crown" as used in section 19 (c) of the Exchequer Court Act must not be construed apart from its context or without regard to the origin of the statutory enactment in which it appears and the judicial history of such enactment.

2. That the term "officer or servant of the Crown" as used in section 19 (c) of the Exchequer Court Act should be regarded as meaning servants or employees of the Government whether appointed by it for the performance of certain duties, or hired by it for certain tasks of employment, all with a view to the accomplishment of governmental purposes and all under the control of the Government and this means persons of a civilian status: the term carries with it the connotation of service or employment with the Government in connection with some aspect of governmental administration or activity.

3. That section 19 (c) of the Exchequer Court Act as amended in 1938 made the doctrine of employer's liability fully applicable to the Crown in respect of the tort of negligence, but such doctrine does not extend to persons on active military service.

4. That a person who enlists as a soldier of the Canadian Active Service Force and takes the oath of allegiance and makes the declaration of service required on his attestation becomes a member of the Non-Permanent Active Militia of Canada on active service.

5. That when a person becomes a member of the Active Militia of Canada on active service, whether by process of law or by voluntary enlistment, whereby he offers his services to his country for the duration of a national emergency, such as now exists, he is performing a national function of citizenship that is not in any way related to governmental service or employment and when he assumes that function he does not enter upon service or employment with the Government and does not become a Crown or governmental servant or employee in any sense of the term: his legal status is that of a person under a written personal engagement with the King whereby he renders his services as a soldier in the defence of his country pursuant to his duty of allegiance to the King whose subject he is.

6. That a person who enlists in an active unit of the Canadian Army for the duration of the present emergency and thereby becomes a member of the Non-Permanent Active Militia of Canada on active service is not an "officer or servant of the Crown" within the meaning, intent or purpose of section 19 (c) of the Exchequer Court Act and the Crown is not liable for the negligence of such a person.

Moscovitz v. *The King* (1934) Ex.C.R. 188; (1935) S.C.R. 404 and *Yukon Southern Air Transport Limited* v. *The King* (1942) Ex.C.R. 181 commented upon and distinguished *Larose* v. *The King* (1901) 31 Can. S.C.R. 206 followed. *Goldstein* v. *State of New York* (1939) 281 N.Y. 396; 24 N.E. (2d) 97; 129 A.L.R. 905 applied.

PETITION OF RIGHT by Suppliant claiming damages against the Crown for personal injuries alleged to have been caused by the negligence of an officer or servant of the Crown in the performance of his duties.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Toronto.

G. A. Sullivan, K.C. for Suppliant.

R. L. Kellock, K.C. for Respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT, now (March 24, 1943) delivered the following judgment:

The suppliant brings this Petition of Right claiming damages from the Crown for personal injuries suffered by him. On January 12th, 1942, having left the east entrance of the Union Station in the City of Toronto, he was crossing Front Street in a northerly direction, when he was struck and knocked down by a 1941 Plymouth station wagon, coming from the west and proceeding east on Front Street, owned by the Department of National Defence of the Dominion of Canada and driven by Private William MacDonald, a member of the Canadian Active Service Force, serving with the Royal Canadian Army Service Corps. At the time of the accident Private MacDonald was attached to the Canadian Small Arms Training Centre at Long Branch, near Toronto, and was engaged in transporting soldiers' mail from Long Branch to Toronto and army mail to the headquarters of Military District No. 2 at Toronto.

The suppliant, in addition to body and head bruises, suffered a fractured pelvis, which leaves him still with some limitation of movement of his left hip and a stiff back, with a likelihood of some permanent disability.

The petition alleges negligence on the part of Private MacDonald while acting within the scope of his duties or employment as a servant of the Crown and contends that the respondent is responsible for the injuries sustained by the suppliant as the result of such negligence.

The respondent denies negligence on the part of Private MacDonald, alleges that the suppliant was guilty of contributory negligence and that his injuries were the result of his own negligence, and raises the defence that at the time of the accident Private MacDonald was not an officer or servant of the Crown within the meaning of section 19 (*c*) of the Exchequer Court Act.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

Before dealing with the question of fact as to whether the suppliant's injuries resulted from the negligence of the soldier driver of the station wagon, I must deal first with the important question of law raised on behalf of the respondent, namely, whether an enlisted soldier, such as Private MacDonald, is an "officer or servant of the Crown" within the meaning of section 19 (*c*) of the Exchequer Court Act, R.S.C. 1927, chap. 34, as amended in 1938. If he is not, the petition of the suppliant must be dismissed, for unless the suppliant can bring his claim within the terms of the statute, this Court has no jurisdiction to entertain his petition.

The section of the Exchequer Court Act, under which this petition of right is brought, since the amendment of 1938, now reads as follows:

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

In order to succeed in his petition the suppliant must bring his claim within the express terms of this statutory enactment, for apart from it there is no liability on the part of the Crown. This means that the suppliant in this petition of right must prove not only that his injuries resulted from the negligence of Private MacDonald, but also that at the time of the accident Private MacDonald was an officer or servant of the Crown within the meaning of section 19 (*c*) of the Exchequer Court Act, as it now stands.

It is now settled law in England that no proceedings can be taken against the Crown for a tort. (1) This rule of law was settled by the cases of *Viscount Canterbury* v. *The Attorney General* (2); *Tobin* v. *The Queen* (3) and *Feather* v. *The Queen* (4), and is still the law in that country, with the result that the only remedy open to a person in England who has suffered from a tortious act of an officer or servant of the Crown is an action against the actual person who was guilty of the tortious act.

(1) Jenks' Digest of English Civil Law 2nd Ed. Vol. 1, para. 743.

(2) (1843) 1 Ph. 30.

(3) (1864) 16 C. B (N.S.) 310.

(4) (1865) 6 B. & S. 257.

It is true that students of the law, such as the eminent English legal historian, Professor W. S. Holdsworth, after exhaustive legal research, have expressed the opinion that their Lordships who settled the doctrine in England "that the proceeding by petition of right cannot be resorted to by the subject in the case of a tort", *Feather* v. *The Queen* (*supra*), did so through lack of proper appreciation of the fundamental reasons for the modern doctrine of employer's liability, namely, that it rests upon grounds of public policy, and not upon any theory of *respondeat superior*, based upon either an implied undertaking by the master to answer for the wrongs of his servant, or some express or implied authority given by the master to the servant, or the fiction that the wrong of the servant is the wrong of the master, and should, therefore, be imputed to him, under the maxim, *que facit per alium facit per se*, or fault on the part of the master in choosing a careless servant.

Professor Holdsworth in his great work, A History of English Law, traces the development of the modern doctrine of employer's liability (1), and the history of remedies against the Crown (2). He recognizes that it is an "undoubted rule that the modern doctrine of the employer's liability for the torts of his servant is not applicable to the Crown" and expresses the opinion that an obvious failure of justice arises from the fact. After making the statement (3):

> The one respect in which the courts have, it seems to me, given inadequate recognition to the principle that the subject should have a remedy against the crown where he has a remedy against a fellow subject, is in their treatment of petitions of right for torts

He proceeds to discuss the meaning and extent of the rule that no petition of right will lie against the Crown for a tort, and then makes the following critical comment on the "undoubted rule" of English law above referred to (4):

> But the most obvious failure of justice arises from the undoubted rule that the modern doctrine of the employer's liability for the torts of his servants is not applicable to the Crown. I think that the cases show that this rule is largely due to the view that the tort of the servant is imputed to the employer, in the same way as it is imputed to a person who has authorized a tort (5).
>
> This view seems to run through the cases, and is characteristic of the period when, as we have seen, (6) the true basis o fthis liability was not

(1) Vol. VIII, pp 472-479.
(2) Vol. IX, pp. 4-45.
(3) Vol. IX, p. 42.
(4) Vol. IX, p. 43.
(5) Vol. IX, p 43, note 2.
(6) Vol. VIII, pp. 477-478.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

properly understood. But if in fact the basis of this liability is, not the fact that the employer has authorized and therefore committed a tort; if it results rather from the imposition by law of a duty "analogous to the duties imposed with various degrees of stringency on the owners of things which are or may be sources of danger to others", (1) there seems to be no reason why the Crown should not be subject to the same duties.

No doubt it was difficult to hold that the Crown was liable for the torts of its servants, since this meant that the various reasons that had from time to time been assigned for holding a master liable for the wrongs of his servant would have to be reconciled with the maxim or rule that "the King can do no wrong.", but if the basis for the modern doctrine of employer's liability, namely, that it rests on grounds of public policy, had been adopted, it would have been possible to give the subject a remedy against the Crown, by way of petition of right, for the torts of its servants, without doing any violence to the rule that "the King can do no wrong". This would have carried to its logical conclusion the view that, although the King was not suable in his own courts by a subject, he was, nevertheless, since he was the fountain head of justice, "morally bound to do the same justice to his subjects as they could be compelled to do to one another" (2).

While the criticism expressed by Professor Holdsworth seems difficult, if not impossible, to answer and while it is difficult to see any real fundamental difference, in principle, apart from historical development, for holding that a petition of right does not lie against the Crown in the case of a tort, but that it does lie "in all cases in which the land, goods or money of the subject are in the possession of the Crown", which might involve wrongful dispossession or abstraction of such property by the Crown, and for breaches of contract, and while it is permissible for any critic of the policy of the law to agree with the views expressed by Professor Holdsworth, it is not now open to any court to deny the binding character of the rule itself within its limits as defined by the courts. Any change in the law must come by way of legislative enactment.

Nor is it necessary in this case to discuss the precise limits of the rule in England that no petition of right lies against the Crown for a tort, or whether under the

(1) Pollock, Essays in Jurisprudence and Ethics 128.

(2) Holdsworth—Supra, Vol IX, p. 10.

authorities, a petition of right may lie for damages for such causes of action as conversion or nuisance. It is sufficient for the purposes of this case to say that it is settled law in England that no petition of right lies against the Crown for the negligence of any of its officers or servants.

The English law on this subject was recognized as applicable in Canada by the decisions of the Supreme Court of Canada in *The Queen* v. *McFarlane* (1) and *The Queen* v. *McLeod* (2),

No change was made in the law of England in this respect by The Petition of Right Act of 1860, 23 & 24 Vict. chap. 34, known as Bovill's Act. This statute was passed mainly for the purpose of simplifying the procedure in petitions of right and assimilating the proceedings in such petitions as nearly as possible to the course of practice and procedure then in force in actions and suits as between subject and subject. It did not extend the field in which petitions of right against the Crown might lie. Indeed section 7 of the statute contains a specific proviso to this effect.

> Provided always, that nothing in this Statute shall be construed to give to the Subject any Remedy against the Crown in any Case in which he would not have been entitled to such Remedy before the passing of this Act.

Nor was any change made in the law of Canada on this subject by the Petition of Right Act passed by the Dominion Parliament in 1876, Statutes of Canada, 1876 chap. 27, which by section 19 provided:

> 19. Nothing in this Act contained shall—
>
> 1. Prejudice or limit otherwise than is herein provided, the rights, privileges or prerogatives of Her Majesty or Her Successors; or—
>
> 2. Prevent any suppliant from proceeding as before the passing of this Act; or—
>
> 3. Give to the subject any remedy against the Crown
>
> (*a*) in any case in which he would not have been entitled to such remedy in England under similar circumstances by the laws in force there prior to the passing of the Imperial Statute twenty-third and twenty-fourth Victoria, chapter thirty-four, intituled: "*An Act to amend the law relating to Petitions of Right, to simplify the proceedings and to make provisions for the costs thereof,*" or—
>
> (*b*) in any case in which, either before or within two months after the presentation of the petition, the claim is, under the Statutes in that behalf, referred to arbitration by the head of the proper department, who is thereby authorized with the approval of the Governor in Council to make such reference upon any petition of right.

(1) (1882) 7 Can. S.C.R. 216. (2) (1882) 8 Can. S.C.R. 1.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

It may therefore be regarded as settled law, even if the reasons for it are properly subject to critical comment, that in Canada no petition of right lies against the Crown for negligence, unless authority for such a proceeding can be found in the terms of some statutory enactment. In the case of the Crown in the right of the Dominion, the liability of the Crown must be found in the express terms of a statutory enactment of the Dominion Parliament. If it cannot be found in any such statute it does not exist at all.

In England, no petition of right would lie against the Crown in a case such as the one now before the Court. There the aggrieved party would be confined to his right of action, if any, against the soldier driver of the motor vehicle, although it appears that in practice, in a proper case, the suit would be defended by a solicitor for the Treasury and Counsel for the Attorney General and that a judgment for damages awarded against the soldier would be paid *ex gratia* by the Crown. Recently since the commencement of the present war a Claims Commission has been constituted in the United Kingdom to deal with claims based upon alleged negligence of members of the armed forces but the legal liability of the Crown in such cases has never been admitted in England.

In Canada, however, it was recognized at an early date that in certain cases there ought to be a liability on the part of the Crown for the acts of its officers and servants. Statutory recognition of the desirability of some modification of the rule of governmental irresponsibility for tort which obtained in England and had been accepted as the law in Canada was finally accorded in 1887 by "An Act to amend "The Supreme and Exchequer Courts Act", and to make better provisions for the Trial of Claims against the Crown" Statutes of Canada, 1887, chap. 16, which established the Exchequer Court of Canada as a separate court and by section 16, paragraph (*c*) gave it exclusive original 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 public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment;

Provision had already been made in a previous statute for dealing with certain classes of claims against the govern-

ment. In 1870, by "An Act to extend the powers of the Official Arbitrators to certain cases therein mentioned", Statutes of Canada, 1870, chap. 23, it was provided by section 1 that where there was a supposed claim upon the Government of Canada:

> Arising out of any death, or any injury to person or property on any railway, canal, or public work under the control and management of the Government of Canada.

The claim might by the head of the department concerned therewith be referred to official arbitrators who should have power to hear and make an award upon such claim.

In 1879 an appeal, when the claim exceeded five hundred dollars, from the Official Arbitrators to the Exchequer Court of Canada and from it to the Supreme Court was provided by "An Act respecting the Official Arbitrators", Statutes of Canada, 1879, chap. 8.

In 1886 by "An Act respecting the Official Arbitrators", R.S.C. 1886, chap. 40, sec. 6, the above jurisdiction of the Official Arbitrators was slated as being in respect of:

> Any claim . . . . arising out of any death, or any injury to person or property on any public work.

The Exchequer Court Act of 1887, by Section 58, repealed "An Act respecting the Official Arbitrators", R.S.C. 1886, chap. 40, and vested the jurisdiction previously exercised by the Official Arbitrators in the newly established separate Exchequer Court of Canada.

It should be noted, however, that the first statutory admission of legal liability on the part of the Crown for the negligence of its officers or servants, while acting within the scope of their duties or employment, appeared in section 16, paragraph (*c*) of the Exchequer Court Act of 1887, above referred to. This original liability was a very limited one; it was widened by an amendment in 1917 and still further enlarged by an amendment in 1938. These statutory amendments were made after judicial decisions had exposed the limitations of the jurisdiction conferred upon the Exchequer Court, firstly by the statute of 1887 and then by the amendment of 1917.

It may be assumed that a petition of right against the Crown lies in Canada wherever it is permitted by the law of England as it stood immediately prior to the enactment of the English Petition of Right Act of 1860.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

This situation was maintained by section 15 of the Exchequer Court Act of 1887, now section 18 of the present statute.

Conversely, it may also be assumed, notwithstanding arguments to the contrary which have been made from time to time before the courts, but have never been accepted by them, that a petition of right against the Crown does not lie in Canada, where it was not permitted by the law of England as it stood immediately prior to the enactment of the English Petition of Right Act of 1860, above referred to, unless it is permitted by the express terms of some Canadian statutory enactment.

It becomes, therefore, essential to determine whether a petition of right lies against the Crown in a case such as the present, for unless the suppliant can shew that his case comes within the terms of section 19, subsection (*c*) of the Exchequer Court Act, as amended in 1938, the Court has no jurisdiction to hear his petition; the basic law, namely, that the subject cannot bring a petition of right against the Crown for damages for negligence will apply and he will be left without legal redress, however serious his injuries may be, except such right of action as he may have against the actual person whose negligence resulted in his injuries. In such case his action would lie elsewhere than in the Exchequer Court.

In considering whether the term, "officer or servant of the Crown", as it now appears in section 19 (*c*) of the Exchequer Court Act, and within the meaning of such section, includes a person such as Private MacDonald who has enlisted in the Canadian Active Service Force for the duration of the present emergency and is now serving therein, it is important to observe the warning given by Duff C. J. in *The King* v. *Dubois* (1) against following decisions upon other statutes not in *pari materia*. He said:

> Decisions in other jurisdictions upon other statutes not in *pari materia*, interesting as they may be, cannot safely be relied upon as a guide, especially when, in the decisions of this Court, and in the history of the legislation under review, we have a very sufficient lexicon for the purpose in hand

The fact, therefore, that members of the armed forces of Canada have in certain cases been held not subject to certain provincial statutory requirements on the ground that they were servants of His Majesty engaged in their

(1) (1935) S C R. 378 at 400

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

military duties, as, for example, in the cases of *Rex* v. *Anderson* (1), and *Rex* v. *Rhodes* (2), must not be taken as an indication that such persons are also " officers or servants of the Crown " within the meaning of section 19 (*c*) of the Exchequer Court Act.

Nor is it permissible to assume at the outset that such a general term as " officer or servant of the Crown " includes or was meant to include every person who could possibly be considered as coming within its scope. It is not to be denied, for example, that an enlisted soldier, such as Private MacDonald, serves His Majesty for the purposes for which he enlisted and in accordance with his engagement, but it by no means follows as a matter of course, as will be seen later, that he is " an officer or servant of the Crown " within the intendment of the section under discussion. The term must not be construed apart from its context or without regard to the origin of the statutory enactment in which it appears, and the judicial history of such enactment.

In order, therefore, to arrive at the precise meaning of the term " officer or servant of the Crown " as it is used in section 19 (*c*) of the Exchequer Court Act, as amended in 1938, it is necessary to consider not only the express terms of the statute itself, but also the history of the legislation and the judicial decisions that have been rendered with regard to its meaning, for as Lindley, M.R. said in *In re Mayfair Property Co.:* (3)

> In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported *Heydon's Case* to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief.

By the law as it stood prior to 1887 there was no liability at all on the part of the Crown for the negligence of any of its servants. Since the enactment of section 16 (*c*) of the Exchequer Court Act in 1887, there have been a great many judicial decisions as to the meaning of the statute. The course of interpretation and construction followed by the courts is instructive, not only as illustrative of the care taken by the courts in defining the precise limits of the jurisdiction given to the Exchequer Court in this matter and the extent of the liability of the Crown for

(1) (1930) 39 Man R 84 (2) (1934) O.R. 44.
(3) (1898) 2 Ch. 28 at 35.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

negligence, but also as indicative of the respective functions of the Court and of the legislative authority. Changes in the law are not to be effected by judicial attempts either to widen or to narrow the jurisdiction that is conferred by statute. In view of the fact that apart from statute, there is no crown liability at all for negligence, it follows that the Crown is not liable by statute unless the statute so enacts. The Court has no right to endeavour to include as many cases as possible within the liability, nor to exclude from it cases which are meant to be included. The Court should not seek to give either a wide or a narrow construction to the statutory liability in question, but should endeavour rather to ascertain its precise limits. It is no part of the judicial function to change the law; that right or duty is for the appropriate legislature. It is in that light that the Courts have viewed the statute now under consideration.

It is in the same light that the Court must view the question of law raised on behalf of the respondent in this case. Before dealing with such question specifically, I think it desirable to review in a general way the judicial history of the statute now under discussion and the amendments that have been made to it, with their legal effect. Indeed, such a review is essential to the ascertainment of the exact meaning of the term "officer or servant of the Crown" as it is used in the statute.

It was argued at the outset in *City of Quebec* v. *The Queen* (1) and even as late as 1908 in *Armstrong* v. *The King* (2) that section 16 (*c*) of the Exchequer Court Act was not intended to create any liability which did not formerly exist, but that its only purpose was to confer jurisdiction upon the court to give effect to an existing remedy. This contention was negatived by the Supreme Court of Canada in *City of Quebec* v. *The Queen* (*supra*), where Gwynne J. stated that he had no doubt that there had been a change in the law. It is now settled that section 16 (*c*) of the Exchequer Court Act of 1887 not only conferred jurisdiction on the Exchequer Court but also imposed a liability upon the Crown for negligence, which did not exist before. In *Armstrong* v. *The King* (3) Davies J. said:

(1) (1892) 3 Ex. C.R. 164; (1894) 24 Can. S.C.R. 420.
(2) (1907) 11 Ex. C.R. 119; (1908) 40 Can. S.C.R. 229.
(3) (1908) 40 Can. S.C.R. 229 at 248.

I think our previous decisions have settled, as far as we are concerned, the construction of the clause (c) of the 16th section of the "Exchequer Court Act", and determined that it not only gave jurisdiction to the Exchequer Court but imposed a liability upon the Crown which did not previously exist,

There was never any doubt that the liability of the Crown for negligence created by the 1887 enactment was qualified and limited, but there was controversy as to the extent of such liability. Burbidge J. was strongly of the opinion that if the cause of the injury to the person or to property arose on a public work, the suppliant's claim was within the statute, even if the injury itself did not occur actually on the public work. He gave expression to this view in a number of cases such as, *City of Quebec* v. *The Queen* (1); *City of Quebec* v. *The Queen* (2); *Filion* v. *The Queen* (3); *Letourneux* v. *The Queen* (4); *Paul v. The King* (5); *Price* v. *The King* (6). He thought that any other construction would be a narrow one.

This extended view of the liability of the Crown was rejected by the Supreme Court of Canada in a number of cases, such as *City of Quebec* v. *The Queen* (7) and *Larose* v. *The King* (8). It was definitely settled in *Paul* v. *The King* (9) that a suppliant in order to bring his claim within the statute must shew that the injury of which he complained had occurred actually "on a public work". If it happened "off" the public work itself, he had no claim, even if the negligence which caused the injury had arisen "on" a public work. The decision in *Paul* v. *The King* was followed in a large number of cases such as *The King* v. *Lefrancois* (10); *Chamberlin* v. *The King* (11); *Olmstead* v. *The King* (12); *Piggott* v. *The King* (13); *Theberge* v. *The King* (14); *Desmarais* v. *The King* (15).

These decisions indicate the closeness of the judicial decisions to the express words of the statute and the view

(1) (1891) 2 Ex. C.R. 252 at 269, 270.
(2) (1892) 3 Ex C.R. 164 at 178.
(3) (1894) 4 Ex. C R. 134 at 144.
(4) (1900) 7 Ex. C R. 1 at 7.
(5) (1904) 9 Ex. C R 245 at 270.
(6) (1906) 10 Ex. C.R. 105 at 137.
(7) (1894) 24 Can. S C.R. 420.
(8) (1901) 31 Can. S C.R. 206.
(9) (1906) 38 Can. S C.R. 126.
(10) (1908) 40 Can. S C R. 431.
(11) (1909) 42 Can. S.C.R. 350.
(12) (1916) 53 Can. S C R. 450.
(13) (1916) 53 Can. S C.R. 626.
(14) (1916) 17 Ex. C.R. 381.
(15) (1918) 18 Ex. C.R. 289.

1943

MATTHEW McARTHUR v. THE KING

Thorson J.

of the courts that the liability of the Crown is not to be extended beyond the intendment of the statute. In *City of Quebec* v. *The Queen* (1) Gwynne J. expressed the following view as to the limitations placed upon the court in construing a statute such as the one under consideration:

> The claim here is as to "injury to property" alone not occurring *upon* any public work, and we cannot hold that the Exchequer Court has jurisdiction in the present case without eliminating wholly from the sentence the words "on any public work", which it is not competent for us to do.

This rule of close adherence to the express terms of the statute has governed the courts. Where any decision has appeared to run counter to it, the Supreme Court of Canada has not hesitated to reject its authority. Thus *Letourneux* v. *The King,* (2) which appeared to hold that it was not necessary for a suppliant to show that his injury was actually done or suffered upon the public work itself, has been definitely disapproved. In *Olmstead* v. *The King* (3) Anglin J. said:

> The plaintiff's claim, however, is for damages for injuries sustained through the negligence of a Crown servant in carrying on a public work. The injury of which he complains did not happen on the public work. Section 20 (*c*) of the "Exchequer Court Act", therefore, does not confer jurisdiction on the Exchequer Court. *Chamberlin* v. *The King, Paul* v. *The King* Since these cases were decided *Letourneux* v. *The King* cannot be followed in such a case as this In that case the full limitative effect of the words "on any public work" in sub-sec (*c*) of sec 20 would appear not to have been sufficiently considered.

In *Pigott* v. *The King* (4) Anglin J. expressed the same views:

> Since the decisions in *Chamberlin* v *The King* and *Paul* v *The King, Letourneux* v *The King* is not authority for bringing such an action

In *The King* v. *Dubois* (5) Duff C.J., after pointing out that *Letourneux* v. *The King* (*supra*) was "very imperfectly reported", said:

> It is impossible now to ascertain what were the grounds on which the majority of the court proceeded.

No decision of the courts in construing the meaning of the statute as it was enacted in 1887 is more striking than the one rendered in *Pigott* v. *The King* (6). In that case

(1) (1894) 24 Can. S.C.R. 420 at 450.
(2) (1903) 33 Can. S.C.R. 335
(3) (1916) 53 S.C.R. 450 at 456, 457.
(4) (1916) 53 Can S.C.R. 626 at 632
(5) (1935) S.C.R. 378 at 389
(6) (1915) 19 Ex. C.R. 485; (1916) 53 Can. S.C.R. 626.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

the suppliants brought their petition of right for damages done to their dock and piling grounds caused by the explosion of dynamite on adjoining property on which the Crown was constructing a large cement dock. The damage was the result of negligence on the part of servants of the Crown while engaged in blasting operations in the course of construction of the dock. Although the suppliants would have had a clear case against a fellow subject under similar circumstances, it was held that they had no claim against the Crown under the statute because the injury to them did not happen " on a public work ". If the injury had been to persons rather than to property the result would have been the same. If a number of persons had been injured, those who were on the public work would have had a claim against the Crown under the statute but those who were not actually on the public work when they were injured would have had no claim.

The anomaly of such a situation was obvious, but the Courts had no option in the matter other than to decide as they did as long as the statute remained in its original form.

In 1917, by " An Act to amend the Supreme Court Act and the Exchequer Court Act ", Statutes of Canada, 1917, chap. 23, Sec. 2, paragraph (*c*) of section 20 of the Exchequer Court Act, R.S.C. 1906, chap 40 (formerly paragraph (*c*) of Section 16 of the Exchequer Court Act of 1887) was repealed and the following was substituted therefor:

> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

It may be noted that the words "on any public work" were removed from their place immediately after the words "any death or injury to the person or to property" and were replaced by the words " upon any public work" immediately after the words " duties or employment ". The liability of the Crown, although widened, was still a very limited one. It was quite clear, after the amendment of 1917, that the suppliant no longer had to show that his injury, whether to his person or to his property had occurred actually " on " a public work, so long as he could shew that it had resulted from the negligence of some officer or servant of the Crown, while acting within the

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

scope of his duties or employment, if such duties or employment were "upon any public work".

The meaning of the amendment and the extent of the widened liability of the Crown for negligence resulting from the amendment came before the courts for consideration in a number of cases, before the interpretation and construction of the statute as amended was finally settled in *The King* v. *Dubois* (1).

Contentions were advanced before the courts by counsel for suppliants for as wide an application of the amendment as possible. The main questions in controversy were as to the meaning of the term "upon any public work" in the 1917 amendment. Did the word "upon" have any geographical significance? Was the term "public work" broad enough to include "public service"?

The first of these questions came before the courts for determination in the case of *Schrobounst* v. *The King* (2) in which the decision was rendered on questions of law. In that case the facts alleged were that the suppliants were in a vehicle, standing at the curb, on a public street in the City of St. Catherines, when they were run into and injured by a motor truck, the property of the Crown, due to the negligence of the driver thereof, a servant of the Crown, employed in transporting other employees of the Crown to a public work at Thorold. The contention of the Crown was that the words "upon any public work" still had a geographical significance and that the Court could not entertain the petition because the servant of the Crown in question was not actually "upon" any public work. This contention was not approved by the courts. In the Exchequer Court (3) Maclean J. expressed his views as follows:

> I am of the opinion therefore that the words "employment upon any public work" is merely descriptive of the work or employment, and was not intended to mean that the work or employment must be performed on any defined or specific locus whereon a public work is being maintained, constructed, controlled or managed or that the negligence complained of must occur thereon. I cannot therefore uphold the points of law raised on behalf of the respondent.

On appeal to the Supreme Court of Canada the judgment of the court below was affirmed. There the judgment of the Court was delivered by Mignault J. who said: (4)

(1) (1935) S.C.R. 378.
(2) (1925) Ex. C.R. 167; (1925) S.C.R. 458.
(3) (1925) Ex. C.R. 167 at 171.
(4) (1925) S.C.R. 458 at 459.

We are of the opinion that the words "upon any public work" in subsection (c) qualify not necessarily the presence but the employment of the negligent servant or officer of the Crown.

If it had been intended to restrict the application of the subsection to the case in which the person causing the injury was at the time physically present "upon any public work" these latter words would more properly have been inserted immediately after the word "while", where their significance would have been unmistakeable. The construction placed on the words "on any public work" in *Piggott's Case* (1) and other cases decided on the subsection as it stood prior to 1917, proceeded upon and was necessitated by their collocation with the words "person or property".

The decision in *Schrobounst's Case* (supra) is subject to the following remarks of Duff C. J. in *The King* v. *Dubois:* (2)

It is possible that Schrobounst's case has carried the construction of section 19 (c) to the furthest permissible limit.

In *Dubois* v. *The King* (3) a sharp difference of opinion between the Exchequer Court and the Supreme Court of Canada arose. The case was heard on questions of law. The facts alleged in the petition of right were that specially equipped motor cars, owned by the Government of Canada, were employed by the Radio Branch of the Department of Marine, in the detection and elimination of radio inductive interference, and that two employees of the Radio Branch who were returning to Ottawa in such a car from a tour of inspection had stopped the car on one side of the travelled road to wipe the windshield which had become clouded due to weather conditions, with the result that an oncoming car in which the son of the suppliants was a passenger collided with the Government car and was killed. The questions of law were, (1) whether the Goverment owned motor car under the circumstances was a "public work" within the meaning of sec. 19 (c) of the Exchequer Court Act and (2) whether the employees in question were at the time of the collision officers or servants of the Crown acting within the scope of their duties or employment upon a public work, within the meaning of the same section. In the Exchequer Court (4) Maclean J. answered both these questions in the affirmative. He expressed the view that the term "any public work" meant any work carried on by the Crown to serve the public with some necessity or convenience required by the public and made available by a parliamentary vote of public

(1) (1916) 53 Can. S.C.R. 626.
(2) (1935) S.C.R. 378 at 398.
(3) (1934) Ex C.R. 195; (1935) S.C.R. 378.
(4) (1934) Ex C.R. 195.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J

moneys and included public services such as that of detecting and eliminating radio inductive interference. At page 203 he said:

> Now, I think a public service of this nature is a "public work", and I think also that any physical instrumentality (such as the specially equipped motor car in this case) owned, equipped and used by the Crown, in carrying out a public service of such a character, is a "public work" within the meaning of the Exchequer Court Act.

And at p. 204, after discussing certain previous decisions on the statute he said:

> These cases go to show that a "public work" includes public services, properties or buildings, wherein is administered one of the public services of Canada, at the expense of Canada, and excludes the popular idea or notion that a "work" is necessarily something constructive or permanent in the material sense.

And at p. 206 he stated his conclusion in the following terms:

> I cannot avoid the conviction that the work here rendered by the Crown for the public benefit, with property or means owned and controlled by the Crown, through servants employed by the Crown, a work or service made possible by moneys voted by parliament, constitutes a public work within the meaning of the Exchequer Court Act, and falls within the principle laid down in the *Schrobounst* case.

This was the widest construction of the term "public work" ever given in the judicial history of the statute. When the case came before the Supreme Court of Canada by way of appeal from the judgment of the Exchequer Court the judgment of the court below was unanimously reversed; (2) the views expressed by Maclean J. in the Exchequer Court as to the wide import of the term "public work" and that it was broad enough to include "public service" were emphatically negatived and the term was confined to the limits which it had received in previous judicial interpretations of it. The headnote of the Supreme Court report (1) reads, in part, as follows:

> Held The Government car was not a "public work", nor were its occupants acting within the scope of their duties or employment "upon any public work" at the time in question, within the meaning of s. 19 (*c*) of the *Exchequer Court Act* (R S C 1927, c 34).
>
> Having regard to the history of the legislation and the judicial decisions upon it (reviewed at length in the judgment), the phrase "public work" in s 19 (*c*) means a physical thing having a defined area and an ascertained locality, and does not comprehend public service or employment, as such; nor does it include vehicles or vessels This construction is further supported by the language of the French version of the section

(1) (1935) S C R 378 at 379

Chief Justice Sir Lyman Duff, in a comprehensive judgment, outlined the history of the legislation from its inception and analyzed the course of its judicial interpretation. Speaking of the section in its original form and the judicial decisions upon it he said, at page 383:

> The actual decisions of this court upon the enactment establish three propositions: first, that the phrase "on a public work" served the office of fixing the locality within which the death or injury must occur in order to bring the enactment into operation; second, that the phrase "public work" denoted, not a service or services, but a physical thing; third, that such physical thing must have a fixed situs and a defined area

And after discussing certain statutory definitions of the term " public work ", he said, at page 385:

> So read and construed the term "public work" cannot be given the sense the respondent seeks to ascribe to it· of public service, employment or duty, nor can it fairly be read as comprehending such things as vehicles and vessels This, we shall see, is the effect of the decisions of this court respecting the construction of these paragraphs

Later, speaking of the amendment of 1917 he said, at page 393:

> The amendment with which we have to deal was an amendment introduced into the *Exchequer Court Act*, an amendment effected, as already observed, by a change in the order of the words in one paragraph of section 16 of that Act. The term "public work" was already there in paragraph (*b*). It was already there and remained there in the amended paragraph (*c*). The scope of the phrase in section 16, as ascertained by reference to the legislation in which those provisions took their origin and the definitions in that legislation, and as determined by the decisions of this Court was plainly settled. No expansion of the meaning of the term "public work", so determined, was necessary to give full effect to the amendment. There is nothing in the amendment requiring any alteration in the sense of the term as settled The amendment, so to speak, was an amendment within the framework of the existing statute; which framework is not altered by it. "Public work" still, in paragraph (*c*), as well as in paragraph (*b*), designates a physical thing and not a public service

The decision of the Supreme Court of Canada in *Dubois* v. *The King* (*supra*) is a striking illustration of the necessity for close attention to the express terms of such a statute as the one now under discussion and the duty of the courts to hold general terms in such a statute within the limits necessary for the accomplishment of its purposes, and not allow them to be expanded beyond such limits.

After the *Dubois* case had been decided, and, no doubt, as the result of it, the statute was further amended in 1938 by " An Act to amend the Exchequer Court Act ", Statutes of Canada, 1938, chap 28, sec. 1, which repealed paragraph

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

(c) of section 19 and re-enacted it without the words "upon any public work", so that paragraph (c) of section 19 of the Exchequer Court Act, R.S.C. 1927, chap 34 (originally section 16 (c) of the Exchequer Court Act of 1887) now reads as follows:

> (c) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

It is under the statute in this form that the present petition of right is brought. The specific question of law now before the court for determination is whether the term "officer or servant of the Crown" contained in section 19 (c) as it now stands should be construed as including persons,, such as Private MacDonald, who have enlisted in the armed forces of Canada for the duration of the present emergency and are now on active service with the Canadian Army. It may, at first, appear that the foregoing review of the legislation is irrelevant to the specific question of law now under consideration but that it is not so can be demonstrated. Just as the decisions on the statute before the amendment of 1917, carried weight as to the meaning still to be given to the term "public work" in the amendment of 1917, although in many instances they would no longer be applicable to similar facts after the amendment, so the judicial history of the statute is still of great importance as a guide to the approach that should be made in attempting to reach a solution of the present problem. In view of the judicial definitions of the term "public work", as it appeared in the statute both before and after the amendment of 1917 and the close interpretation and construction of the statute, which the courts have given to it with a view to fixing the precise limits of the liability of the Crown for negligence within the terms of the statute, it seems clear that it would not be a correct approach to the problem to assume that every person is included in the term "officer or servant of the Crown" within the meaning of section 19 (c) of the Exchequer Court Act, merely because he is performing some national or public duty or service and is in receipt of an emolument or pay from the Crown.

That such an assumption is unwarranted seems obvious. It was contended, for example, in *McHugh* v. *The Queen*

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

(1) that the Minister of Public Works was an "officer or servant of the Crown" within the meaning of section 16 (*c*) of the Exchequer Court Act of 1887, but this view was negatived by Burbidge J. This case was later approved and followed by Audette J. in *Mavor* v. *The King* (2). These two cases can be considered as authorities for the statement that the term "officer or servant of the Crown" in section 19 (*c*) of the Exchequer Court Act does not include a Minister of the Crown, even although he is in recipt of an emolument from the Crown. The Minister although appointed by the Crown is an adviser to the Crown and responsible to Parliament. There are also many other persons, who, although their appointments and emoluments come from the Crown, are clearly not in any sense "officers or servants of the Crown" within the meaning of the statute under discussion, such as, for example, the Lieutenant-Governors of the provinces who, although appointed and paid by the Crown, are His Majesty's representatives, and likewise the Judges of the Dominion or Provincial Courts, who, although appointed and paid by the Crown, are independent of it. These observations are made only for the purpose of shewing that although the term "officer or servant of the Crown" is a general one, it does not follow that there are no limitations to its meaning. Indeed there are limitations to the term, inherent in the origin of the statute in which it appears, its context in the statute and the judicial interpretation of the meaning of the statute. Just as the general term "public work", which is nowhere defined in the Exchequer Court Act, was not permitted to receive an unrestricted meaning but was held to the meaning fixed by judicial decisions, so likewise the meaning of the general term "officers and servants of the Crown" must, since it is nowhere defined by the statute, be fixed according to rules of construction, similar in principle to those that have governed the court in its decisions on this statute in the past.

Moreover, since it is quite clear that the liability of the Crown for negligence in the original statutory enactment was strictly limited, it is not to be assumed that the liability although it now covers a much wider field than it did at the outset, has now become unlimited.

(1) (1900) 6 Ex. C.R. 374. (2) (1919) 19 Ex. C.R. 304.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

The decision of the Supreme Court of Canada in the *Dubois* case (*supra*) while important in itself, for its correction of the erroneous expansion of the term "public work" made in the judgment of the court below, and, perhaps even more so, for having, no doubt, pointed to the need for the amendment of 1938, is even more important for the rules of construction of a statute such as this and for the warnings of the dangers to be avoided in such construction which it contains.

In *The King* v. *Dubois* (*supra*) Duff C. J. said, at page 381:

> It will appear as we proceed that the most effectual way of ascertaining the import of the language we have to construe is to note the course of legislation upon the subject matter of the enactment from 1870 onward, and to examine with some care the course of judicial decision upon that legislation.
>
> One general observation will not, I think, be superfluous The judicial function in considering and applying statutes is one of interpretation and interpretation alone The duty of the court in every case is loyally to endeavour to ascertain the intention of the legislature; and to ascertain that intention by reading and interpreting the language which the legislature itself has selected for the purpose of expressing it.
>
> In this process of interpretation the individual views of the judge as to the subject matter of the legislation are, of course, quite irrelevant.
>
> We have before us an enactment which presents certain peculiarities There is a remedy given against the Crown in a limited class of torts; and the reasons which actuated the legislature in prescribing the limitations cannot be stated with any kind of certainty That is no ground for ignoring the limitations or for ascribing a non-natural meaning to the words in which they are stated in order to minimize the effect of these words.
>
> It is the duty of the courts to give effect to the language employed, having regard to the judicial construction which it has received.

At page 398, he sounded the following warning:

> It is important, in applying legislation of this character, to be on one's guard against a very natural tendency. For the reasons I have given the conclusion is inescapable that the purpose of the statute is not to establish the doctrine *respondeat superior* as affecting the Crown throughout the whole field of negligence. The area of responsibility, even in respect of negligence, is restricted. In *Schrobounst's Case* (1) this Court thought it was not infringing upon this restriction in holding that the facts of that case brought it within the statute. There is a natural tendency to take the latest case as a new starting point and to apply the statute to all cases which seem to fall within any of its apparent logical implications. But one thing is indisputable. If the supposed logical implication carries you beyond the area delimitated by the language of the statute, then you cannot give effect to it without transcending your function as a judge. You are constituting yourself a legislator;

(1) (1925) S C R. 458

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

Then he concluded the above observations of a general nature with the following specific one relating to the question in issue before the court, at page 399:

And you cannot, for the purpose of this case, having regard to the history of the legislation and the decisions upon it, which are binding on this court, hold that "public work", in this enactment, includes matters which are not physical things, but public service or public employment as such

In the period prior to the amendment of 1917, there was only one judicial pronouncement as to the meaning of the term "officer or servant of the Crown" directly on the specific question of law that is now before the Court. In *Larose* v. *The King* (1) the facts alleged were that the suppliant who was working in his field more than a mile away from the rifle range at Cote St. Luc in the District of Montreal was wounded by a bullet fired during target practice from the rifle range. Burbidge J. dismissed the petition mainly on the ground that the rifle range was not a public work within the meaning of that term as used in section 16 (*c*) of The Exchequer Court Act of 1887.

On appeal to the Supreme Court of Canada, the judgment of the court below was affirmed and the reasons for judgment of Burbidge J. were approved. Taschereau J., in giving the judgment of the Court (Girouard J. dissenting), in addition to approving the reasons for judgment given in the Exchequer Court said: (2)

Then I do not see that the words "any officer or servant of the Crown" can be held to include the officers or men of the militia. It must not be lost sight of that the suppliant to succeed must come within the strict words of the Statute

No reasons for the above opinion appear in the reported judgment. The contention on which it was based was advanced by counsel for the Crown, Fitzpatrick K.C., Solicitor General of Canada, and Newcombe K.C., Deputy Minister of Justice, both of whom, it is interesting to note, subsequently became members of the Supreme Court of Canada, the former becoming its Chief Justice. The factum on behalf of the Attorney General of Canada filed in the appeal contains the following argument on the point:

The expression, "any officer or servant of the Crown", does not include the officers or men of the militia

Sec. 10 of the Militia Act, R.S.C., cap. 41, enacts as follows: "The militia shall consist of all the male inhabitants of Canada of the age of eighteen years and upwards, and under sixty, not exempted or disqualified

(1) (1900) 6 Ex C.R. 425

(2) (1901) 31 Can S.C.R. 206 at 209.

1943

MATTHEW McARTHUR v. THE KING

Thorson J.

by law, and being British subjects by birth or naturalization; but Her Majesty may require all the male inhabitants of Canada capable of bearing arms to serve in a case of a *"levée en masse"*.

Surely the country is not to be liable for the negligence of all these.

It may fairly be assumed that Taschereau J. deliberately adopted the argument of counsel for the Crown and made the conclusion based on it part of the judgment of the Court. It should be noted that the remarks of Taschereau J. are not *obiter*. The judgment dismissing the petition in the *Larose* case could stand on this ground as easily as on any of the other grounds that were advanced, of which there were a number, namely, that the rifle range was not a public work within the meaning of the statute, that the injury to the suppliant had not happened "on" a public work, and that there was no evidence of negligence. The decision should, therefore, be regarded as a judicial pronouncement of the Supreme Court of Canada on the specific question now under consideration, and binding upon this court, unless there is something in subsequent amendments to the statute which deprives it of its authority. Further reference to the *Larose* case will be made later. It seems to me that the decision is sound in principle having regard to the limited character of the liability of the Crown. It could not possibly have been intended by Parliament that the Crown should, even potentially, become liable for the negligent acts of "all the male inhabitants of Canada capable of bearing arms". The class of persons for whose negligence the Crown was made responsible was a very restricted one.

It cannot be too strongly stressed that the liability of the Crown for negligence under the statute of 1887 was a very limited one. It was confined to negligence resulting in an injury to the person or to property "on" a public work. The injury had to occur actually on a public work and, even then, only a public work that was a physical thing having a defined area and an ascertained locality. If the injury happened "off" the public work or on a vehicle or vessel the injured person had no claim against the Crown. It would also appear that the negligence itself had to arise on a public work before there could be any valid claim. This was certainly the view expressed in many of the judicial decisions on the statute. It was also repeatedly stated that the suppliant had to come within

the express terms of the statute, which meant, of course, the express terms of the statute as they had been judicially defined.

Under the circumstances it is clear that, at the outset, liability was not imposed upon the Crown for the negligence of all its officers or servants. Just as the term "public work", in the statute, was closely defined by the courts and was never given the wide meaning that Maclean J. sought to ascribe to it in the *Dubois'* case, (*supra*) so it is reasonable to assume that the term "officer or servant of the Crown" had also a limited meaning and included only the kind of officers or servants of the Crown that would have duties or employment on a public work, that is, persons with various kinds of duties to perform on the public work of a supervisory or directing nature and workmen engaged on the public work in carrying out the tasks assigned to them by persons in authority over them. It seems clear to me that the Crown did not assume liability for the negligence of officers or men of the militia, who would in their capacity as such have nothing to do with a "public work" as defined by the judicial decisions. The term, in my opinion, included only civilian personnel in the employ of the government.

Support for the view that only such a limited class or kind of persons was meant by the term "office or servant of the Crown" may be found in the reasons suggested by the Judicial Committee of the Privy Council for the departure by new and undeveloped countries owing allegiance to the Crown from the well recognized doctrine of Crown immunity from liability for tort which was the law of England and likewise the law of such countries until they themselves altered it by statute.

In *Farnell* v. *Bowman* (1) there was an appeal to the Judicial Committee from the Supreme Court of New South Wales in which the main question to be determined was whether, under the provisions of a certain statute of the colonial legislature, the Government of the colony was liable to be sued in an action of tort. The Committee held on construction of the statute before it that the Government was so liable. In the course of delivering the judgment of their Lordships, *Sir Barnes Peacock,* at p. 649, said:

(1) (1887) 12 A.C. 643.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

> It must be borne in mind that the local Governments in the Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen If, therefore, the maxim that "the king can do no wrong" were applied to Colonial Governments in the way now contended for by the appellants, it would work much greater hardship than it does in England.

In *The Attorney General of the Straits Settlement* v. *Wemyss* (1), in which the Judicial Committee had before it as one of its problems the effect of the Crown Suits Ordinance of 1876 of the colonial legislature, the Committee gave further approval to the views expressed in *Farnell* v. *Bowman* (*supra*). The judgment of their Lordships was delivered by Lord Hobhouse, who, at p. 197, said:

> In the case of *Farnell* v *Bowman* attention was directed by this Committee to the fact that in many colonies the Crown was in the habit of undertaking works which, in England, are usually performed by private persons and to the consequent expediency of providing remedies for injuries committed in the course of these works

These remarks would be much more applicable to the Canadian statute than to the statutes of New South Wales and the Straits Settlement which imposed a much wider liability upon the Crown than was the case under the Canadian Statute where the liability for negligence was limited to injuries occurring "on" a public work.

It should, perhaps, be said by way of qualification of the applicability of these remarks of the Judicial Committee to the specific question now before the court that in so far as they merely seek to justify the policy of the colonies in question in departing from the law of England, they are of little, if any, value, since the courts are not concerned with the policy of legislation but only with its interpretation and application; but, in so far as they are indicative of the intention of the legislature to meet a particular situation and to provide a remedy for it, they are very illuminating and would be particularly applicable to the Canadian legislation which confined the liability of the Crown to the kind of enterprises referred to by the Judicial Committee in the statements that have been quoted.

(1) (1888) 13 A C. 192.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

Indeed, the Supreme Court of Canada gave expression to similar views in determining the intention of the legislature in enacting the legislation of 1887. In *City of Quebec* v. *The Queen* (1) Gwynne J. said:

> The object, intent and effect of the above enactment was, as it appears to me, to confer upon the Exchequer Court, in all cases of claim against the government, either for the death of any person, or for injury to the person or property of any person committed to their charge upon any railway or other public work of the Dominion under the management and control of the government, arising from the negligence of the servants of the government, acting within the scope of their duties or employment upon such public work, the like jurisdiction as in like cases is exercised by the ordinary courts over public companies and individuals

This judicial pronouncement has been approved by the Supreme Court of Canada in a number of cases. In *The Queen* v. *Filion* (2), Sedgewick J., after referring to the above remarks of Gwynne J. in *City of Quebec* v. *The Queen (supra)*, said:

"I consider myself bound by that judgment." And in *The King* v. *Dubois* (3), Duff C.J. gave further approval of the correctness of this interpretation of "the object, intent and effect" of the legislation when, after referring to the above views of Gwynne J. and their adoption by Sedgewick J., he said:

> These words of Mr Justice Gwynne adopted by Mr Justice Sedgewick, gave no countenance to the suggestion that the term "public work" in the enactments under consideration should be construed in the sense of public employment or service.

Not only do the words in question have the negative effect which Duff C. J. ascribes to them; but they also indicate very clearly that under the original statute, the liability of the Crown is limited to claims against the government "either for the death of any person, or for injury to the person or property of any person committed to their charge" where the injury happens "upon any railway or other public work of the Dominion under the management and control of the Government"; they also shew the limited class of "servants of the Government" for whose negligence "the Government" is made liable. The limited class consists of "servants of the Government, acting within the scope of their duties or employment upon such public work." In other words the term "officer

(1) (1894) 24 Can. S C R 420 at 449
(2) (1894) 24 Can. S.C.R. 482 at 485.
(3) (1935) S C.R. 378 at 385.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

or servant of the Crown" is confined to the kind or class of servants of the Crown whose duties or employment would be upon a public work, that is to say civil servants of the Government with various duties to perform upon public works, or civilian workmen engaged upon them. There is nothing to suggest that the term should include persons who are in "military service" in the permanent forces or as members of the militia, for such persons while in such military service would have no "duties or employment on any public work". It would seem fair to say, borrowing the phraseology of Duff C.J. in the *Dubois* Case *(supra)* that these words of Mr. Justice Gwynne give no countenance to the suggestion that the term "officer or servant of the Crown" in the enactment under consideration should be construed as including persons in military service as such. The words of Mr. Justice Gwynne, on the other hand, may be taken as authority for the view that the term "officer or servant of the Crown" has been defined by the Supreme Court of Canada as meaning "servants of the Government". When "the Crown" is spoken of in a statute, the term is symbolic of the executive power and means the King acting in his executive capacity. This, in effect, means "the Government". The term "officer or servant of the Crown", as used in section 19 (*c*) of the Exchequer Court Act should, therefore, be regarded as meaning "servants", or "employees", "of the Government" whether appointed by it for the performance of certain duties, or hired by it for certain tasks of employment, all with a view to the accomplishment of governmental purposes, and all under the control of the Government. This, I think, clearly means persons of a civilian status.

This interpretation of the term is, in my opinion, more consistent with the French version of the statute, than a wider one would be. In the French text of the statute, as binding, of course, as the English one, the term used is "employé ou serviteur de la couronne".

Further support for the view that the term contemplates only persons having a civilian status is given by Mr. Justice Gwynne's statement that, within the limits expressed by him, it was "the object, intent and effect" of the enactment to confer upon the Exchequer Court in respect of claims against the government "the like juris-

diction as in like cases is exercised over public companies and individuals". It is, of course, obvious that the only kind of "officers or servants" that a public company or an individual could have would be persons in civil life, that is to say, civilian officers or servants.

It is also a sound principle of construction, to give to phrases or collocations of words that are used in a statute, and have not otherwise been judicially construed either in such statute or in a statute in *pari materia,* the ordinary well established legal meaning that such phrases or collocations of words have acquired. The term "officer or servant" in conjunction with the words "while acting within the scope of his duties or employment" makes its appearance in English legal phraseology with the commencement of the formulation of the modern doctrine of employer's liability. This statement is supported by Professor W. S. Holdsworth who, after discussing the various grounds that had been assigned for holding the master responsible for the acts of his servants, said: (1)

> But, at the end of the eighteenth and the beginning of the nineteenth centuries, it began to be more plainly seen that this liability did not depend upon agency at all It followed that these phrases about implied commands were out of place. Therefore the phrases "scope or course of employment or authority" take their place. This development helped the judges at length to see that the rule rested ultimately on grounds of public policy.

The phrase and the collocation of words had acquired and still have a well known legal meaning; they indicate the circumstances under which the employer is responsible for the acts of his "officers or servants", that is to say, only while they are acting within the scope of their duties or employment. The relationship of an employer to his "officer or servant" is a contractual one, at any rate most certainly a civilian one, and the extent of the employer's liability is limited. It would seem to be a correct interpretation, to say of an enactment whereby liability is imposed for the conduct of "an officer or servant", "while acting within the scope of his duties or employment", that the doctrine of employer's liability has been incorporated in such enactment, subject of course, to whatever restrictions upon its application the enactment may contain. In view of the limited application of the doctrine of employer's liability to the Crown by the statute, as it was

(1) A History of English Law, Vol. VIII p. 478.

1943

MATTHEW McARTHUR v. THE KING

Thorson J

enacted in 1887, it is reasonable to assume that the only "officers or servants" contemplated by the statute were persons who would be subject to the doctrine of employer's liability if the employer, instead of being the Crown, were a corporation or a private individual. To say that when there was only a very limited application of the doctrine of employer's liability to the Crown, the liability should be held to include responsibility for the acts of persons, such as military officers or soldiers on active military service, to whom the doctrine, as it is ordinarily understood as between subject and subject, could not possibly apply, involves, in my opinion, an extension of the terms of the statute that is wholly unwarranted and quite unnecessary to give effect to the remedy which in its limited form the statute was intended to give.

In view of the complete absence of liability on the part of the Crown before the statute in question was enacted, the very limited liability that was imposed by it, the close construction of the statute by the courts and the reasons indicated in this discussion, the conclusion appears to me to be inescapable that the term "any officer or servant of the Crown" as it appeared in Section 16 (*c*) of the Exchequer Court Act of 1887 meant only civilian officers or servants of the Crown, such servants or employees of the Government as would have duties or employment upon a public work, the kind of officers or servants that a public corporation or an individual would have, persons who could be subject to the doctrine of employer's liability as it was ordinarily understood having either full contractual capacity or, at any rate, freedom of action in respect of their duties or employment, and did not include officers or men of the militia of Canada or members of the armed forces of the country engaged in active military service.

The amendment of 1917 made no change in the term "officer or servant of the Crown" or in the collocation of words "while acting within the scope of his duties or employment". The amendment consisted only in the deletion of the words "on any public work" immediately after the words "injury to the person or to property" and the addition of the words "upon any public work" immediately after the words "duties or employment". It should also be noted that the word "upon" replaced the word "on".

1943

MATTHEW McARTHUR v. THE KING

Thorson J

The result of the amendment was that after it was made it was no longer necessary for the suppliant to shew that his injury had occurred actually "on" a public work. Nor did he have to shew that the negligence that was the cause of his injury had arisen "on" a public work, nor that the "officer or servant of the Crown" had duties or employment "on" a public work. All that he had to shew was that his injury had resulted from the negligency of an officer or servant of the Crown, while acting within the scope of his duties or employment "upon any public work", the term "upon any public work" being considered as merely descriptive of the duties or employment of the officer or servant of the Crown. This was the decision in the *Schrobounst* case *(supra)*.

The purpose of the amendment of 1917 in deleting the words "on any public work" immediately after the words "injury to the person or to property" was to make it clear that the suppliant no longer had to shew that his injury had occurred actually "on" a public work and to bring within the ambit of the statute cases such as *Piggott* v. *The King* (1), in which the suppliant had been denied relief against the Crown solely because his injury had not happened "on" the public work. That this was a purpose of the amendment of 1917 was indicated by the Supreme Court of Canada in *Wolfe Company* v. *The King* (2), where Mignault J. after referring to the decision in *Piggott* v. *The King* (*supra*) said:

> The amendment having been made in the year following this decision, it is not unreasonable to suppose that the intention was to bring such a claim as the one dismissed in *Piggott* v *The King* within the ambit of the amended clause.

Likewise in *The King* v. *Dubois* (3), Duff C. J. said:

> My own view, as already intimated is that the principal object of the amendment of 1917 was to bring within the scope of the statute those cases such as *Piggott* v. *The King* and *Chamberlain* v. *The King*, in which an injury not occurring on a public work was caused by the negligence of some servant of the Crown upon a public work; injuries, for example, caused by the escape of sparks from a carelessly constructed locomotive engine, by blasting operations carelessly conducted, and cases in which, through the negligent working of a canal, lands at some distance from the canal are flooded.

(1) (1916) 53 Can. S C R 626.
(2) (1921) 63 Can S C.R 141 at 152.
(3) (1935) S.C R. 378 at 396.

1943

MATTHEW McARTHUR v. THE KING

Thorson J.

It is also clear that another purpose was intended by using the word "upon" instead of the word "on" in connection with the words "any public work" to make it certain that it would not be necessary for a suppliant to show that the duties or employment of the Crown officer or servant had actually been "on" a public work, so long as the duties or employment were related to or connected with a public work; in other words to make it clear that the words "upon any public work" were not restrictive of the locality of the duties or employment of the Crown officer or servant, but were merely descriptive of the nature of such duties or employment. That such a purpose was intended by the amendment is clearly indicated in *The King* v. *Dubois* (1), where Duff C. J. said:

> The purpose of the legislation having been, as I have said, to correct the "stupid" inequalities, to use the phrase of Mr. Justice Idington, arising in the application of the statute as it stood before 1917, it seemed to me that that purpose would be largely frustrated if you read the word "upon" which had been substituted for the word "on" strictly as a preposition of place. In a very large number of cases the offices of the Crown responsible for the injury would be a person whose duties were not carried out on the public work in the physical sense

But, as is pointed out by the Supreme Court of Canada in the *Dubois* case *(supra)* the amendment of 1917 did not go beyond these purposes. There was nothing in the amendment to indicate any other purpose. There was no change in the term "public work", and no change in the term "officer or servant of the Crown". It was not necessary in order to give effect to the purposes of the amendment that have been mentioned to extend the meaning of the term "public work" to include "public service", and there was nothing in the amendment itself to indicate that the legislature meant any more by it than it had expressly stated. In the *Dubois* case (2), Duff C. J., in speaking of the term "public work", said:

> The scope of the phrase in section 16, as ascertained by reference to the legislation in which those provisions took their origin and the definitions in that legislation, and as determined by the decisions of this court, was plainly settled. No expansion of the meaning of the term "public work", so determined, was necessary to give full effect to the amendment. There is nothing in the amendment requiring any alteration in the sense of the term as settled. The amendment, so to speak, was an amendment within the framework of the existing statute; which framework is not altered by it.

(1) (1935) S.C.R. 378 at 397. (2) (1935) S C R. 378 at 393.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

Similarly, it would seem that just as the term "public work" received no enlargement by the amendment of 1917, so the term "officer or servant of the Crown" retained the same meaning after the amendment as it had prior thereto and at the time of the original enactment in 1887. There was no change in the term, and no reason to assume any change in its meaning in order to give full effect to the purposes of the amendment. The reasoning of Chief Justice Duff, to which I have just referred is as applicable in principle to the term "officer or servant of the Crown" as it was to the term "public work". There was certainly nothing in the amendment of 1917 to indicate that the term "officer or servant of the Crown" was thereafter intended to include persons on active military service, if there were no intention prior to the amendment that the term should include such persons.

The only enlargement in respect of the term was a quantitative or numerical one, consequently resulting from the amendment, namely, that it would now cover persons whose duties or employment were "upon any public work" in the sense given to those words, as above indicated, even although they may not have been actually "on" a public work. The kind or class of "officer or servant of the Crown" was in nowise affected by the 1917 amendment. It was still of a civilian character.

The course thus far taken by the courts in interpreting the meaning of the statute is in accordance with the rule of interpretation laid down in Maxwell on The Interpretation of Statutes, 8th Edition, at page 73, where, after mentioning that there are certain objects which the Legislature is presumed not to intend, the author says:

> One of these presumptions is that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual, or their natural sense, would be to give them a meaning other than that which was actually intended General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually be

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

construed as being limited to the actual objects of the Act The general words of the Act are not to be so construed as to alter the previous policy of the law.

It was in the light of these principles that the Courts construed the term "on any public work" in the 1887 enactment and the term "upon any public work" in the 1917 amendment. The construction of these terms, which, apart from their context, were general ones, was limited to the actual objects of the Act.

It is clear, therefore, that it is not a proper approach to the interpretation of the term "any officer or servant of the Crown", even after the amendment of 1938, whereby the words "upon any public work" were omitted from section 19 (*c*) altogether, to assume at the outset that the term now includes every person performing any kind of public duty or rendering any kind of national service even if the term by itself should be capable of such a meaning. We have already seen, for example, that certain persons, such as Ministers of the Crown and others are not included within the meaning of the term, notwithstanding the fact that they have public duties to perform and receive their appointments and emoluments from the Crown. The term must be interpreted in such a way as to give effect to the actual objects of the Act, but the Court has no right to give it a wider meaning.

This is, perhaps, particularly true of a statute such as the present one, touching as it does the position of the Crown and the basic law that, apart from statute, the Crown is not liable for damages resulting from negligence.

Maxwell, in the text book above referred to, at page 120, makes the following statement as to the construction of a statute in so far as it affects the Crown:

> At all events, the Crown is not reached except by express words or by necessary implication in any case when it would be ousted of an existing prerogative or interest It is presumed that the Legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms or makes the inference irresistible. Where, therefore, the language of the statute is general, and in its wide and natural sense would divest or take away any prerogative or right from the Crown, it is construed so as to exclude that effect

The statutory rule goes even further for section 16 of the Interpretation Act, R.S.C. 1927, chap. 1 provides:

> 16. No provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

Was there anything in the amendment of 1938 that involved any change in the meaning of the term "officer or servant of the Crown" in the section as amended from that which it had immediately prior to the amendment? It has been seen that there was an expansion of liability on the part of the Crown for negligence as the result of the 1917 amendment. The term "upon any public work" was entitled to a broad interpretation as was indicated by Duff C. J. in *The King* v. *Dubois* (1), when he said:

> My view has always been that where you have a public work, in the sense indicated in the course of the preceding discussion, and an injury is caused through the negligence of some servant of the Crown in the execution of his duties or employment in the construction, the repair, the care, the maintenance, the working of such public work, you are not deforming the language of the section, as amended in 1917, by holding that such an injury comes within the scope of the statute, that is to say, that it is an injury due to the negligence of an employee of the Crown while acting in the scope of his duties or employment "upon a public work". I have always thought, moreover, that the principle ought not to be applied in a niggardly way and that it ought to extend to the negligent acts of public servants necessarily incidental to the construction, repair, maintenance, care, working of public works.

The number of persons, therefore, whose negligence in the course of their duties or employment might involve the Crown in liability for the results of such negligence was substantially enlarged, but the Crown was still liable only for the negligence of officers or servants whose duties or employment were connected with or related to some aspect of a public work. That meant only civilian servants or employees of the Government where the relationship of the officer or servant to the Crown was one of civilian employment, whether created by appointment or by contract. The amendment of 1917, in order to effect its purposes, as has been seen, did not involve any extension of the term "officer or servant of the Crown" other than one that was purely consequential to the amendment but was still only quantitative or numerical in character.

The amendment of 1938, by deleting the "troublesome" words "upon any public work" from the section, greatly increased the number of persons for whose negligence the Crown might become responsible. It was no longer necessary for the suppliant to show that the duties or employment of the officer or servant of the Crown, whose negligence had resulted in injury to him, had been "upon

(1) (1935) S C R 378 at 397.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

any public work". All that he had to show was that his injury resulted from the negligence of any officer or servant of the Crown while acting "within the scope of his duties or employment". There was no longer any restrictive description of his duties or employment in the statute.

The amendment of 1938 was intended to bring within the ambit of the section such claims as the one that was in question in the *Dubois* case (*supra*), where the officers or servants of the Crown were engaged in the public service of locating and removing radio inductive interference. After the 1938 amendment any person in the employ of the Government engaged in a public service of a similar nature or kind, could be deemed to be an "officer or servant of the Crown" within the meaning of the section. The duties or employment of the officer or servant no longer had to have any connection with or be in any way related to a public work; they could be incidental to any kind of governmental activity, for the accomplishment of which the officer or servant had been appointed or hired.

In the last case which came before the Supreme Court of Canada in which the section, as it stood prior to the 1938 amendment, was before the Court for consideration, *Salmo Investments Limited* v. *The King* (1) Crocket J., at pages 272, 273, said:

> The section remained as thus amended until Parliament in 1938 finally, and, if I may say so, very sensibly, removed the troublesome words "upon any public work", entirely from the section, and thereby established the doctrine of *respondeat superior* as regards the Crown, and rendered it liable for the negligence of its servants in the course of their employment, in the same way as any other master would be liable for the negligence of his or its servants.

While the 1938 amendment and its effect were not before the Court and the above remarks of Crocket J. were, therefore, perhaps *obiter*, I am of the opinion that they correctly express the "object, intent and effect" of the enactment in its amended form. They are in accord with the pronouncement of Gwynne J. in *City of Quebec* v. *The Queen* (2) which I have already quoted, but take the liberty of quoting again, deleting only the limitations expressed by him which are no longer applicable to the enactment as it now stands:

(1) (1940) S.C.R. 263.

(2) (1894) 24 Can. S.C.R. 420 at 449.

> The object, intent and effect of the above enactment was, as it appears to me, to confer upon the Exchequer Court, in all cases of claim against the government, either for the death of any person or for injury to the person or property of any person . . . . ., arising from the negligence of the servants of the government, acting within the scope of their duties or employment . . . . ., the like jurisdiction as in like cases is exercised by the ordinary courts over public companies and individuals.

While the doctrine of employer's liability became thus fully applicable to the Crown in respect of the tort of negligence, by virtue of the 1938 amendment of the statute, and a great extension of the field of the liability of the Crown for the negligence of its officers or servants resulted in consequence thereof, the amendment had no further effect. The officers or servants for whose negligence the Crown was made responsible were still the kind or class of officers or servants to whom the doctrine of employer's liability would apply if the employer were some person other than the Crown, that is to say, employees of the Government in the real sense of the term, coming within the general concept of the relationship of master and servant as it is ordinarily understood, with full freedom of action to each party to the relationship, persons of the same kind or class as public companies or individuals could have as their officers or servants, in other words, civilian servants or employees of the government appointed or hired by it to carry out the regular purposes of government.

Since the amendment would have the wide effect which was intended for it, namely, that of making the doctrine of employer's liability applicable to the Crown so far as the tort of negligence is concerned, without any change in the meaning of the term "officer or servant of the Crown" and since, therefore, no change of meaning is necessary to give effect to such purpose of the amendment, the term should not receive any wider meaning than it had before. There is nothing in the amendment itself to indicate that the term "officer or servant of the Crown" was intended to receive any meaning different from that which it had before. There was no change in the term "officer or servant of the Crown" itself or in the collocation of words "while in the course of his duties or employment". There is nothing to indicate in any way that the legislature intended to go beyond the application of the doctrine of employer's liability to the Crown in the field of negligence,

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

or that it meant to include within the scope of the doctrine persons of a class or kind to whom the doctrine as it is ordinarily understood could not apply, such as persons on active military service who, in the emergency of war, offer their services to their country for the duration of the emergency and by so doing enter into a status fundamentally different from that of a government servant or employee. Before the Crown should be held responsible for the negligence of such persons to whom the doctrine of employer's liability, as understood between subject and subject, would not apply, and where the relationship of the parties is so different from that of master and servant, or employer and employee, would require language in the statute of the clearest and most explicit kind. Any such far reaching extension of the liability of the Crown would have to be stated in the statute in express terms. In the absence of such express statutory terms, the Court is not justified in including within the term "officer or servant of the Crown", which by judicial definition has become synonymous with the term "servant or employee of the government", persons whose status is fundamentally different from that of government servants or employees.

That the status of a soldier on active miiltary service who has enlisted for the duration of the present emergency is fundamentally different from that of a civilian servant or employee of the Government seems quite clear. The soldier driver of the motor vehicle in question in this petition of right, Private William James MacDonald, enlisted on October 8th, 1940, at Toronto in the Canadian Active Service Force, with the unit described as No. 2 District Depot, Canadian Active Service Force, Royal Canadian Army Service Corps (Service Wing). It appears from his attestation paper, Form M.F.M. 2, that on the said date he took the oath of allegiance and made the declaration required to be taken and made by a man on his attestation. The oath of allegiance was in the following form,—

I, William James MacDonald do sincerely promise and swear (or solemnly declare) that I will be faithful and bear true allegiance to His Majesty.

W. J. MacDonald.

A specific statutory effect is given to this oath by section 21 of The Militia Act, R.S.C. 1927, Chap. 132, which provides not only for the taking of the oath but also for the effect it shall have, as follows:

21. The following oath shall be taken and subscribed before one of such commissioned officers of the Militia as are authorized for that purpose by any general order or by regulation, or before a justice of the peace, by every person upon engaging to serve in the Active Militia:—

I, A.B., do sincerely promise and swear (or solemnly declare) that I will be faithful and bear true allegiance to His Majesty.

2. Such oath shall have the effect of a written engagement with the King, binding the person subscribing it to serve in the Militia until he is legally discharged, dismissed or removed, or until his resignation is accepted.

In addition to taking this oath of allegiance Private MacDonald, after having given certain particulars with regard to himself, also made the following declaration:

I, William James MacDonald, do solemnly declare that the above particulars are true, and I hereby engage to serve in any Active Formation or Unit of the Canadian Army so long as an emergency, i.e., war, invasion, riot or insurrection, real or apprehended, exists, and for the period of demobilization after said emergency ceases to exist, and in any event for a period of not less than one year, provided His Majesty should so require my services.

W. G. Black.

Dated October 18th, 1940. W. J. MacDonald.

This indicates the nature and extent of Private MacDonald's engagement on his enlistment.

Sections 139 and 140 of the Militia Act provide for the making of regulations for carrying the Act into effect and for giving such regulations the force of law, as follows:

139. The Governor in Council may make regulations for carrying this Act into effect, for the organization, discipline, efficiency and good government generally of the Militia, and for anything requiring to be done in connection with the military defence of Canada.

140. Such regulations shall be published in the *Canada Gazette*; and upon being so published, they shall have the same force in law as if they formed part of this Act.

Under these provisions of the Militia Act the Governor in Council made the regulations known as The King's Regulations and Orders for the Canadian Militia, or more briefly, K.R. (Can.).

In conjunction with section 21, subsection 2, of the Militia Act there should also be read paragraph 302 of the said K.R. (Can.) which provides that upon signing the

1943

MATTHEW McARTHUR v. THE KING

Thorson J

declaration and taking the oath the person concerned shall be deemed to be enlisted as a soldier of the Non-Permanent Active Militia.

By virtue of these provisions Private MacDonald on his enlistment as a soldier of the Canadian Active Service Force became a member of the Non-Permanent Active Militia of Canada. In that category he would come within the ambit of the statement made by Taschereau J. when delivering the judgment of the Supreme Court of Canada in *Larose* v. *The King* (1):

> Then I do not see that the words "any officer or servants of the Crown" can be held to include the officers or men of the militia. It must not be lost sight of that the suppliant to succeed must come within the strict words of the statute.

Section 64 of the Militia Act provides for the placing of the Militia on active service by reason of emergency as follows:

> 64. The Governor in Council may place the Militia, or any part thereof, on active service anywhere in Canada, and also beyond Canada, for the defence thereof, at any time when it appears advisable so to do by reason of emergency.

and by Section 2, paragraph (*b*) it is provided that;

> "emergency" means war, invasion, riot or insurrection, real or apprehended.

Such an emergency was declared to exist by a Proclamation issued on September 1st, 1939, pursuant to Order in Council P.C. 2477 of the same date; under the provisions of the War Measures Act, R.S.C. 1927, chap. 206, the issue of such a Proclamation is conclusive evidence that the emergency exists.

By orders of the Governor in Council under Sec. 64 of the Militia Act, all active units of the Canadian Army have been placed on active service in Canada, and by a further order all such units which have been or may be comprised in or form part of the Canadian Active Service Force Overseas (now the Canadian Army Overseas) have been placed on active service beyond Canada for the defence thereof.

Furthermore Section 69 of the Militia Act provides for the subjection of officers and men of the Active Militia to military law, as follows:

> 69 The *Army Act* for the time being in force in Great Britain, the King's regulations, and all other laws applicable to His Majesty's troops in

(1) (1901) 31 S.C.R. 206 at 209.

Canada and not inconsistent with this Act or the regulations made hereunder, shall have force and effect as if they had been enacted by the Parliament of Canada for the government of the Militia.

2. Every officer and man of the Militia shall be subject to such acts, regulations and laws

(*a*) from the time of being called out for active service; etc.

and by Section 2, paragraph (*g*) it is provided that:

"On active service", as applied to a person subject to military service, means whenever he is enrolled, enlisted, drafted or warned for service or duty during an emergency, or when he is on duty, or has been warned for duty in aid of the civil power.

Private MacDonald, therefore, on his enlistment in addition to becoming a member of the Non-Permanent Active Militia of Canada, was immediately on active service and became subject to military law.

It remains now to consider his status and the respects in which it is fundamentally different from that of a civilian servant or employee of the government.

In the first place the engagement upon which such a person enters upon his enlistment is a personal engagement with the King, with obligations attached thereto of only a unilateral character. The relationship is very different from the contractual relationship that exists between a master and his servant, with full freedom of action on the part of each. While the enlisted soldier must serve the King for the period for which he has engaged himself and cannot, prior to the legal termination thereof, leave such service unless he is released therefrom by the authority of the King, without subjecting himself to penal consequences, there is on the other hand no obligation on the part of the King to retain the soldier for any period of service. Even although the causes of discharge from the service have been specified by Orders in Council, there is nothing to restrict the Governor in Council from discharging a soldier on any ground. In other words, the obligations as to service are only unilateral in that while the soldier must carry out his engagement of service under penal consequences for failure to do so, the King may dispense with the services of his soldier at pleasure and the soldier has, of course, no remedy for such discharge, even if such discharge be without cause.

Then, too, special provisions are made by statute for compensation to soldiers on active service for disability

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

resulting from injury or disease and to their dependents in the case of their death, which are not applicable to ordinary officers or servants of the Crown.

Moreover, the pay and allowances of members of the Active Militia on active service are at such rates as may be prescribed by the Governor in Council. They are in the main fixed according to the rank of the soldier regardless of the nature of his duties. Even in respect of his pay and allowances the soldier has no contractual rights against the Crown. It is clearly established that no petition of right or any other proceeding against the Crown will lie in law for the recovery of military pay by an officer or soldier. *Cooke* v. *The King* (1) and the cases therein referred to.

Indeed it is established that all engagements between those in the military service of the Crown and the Crown are voluntary on the part of the Crown and give no occasion for an action in respect of any alleged contract, and that rule applies as well to private soldiers as it does to officers. *Mitchell* v. *The Queen* (2) and *Leaman* v. *The King* (3).

While these aspects of the personal engagement of the soldier with the King shew that the relationship is very different from that of master and servant in the ordinary sense and substantially different from that of a servant or employee of the Government, there is still another difference in status that is even more striking.

As I have indicated, a soldier such as Private MacDonald on his enlistment subjects himself to military discipline and military law. He owes a duty of implicit obedience to superior authority. He has not only abandoned his civilian status and given up many of his civil rights as an ordinary person but he has also assumed obligations and incurred the risk of penalties of a kind radically different from those to which a civilian can be subject. He may be tried by court-martial for acts committed by him which are not illegal under any law other than the military one and which, if committed by him in civilian life would carry no penal consequences with them, but which, according to military law, may involve him in the loss of his personal liberty. For example, under military law severe penalties such as penal servitude, imprisonment or detention may be awarded

(1) (1929) Ex. C.R. 20. (2) (1896) 1 Q.B. 121 n.
(3) (1920) 3 K.B.D. 663.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

to a soldier who deserts, absents himself without leave or disobeys the orders of a superior, whereas the same acts if done by a civilian servant or employee of the Government, while they might result in his dismissal from the service, could not involve him in any deprivation of liberty or in penal consequences of any kind. Indeed, some breaches of duty on the part of a soldier on active service might bring upon him the penalty of death.

It is, therefore, quite clear that the status of a person who has enlisted for active service for the duration of the present emergency is fundamentally different from that of an ordinary "officer or servant of the Crown" with the connotation of that term indicating service or employment with the Government.

Furthermore, the wide scope of the Militia Act indicates that something quite different from service or employment with the Government is contemplated by it. Section 8 of the Militia Act indicates how wide the liability to militia service is. Potentially, it extends to every male inhabitant in Canada who is capable of bearing arms. The section provides as follows:

> 8. All the male inhabitants of Canada, of the age of eighteen years and upwards, and under sixty, not exempt or disqualified by law, and being British subjects, shall be liable to service in the Militia: Provided that the Governor General may require all the male inhabitants of Canada capable of bearing arms, to serve in the case of a *levée en masse*.

From the previous discussion of Section 19 (*c*) of the Exchequer Court Act, both as originally enacted and in its present form, it is clear that Parliament intended to impose the doctrine of employer's liability upon the Crown with respect to the tort of negligence first, within the narrow limits fixed by the original enactment of 1887, then, within the extended range resulting from the amendment of 1917, and finally, by the amendment of 1938, over the whole field of negligence, as suggested by Crockett J in *Salmo Investments Limited* v. *The King* (1) in the statement which I have already cited, but that liability was only in respect of officers or servants of the Crown while acting within the scope of their duties or employment. It seems to me beyond argument that when Parliament first imposed a liability upon the Crown for the negligence of its officers or servants it never contemplated a potential liability for the negligent

(1) (1940) S C R. 263 at 272, 273.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

acts of all the male inhabitants of Canada, capable of bearing arms, in the event of their being engaged in the national duty of active militia service. Nor can I see anything in the amendments of 1917 or 1938 whereby a strictly limited liability for the negligence of certain persons in the service or employment of the Government under specified circumstances has been turned into what is virtually capable of becoming an almost unlimited liability for the negligence of all the male inhabitants of Canada capable of carrying arms, who may become members of the Active Militia on active service. Such an expansion of the liability of the Crown is not possible except by express statutory enactment.

It is clear from the judicial history of section 19 (*c*) of the Exchequer Court Act that the term "officer or servant of the Crown" carries with it the connotation of service or employment with the Government in connection with some aspect of governmental administration or activity. It would, in my view, involve an improper straining of the term "officer or servant of the Crown" as it is used in the section to hold, that it extends to and includes persons who either by voluntary enlistment or by process of law become members of the Active Militia of Canada on active service. In my judgment, when a person becomes a member of the Active Militia of Canada on active service, whether by process of law or by voluntary enlistment, whereby he offers his services, and, if necessary, his life to his country for the duration of a national emergency, such as now exists, he is performing what may be termed a national function of citizenship of the highest order that is not in any way related to governmental service or employment. When he assumes that function he does not enter upon service or employment with the Government and does not become a Crown or governmental servant or employee in any sense of the term. His duties and his status are of an entirely different character. His legal status, in my judgment, may be defined as that of a person under a written personal engagement with the King whereby he renders his services as a soldier in the defence of his country pursuant to his duty of allegiance to the King, whose subject he is. Such a status is quite different from that of an "officer or servant of the Crown" as that term is used in section 19 (*c*) of the Exchequer Court Act, with its connotation of governmental

service or employment in connection with some aspect of governmental administration or activity. Nor does it make any difference to the status of such person, whether he is called to such national duty under the provisions of a statutory enactment or whether he enters upon such a status by his voluntary enlistment. Certainly he does not lose the status he would have, had he been called thereto by process of law, by the fact that his enlistment has been voluntary. Nor does the particular duty or function that he may be performing while he is on active service in any manner affect his status, for he is liable for general active service and subject to such assignments of particular tasks as superior military authority may from time to time determine.

This view as to the status of a member of the Active Militia on active service was expressed by Audette J. in *Cooke* v. *The King* (1). When speaking of section 8 of the Militia Act (then R.S.C. 1906, chap. 41, Section 10), he said:

> The compliance with this law, whereby the subject is so enlisted, cannot be called a contract creating mutual rights and obligations between the parties, as contended by suppliant at trial. The enlistment is more in the nature of a formal transmutation of a citizen into a soldier for the time being and as required by the defence of the realm.

and later:

> The enlistment is more in the nature of a species of compact (which is intelligible and requires only the statement of it to recommend it to the consideration of anyone of common sense) whereby the soldier is placed at the pleasure of the State,

and further:

> The authority and power given to the State under the Act is quite extensive. The King has the right to require the personal service of every man able to bear arms and the allegiance due from the subject renders it incumbent upon him to assist his Sovereign The prerogative of the Crown is founded on immemorial usage, recognized, admitted and sanctioned by Parliament. Chitty's prerogative, 46, 47.

A similar view was also expressed by the New York Court of Appeals in *Goldstein* v. *State of New York* (2). There the Court in dealing with a question similar to the one new under discussion, after referring to the provisions of the State Military Law, said (3):

(1) (1929) Ex C R 20, at 23.
(2) (1939) 281 N Y 396, 24 N E (2d) 97; 129 A L R 905
(3) 129 A L.R 905 at 908

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

It seems clear that one who joins the State militia and is engaged in active service therein is in no sense an employee of the State. He is simply performing a duty which he owes to the sovereign State as a resident and citizen. It makes no difference whether he does that voluntarily in time of peace or in response to the call of the Governor in time of trouble.

Before dealing further with the decision in the *Goldstein* case, I should first make reference to certain opinions that have already been expressed in this Court as to whether members of His Majesty's armed forces in peace time, being members of the Permanent Forces and not of the Non-Permanent Active Militia, were officers or servants of the Crown within the meaning of section 19 (*c*) of the Exchequer Court Act. There are two cases to which reference should be made.

The first one is *Moscovitz* v. *The King* (1). In that case the suppliants were the widow and stepmother of a man who had been killed while a pasenger in a motor truck. It was alleged that his death was the result of negligence on the part of Private Kelly who had enlisted in the Permanent Forces as a member of the Canadian Army Service Corps and was engaged as a transport driver. He was stationed at Kingston and was driving a motor truck loaded with supplies from Kingston. After he had delivered the supplies to the Royal Canadian Air Force at Trenton and while he was returning to Kingston the truck which he was driving collided with that in which the deceased was a passenger resulting in his death.

The action was tried by Maclean J. who held that Private Kelly was an officer or servant of the Crown within the meaning of section 19 (*c*) of the Exchequer Court Act and that he had been employed "upon a public work" at the time of the negligence which resulted in the death of the deceased, and found in favour of the suppliants. At page 192, he said:

> Private Kelly was engaged in the Canadian Army Service Corps, as a transport driver, and such were his duties, and it was while acting within the scope of such duties the accident here occurred On the occasion in question, Kelly was, I think, a servant of the Crown, performing a public work. The fact that Kelly was an enlisted soldier, or in a soldier's uniform, would not seem to me to affect the question as to whether or not he was a servant of the Crown, on a public work, on the occasion in question.

(1) (1934) Ex. C.R. 188.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

and later, on the same page:

> I know of no principle or authority for the proposition that an enlisted member of the Permanent Military Forces of Canada is not a servant of the Crown, for some purposes at least. I think Kelly was a servant of the Crown in the sense intended by the Exchequer Court Act.

Before stating these views he sought to distinguish the case before him from the facts in *Larose* v. *The King* (1) and to explain the opinion of Taschereau J. in that case. At page 191, he said:

> The facts of that case would seem to me to be inapplicable here. On appeal to the Supreme Court of Canada, Taschereau, J., who delivered the judgment of the court, said: "Then I do not see that the words that 'any officer or servant of the Crown' can be held to include the officers or men of the militia". I cannot feel confident just what was meant by this observation. By sec. 76 of the Militia Act, Chap. 41 R S C, 1886, Her Majesty was empowered to sanction the organization of rifle associations, and of associations for purposes of drill, to be composed of Militia officers, or men on the Militia Rolls, and of independent companies of infantry composed of professors, masters or pupils of universities, schools or other public institutions, or of persons engaged in or about the same, under such regulations as were from time to time approved by Her Majesty; but such associations or companies, it was provided, should not be provided with any clothing or allowance therefor. I think that Taschereau J. was of the opinion in that case, that the "officers or men of the militia" were not "officers or servants of the Crown", upon the ground that at the time material there, the "officers or men of the militia" were acting as members of a voluntary rifle association, and were not under any obligation as to service in such rifle association, and were not under the pay of the Crown as such.

With great deference to the late President of this Court, I cannot see any grounds for assuming that Taschereau J., when he stated that he did not see that the words " any officer or servant of the Crown " could be held to include the officers or men of the militia, was thinking of members of a voluntary rifle association. Indeed, such an assumption is not in accord with the facts. It is quite clear from the report of the *Larose* case (*supra*) that when Taschereau J. referred to officers or men of the militia he meant exactly what he said and did not have in mind persons who were merely members of a voluntary rifle association. The report clearly shews that the rifle practice that was taking place on the rifle range in question was governmental rifle practice for members of the militia under the supervision of the Department of Militia and not merely rifle practice of members of a voluntary rifle association. It is true, of course, that there were also

(1) (1901) 31 Can. S C R 206

1943

MATTHEW McARTHUR v. THE KING

Thorson J

some amateurs or volunteers not on duty who were practising on the rifle range at the time in question, but it is obvious from the report of the case that Taschereau J. was not thinking of any such persons. That such is the fact may be seen from the following extracts from the judgment in the *Larose* case (1). At page 208, Taschereau J. said:

> The suppliant brought this action in the Exchequer Court by petition of right against the Crown, claiming $10,000 for personal damages, alleging that the bullet which wounded him had been fired by one of the militiamen of Her Majesty, who was practising shooting at the place, and that
>
> "les autorités dépendant du département de la milice qui ont le contrôle de ce champ de tir, savaient que l'exercice du tir à cet endroit, surtout avec les balles et les fusils employés dans les dernières années, étaient dangereux pour les voisins".
>
> No other act of negligence or ground of action is charged in the petition of right.

and, at page 209:

> Moreover, it is not proved who fired the shot that wounded the suppliant It may have been fired by one of the amateurs or volunteers not on duty, who were there practising on that date with the men having what is called in the case, government practice.

If there had been any evidence that the shot had been fired by "one of the amateurs, or volunteers not on duty", there would have been no reason for Mr. Justice Taschereau making any remarks at all about officers or men of the militia.

Maclean J. after making the comment on the *Larose* case (*supra*) which I have cited, then made reference to the opinion of Burbidge J., who had been the trial judge in that case, that the rifle range was not a public work within the meaning of the term as used in the Exchequer Court Act, and continued with the following statement, at page 191:

> I do not therefore think that Taschereau, J intended to say that "any officer or servant of the Crown", did not include one enlisted in one of the permanent military services of Canada maintained by the Crown, and whose assigned duties were comparable to those of Kelly in this case.

While I am unable to conclude from anything that Taschereau J. said in the *Larose* Case (*supra*) whether he meant to exclude from the ambit of his remarks members of the permanent military services of Canada, the fact remains that in the *Moscovitz* Case (*supra*) Maclean J. was

(1) (1901) 31 Can S C R 206

1943

MATTHEW McARTHUR v. THE KING.

Thorson J

of the opinion that the exclusion of officers or men of the Militia from the term " officer or servant of the Crown " as used in the Exchequer Court Act did not extend to members of the permanent military services of Canada such as Private Kelly.

Upon appeal to the Supreme Court of Canada, the judgment of the Exchequer Court was reversed for reasons similar to those that moved the Court to reverse the judgment of the Exchequer Court in *The King* v. *Dubois* (1).

In *The King* v. *Moscovitz* (2) the Supreme Court of Canada dealt directly with the opinion expressed by Maclean J. in the court below that Private Kelly when driving the motor truck in question was employed " upon a public work " and held that his opinion in that respect was erroneous and inadmissible, in view of the meaning of the term " public work " and the fact that it did not include public service.

Duff C.J. who delivered the judgment of the court said, at page 407:

> The phrases "public work" and "chantier public" contemplate, as has been fully explained in *Dubois'* case, not public services, but physical things . . . .
>
> I cannot find here any such connection between the duties or employment in which Kelly was engaged at the time of the collision, and either the garage at Kingston which served as a depot for mechanical transport vehicles, or the Trenton airport, as to bring Kelly's negligence within the scope of the words quoted. Kelly was, in truth, simply the driver of an automobile the property of the Crown under the control of the Army Service Corps; an automobile used generally, it may be assumed, for the purposes of military transport If you interpret "public work", "chantier public", as the learned President has done, as embracing a public service of that kind, then the case, of course, falls within the statute I have given my reasons in the *Dubois* case for the conclusion that the phrase cannot receive such an extended interpretation. Such a public service is not, as explained in that judgment, for the purpose in hand, differentiated by any substantial distinction from any other public service; and to read "public work", "chantier public", as the equivalent of public service, is for the reasons there given plainly inadmissible.

The Supreme Court of Canada did not however deal with the opinion expressed by Maclean J. in the court below that Private Kelly was an " officer or servant of the Crown " within the meaning of the Exchequer Court Act, unless an inference that the Supreme Court had approved of his opinion on that question may be drawn from a certain sentence from the judgment of Chief Justice Duff which I have cited, to which sentence I shall later refer.

(1) (1935) S C R 378 (2) (1935) S.C.R. 404.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

The second case in which an opinion on the question was given is *Yukon Southern Air Transport Limited* v. *The King* (1). In that case the Court had before it a petition of right whereby the suppliant claimed damages from the Crown for the total loss of an aeroplane owned by it due to the alleged negligence of Sergeant Pilot Davis and Squadron Leader Fullerton, both members of the Royal Canadian Air Force. It should perhaps be noted that the accident in question in the proceedings took place on March 2nd, 1939, after the amendment of 1938 had gone into effect, but before the commencement of the present emergency.

One of the questions before the Court was whether Sergeant Pilot Davis and Squadron Leader Fullerton were officers or servants of the Crown within the meaning of Section 19 (*c*) of the Exchequer Court Act. Counsel for the suppliant contended that they were and in support of such contention relied upon the following sentence taken from the judgment of Duff C.J. in *The King* v. *Moscovitz* (2) which I have already cited.

> If you interpret "public work", "chantier public", as the learned President has done, as embracing public service of that kind, then the case, of course, falls within the statute.

It was argued that by this statement the Chief Justice had made it clear that but for the fact that the accident had not occurred "upon a public work" the Crown would have been liable in the *Moscovitz* case (*supra*). The statement was relied upon as authority for the contention that it had been held in the *Moscovitz* case (*supra*) by Maclean J. that Private Kelly, at the time of the accident in that case, had been an officer or servant of the Crown within the meaning of section 19 (*c*) of the Exchequer Court Act and that this view had been approved by the Supreme Court of Canada by the above statement but that the petition had been dismissed by the Supreme Court of Canada solely on the ground that Private Kelly's employment had not been "upon a public work". This inference from the sentence that I have quoted and the contention of counsel based upon it appears to have been adopted by the Court. In giving judgment in favour of the suppliant Angers J. said (3):

(1) (1942) Ex. C.R. 181. (2) (1935) S.C.R. 404 at 407.
(3) (1942) Ex. C.R. 181 at 188.

After a careful perusal of the law and precedents, I am satisfied that Fullerton and Davis were, at all times material herein, officers and servants of the Crown within the meaning of paragraph (*c*) of subsection 1 of section 19 and that consequently, if the accident was caused by their negligence or the negligence of either of them the respondent is responsible therefor See *Larose* v. *The King* (1); *Moscovitz* v. *The King* (2). In the latter case Sir Lyman Duff C. J. expressed the following opinion (p. 408):

> "If you interpret 'public work', 'chantier public', as the learned President has done, as embracing a public service of that kind, then the case, of course, falls within the statute."

With great deference to the opinion so expressed by Angers J., I think that the above sentence from the judgment of the Chief Justice in the *Moscovitz* case (*supra*) should be read with the context in which it appears. The Judgment of the Chief Justice, from which this sentence is taken, is devoted to the conclusion that it is inadmissible to read the term "public work", "chantier public", in section 19 (*c*) of the Exchequer Court Act as the equivalent of public service, and that the kind of service that Private Kelly was performing, since his employment was not "upon a public work", made no difference. When the Chief Justice made the statement referred to, he did so in the course of an argument resulting in that conclusion. I venture the opinion that when he made it he did not have in mind any pronouncement at all, either directly or by implication, upon the opinion expressed by Maclean J. in the Court below that Private Kelly was an "officer or servant of the Crown" within the meaning of section 19 (*c*) of the Exchequer Court Act. The whole tenor of the argument shews that it was the other opinion expressed by Maclean J. in the court below namely, that Private Kelly in driving his truck under the circumstances in question was employed "upon a public work", that was under examination. Indeed, it appears to me that the sentence in question is clearly referable to such other opinion. The Supreme Court of Canada having come to the conclusion that Private Kelly's duties or employment were not duties or employment "upon a public work", within the meaning of the term "public work", "chantier public", as explained in the *Dubois* case (*supra*), and that the judgment of the court below should be reversed on that ground, it became quite unnecessary for it to make any pronouncement at all

(1) (1901) 31 Can. S.C.R. 206.

(2) (1934) Ex. C.R. 188; (1935) S.C.R. 404.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J

upon the question whether Private Kelly was or was not an "officer or servant of the Crown" within the meaning of the statute. That question had, by reason of the conclusion reached by the Supreme Court, become immaterial to the issue that was before it and any pronouncement upon it could have no effect upon the result of the case. Under the circumstances, I am of the view that no inference should be drawn from this sentence, taken out of its context, that the Supreme Court of Canada has held in the *Moscovitz* case that a member of the permanent military services of Canada is an "officer or servant of the Crown" within the meaning of section 19 (*c*) of the Exchequer Court Act. I cannot believe that the Supreme Court intended a pronouncement of such importance to be left as a matter of such inference, particularly when an inference as to a different matter may quite properly be taken. In my opinion the better view is that the Supreme Court in the *Moscovitz* case (*supra*) made no pronouncement at all upon the question.

In view of the reversal of the judgment of the Exchequer Court in the *Moscovitz* case (*supra*) by the Supreme Court of Canada on the grounds mentioned, it may be that the opinion expressed by Maclean J. in that case that Private Kelly was an officer or servant of the Crown within the meaning of section 19 (*c*) of the Exchequer Court Act, since it now stands by itself and is unsupported by a judgment based upon it, has no binding force as a judicial pronouncement but the same cannot be said of the decision of the Court in *Yukon Southern Air Transport Limited* v. *The King* (1). In that case the opinion of Angers J. that Sergeant Pilot Davis and Squadron Leader Fullerton were "officers or servants of the Crown" within the meaning of section 19 (*c*) of the Exchequer Court Act is clearly not *obiter* since it was essential to the judgment rendered. Indeed, without such a finding the Court would have been without jurisdiction to determine the other issues involved in the petition. It should be pointed out, however, that the decision does not go beyond holding that the officers of the Royal Canadian Air Force in question in that action, both of them members of the Permanent Force, were "officers or servants of the Crown" within the meaning of section 19 (*c*). Since Private Macdonald, at the time of the accident in

(1) (1942) Ex. C.R. 181.

1943

MATTHEW McARTHUR v. THE KING

Thorson J

this case, was a member of the Non-Permanent Active Militia on active service and, in my opinion, clearly within the ambit of the judgment of the Supreme Court of Canada in the *Larose* case (*supra*), I must hold that the decision of this court in *Yukon Southern Air Transport Limited* v. *The King* (*supra*) is not applicable to the circumstances of the case now under consideration.

It may be that a differentiation should be made between members of the Permanent Forces of Canada in peace time and members of the Active Militia on active service in a time of emergency such as the present. While I am not inclined to such a view, I appreciate that an argument in favour of such a differentiation might be supported by reference to the special provisions of the Militia Act relating to the Permanent Force and setting it apart, as it were, from the rest of the Militia. It might also be contended that, with the deletion of the words "upon any public work" from section 19 (*c*) of the Exchequer Court Act, after the amendment of 1938, the section now includes within its ambit liability on the part of the Crown for the negligence of persons permanently engaged in its military service as a profession and that such persons are "officers or servants of the Crown" within the meaning of the section. It might be argued further that the professional service of such persons is not rendered as a matter of national duty or pursuant to any duty of allegiance, since no emergency exists, but solely as a matter of personal choice with no obligatory liability to militia service involved therein and is, therefore, of the nature of governmental service or employment. If such a differentation should be made, then, of course, *Yukon Southern Air Transport Limited* v. *The King* (*supra*) stands clearly distinguishable from *Larose* v. *The King* (*supra*). If, on the other hand, no distinction should be made, then the judgment of the Supreme Court of Canada in *Larose* v. *The King* (*supra*) is the superior and governing authority. In any event this question is not presently before the Court for determination.

I may, perhaps, add that the term "militia" by section 2(*e*) of the Militia Act means all the military forces of Canada and that, so far as I have been able to gather, whatever differences there may possibly be in peace time between the Permanent Force and the Non-Permanent Active Militia, in a time of emergency such as the present,

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

members of the Permanent Force and members of the Non-Permanent Active Militia are equally members of the Active Militia of Canada on active service and there is no essential difference in their status.

The only two cases in the Exchequer Court, which I have been able to find, in which there has been any expression of opinion as to whether members of the armed forces of Canada are "officers or servants of the Crown" within the meaning of section 19 (*c*) of the Exchequer Court Act, are those that I have mentioned, namely, *Moscovitz* v. *The King* (1) and *Yukon Southern Air Transport Limited* v. *The King* (2). For the reasons stated I do not consider the decisions in either of them applicable to the circumstances of the present case.

In another case, *Brebner* v. *The King* (3), Audette J. found for the suppliant in a petition where the negligence alleged and proved was that of a private soldier in the Army Service Corps, but the question now under discussion was not referred to in that case at all. There, also, the private soldier was a peace time member of the Permanent Force. Under the circumstances and in view of the *Larose* case (*supra*) the decision in the *Brebner* case cannot be regarded as an authority here.

This leaves the judgment of the Supreme Court of Canada in *Larose* v. *The King* (4) as the only Canadian judicial pronouncement that is applicable to the circumstances of this case. I have no hesitation in accepting the judgment of Taschereau J. in that case as an authority that should be followed in this one.

It is not surprising that there is no English decision on the question now under discussion, since under the law obtaining in England a petition of right against the Crown for an alleged cause of action such as the present one would not be entertainable at all.

I am greatly strengthened in the opinion which I have formed by the decision of the New York Court of Appeals in *Goldstein* v. *State of New York* (5) to which reference has already been made.

(1) (1934) Ex. C.R. 188.
(2) (1942) Ex. C.R. 181.
(3) (1913) 14 Ex. C.R. 242.
(4) (1901) 31 Can S.C.R. 206.
(5) (1939) 281 N.Y. 396; 24 N.E. (2d) 97; 129 A.L.R. 905.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

While I am mindful of the warning given by Duff C.J. in *Dubois'* case (1) against placing reliance upon "decisions in other jurisdictions upon other statutes, not in *pari materia*", I think that the circumstances of the *Goldstein* case (*supra*) are so similar to those in question in the present proceedings, and the findings so clear and striking, that the decision in that case is worthy of careful examination as being very instructive as to the construction that should be placed upon the term "officer or servant of the Crown" as it is used in section 19 (*c*) of the Exchequer Court Act.

It should be noted that in the United States the same doctrine of governmental irresponsibility for torts that obtains in England applies with equal force in most, if not all, of the states in the Union. The concept contained in the maxim that the King can do no wrong was accepted and applied to the Sovereign State, so that the rule that applies in England that no proceedings can be taken against the Crown for tort is the basis for a similar rule in the United States, namely, that in the absence of express statutory provision, no action lies against the State for the torts of its officers or servants.

The *Goldstein* case (*supra*) came before the New York Court of Appeals by way of an appeal by the defendant State of New York from a judgment of the Supreme Court, Appellate Division, Third Department, which affirmed a judgment of the Court of Claims in favour of the claimants for damages growing out of the death of their son while serving in the State militia, through the negligence of other members of the militia. The New York Court of Appeals reversed the judgments of the courts below and dismissed the claims. The New York Court of Appeals had before it a number of questions, the first being whether the deceased member of the militia was an employee of the State within the meaning of the Workmen's Compensation Law in effect in the State. It was urged before the Court by counsel for the State that the deceased, a private of the State militia, who was engaged in active service at the time of the injury which caused his death, and suffered such injury as a result of the negligence of a fellow-private and of a militia officer, was an employee of the State and that, therefore, the Workmen's Compensation Law (Con-

(1) (1935) S C.R. 378 at 400.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

sol. Laws, ch. 67) afforded the exclusive remedy. It was conceded that if the deceased were an employee of the State covered by that law there could be no recovery in the proceedings that were then before the court.

The New York Court of Appeals refused to accept this contention advanced on behalf of the State. Hubbs J. who delivered the opinion of the court said: (1)

> The deceased, while in active service in the militia, received $1 25 per day pay It is, therefore, urged by the State that as he received pay from the State and was engaged in the service of the State he was an employee of the State within the meaning of group 16 of section 3 of the Workmen's Compensation Law We cannot accept that conclusion

and, later, on the same page:

> In determining whether particular persons or classes are covered it is necessary to consider the statute as a whole and the purpose embodied in its enactment When so considered it seems to us to be apparent that it was never intended to cover militiamen while engaged in active service There are many reasons which lead to that conclusion

Thus far the decision is perhaps not strictly on a statute in *pari materia* with the one now under discussion, since the court was dealing with the State Workmen's Compensation Law.

The learned judge then enumerated the essential differences between working men and women and members of the State militia in active service and then, after referring to the State Military Law under which " the militia of the state shall consist of all able-bodied male citizens . . . between the ages of eighteen and forty-five who are residents of the state " and whereby it is provided that the Governor may, in case of necessity, order into active service of the State any part of the militia that he may deem proper (which provisions are strikingly similar to those of section 8 of the Canadian Militia Act except that they are not quite as extensive in their scope), went on to express the view, which I have already quoted, that a member of the State militia engaged in active service is in no sense an employee of the State but is simply performing a duty which he owes to the Sovereign State as a resident and citizen. This expression of opinion is as applicable to the facts now in issue as it was to those that were before the New York Court.

(1) 129 A L R 905 at 907

The Court had also before it another question, which is almost identical with the one under consideration in this case, namely, whether the officers and privates in the State militia are " officers and employees " of the State within the meaning, intent and purpose of a statute passed by the State whereby the State waived its immunity from liability for the torts of its officers and employees. The Court answered this question in the negative. The statute in question, namely, Section 12-a of the Court of Claims Act, in effect at the date of the death of the son of the claimants, was in the following terms:

Waiver of immunity from liability for torts of state officers and employees The state hereby waives its immunity from liability for the torts of its officers and employees and consents to have its liability for such torts determined in accordance with the same rules of law as apply to an action in the supreme court against an individual or a corporation, and the state hereby assumes liability for such acts, and jurisdiction is hereby conferred upon the court of claims to hear and determine all claims against the state to recover damages for injuries to property or for personal injury caused by the misfeasance or negligence of the officers or employees of the state while acting as such officer or employee. Such claim must be submitted pursuant to the procedural provisions of the court of claims act. Nothing herein contained shall be construed so as to affect, alter or repeal any provisions of the workmen's compensation law.

It is to be noted that this statute, which is even wider in its scope than section 19 (*c*) of the Exchequer Court Act, is just as general in its terms. The New York Court of Appeals held, notwithstanding the general terms of the statute, that the term "officers or employees of the State" as used in section 12-a of the Court of Claims Act did not include officers and privates of the militia on active service. On this question Bunn J. said: (1)

If private members of the State militia are not employees of the State, then for the same reason the officers referred to were not. The word "officers" as used in section 12-a is included in the term employee Neither was acting in any employment of the State They were citizens performing a public duty under the Military Law By section 12-a "the State . . . waives its immunity from liability for the torts of its officers and employees" The officers and privates in the militia referred to in the findings are not "officers and employees" within the meaning, intent and purpose of the section Therefore, the State has not waived its immunity from liability for their torts Any other construction would be contrary to the history of military organization and control.

This decision of the New York Court of Appeals, which is, of course, not binding upon this court, is, in my opinion, sound in principle. It is directly in line with the views

(1) 125 A L R 905 at 909

1943

MATTHEW McARTHUR v. THE KING

Thorson J.

expressed by Taschereau J. when speakng for the Supreme Court of Canada in *Larose* v. *The King* (1), already cited, which are likewise sound in principle and binding upon this court in the circumstances of this case.

I have therefore come to the conclusion that a person who enlists in an active unit of the Canadian Army for the duration of the present emergency and thereby becomes a member of the Non-Permanent Active Militia of Canada on active service is not an "officer or servant of the Crown" within the meaning, intent or purpose of section 19 (*c*) of the Exchequer Court Act, in that such a person on his enlistment enters upon a personal engagement with the King whereby he puts his services at the disposal of his country pursuant to his duty of allegiance to his Sovereign; in so doing he is performing a national duty and does not thereby become a crown or governmental servant or employee in any sense of the term. It follows as a consequence that the Crown is not liable for the negligence of such a person.

There is a further reason for the conclusion that Parliament did not intend the Crown to be made liable for the negligence of the officers and men of the militia, to which reference may be made.

The Militia Act itself specifies the circumstances under which compensation shall be payable in respect of injury suffered as the result of militia activities, and it is reasonable to assume that when Parliament by the Militia Act has provided remedies for specific injuries resulting from militia activities it has fixed the limits of the liability to be assumed in connection with such activities, unless liability for injuries other than those specified by the Militia Act has been expressly imposed by some other statute. For example, Section 7 of the Militia Act gives certain powers to the officer commanding the Militia in a locality or any officer duly authorized by him, subject to certain conditions. The section provides as follows:

> 7. Whenever an emergency exists, the officer commanding the Militia in the locality, or any officer duly authorized by him, may, subject to the regulations, enter upon and occupy with troops, or other persons, any buildings or lands for defence purposes, and may dig trenches and throw up field works on any such lands, and may fortify any buildings and may, for the purposes aforesaid, destroy or desolate and lay waste any such buildings or lands, and destroy food, crops, fodder, stores, or other things, and

(1) (1901) 31 Can. S C R 206 at 209.

slaughter live stock, or may take or cause to be taken, any such food, crops, fodder, stores or other things; and may drive or cause to be driven, any live stock to some place of safety; and may also impress any horses, mules, oxen or other animals required for military purposes.

The statute contemplates that if the powers conferred by this section are acted upon injury will result from the exercise of such powers and by subsection 2 of section 7 it makes provision for compensation for such injury in the following terms:

7. (2) Any person injured by the exercise of any of the provisions of this section shall be compensated from the Consolidated Revenue Fund of Canada.

A further example of the payment of compensation for property loss or injury may be found in the provisions of the Militia Act relating to the taking possession of railways. Section 90 of the Militia Act provides that under certain circumstances the Minister of National Defence may empower any person or persons to take possession in the name or on behalf of His Majesty of any railway in Canada, and of the plant belonging thereto, or of any part thereof, or to take possession of any plant without taking possession of the railway itself, and to use it for His Majesty's service. If such action is taken the owners are entitled to compensation in accordance with the provisions of section 91 of the Militia Act which reads as follows:

91. There shall be paid to any person whose railway or plant is taken possession of in pursuance of this Act, out of moneys to be provided by Parliament, such full compensation, for any loss or injury he sustains by the exercise of the powers of the Minister under the last preceding section, as is agreed upon between the Minister and the said person, or, in case of difference, as is fixed upon reference to the Exchequer Court of Canada.

The sections to which I have referred provide for compensation for loss or injury to property only. The statute also prescribes the circumstances under which compensation shall be paid for personal as well as property injury but it will be seen that the liability for personal injury is a very narrow and restricted one. Sections 52-54 of the Militia Act deal with rifle ranges and drill sheds. Section 52 makes provision for a rifle range at or as near as possible to the headquarters of every regimental division and the inspection and approval of such range before being used; section 53 provides for regulations for conducting rifle practice and for the safety of the public and section 54 provides for the

1943

MATTHEW McARTHUR v. THE KING

Thorson J

payment of compensation for the death of any person or for any injury to the person or to property, arising from the use of any such rifle range, as follows:

54. His Majesty shall be liable to make compensation for the death of any person, or for any injury to the person or to property, arising from the use of any such rifle range or of any rifle range under the control of the Department of National Defence for target practice, carried on in accordance with the regulations of the Governor in Council in that behalf.

2. There shall be no claim to compensation

(a) where death or injury to the person is due to negligence on the part of the person killed or injured;

(b) where such person at the time death or injury was sustained was present as a spectator at the shooting, or for the purpose of taking part in the shooting, or in some official or other capacity in connection therewith; or

(c) in case of injury to property, where such injury is due to negligence on the part of the owner of the property.

It is interesting to note that at the time *Larose* v. *The Queen* (1) was decided in the Exchequer Court, the Militia Act contained no provision for compensation for personal injury arising from the use of a rifle range. At that time the relevant sections of the Militia Act, R.S.C. 1886, chap. 41, dealing with rifle ranges and drill sheds were sections 69-71. Section 69 dealt with the provision of rifle ranges, the appropriation of land therefor, regulations for conducting target practice and for the safety of the public and concluded with the following provisions as to inspection and compensation:

And all such ranges shall be subject to inspection and approval before being used, and the owners of private property shall be compensated for any damage that accrues to their respective properties from the use of any such rifle range

It will be recalled that in *Larose* v. *The Queen* (2) Burbidge J. held against the suppliant on the ground that the rifle range in question was not a public work within the meaning of that term as used in section 16 (*c*) of the Exchequer Court Act, but, after he had referred to section 69 of the Militia Act and pointed out that compensation under it was limited to damages accruing to property and did not extend to personal injuries, he concluded his finding as follows:

Parliament has made provision for compensating persons for damages accruing to their properties from the use of a rifle range; but not for personal injuries, and it is not for the court to add to or extend the remedies that Parliament has provided.

(1) (1900) 6 Ex C R 425. (2) (1900) 6 Ex. C R. 425 at 428, 429

It is of interest to note from the judgment of Burbidge J. in the *Larose* case (*supra*) that in 1898, after the accident to Larose had happened, Parliament, by the Appropriation Act of that year, voted a sum of one thousand dollars as a gratuity to " Joseph Larose, shot at Côte St. Luc ". It was because the suppliant thought this sum insufficient that he brought his petition of right.

Subsequently to the judgment of the Exchequer Court in the *Larose* case (*supra*) and its affirmation by the Supreme Court of Canada, the Militia Act was recast in 1904, Statutes of Canada 1904, chap. 23, and section 59 was then enacted, substantially in the same form as the present section 54, quoted above, whereby, no doubt as the result of the *Larose* case, liability to pay compensation for injury arising from the use of rifle ranges was extended to include compensation for death or injury to the person.

With the exception of section 73 which enacts that when any officer or soldier is killed on active service, or dies from wounds or disease contracted on active service, drill or training, or on duty, provision shall be made for his wife and family out of the public funds, section 54 is the only section of the Militia Act which provides for compensation for personal injury suffered as the result of any militia activity.

Parliament has in this manner specifically set out the circumstances under which compensation shall be payable for injury resulting from militia activities. It has prescribed a very limited area of liability for personal injuries, namely, only those that arise from the use of rifle ranges, as defined by section 54. This was done after the decision of the Supreme Court of Canada in the *Larose* case (1), when, if it had been so intended, the effect of that decision could easily have been nullified. It would, under the circumstances, in my judgment, be unsound to extend the field of liability for militia activities beyond the one specifically fixed by Parliament by the Militia Act or to make it include a general liability for the negligence of all officers and men of the militia. The liability of the Crown for personal injury under the Militia Act is a very restricted one: it is an indication that Parliament did not intend any general assumption of liability by the Crown for the acts of officers or men of the militia. Since Parliament has

(1) (1901) 31 Can. S.C.R. 206.

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

thus deliberately delimited the field of liability for militia activities, I see no justification for any extension of such liability and I agree with the views expressed by Burbidge J. in *Larose* v. *The Queen* (*supra*) that "it is not for the Court to add to or extend the remedies that Parliament has provided".

Having reached the conclusion which I have already stated, I find that Private MacDonald, the driver of the Plymouth station wagon in question in this petition of right, was, at the time of the accident to the suppliant, not an "officer or servant of the Crown" within the meaning of that term as it is used in section 19 (*c*) of the Exchequer Court Act.

Since the suppliant, in order to succeed in his claim against the Crown, must prove all the facts that are necessary to bring his claim within the jurisdiction of the Court, and since the Court has no jurisdiction to entertain a claim against the Crown for negligence when the alleged negligence is that of some person other than an "officer or servant of the Crown" within the meaning of section 19 (*c*) of the Exchequer Court Act, and since there is no other statutory enactment under which his claim can be brought in this court, the Court has no alternative other than to hold that the petition of the suppliant in this case must be dismissed, even if the injuries suffered by him resulted from the negligence of Private MacDonald, since it follows from the conclusion I have reached as to his status that the Crown would not be liable for negligence on his part, even if such negligence were fully established.

In view of this conclusion it is not necessary for the Court to deal with a number of interesting questions that arose during the course of the trial, nor need the Court deal with the issue of negligence itself. I might say, however, that if I had come to a different conclusion on the important question of law involved in this case, I would have had no hesitation in dismissing the suppliant's petition on the ground that he had failed, on the facts, to shew that his injuries had resulted from negligence on the part of Private MacDonald.

I have dealt with this question of law at considerable length, in the belief that its importance merited as careful a consideration of its various aspects as possible. With

1943

MATTHEW McARTHUR v. THE KING.

Thorson J.

the consequences of the decision, namely, that claims against the Crown, based upon alleged negligence on the part of officers and men of the Active Militia of Canada on active service, are not within the jurisdiction of this Court to entertain, and that persons injured as a result of such negligence will be left without any remedy except such as they may have against the individual person guilty of such negligence, the Court as such can have no concern. Nor can the Court take cognizance of the fact that claimants in the United Kingdom and elsewhere, by virtue of Orders in Council, such as P. C. 29/2544, dated April 11, 1941, constituting a Canadian Claims Commission (Overseas) which is charged with the duty of dealing with claims against the Crown in the right of the Dominion of Canada arising in the United Kingdom and on the continent of Europe out of any death or injury to the person or to property resulting from the alleged negligence of any Canadian Military or Air Force personnel or of any civilian personnel employed by the Department of National Defence while acting within the scope of their duties or employment, and is empowered to consider such claims and determine whether the Crown, but for any immunity or privilege, would be legally liable in the circumstances of each claim, stand in a preferred position in respect of their claims against the Crown in the right of the Dominion as compared with claimants in Canada itself. It is the duty of the Court in a case such as the one now under consideration to determine the precise limits of the jurisdiction conferred upon it and to keep within such limits. Whether such jurisdiction should be enlarged or modified is a matter of policy to be determined by the appropriate legislative authority.

In the case now before the Court there will be judgment that the suppliant is not entitled to any of the relief sought by him in his petition of right herein, and that the same be dismissed, but, under the circumstances, and in view of the importance of the question of law involved, which is squarely raised for the first time since the commencement of the present emergency, the dismissal of the petition will be without costs.

Judgment accordingly.