
1951
Oct. 24-26
Nov. 23

BETWEEN:

MORRIS ROBERT PALMER and NATHAN PALMER carrying on business under the name of HULL PIPE AND MACHINERY CO. ..... SUPPLIANTS;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Crown—Petition of Right—Action for damages for breach of covenant of peaceable enjoyment of leased premises and appropriation, use and destruction of property—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 18, 19(b), 19(c)—Quebec Civil Code, Articles 1053, 1608, 1612, 1641, 1642, 1657—Public Works Act, R.S.C. 1927, c. 166, ss. 3(a), 39—Petition of right lies for breach of contract—Crown in right of Canada not affected by Civil Code of Quebec—Lease of expropriated property must be under authority of Governor in Council—Permissive occupancy of expropriated property by former owner or tenant a tenancy at will—Petition of right does not lie against Crown in right of Canada for tort except negligence.

The suppliants occupied premises in Hull which they used as a storage yard for scrap and other materials. They had been tenants of the City of Hull until the expropriation of the property by the Crown in March, 1947, and continued in occupation without an express lease, paying rent monthly first to the City and then to the Crown. The property was part of the site for the new National Printing Bureau. On August 30, 1949, the Department of Public Works served the suppliants with a notice to quit and deliver up possession on September 1, 1949. At that date Miron & Freres, a Montreal firm, had commenced the excavation of the site, under a contract with the Crown, and the premises occupied by the suppliants was part of

the land to be excavated. The suppliants made no effort to move any of their material and Miron & Freres, having obtained authority from the Chief Architect of the Department of Public Works to put the suppliants out of the way of the excavation, pushed the suppliants' scrap and other materials to one side of the premises with a bulldozer and when it fell into the hole created by the steamshovel as the excavation proceeded carried it away and dumped it into a nearby gully. The suppliants sought to recover damages for breach of covenant of peaceable enjoyment of the premises and appropriation, use and destruction of their property.

Held: That the Crown in right of Canada cannot be affected by a provision of the Civil Code of Quebec.

2. That a lease of expropriated property must be under the authority of the Governor in Council.

3. That where lands have been taken by His Majesty under the Expropriation Act and the former owner or tenant is permitted to remain in occupation of them without a lease made under the authority of the Governor in Council the occupancy of such former owner or tenant, whether rent is paid or not, is a tenancy at will.

4. That a tenancy at will is determinable at the will of either the landlord or the tenant by either party expressly or impliedly intimating to the other his wish that the tenancy should be put to an end.

5. That no petition of right lies against the Crown in right of Canada to recover damages for any tort or "faute" committed by an officer or servant of the Crown, even in the course of his duty or employment, except that of negligence.

6. That on the facts there was no merit in the suppliants' claim for damages for breach of contract.

7. That there was no wrongful conduct on the part of the Chief Architect in authorizing the contractor's engineer to get the suppliants out of the way of the excavation.

PETITION OF RIGHT to recover damages for breach of covenant of peaceable enjoyment of leased premises and appropriation, use and destruction of property.

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

R. Quain K.C. for suppliants.

A. Labbé K.C. and *J. Desrochers* for respondent.

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

THE PRESIDENT now (November 23, 1951) delivered the following judgment:

At the time of the events on which the suppliants, who were dealers in iron and metals, base their amended claim for $33,540 they were in occupation of the premises described in paragraph 6 of the petition of right, being part of lot 6 in Ward Three in the City of Hull. The premises

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were used by them as a yard for the storage of their stocks of various kinds of scrap metal and miscellaneous machinery, equipment and other material. Prior to March 19, 1947, they had been tenants of the City of Hull at a rental of $15 per month but on that date the property, together with other property, was taken by His Majesty under the Expropriation Act, R.S.C. 1927, chap. 64, for the purpose of a public work, namely, as a site for the new National Printing Bureau. The expropriation, of course, extinguished the rights of the City of Hull as owner and the suppliants as lessees of the property but the suppliants continued to pay rent to the City of Hull at the same rate as previously, the last of such payments being by a cheque for $15 payable to the order of the City of Hull—Building Committee, dated June 7, 1949, and marked "June Rent". On July 1, 1949, the suppliants sent the City of Hull—Housing Committee a cheque for $30, marked "Rent—June & July 1949", but this was returned to them by the secretary of the Committee on July 13, 1949, with the information that the property had been expropriated by His Majesty the King and the advice that any further dealings regarding it should be made directly with the present owner. On July 14, 1949, the suppliants wrote to the Committee again saying that they had not received any notice of change of ownership, sending a cheque for the July rent and asking for advice as to where future payments of rent were to be made. To this the secretary of the Committee replied on July 18, 1949, returning the cheque and informing the suppliants that future payments of rent should be made by cheque payable to the Receiver General of Canada and forwarded to Mr. Theo Lambert of 9 Fortier Street, Hull. Accordingly, the suppliants, on July 18, 1949, sent a cheque for $15 payable to the order of the Receiver General of Canada, dated July 18, 1949, and marked "July Rent", to Mr. Lambert who subsequently delivered it to the office of Mr. C. S. Boucher, the lease agent and collector of revenue in the Chief Architect's branch of the Department of Public Works. There the cheque was endorsed as follows:

> Pay to the Order of the Bank of Canada for credit of the Receiver General of Canada on account of the Department of Public Works.
>
> Leases and Accommodation,
> Chief Architect's Branch.

and duly deposited. On August 9, 1949, the suppliants sent a similar cheque to Mr. Lambert marked "August Rent" and on September 7, 1949, a similar one marked "Sept. Rent Blvd. Sacre Coeur". These cheques were delivered by Mr. Lambert to Mr. Boucher's office and endorsed and deposited in the same way as the cheque dated July 18, 1949. No acknowledgment of the receipt of any of the cheques was ever given to the suppliants and no written or parol lease of the premises was ever made. All that transpired between the parties was the sending of the cheques and their endorsement and deposit as aforesaid.

Prior to the date of any of these cheques a contract had been entered into between Miron & Freres, a company having its place of business at Montreal, and His Majesty, represented by the Minister of Public Works of Canada, for the excavation for the new National Printing Bureau. The specifications for the excavation were dated April 4, 1949, and the formal contract was dated November 5, 1949, but it was agreed that the contract was in effect at the time of the events hereinafter referred to and that Miron & Freres were operating under it. The premises occupied by the suppliants formed part of the land to be excavated under the contract and it was a term of it that all the excavation should be completed by or before September 29, 1949. While the precise date when Miron & Freres started the work of excavation is not established it is clear that by the end of August, 1949, they had been working at least about 10 days and were steadily approaching the suppliants' premises. All this was known to them.

On August 23, 1949, Mr. J. M. Somerville, Secretary of the Department of Public Works, under the seal of the Department, addressed a notice to the suppliant Morris Palmer to quit and deliver up possession of the premises on or before September 1, 1949, but this was not served until August 30, 1949, at 4.30 p.m. The next day, August 31, 1949, the said suppliant got in touch with his solicitor, Mr. H. Soloway of the firm of Mirsky, Soloway and Mirsky, and protested against the short period of the notice. Mr. Soloway telephoned Mr. Somerville to the effect that, in his opinion, the notice requiring his clients to vacate in two days was unreasonable. After he had pointed out that the notice, although dated on August 23, 1949, had

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not been served until August 30, 1949, Mr. Somerville agreed that 2 days seemed to be an unreasonable time within which to expect the suppliants to move. Mr. Soloway then pointed out that there was material and equipment on the premises and that the cost of moving would be considerable. He promised to try to get information as to the quantity of material, the cost of moving it and the time required for the purpose and communicate with Mr. Somerville in a day or two or as soon as he could and said that in the meantime they would leave everything as it was which Mr. Somerville said would be satisfactory. Mr. Soloway's letter of August 31, 1949, to Mr. Somerville confirmed the telephone conversation and said that his firm was going into the matter with their clients and would communicate with him within the course of a day or two and advise him of their position. Mr. Soloway did not communicate with Mr. Somerville until September 9, 1949. In the meantime, two events had happened. The suppliant Morris Palmer had consulted Hugh M. Grant Limited for an estimate of the cost of moving the material on the lot and had informed Mr. Soloway that Mr. Grant had estimated that there were from 800 to 1,000 tons of material on the premises and that it would cost approximately $5 per ton to move it. The second event was that some one representing Miron & Freres had broken down the fence around the property. When Mr. Soloway telephoned Mr. Somerville on September 9, 1949, he gave him the information about the material and cost of moving it, complained of the breakage of the fence and claimed compensation for the suppliants. Mr. Somerville said that he would take the matter up with Mr. C. G. Brault, the Chief Architect of the Department, and that the matter was to be left in abeyance until further communication. That compensation was claimed by Mr. Soloway before there was any damage to the suppliants' property apart from the breakage of the fence is plain from his letter of September 9, 1949, Mr. Somerville's letter of September 13, 1949, to Mirsky, Soloway & Mirsky written without prejudice and without any admission of liability for any payment whatsoever asking what compensation the suppliants would accept for immediate vacation of the

premises and Mr. Soloway's reply on September 14, 1949, setting forth the claim for $19,200 then made, which was after Miron & Freres had pushed through the fence a second time to make a roadway for their trucks but before they had done any substantial damage with their bulldozer.

I now come to the evidence relating to the damage to the suppliants' property done by Miron & Freres and shall deal first with the account given by the suppliant Morris R. Palmer. He said that on September 13, 1949, he got a call from one of his men that Miron & Freres were going through their property, bulldozing their material and taking it away, that he went to the yard, stood in front of the bulldozer, which one of the brothers of Miron & Freres was driving, put his hand up and told the driver that he could not come through, that the driver did not say anything but kept coming along with the bulldozer and knocked him over, that he jumped on the bulldozer and told the driver to come down and fight it out with him, that the driver refused to get off and his brother pulled him off, that the driver just kept on coming through and pushing the material into piles, some on the lot and some off and that all the material in the piles was then pushed back against the south fence of the property. Mr. Palmer then said that after that Miron & Freres started excavating with a steam shovel starting from the north and working south, that when the excavation reached where the material was piled up it fell into the hole being excavated by the shovel, was picked up by it along with the gravel and placed on large trucks operated by Miron & Freres, and then taken away by them to a dump nearby. The material thus dealt with consisted of sorted cast iron, scrap steel, scrap brass, re-inforcing rods, angle irons, structural beams, steel plate, some good machinery, two overhead cranes, a shear, a wooden building, a float and other material. The material was so mixed up with earth that it was not economical to sort it out. The fence surrounding the property was also pushed down and destroyed. By the time the excavation was completed all the material had been picked up by the shovel and taken away and there was nothing left.

The suppliant Nathan Palmer told substantially the same story. He said that about 10.45 p.m. on September 1, 1949, after a telephone call from an employee, he went to

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the yard and saw Miron & Freres' bulldozer there, that it had gone right through the fence at the east end of the yard, that on the following day his brother and he went to the yard and saw the bulldozer pushing their material off part of the lot. He confirmed what his brother had said about trying to stop the bulldozer and then said that after he had stopped his brother from trying to fight with the driver he asked the driver "What is the idea of pushing all the material into one heap?" to which he replied "I phoned the government and they gave me permission to remove everything on the premises". He said that he could not do anything and that the driver went on with the bulldozing pushing all the material up to the east end of the yard at the south side. The excavating came later starting from the north and west. According to Mr. Nathan Palmer, the bulldozer came on the scene again and pushed the material to where the steam shovel was working, it lifted the material up, loaded it on Miron & Freres' gravel loaders which took it away and dumped it into a gully or ravine nearby, and this continued until all the material was gone.

Both suppliants gave September 13, 1949, as the date of the bulldozing of the material by Miron & Freres. But I find that it happened at a later date. Mr. C. G. Brault, the Chief Architect of the Department of Public Works, was examined for discovery as an officer of the Crown and part of his examination was selected by counsel for the suppliants and put in as part of their case. In this part Mr. Brault, with an entry in his diary in mind, said that on September 12, 1949, Mr. Maher, the engineer for Miron & Freres, came to his office and told him that Palmer was still on the site and that he said to him "Well, wait a little while and see what happens", that Mr. Maher came to him again on various dates and said "Not only has he not left the premises but he is still piling stuff on the site, he is going to delay the contract", that one morning he phoned and said "What are we going to say?", that he told Mr. Maher to get the suppliant out of his way, saying "Try not to do any damage to his property, but if he interferes with your contract and you warned him, put him out of the way". Mr. Brault said further "The only reason I moved him out is that he was in the way of the excavation". Later in his examination, Mr. Brault said that the first

time he spoke to Mr. Maher was on September 12, 1949, and that Mr. Maher came in again on September 16, 1949, and said that the man was still on the site. This points to the bulldozing having been done not earlier than September 17, 1949. That the bulldozing did not happen on September 13 is confirmed by Mr. Soloway's letter of September 14, 1949, in which only a small claim is made for damages done on September 14, 1949, by bulldozing through the fence and property. This indicates that the pushing of the material into piles had not happened until later. This is confirmed by the fact that Mr. Soloway did not make a complaint of that damage until September 19, 1949, as appears from his letter of that date.

Counsel for the suppliants put forward three claims on their behalf, the first for damages for breach of an alleged obligation of the Crown to allow them peaceable enjoyment of the premises leased to them, the second for compensation for the wrongful taking and destruction of their property and the third for damages for injurious affection of it. No evidence of the quantum of damages alleged to have been sustained was adduced, it having been agreed that if it should be held that the suppliants are entitled to relief there would be a reference to the Registrar for an enquiry and report as to damages.

There is no basis for the third claim. To succeed in it the suppliants would have to bring themselves within section 19(*b*) of the Exchequer Court Act, R.S.C. 1927, chap. 34, which reads as follows:

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
>
> (*b*) Every claim against the Crown for damage to property injuriously affected by the construction of any public work;

This has no application where the whole of a person's property has been expropriated and he has no remaining property that can be injuriously affected. In my view, it has no bearing in a case such as this.

To succeed in either of the first two claims the suppliants must bring themselves within section 18 of the Exchequer Court Act as it stood at the time of the events complained of and prior to its amendment in 1949. It then read as follows:

> 18. The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any

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matter which might, in England, be subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

The first claim may be outlined as follows, namely, that by the sending of the cheques and their endorsement and deposit the suppliants became tenants of the premises under a monthly lease from the Crown, that such a lease imported a covenant by the Crown to allow them peaceable enjoyment of the promises, that as tenants under a monthly lease they were entitled to a month's notice to quit, that the notice served on them on August 30, 1949, was a nullity, that their eviction by having their material pushed off the premises and the premises excavated was a breach of the covenant of peaceable enjoyment and, therefore, a breach of contract for which a petition of right to recover damages lies under section 18 of the Exchequer Court Act.

There is no doubt that a petition of right to recover damages for breach of contract lay against the Crown in England. This was settled beyond dispute in *Thomas* v. *The Queen* (1). It also lies against the Crown in Canada: *Windsor and Annapolis Railway Co.* v. *The Queen et al* (2).

Before the suppliants can establish a breach of contract by the Crown they must show that there was a lease of the premises by the Crown to them and an obligation by the Crown to allow them to have peaceable enjoyment of the premises during the currency of such lease.

This raises an important question. What is the nature of the occupancy of expropriated property by its former owner or tenant after its expropriation by the Crown but before a valid express lease or other disposition of it has been made? It has been my view, since I became a member of this Court, that such an occupancy, being permissive only, was merely a tenancy at will, but I have not been able to find any decision directly on the point.

Counsel for the suppliant submitted that since the property is in the Province of Quebec the obligations and rights of the parties in respect of it must be determined by the law of Quebec and he relied on certain articles of the

(1) (1874) 10 Q.B. 31. (2) (1886) 11 A.C. 607.

Civil Code under the title relating to lease and hire as well as certain decisions in the Quebec courts. Without setting out in detail the articles of the Code to which he referred I shall summarize his argument. He assumed, in the first place, without reference to any article of the Code in support of his assumption, that the payment by the suppliants of the cheques for July, August and September rent and their endorsement and deposit by some one in Mr. Boucher's office constituted a lease of the premises by the Crown and then relied on the provision in Article 1612 that the lessor is obliged by the nature of the contract to give peaceable enjoyment of the thing leased during the continuance of the lease, and on Article 1641 which gives the lessee a right of action to recover damages for violation of the obligations arising from the lease, or from the relation of lessor and lessee. He also referred to Articles 1657 and 1642 in support of his submission that, since the term of the lease was uncertain but the rent was payable at a fixed amount per month, it must be considered a monthly lease and cited several decisions in the Quebec Courts that a month's notice was required in order to terminate a monthly tenancy. From this he argued that since the notice served on August 30, 1949, was not a month's notice it was a nullity and the suppliants could disregard it, that they had a right to remain on the premises until their lease was validly terminated, that the entry of Miron & Freres with the authorization of Mr. Brault and their actions constituted a wrongful eviction of the suppliants and a breach of the Crown's obligation to allow them peaceable enjoyment, and that this was a breach of contract for which they are entitled to damages.

Whether the suppliants have any legal right to relief on this claim is a matter that must be decided by the Court strictly according to the law. On the facts, the claim is without merit. They knew that their occupancy of the premises was a precarious one and that termination of it was imminent. Mr. Morris Palmer knew about the expropriation and its purpose a long time before August 30, 1949. My recollection is that he said that he did not know of it until some time in 1948, but, whether that is so or not, he certainly did know about it around June, 1949. The expropriation of property in the area for the new

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printing bureau was common knowledge but Mr. Palmer's knowledge was specific and particular. In June, 1949, a surveyor had broken down the fence and entered the premises to put survey posts down. When Mr. Palmer saw him he was told that the survey was for the printing bureau. Mr. Palmer also knew before August 30, 1949, that the excavation by Miron & Freres had started. They had then been working about 10 days. He could see that the excavation was marching in from the north and that the suppliants' premises would be wanted almost immediately. Yet the suppliants made no attempt to move. On the contrary, between July 1, 1949, and September 15, 1949, they put additional material on the lot. After Mr. Morris Palmer received the notice of August 30, 1949, he protested to his solicitor who obtained an extension of time. This was not an indefinite extension until the question of compensation was settled, as suggested by Mr. Soloway, but only a short one so that the suppliants would have a longer time within which to move. The suppliants then obtained an estimate from Mr. Grant of the cost of moving and then did nothing further. Mr. Morris Palmer admitted that before September 13, 1949, he had time to save part of the material and that it would not have taken much time to pull such things as the float away, but he made no attempt to save any of the material. He spoke to his lawyer about it who told him that he just had to "sit pat". In my opinion, it would not be unfair to conclude that when the suppliants ascertained the cost of moving the material they decided to do nothing about it, thinking that they had caught the Government in a technical failure to give them sufficient notice and that they might force a payment of compensation through the Government's need for immediate possession so that Miron & Freres could get on with their contract. After an enquiry as to what the suppliants' claim was and their exorbitant demand for $19,200 made in their solicitor's letter of September 14, 1949, the Department of Public Works declined to pay them anything.

Moreover, I am unable to agree with counsel's submission that the obligations and rights of the parties in respect of the premises were fixed by the Civil Code of Quebec. It cannot be so for the property belongs to the

Crown in right of Canada. Article 9 of the Code provides that no act of the legislature affects the rights or prerogatives of the Crown, unless they are included therein by special enactment. This must, of course, refer to the Crown in right of the Province of Quebec. *A fortiori* the Crown in right of Canada cannot be affected by a provision of the Civil Code of Quebec. It is a well established principle that it is beyond the competence of any provincial legislature to impose an obligation on the Crown in right of Canada or confer a cause of action against it. It follows that Article 1612 of the Civil Code of Quebec cannot impose an obligation on the Crown in right of Canada to give peaceable enjoyment to an occupant of its property. Nor can Article 1641 give such occupant any cause of action against the Crown in right of Canada. Only Parliament has jurisdiction to impose any such obligation or confer any such cause of action and it has not done so. On the contrary, as counsel for the respondent pointed out, Parliament has settled the manner in which leases of property that has been expropriated may lawfully be made. He referred to section 3(*a*) of the Public Works Act, R.S.C. 1927, chap. 166, which defines "public work" as meaning and including any work or property under the control of the Minister of Public Works and then to section 39 which provides:

> 39. Notwithstanding anything in this Act, or in any other Act contained, any public work not required for public purposes may be sold or leased, under the authority of the Governor in Council; and the proceeds of such sale or lease shall be accounted for as public moneys: Provided that such public work shall be so sold or leased by tender or at auction after public advertisement, unless it is otherwise authorized by the Governor in Council.

On the strength of this enactment counsel argued that while, under section 9 of the Act, the Minister of Public Works has certain powers of management of public works, which includes property expropriated for a public purpose, such as the property in question, the disposition of such property by sale or lease must be under the authority of the Governor in Council, that such authority is an essential requirement imposed by Parliament for the issue of a valid lease, and that since there was no such authority in the present case there could not be a valid lease of the premises

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to the suppliants. I agree. This is basically the same principle as that applied in *St. Ann's Island Shooting and Fishing Club Ltd.* v. *The King* (1) and in *The King* v. *Cowichan Agricultural Society* (2) where it was held that a lease of surrendered Indian lands was void because it had been made without the direction of the Governor in Council, as section 51 of the Indian Act required, notwithstanding the fact that the rent specified by the lease had been paid and accepted ever since 1912.

I am also of the opinion that, even on the facts, it should not be held that a lease of the premises from the Crown to the suppliants was implied in the endorsement and deposit of the cheques for the July, August and September rents. The practice of the Department of Public Works in leasing lands, which Mr. Boucher outlined in detail from the application for a lease to its final execution, is against such implication. The suppliants never applied for a lease and it is plain that if they had done so their application would not have been approved in view of the fact that the property was part of the site for the new printing bureau and would soon be required for it. And it would be unreasonable to impute to the Crown an intention to lease the lands to the suppliants for a defined term from the fact that the suppliants paid the rents to Mr. Lambert and he brought them to Mr. Boucher's office. Mr. Lambert had simply been asked to collect the rents from the properties that had been expropriated in the Hull district at the same rate as the tenants had paid the former owners, and when Mr. Boucher received the suppliants' cheques he had no knowledge of when the property would be required and there was no report of the payments to the Deputy Minister or the Minister before their endorsement and deposit. The fact is that it was standard practice in the Department to permit a former owner or tenant to remain in occupation of the expropriated property until a formal lease was executed and it has been the policy of the Department in recent years not to execute a lease until after the compensation money has been paid. The proper inference to be drawn in the case of the suppliants is that their occupancy of the premises was merely permissive

(1) (1950) Ex. C.R. 185; (1950) S.C.R. 211.

(2) (1950) Ex. C.R. 448.

until the land was required for the purpose for which it was expropriated. Under the circumstances, counsel for the respondent contended that when the property was expropriated on March 19, 1947, the suppliants' interest in it as tenants of the City of Hull was wholly extinguished leaving them only with a claim for compensation, which is not made in this case, that thereafter they remained in possession without paying any rent to the Crown, which was the owner of the property, but continued to pay rent to the City of Hull, that the payment of the rent for July, August and September was never brought to the attention of the Minister or Deputy Minister and could not constitute an implied lease, that the Leases and Accommodation Division of the Department of Public Works had no authority to make a lease and that the endorsement and deposit of the cheques could not take the place of the authority of the Governor in Council. In my view, these contentions are all sound. It follows that the suppliants did not have a monthly lease of the premises.

What then was the nature of their occupancy? I am satisfied that it was not a tenancy on sufferance since that implies an occupancy without the consent of the Crown, which was not the case. Moreover, such a tenancy implies laches on the part of the owner and, since the Crown cannot be guilty of laches, there cannot be a tenancy on sufferance against the Crown: *vide* Co. Litt. 57 *b*; Woodfall's Law of Landlord and Tenant, 24th Edition, page 286 and 20 Hals. (2nd Edition), page 122.

This leaves only a tenancy at will. Counsel for the respondent contended that the suppliants were really only "squatters" on the premises but with this I do not agree. They had permission to occupy the premises without any term being fixed, but that is all that they had. That is a tenancy at will: *Doe d. Hull* v. *Wood* (1). And, of course, a tenancy at will is determinable at the will of either the landlord or the tenant by either party expressly or impliedly intimating to the other his wish that the tenancy should be put to an end: 20 Hals. (2nd Edition), page 120.

The precarious nature of a permissive occupancy such as that of the suppliants, falling short of the "occupation par simple tolérance", referred to in Article 1608 of the

(1) (1864) 14 M. & W. 681 at 685.

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Civil Code, is recognized in the Province of Quebec. For example in *Cité de Montréal* v. *Poulin* (1) it was held that a tenant whose lease was terminated by expiration of the term stated in the lease and who, notwithstanding notice of expropriation one year before the expropriation, continued to occupy the premises from day to day with the permission of the landlord, who in view of the proposed expropriation had refused to continue the lease, had only a precarious occupation which could be put an end to at any day. Vide also *Marleau* v. *Cedars Rapid Manufacturing and Power Company* (2) and *Gravel* v. *Cité de Montréal* (3) where it was held that mere permission to occupy could not be regarded as equivalent to a written lease or even a verbal one.

I find, therefore, that where lands have been taken by His Majesty under the Expropriation Act and the former owner or tenant is permitted to remain in occupation of them without a lease made under the authority of the Governor in Council the occupancy of such former owner or tenant, whether rent is paid or not, is a tenancy at will.

This finding disposes of the suppliants' first claim. Since their occupancy of the premises was a tenancy at will the notice to quit and deliver up possession served on August 30, 1949, was a valid determination of it. Consequently there was no breach of any covenant of peaceable enjoyment, even if such a covenant could have been implied, and no breach of contract on which to found a petition of right.

I now come to the suppliants' second claim. It is alleged in the petition that the respondent appropriated and used, destroyed and caused to be destroyed property of the suppliants on their premises by employing bulldozers to plow under their entire inventory as well as certain fixtures and immovable property. There is no evidence to support the allegation of appropriation and use. The suppliants' property was never taken or used by the respondent. It was simply pushed out of the way of the excavation by Miron & Freres and then taken away by them and dumped into a nearby ravine or gully. It never at any time came into the possession of the Crown. This leaves only the

(1) (1904) Q.R. 26 S.C.R. 367.
(2) (1918) 24 R N. n.s. 1.
(3) (1898) 4 R. de J. 143.

allegation that the respondent destroyed and caused to be destroyed the suppliants' property. There is a serious defect in this pleading in that the destruction of the goods is ascribed to His Majesty which, strictly speaking, would warrant a finding against the suppliants since it could not be held that His Majesty had committed a wrongful act. But I shall deal with the claim as if it had been alleged that the conduct complained of had been done by an officer or servant of the Crown in the course of his duty or employment.

There are several answers to the suppliants' claim. The first is that if any wrongful act was done to the suppliants' property it was not done by any officer or servant of the Crown but by Miron & Freres, a firm of independent contractors, for whose wrongful conduct, if there was any, the Crown is not liable. The suppliants have commenced an action against Miron & Freres and the question whether there was any wrongful conduct on their part is to be determined in that action.

This Court has only to ascertain whether there was any wrongful act on the part of an officer or servant of the Crown in the course of his duty or employment and, if so, whether a petition of right would lie against the Crown in respect of it. I assume that the officer of the Crown whose conduct is the subject of the suppliants' complaint, although not specified in the pleadings, is Mr. C. G. Brault, the Chief Architect in the Department of Public Works. I find no wrongful conduct on his part. There is no doubt that he instructed Mr. Maher, the engineer of Miron & Freres, to get the suppliants out of the way of the excavation. He frankly admitted that he had given such instructions. He said that he had been informed that Mr. Palmer had been properly notified to vacate, which was the case, and that when Mr. Maher first came to his office to tell him that Palmer was still on the site he told him to "wait a little while and see what happens" and that it was only after Mr. Maher had called him again on various dates that he instructed Mr. Maher to push him off the site, to ge him out of their way. I have already referred to his specific directions, "Try not to do any damage to his property, but if he interferes with your contract and you warned him, put him out of the way". He explained that

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it was his duty to give these instructions since otherwise the Crown would have been penalized for delaying the contract with Miron & Freres. It is plain from Mr. Brault's actions, as well as from Mr. Somerville's extention of time, that it was only after it became apparent that the suppliants had no intention of moving their property off the premises or giving up possession of them that Mr. Brault gave his instructions. That the suppliants intended to block Miron & Freres is shown by Mr. Morris Palmer's statement that prior to September 13, 1949, his brother and he took turns at night with the view of not letting Miron & Freres pass through their property. Under all the circumstances, I find that there was nothing unlawful in Mr. Brault's instructions.

But even if Mr. Brault's conduct could not be justified and his instructions to Miron & Freres' engineer were unlawful and constituted a wrongful interference with the suppliants' property so that he could himself have been successfully sued for trespass, or other tort, the suppliants could not, under the existing state of the law, have any redress from the Crown, for it is settled law that no petition of right lies against the Crown in right of Canada to recover damages for any tort, or "faute", to use the language of Article 1053 of the Civil Code of Quebec, committed by an officer or servant of the Crown, even in the course of his duty or employment, except that of negligence, for which a claim may be made under section 19(*c*) of the Exchequer Court Act.

This immunity of the Crown from responsibility for civil wrongs committed by its officers or servants was an inheritance from the law of England as it stood prior to the Crown Proceedings Act, 1947. The question whether a petition of right would lie to recover damages for a tort was first argued in *Viscount Canterbury* v. *Attorney General* (1). There the suppliant claimed damages for injury to property suffered by him through a fire alleged to be due to certain servants of the Crown. In the course of his judgment denying the claim Lord Lyndhurst L.C. said, at page 321:

> It is admitted that, for the personal negligence of the Sovereign, neither this nor any other proceeding can be maintained. Upon what

(1) (1843) 1 Ph. 306.

ground, then, can it be supported for the acts of the agent or servant? If the master or employer is answerable upon the principle that *qui facit per alium, facit per se,* this would not apply to the Sovereign, who cannot be required to answer for his own personal acts. If it be said that the master is answerable for the negligence of his servant, because it may be considered to have arisen from his own misconduct or negligence in selecting or retaining a careless servant, that principle cannot apply to the Sovereign, to whom negligence or misconduct cannot be imputed, and for which, if they occur in fact, the law affords no remedy.

The matter was next discussed in *Tobin* v. *The Queen* (1). There the commander of one of the Queen's ships employed in the suppression of the slave trade on the coast of Africa seized a schooner belonging to the suppliant, which he suspected of being engaged in slave traffic, and, it being inconvenient to take her to a port for condemnation in a Vice-Admiralty court, caused her to be burnt. It was held by Erle C.J., in a judgment exhaustively reviewing the authorities, that a petition of right will not lie to recover compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty, nor to recover unliquidated damages for a trespass, the remedy for the wrong, if any, being against the person who did it. The law was finally settled in *Feather* v. *The Queen* (2). There a petition of right was taken for damages for the alleged unauthorized use of the suppliant's patent by the Crown. While the case was decided against the suppliant on another point, the court was invited to pronounce an opinion on the subject under review. After a thorough argument the court declined to dissent from the decision in *Tobin* v. *The Queen* (*supra*), and Cockburn C.J. gave the following comprehensive statement of the reasons why the Crown could not be held responsible for a tort, at page 295:

Not only is there no precedent for a petition of right being entertained in respect of a wrong in the legal sense of the term, but, if the matter is considered with reference to principle, it becomes apparent that the proceeding by petition of right cannot be resorted to by the subject in the case of a tort. For it must be borne in mind that the petition of right, unlike a petition addressed to the grace and favour of the Sovereign, is founded on the violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the Sovereign, a suit at law or equity could be maintained. The petition must therefore shew on the face of it some ground of complaint which, but for the inability of the subject to sue the Sovereign, might be made the subject of a judicial proceeding. Now, apart altogether

(1) (1864) 16 C.B. (N.S.) 309. (2) (1865) 6 B. & S. 257.

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from the question of procedure, a petition of right in respect of a wrong, in the legal sense of the term, shews no right to legal redress against the Sovereign. For the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the Sovereign. For, from the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize wrong. For to authorize a wrong to be done is to do a wrong; inasmuch as the wrongful act, when done, becomes, in law, the act of him who directed or authorized it to be done. It follows that a petition of right which complains of a tortious act done by the Crown, or by a public servant by the authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress. As in the eye of the law no such wrong can be done, so, in law, no right to redress can arise; and the petition, therefore, which rests on such a foundation falls at once to the ground.

This has always been accepted as a correct statement of the law of England on the subject as it then was. It was also recognized by the Supreme Court of Canada as applicable in Canada: *The Queen* v. *McFarlane* (1); *The Queen* v. *McLeod* (2).

The doctrine of governmental irresponsibility for the wrongdoing of public servants implicit in the decision in *Feather* v. *The Queen* (*supra*) persisted in England until its abandonment by the Crown Proceedings Act, 1947. In Canada it was substantially modified by a succession of enactments imposing a liability on the Crown for the negligence of its officers or servants while acting within the scope of their duties or employment, at first of a very limited nature but later greatly enlarged, ending in section 19(*c*) of the Exchequer Court Act, as amended in 1938. But apart from this modification in respect of the tort of negligence the doctrine is still part of the law affecting the Crown in right of Canada.

The doctrine that "the proceeding by petition of right cannot be resorted to by the subject in the case of a tort" runs counter to the modern doctrine of the employer's liability for the torts of his servants, and has been the subject of adverse comment by students of the law and others. The eminent English legal historian, Professor W. S. Holdsworth, in his great work, A History of English Law, traced the development of the modern doctrine of employer's liability (Vol. VIII, pp. 472-479) and the history of remedies against the Crown (Vol. IX, pp. 4-45).

(1) (1882) 7 Can. S.C.R. 216. (2) (1883) 8 Can. S.C.R. 1.

He expressed the opinion that the one respect in which the courts had given inadequate recognition to the principle that the subject should have a remedy against the Crown where he had a remedy against a fellow subject was in their treatment of petitions of right and he considered that an obvious failure of justice had arisen from the rule that the modern doctrine of the employer's liability for the torts of his servants was not applicable to the Crown. He attributed the rule to failure on the part of the judges who formulated it to understand properly the true basis of the employer's liability. It does not rest on any theory of *respondeat superior* based on an implied undertaking by the master to answer for the wrongs of his servant, or an 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 be imputed to him under the maxim *qui facit per alium, facit per se,* or fault on the part of the master in the choice of his servant, as appears from the reasoning of the judges, but on grounds of public policy and 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", as Sir Frederick Pollock put it in his Essays in Jurisprudence and Ethics, page 128. If this basis for the doctrine of employer's liability had been appreciated by the judges as it is now understood it would have been possible to give the subject a remedy against the Crown without doing any violence to the rule that "the King can do no wrong" and 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". There would then have been no true reason why a petition of right should not lie to recover damages for a tort. But while it is permissible to point out the fallacies in the reasoning that led to the decision in *Feather* v. *The Queen* (*supra*) and the resulting doctrine of governmental irresponsibility for the wrong-doing of public servants and to agree with such students of the law as Professor Holdsworth that it gave rise to an

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obvious failure of justice, the fact remains that the law is settled and it is not open to any court to change it. Only Parliament can do so.

This Court must, therefore, hold that even if Mr. Brault's conduct had been wrongful so that he would himself have been liable for it, which I do not find it to be, the Crown, under the law as it stands, would not have been responsible for it.

Since none of the suppliants' claims can be sustained there must be judgment that the suppliants are not entitled to any of the relief sought by them and that the respondent is entitled to costs.

Judgment accordingly.