BETWEEN:

GERMAIN BENDER .... SUPPLIANT,

AND

HIS MAJESTY THE KING .... RESPONDENT.

1943 Nov. 9 — 1946 Aug. 2

Crown—Petition of Right—Negligence—Workmen's Compensation—Exchequer Court Act, R.S.C. 1927, c. 34, sec. 19 (c)—Government Employees Compensation Act, R.S.C. 1927, c. 30, sec. 3 (1)—Maxim nemo debet bis vexari pro una et eadem causa—Presumption against repeal of an Act by implication—Receipt of compensation under Government Employees Compensation Act not a bar to a claim for damages under section 19 (c) of Exchequer Court Act.

By Order in Council P.C. 37/1038, dated Feb. 9, 1942, with force from Nov. 6, 1940, the Government Employees Compensation Act was made applicable to employees of the Inspection Board of the United Kingdom and Canada. The suppliant, an employee of the Board, suffered personal injuries arising out of and in the course of his employment and claimed and received compensation under the Government Employees Compensation Act. Subsequently, by Petition of Right he claimed damages for his injuries under section 19 (c) of the Exchequer Court Act. Question of law whether the Petition of Right lies.

Held: That an employee of the Crown who has claimed and received compensation for injuries arising from and out of the course of his employment under the Government Employees Compensation Act is not thereby barred from pursuing his claim for damages for such injuries under section 19 (c) of the Exchequer Court Act.

ARGUMENT on question of law ordered to be set down and disposed of before the trial.

The argument was heard before The Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

F. Choquette, K.C. for suppliant.

L. A. Pouliot, K.C. for respondent.

The President now (August 2, 1946) delivered the following judgment:

In order that the question of law set down for disposition before the trial may be properly understood certain facts and documents must be referred to.

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The suppliant was employed by the Inspection Board of the United Kingdom and Canada as a day labourer at its proof butts at Valcartier in Quebec from February 12, 1941, to June 7, 1941, at which date he suffered the personal injuries for which he claims damages.

In the early part of the war, the United Kingdom and Canada each had its own organization to inspect war munitions and supplies. Later, it was found desirable to co-ordinate the inspection services of the two governments and a Board known as the Inter-Government Inspection Board was established by Order in Council P.C. 5995, dated October 26, 1940, (Exhibit D-1). Later, this Board became known as the Inspection Board of the United Kingdom and Canada, the change of name being formally authorized by Order in Council P.C. 2226, dated April 7, 1941, (Exhibit D-2). Before the establishment of such Board the United Kingdom Technical Mission had on its staff in Canada several groups of employees, including those of the Inspector General, and Order in Council P.C. 5319, dated October 2, 1940, (Exhibit D-3) authorized an agreement between the Governments of Canada and the United Kingdom whereby the employees of such Mission, or of any other agency of the United Kingdom that might be exercising similar functions in Canada, should be brought under the provisions of the Government Employees Compensation Act. The purpose of this agreement was to put United Kingdom employees in Canada on the same basis as Canadian Government employees in the matter of workmen's compensation. The agreement was signed on October 8, 1940, (Exhibit D-4). At the time of his examination for employment by the Board the suppliant signed a document (Exhibit D-5) whereby in the event of his being caused personal injury by accident arising out of and in the course of his employment he agreed to be governed by the provisions of the Government Employees Compensation Act. Subsequently, by Order in Council, P.C. 37/1038, dated February 9, 1942, (Exhibit D-3a), the provisions of the Government Employees Compensation Act were made applicable to all persons employed by the Inspection Board of the United Kingdom and Canada during the period of their employment in Canada and it

was provided that the Order should be deemed to have come into force and operation as of and from November 6, 1940.

On June 7, 1941, the suppliant suffered serious personal injuries arising out of and in the course of his employment at Valcartier and claimed compensation under the Government Employees Compensation Act. The claim was heard by the Workmen's Compensation Commission of Quebec and on June 17, 1942, the Commission found that he was suffering from a total permanent disability and awarded him a monthly allowance of $54.16 from April 8, 1942, (Exhibit D-6). Subsequently, on July 21, 1943, it awarded him an additional allowance of $15 per month from May 7, 1942, for a period of two years, (Exhibit D-7).

On May 23, 1942, the suppliant presented his petition of right in which he claimed damages for his injuries over and above the amount of compensation awarded to him on the ground that they were the result of negligence of officers or servants of the Crown. A fiat was granted and the petition was duly filed in this Court on July 21, 1942. By his statement of defence the respondent denied all allegations of negligence and contended that the suppliant has no rights other than to the compensation he has received.

On the application of the respondent, leave was given to have the following question set down and disposed of before the trial:

> In view of Orders in Council P.C. 5995, dated the 26th October, 1940, and P.C. 2266, dated the 7th April, 1941, referred to in paragraph 21 of the Statement of Defence and filed as Exhibits D-1 and D-2; in view of Order in Council P.C. 5319, dated the 2nd October, 1940, referred to in paragraph 22 of the Statement of Defence and filed as Exhibit D-3; in view of the agreement dated the 8th October, 1940, between the Government of the United Kingdom and of Canada, referred to in paragraph 23 of the Statement of Defence and filed as Exhibit D-4; in view of the consent in writing, referred to in paragraph 25 of the Statement of Defence and filed as Exhibit D-5; in view of the compensation already received by the Suppliant as alleged in paragraph 26 of the Statement of Defence, and assuming the acts or omissions alleged in the Petition of Right herein to be established, does a Petition of Right lie.

In his written argument counsel for the respondent submitted that Order in Council P.C. 5319, dated October 2, 1940, (Exhibit D-3), the agreement dated October 8, 1940, (Exhibit D-4), and the document signed by the suppliant

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(Exhibit D-5) have nothing to do with the matter in view of Order in Council P.C. 37/1038, dated February 9, 1942, (Exhibit D-3a). With this submission I agree, with the result that the question of law is amended by striking out the references therein to Exhibits D-3, D-4, and D-5, adding the necessary reference to Exhibit D-3a, and identifying the compensation received by reference to Exhibits D-6, and D-7. In effect, the question of law is whether the suppliant, having claimed and received compensation for his injuries under the Government Employees Compensation Act, R.S.C. 1927, chap. 30, as amended in 1931, can have any claim for damages for such injuries under section 19 (c) of the Exchequer Court Act, R.S.C. 1927, chap. 34, as amended in 1938. The question is a novel one.

Section 19 (c) of the Exchequer Court Act, as amended in 1938, provides 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.

The history of this section from its inception as section 16 (c) of the Exchequer Court Act of 1887 was reviewed by the Supreme Court of Canada in *The King* v. *Dubois* (1), and by this Court in *McArthur* v. *The King* (2) and *Tremblay* v. *The King* (3). It is clear that it "not only gave jurisdiction to the Exchequer Court but imposed a liability upon the Crown which did not previously exist", and that such liability is to be ascertained according to the laws in force in the province at the time when the Crown first became liable: *The King* v. *Armstrong* (4), and *Gauthier* v. *The King* (5). It follows also from section 19 (c) not only that it imposed a liability upon the Crown which did not previously exist, but also that it gave birth to a cause of action against it which did not previously exist. Such cause of action—by petition of right—is for damages

(1) (1935) S.C.R. 378.
(2) (1943) Ex. C.R. 77.
(3) (1944) Ex. C.R. 1.
(4) (1908) 40 Can. S.C.R. 229 at 248.
(5) (1918) 56 Can. S.C.R. 176 at 180.

for death or injury resulting from negligence of an officer or servant of the Crown, while acting within the scope of his duties or employment.

The Government Employees Compensation Act, first enacted in 1918, also imposed a new liability upon the Crown and gave birth to a new cause of action against it. Section 3 (1), as amended in 1931, provides:

3 (1) An employee who is caused personal injury by accident arising out of and in the course of his employment, and the dependents of an employee whose death results from such an accident, shall, notwithstanding the nature or class of such employment, be entitled to receive compensation at the same rate as is provided for an employee, or a dependent of a deceased employee, of a person other than His Majesty under the law of the province in which the accident occurred for determining compensation in cases of employees other than of His Majesty, and the liability for and the amount of such compensation shall be determined subject to the above provisions under such law, and in the same manner and by the same board, officers or authority as that established by such law for determining compensation in cases of employees other than of His Majesty, or by such other board, officers or authority, or by such court as the Governor in Council shall from time to time direct: Provided that the benefits of this Act shall apply to an employee on the Government railways who is caused personal injury by accident arising out of and in the course of his employment, and the dependents of such an employee whose death results from such an accident, to such an extent and to such an extent only as the Workmen's Compensation Act of the province in which the accident occurred would apply to a person in the employ of a railway company or the dependents of such persons under like circumstances.

The liability imposed and the cause of action conferred by this Act is for compensation for injury or death by accident arising out of and in the course of the employment of the employee. The basic principle for the compensation is the same as that of the various Workmen's Compensation Acts of the provinces of Canada, which in turn followed the lead of Great Britain. In that country the first Workmen's Compensation Act was that of 1897, the new principle behind the legislation having been borrowed from Germany. By this Act the employer was, for the first time, made liable to compensate his workmen for injuries arising out of and in the course of their employment. The liability was imposed quite irrespective of whether the employer or any one for whose acts he was liable had been guilty of negligence or any other breach of duty or not.

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It was not, therefore, a tortious or delictual liability at all. In reality, the Act made the employer an insurer of his workmen against the risks of the employment, which previously they had been obliged to take themselves. The employee's cause of action was likewise an entirely new one; it was based upon injury arising out of and in the course of his employment, and had nothing to do with whether any one had been guilty of tort or delict at all. His right to compensation from his employer was a statutory one and similar in effect to the right he would have had against his insurer if he had taken out a policy of accident insurance against the risks of his employment.

This is not a case, therefore, for the application of either of the maxims *nemo debet bis vexari pro una et eadem causa,* or *una via electa non datur recursus ad alteram.* The suppliant has not "one and the same" cause of action under the two Acts in respect of which he has two remedies; on the contrary, he has two entirely separate and distinct causes of action, one based on tort or delict and the other not, each with its own appropriate remedy. His right to damages under section 19 (c) of the Exchequer Court Act, if he can satisfy the onus of proof required by it, remains, therefore, unless it can be shown that it has been taken away. He would not have lost such right if he had insured himself against injury arising out of and in the course of his employment. Why, then, should he lose it by reason of the fact that the Government Employees Compensation Act has effected such a statutory insurance for him?

Counsel for the Crown contended that the Government Employees Compensation Act in respect of the cases to which it is applicable by implication repeals section 19 (c) of the Exchequer Court Act, and that where a person has a claim against the Crown for compensation for injuries arising out of and in the course of his employment, he has no claim against it under section 19 (c) of the Exchequer Court Act, even if his injuries resulted from negligence on the part of an officer or servant of the Crown. I am unable to accept this contention.

There is a presumption against the repeal of an Act by implication. In 31 Hals., 2nd Ed., in paragraph 684, the rule is stated:

> No statute operates to repeal or modify the existing law, whether common or statutory, or to take away rights which existed before the statute was passed, especially if it involves a drastic departure from the principles of law existing when it was passed, unless the intention is clearly expressed or necessarily implied.

And, in paragraph 685:

> Affirmative statutes do not repeal precedent affirmative statutes unless they are contrary or repugnant to them; for without negative or repealing words, expressed or implied, the intention of Parliament to alter what already existed is not apparent, and it is always to be presumed that there was no such intention. Where, however, such intention is evident, as by the introduction of that which is inconsistent with the law as it previously existed, either affirmative or negative language may directly or impliedly repeal what is contrary to the purview of the new statute.

And, in para. 688:

> A statute giving a new remedy does not of itself, and necessarily, destroy previously existing rights and remedies to which it does not refer.

Maxwell on the Interpretation of Statutes, 8th ed., at page 139, puts the rule;

> An author must be supposed to be consistent with himself, and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect, the work of the Legislature is treated in the same manner as that of any other author, and the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it. But it is impossible to construe absolute contradictions. Consequently, if the provisions of a later Act are so inconsistent with, or repugnant to, those of an earlier Act that the two cannot stand together, the earlier stands impliedly repealed by the later. *Leges posteriores priores contrarias abrogant. Ubi duae contrariae leges sunt, semper antiquae abrogat nova.*

And it was laid down by Warrington L.J. in *Wallwork* v. *Fielding* (1) that in order that a subsequent statute, not expressly repealing a previous Act, or the provision of a previous statute, may operate by implication as a repeal, it must be found that the provisions of the subsequent statute are so inconsistent with those of the previous one that the two cannot stand together.

(1) (1922) 2 K.B. 66 at 73.

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There is no express reference in either of the Acts in question to the liability imposed or the right conferred by the other and I cannot see any necessary implication for their abrogation. Nor can I see any reason why the two Acts should not stand together. The liabilities imposed and the rights conferred by each of them are separate and distinct and rest upon quite different considerations of policy. Under the Government Employees Compensation Act the employee is entitled to compensation from his employer for personal injury by accident arising out of and in the course of his employment; negligence has nothing to do with the matter; his right is based on grounds of economic policy that he should be insured against the risks of injuries inherent in his employment. I am quite unable to see how the conferring of such a new statutory right of insurance against employment accidents can by itself abrogate an existing right of action for damages for injuries resulting from such a breach of lawful duty as negligence. If the injured person cannot prove that his injury resulted from negligence and cannot, therefore, substantiate his claim for damages, he is nevertheless entitled to compensation for his injury if it arose out of and in the course of his employment. Conversely, I am unable to see how the taking of compensation for injury by accident, to which the injured employee is entitled in any event, whether there is negligence or not, can by itself take away his right of action for damages, which might be greater than the amount of the compensation, if he can prove that his injury was the result of negligence for which the employer is liable. Nor can I see how the imposition of a general obligation on an employer to insure his employees against the risks of their employment, can automatically absolve him from a particular liability where one of them is hurt through the negligence of a person for whose act he is by law liable. In my view, neither the causes of action of the injured person nor the liabilities of the Crown under the two Acts are exclusive of one another, in the absence of statutory provision making them so.

No help is obtainable from the decisions under the English Act or the Acts of the various provinces of Canada, for in such Acts the matter of the two rights and liabilities

has been expressly provided for by statutory enactment. By section 1 (2) (b) of the original Workmen's Compensation Act, 1897, of Great Britain, retained in the Act of 1906, it was provided that nothing in the Act "shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act." Both causes of action were thus open to the injured employee but he was required by the Act to elect which one he would take; he could not take both. In *Edwards* v. *Godfrey* (1) it was held by the Court of Appeal that an unsuccessful plaintiff in an action for damages against his employer could not subsequently take proceedings under the Workmen's Compensation Act. This decision was followed by the same court in *Cribb* v. *Kynoch, Limited* (*No.* 2) (2). The effect of the statutory provision was put by Cozens-Hardy M.R., at page 555:

> The true meaning of the Act is that a workman cannot proceed to trial under the Act and fail, and then proceed by common law action, and also cannot proceed by common law action and, having failed in that action, then proceed under the act.

In my opinion, these decisions are based upon the express statutory requirement that the employee must exercise his option as to his rights and that having chosen one he could not pursue the other. There is nothing to indicate that the provision as to the exercise of the option is merely declaratory of what the law would have been in any event even without such provision, as suggested by Boyle J. in *McClenaghan* v. *City of Edmonton* (3). Indeed, quite the reverse is the case, for Cozens-Hardy M.R. in *Cribb* v. *Kynoch, Limited* (*No.* 2) (*supra*) speaks of the provision as to an option as a remarkable one. At page 558, he said:

> I think that it must have been the desire to guard against an employer being subjected to two lawsuits to recover compensation for the same injury that led to the introducion, immediately after the provision that secures to the workman his old right of action, of the remarkable words "but in that case the workman may at his option either claim compensation under this Act or take the same proceedings as were open to him before the commencement of this Act."

It seems clear that but for the express statutory provision putting the injured employee to his election between his

(1) (1899) 2 Q.B. 333.
(2) (1908) 2 K.B. 551.
(3) (1926) 1 D.L.R. 1042.

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rights, there would be nothing to prevent him from bringing an action for damages for injuries resulting from negligence, even although he had received compensation on the basis of the Act. There is, however, nothing in the Government Employees' Compensation Act at all similar to section 1 (2) (b) of the English Workmen's Compensation Act of 1897 or 1906.

When the various provinces of Canada adopted the principle of workmen's compensation they followed in the main the model of the English Act. In some cases the provincial Act required the injured employee to elect whether he would proceed against his employer under the Act or independently of it; in others, it was provided that if the Act was applicable to the case, the only remedy of the employee was that given by the Act. We need concern ourselves only with the development in the province of Quebec where the suppliant's injury occurred.

The Quebec Workmen's Compensation Act, R.S.Q., 1941, chap. 160, was first enacted in 1909, Statuts de Québec, 1909, chap. 66. Section 15 provides:

> Accidents happening on or after the 1st of September, 1931, shall be governed by the provisions of this act and the compensation under this act shall be in lieu of all rights, recourses and rights of action, of any nature whatsoever, of the workman, of the members of his family or his dependents against the employer of such workman by reason of any such accident happening to him on or after the said 1st day of September, 1931, by reason of or in the course of his work for such employer, and no action in respect thereof shall lie in any court of justice.

and article 1056a of the Civil Code, as amended in 1941, Statuts de Québec, 1941, chap. 67, provides:

> 1056a. No recourse provided for under the provisions of this chapter shall lie, in the case of an accident contemplated by the Workmen's Compensation Act, 1931, except to the extent permitted by such act.

It is thus clearly established by the law of Quebec that the only recourse which a workman has against his employer for an injury arising out of or in the course of his work is under the Workmen's Compensation Act. If the law of Quebec were the governing law, then the contention of counsel for the respondent to which I have referred would be well founded. Indeed, counsel argued that the Government Employees' Compensation Act had

adopted the provincial law, that there had been a submission to the law of Quebec, that it governed the case and that it was an essential part of such law that an employee injured in the course of his work had only one recourse against his employer, namely, that under the Quebec Workmen's Compensation Act. I am unable to agree. The suppliant's right to compensation does not spring from the Workmen's Compensation Act of Quebec at all, but from the Government Employees' Compensation Act, and Order in Council P.C. 37/1038, dated February 9, 1942, making it applicable to him. All that Parliament has done is to authorize the use of the provincial machinery for the fixing of the liability of the employer and the amount of the employee's compensation.

That the use made of the provincial machinery is a limited one is clearly shown by the judgment of the Supreme Court of Canada in *Ching* v. *Canadian Pacific Ry. Co.* (1). There Rand J., speaking of the Government Employees' Compensation Act, says, at page 457:

> What the latter does is to make full provision for the creation of rights in, and the payment of compensation to, Dominion Government Employees. For the purpose of administration, either the existing machinery under the compensation laws of the various provinces, or new machinery set up under the Dominion Act itself, may be used; . . . The authority given by the Dominion Act to the Provincial Board is strictly limited and, under the language of the principal section, the right to compensation is unencumbered by a referential incorporation of provisions of the Provincial Act dealing with consequential matters.

and then, at page 458, after setting out section 3 (1) of the Act:

> The important words are: "And the liability for and the amount of such compensation shall be determined . . . in the same manner and by the same board". It is the liability of the Dominion Government to pay and the amount of the compensation, the right to which is given earlier in the section, which are to be determined; not the resulting effects upon collateral rights against third parties. To suggest, therefore, that the enactment of a special code of provisions with the powers of carrying them into administration without reference to the Provincial Board, is a submission in any sense of the term to a Provincial Act constituting another code, is to disregard the precise and individual character of the Dominion enactment.

This statement clearly indicates that the Workmen's Compensation Act of Quebec is not incorporated into the Government Employees' Compensation Act, that there

(1) (1943) S.C.R. 451.

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has been no submission to the provincial law and that the suppliant's case is not governed by it. The substantive right to compensation is created by the Government Employees' Compensation Act; this contains no provision similar either to section 15 of the Quebec Workmen's Compensation Act or to section 1056 (a) of the Civil Code; there is no provision either that an injured employee should elect whether he will proceed under the Act or independently of it, or that if the Act is applicable to his case he shall have only such rights as the Act affords: the Act is quite silent on the subject of the employee's rights against the Crown independently of the Act. In this respect there is, in my opinion, a fundamental difference between the Government Employees' Compensation Act on the one hand and either the English or the Quebec Workmen's Compensation Act on the other.

Under the circumstances I have come to the conclusion that an employee of the Crown who has claimed and received compensation for injuries arising from and out of the course of his employment under the Government Employees' Compensation Act is not thereby barred from pursuing his claim for damages for such injuries under section 19 (c) of the Exchequer Court Act. The question of law is, therefore, answered in the affirmative, with the result that the parties may proceed to trial of the facts in issue. The costs of the argument on the question of law will be costs in the cause.

Order accordingly.