
CANADA / JUDGMENT

Norton v. Fulton

(1907) 39 SCR 202

COURT

Supreme Court of Canada

DECIDED

24 June 1907

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Collection

Supreme Court Judgments

Date

1907-06-24

Report

(1907) 39 SCR 202

Judges

Fitzpatrick, Charles; Davies, Louis Henry; Maclellan, James; Duff, Lyman Poore

On appeal from

British Columbia

Subjects

Constitutional law

Decision Content

Supreme Court of Canada

Norton v. Fulton, (1907) 39 S.C.R. 202

Date: 1907-06-24

William Thomas Norton (Plaintiff) Appellant;

and

The Honourable Frederick Fulton (Defendant) Respondent

1907: May 20; 1907: June 24.

Present: Fitzpatrick C.J. and Davies, Idinton, Maclellan and Duff JJ.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA

Constitutional law—Construction of statute—"Crown Procedure Act" R.S.B.C. c. 57—Duty of responsible ministers of the Crown—Refusal to submit petition of right—Tort—Right of action—Damages—Pleading—Practice—Withdrawal of case from jury—New trial—Costs.

Under the provisions of the "Crown Procedure Act," R.S.B.C. ch. 57, an imperative duty is imposed upon the Provincial Secretary to submit petitions of right for the consideration of the Lieutenant Governor within a reasonable time after presentation and failure to do so gives a right of action to recover damages.

After a decisive refusal to submit the petition has been made, the right of action vests at once and the fact that a submission was duly made after the institution of the action is not an answer to the plaintiff's claim.

In a case where it would be open to a jury to find that an actionable wrong had been suffered and to award damages, the withdrawal of the case from the jury is improper and a new trial should be had.

The Supreme Court of Canada reversed the judgment appealed from (12 B.C. Rep. 476), which had affirmed the judgment at the trial withdrawing the case from the jury and dismissing the action and allowing the plaintiff his costs up to the time of service of the statement of defence, costs being given against the defendant in all the courts and a new trial ordered. Davies and Maclellan JJ. dissented and, taking the view that the refusal, though illegal, had not been made maliciously, considered that, on that issue, the plaintiff was entitled to nominal damages, that, in other respects, the judgment appealed from should be affirmed and that there should be no costs allowed on the appeal to the Supreme Court of Canada.

APPEAL from the Supreme Court of British Columbia[1], affirming the judgment of Morrison J., at the trial, whereby the case was withdrawn from the jury and the appellant's action was dismissed without costs to the respondent, but with costs to the appellant up to the time of the service of the statement of defence.

The respondent is Provincial Secretary of the Province of British Columbia and a member of the Executive Council. The appellant, on 24th April, 1906, left with the respondent a petition of right in order that the same might be submitted to the Lieutenant Governor of the province for his consideration and for the purpose of obtaining from him the necessary fiat as provided by the "Crown Procedure Act" (R.S.B.C. ch. 57) sec. 4. The respondent, on 2nd May, brought the petition of right before the Executive Council. It was then discussed but no minute of council was prepared, nor was any order in council made. Pursuant, however, to the decision arrived at by the council, the appellant's solicitors were notified by the respondent, by letter dated 2nd May, that the council did not see their way to recommend that the fiat be granted. To this the

appellant's solicitors replied by letter of 3rd May, asking whether they were to understand from this that the respondent declined to submit the petition to the Lieutenant Governor. The respondent by letter of 4th May replied in the affirmative.

The action was brought by the appellant on 7th May, 1906. On 21st June, 1906, the respondent brought the matter again before the Executive Council and a formal minute was prepared refusing the fiat, which was duly approved by the Lieutenant Governor. The respondent then, on 22nd June, filed his defence, in which this submission and refusal is set up, and also paid into court the sum of \$5.00 to satisfy the appellant's claim. The appellant refused to accept this, and proceeded to trial. There was no suggestion in the evidence of fraud or malice on the part of the respondent.

Mr. Justice Morrison, at the trial of the action, withdrew the case from the jury and gave judgment for the respondent, dismissing the action but ordering the respondent to pay the costs up to the time of the service of the defence. This judgment was sustained by the judgment appealed from.

W. S. Deacon for the appellant, As all the members of the full court agreed that the defendant's refusal to submit the petition was an actionable wrong—Hunter C.J. and Irving J., expressly so deciding, and Martin J. not disagreeing, we submit that the case should not have been withdrawn from the jury, and that the grounds upon which the majority of the court refused a new trial were insufficient.

The action was not for mere delay in submitting, or for omission or neglect to submit, but for a specific refusal to do so. The defendant being sued for obstructing and preventing the plaintiff in the prosecution of his remedy on 4th May, 1906, it is immaterial that he ceased to do so on 21st June, following—if his conduct on the latter occasion can be regarded as a cessation of his obstruction. The question is not whether a new trial should be refused because only nominal damages were recoverable, nor as to the amount of damages recoverable, but merely whether the plaintiff had been accorded that trial by jury which had been ordered, and to which he was entitled. There was no verdict, as the whole case had been withdrawn from the jury by the trial judge, and there was nothing for the appellate court to review but the propriety of the course adopted. *Wood v. Rockwell*[2]; *Beatty v. Oille*[3], per Ritchie C.J. at page 712; *Scammell v. Clarke*[4]. The plaintiff has the right to have left to the jury all issues proper to be passed upon by the jury. See "Supreme Court Act," 3 Edw. VII. ch. 15, sec. 66 (B.C.); *Lewis v. old*[5]; *Cowan v. Affie*[6]; *Denmark v. McConaghy* [7]; *Canadian Pacific Ry. Co. v. The Cobban Manufacturing Co.* [8].

If the consideration of what damages the jury might have properly awarded, had it been permitted to pass upon that question, was proper to be entered upon by the full court, the conclusion that such damages would necessarily be assessed as nominal is erroneous, because the right infringed was not a mere naked right, the enjoyment of which could be said to be of no value, but an important constitutional privilege and civil right. See *Ashby v. White*[9], per Holt C.J.; per Bowen, L.J., in *The Queen v. Commissioners of Inland Revenue*[10], at page 236; per

Langdale M.R., in *Ryves v. Duke of Wellington*[11], at page 464; per Jervis C.J., in *Eastern Archipelago Co. v. The Queen*[12], at pages 914 and 915.

The remedy by petition of right is an absolute and specific form of legal remedy, and the defendant has interfered with and prevented the plaintiff from prosecuting it. See Chaster on Powers of Executive Officers (5 ed.), pages 162, 163, and cases there cited. The defendant's conduct derived no validity from his having procured the concurrence in it of the Executive; per Romer J., in *Raleigh v. Goschen* [13], at page 77, and per Sir R. E. Webster, A.G., *arguendo*, at page 78. See also *Ferguson v. Earl of Kinnoull* [14], pages 251 and 305, and cases cited, and the language of Lord Brougham, at page 305.

The circumstances under which a tort is committed are proper for a jury to consider on the question of what damages should be awarded. *Merest v. Harvey* [15].

Nesbitt K.C. for the respondent. The rights of the appellant, if any, were under section 4 of the "Crown Procedure Act," and, had it not been for the letter of the respondent of 4th May, there could have been no cause of action as the petition was ultimately submitted in due form and without unreasonable delay. *Irwin v. Grey*[16]. There was, in truth, no real refusal to submit in the first instance, but, if what happened amounted to a technical refusal to submit the petition as required by the statute, the appellant became thereby entitled to nominal damages only. No actual damage resulted, and there were no circumstances of aggravation. The court, will not order a new trial merely for the purpose of enabling a plaintiff to obtain a judgment for nominal damages; *Scammel v. Clarke*[17]; *Simonds v. Chesley*[18]; *Milligan v. Jamieson*[19]; nor where nothing is to be gained thereby. The court may itself direct the proper judgment. *Goddard v. Midland Railway Co.*[20]; *Allcock v. Hall*[21]; *Bryant v. North Metropolitan Tramways Co.*[22]; *Feize v. Thompson*[23]; *Yorkshire Guarantee & Securities Corporation v. Fulbrook & Innes*[24].

THE CHIEF JUSTICE—This appeal is allowed with costs. I agree in the opinion stated by Mr. Justice Duff.

DAVIES J. (dissenting)—In this case I concur with the reasons for judgment of Mr. Justice MacLennan and would dismiss the appeal.

IDINGTON J—The appellant claimed to be entitled to a renewal of a license from the Crown, which expired on the 26th of January, 1906, to cut timber and had made, on the 24th of January, 1906, application to the Chief Commissioner of Lands and Works for British Columbia, for such renewal of license.

He was either refused or his application so neglected that he had a grievance.

The question raised by the appellant was whether or not he had been thus denied properly a renewal of license. He presented a petition of right seeking to have this question determined and his alleged right to renewal declared.

The petition was presented on the 24th day of April, 1906, under the Crown Procedure Act, R.S.B.C. ch. 57. Section 4 thereof reads as follows:

- (4) The said petition shall be left with the Provincial Secretary, in order that the same may be submitted to the Lieutenant-Governor for his consideration, and in order that the Lieutenant-Governor, if he shall think fit, may grant his fiat that right be done. No fee or sum of money shall be payable by the suppliant on so leaving such petition, or upon his receiving back the same.

The defendant seems to have had no regard to the statute and after he had, as he alleges, brought the matter under the notice of his colleagues at council, refused to submit this petition to the Lieutenant-Governor as the statute requires.

This refusal is shewn by the respondent's letters to the appellant's solicitors in the correspondence in evidence. The acknowledgment of the receipt of the petition is shewn and then an ambiguous letter comes from respondent and the following letters cover the point now raised:—

May 3rd, 1906.

The Honourable the Provincial Secretary,
Victoria, B.C.

Dear Sir,—

Norton v. Rex. We are in receipt of yours of the 2nd instant. Will you kindly let us know if we are to understand from same you decline to submit the petition of right to the Lieutenant-Governor for his fiat and oblige.

Yours truly,

WADE, DEACON & DEACON,

Per W. S. D. EXHIBIT 5.

Provincial Secretary's Office, Victoria, No. 1207.

May 4th, 1906.

Messrs. Wade, Deacon & Deacon.

Barristers, Vancouver, B.C.

Sir,

Norton v. Rex. I have the honour to acknowledge the receipt of yours of 3rd instant, asking if you are to understand from my communication that I have declined to submit the petition of right to His Honour the Lieutenant-Governor. In reply I beg to say that is what I intended to convey in my previous letter.

I have the honour to be Sir, your obedient servant,

FRED. J. FULTON,

Provincial Secretary.

There seems here an express refusal to discharge a duty created, by statute.

The appellant became entitled the moment of this refusal to an action for breach by respondent of his statutory duty.

The action was brought and then awakening to a sense of duty the respondent proceeded, before filing his pleas herein, to an apparent discharge of this duty.

The result was a refusal by the Lieutenant-Governor on the advice of the respondent to grant a fiat.

The respondent then pleads this and payment into court of five dollars to cover the damages.

The case proceeds to trial by means of a special jury without any motion to stay proceedings, if such a step were open.

The case is tried with that jury until the foregoing defence is shewn by the evidence of defendant and then upon motion of his counsel the learned trial judge dismissed the action.

By what right this was done, I am quite unable to understand. A majority of the court below, however, uphold the proceedings.

The learned Chief Justice assigns as a reason for so doing that the statute specifies no time within which the Provincial Secretary is required to submit the petition and, therefore, a reasonable time must be allowed for him and the Executive Council to consider the matter.

Inasmuch as the respondent's letters shew that the executive had been consulted and had come to the decision that he announced and he explicitly states a refusal after all that to submit the petition as the law directs, I fail, with great respect, to understand this reason in its relation to the right of action that had already, as clearly as possible, arisen before action as the result of respondent's express refusal.

The respondent's evidence shews that the reason assigned by him when advising the Lieutenant-Governor to refuse the fiat was the same as present to the mind of respondent and his colleagues in the first place, when refusing to submit the matter at all.

There was thus, it seems to me, clearly no ground for taking more time.

Under the circumstances set forth in this case, the claim for more time would, of itself, be a matter for the jury's consideration in estimating the damages.

The payment into court of a nominal sum does not seem to me to mend matters.

It does not seem as if the respondent had even then properly realized his dereliction of duty and thereby evinced such recognition of it.

His Majesty and His Majesty's representatives have not yet become mere pawns.

I will not affirm that as a matter of course and as settled by law a neglect to submit a subject's petition to the representative of the Crown is to be covered by a tender of five dollars.

The speculation as to the possible result may in any such case be a matter of some difficulty for the jury in considering the damages, so far as it can properly enter into the matter of such consideration.

The minister's act in anticipating, as he did, the result thereof, by moving without any new fact or change of position in the subject matter he had to deal with, may or may not have improved his position. All that was for the jury. The case ought to be tried out and properly tried out.

To maintain the proposition that a minister of the Crown can be so protected in disregarding the statute seems to me equivalent to repealing it.

The result, if the petition had been properly dealt with, is something we can say nothing about.

I think Mr. Justice Irving, in his dissenting judgement, put the matter in the only way it can be properly viewed.

It is peculiarly a case for a jury to assess damages in, if they come to be assessed. A direction to assess only nominal damages would have been an error. And, much more grave is the dismissal of the action without going through even the form of finishing the trial.

The appeal should be allowed with costs and the costs of the abortive trial be borne, in any event, by the respondent.

MACLENNAN J. (dissenting).—This is an appeal by the plaintiff from a judgment of the Supreme Court of British Columbia, dismissing an appeal from a judgment at the trial dismissing the action.

The action was brought against the defendant who is the Provincial Secretary of the Province of British Columbia, and claimed damages for the refusal by the defendant to submit a petition of right on the plaintiff's behalf for the consideration of the Lieutenant-Governor.

The petition was dated the 24th April, 1906, and was received by the defendant on the 26th of April. On the 2nd of May, the defendant wrote to the plaintiff saying that the petition had been laid before the Executive Council and they did not see their way to recommend the fiat. On the following day the plaintiff wrote to the defendant inquiring whether his letter meant that he declined to submit the petition to the Lieutenant-Governor for his fiat.

This was answered by the plaintiff on the 4th saying that was what his letter intended to convey.

This action was commenced on the 7th of May, and the statement of claim was delivered on the 11th of June following alleging that the defendant wrongfully and illegally, and maliciously declined and refused to submit the petition, and claiming \$10,000 damages.

On the 22nd of June the defendant filed a statement of defence, in which, after denying the several allegations of claim, he set up two other defences, the first being that after the commencement of the action, namely, on the 21st of June, he had submitted the petition to the Lieutenant-Governor, who had refused his fiat therefor, and the other defence being that, while denying all liability, he brought into court the sum of five dollars as enough to satisfy the plaintiff's claim. The plaintiff replied, saying nothing as to the payment into court, but joining issue generally, and by way of further reply, denying that the petition of right had been submitted to the Lieutenant-Governor, and alleging that if it was, and if the fiat was refused, it was refused capriciously and without sufficient or any reason; and also that if it was submitted, and the fiat refused, the defendant, and other responsible advisers of the Lieutenant-Governor, so advised him capriciously and without any, or any sufficient, reason.

At the trial, before a special jury summoned at the instance of the defendant, the plaintiff endeavoured to adduce evidence of the merits of his petition, but this was properly disallowed by the learned judge; and there was no evidence whatever of malice on the part of the defendant in omitting or refusing to submit the petition in the first instance, nor any evidence of caprice on the part, either of the Lieutenant-Governor, or any of his advisers, in connection with the subsequent refusal to grant a fiat.

On the contrary, it appeared that when the petition was received by the defendant, it was promptly submitted to the executive council who came to the conclusion that it was not a case in which they ought to advise the Lieutenant-Governor to grant a fiat; and so, what the defendant, erroneously as I think, deemed the unnecessary formality of submitting it to the Lieutenant-Governor, was omitted.

At the conclusion of the trial then, the case stood thus. The defendant had, without any malice or evil intent, committed a breach of duty towards the plaintiff, in not submitting his petition to the Lieutenant-Governor, as well as to his colleagues. Taking the wrong to have been committed on the 2nd of May, the action was brought on the 5th, and on the 21st of June the petition was submitted and the wrong was righted. What possible injury or damage could the plaintiff have suffered between the 2nd and the 5th of May, or up to the 21st of June? It is impossible to perceive what such damages could be, beyond the costs of the action. And even those might perhaps have been avoided, if the plaintiff had called the defendant's attention to the positive terms of the statute, instead of at once issuing a writ.

On the 21st of June the duty, the neglect or refusal of which was the cause of action, had been performed. There could be no more damage after that. The cause of action was not the refusal of a fiat. There could be no action for that. The cause of action was the refusal to submit the petition. The plaintiff's damage would be exactly the same if the fiat had been granted, and in either case must have been, at the utmost, merely the delay between the 2nd May and the 21st June, in having the question decided whether he was to have a fiat granted or not. And no other injury or damage was proved or even suggested.

I am, therefore, clearly of opinion that no damage more than merely nominal was proved, and that it would not have been competent to the jury to assess substantial damages, which they could have done only by exercising their imaginations. *Williams v. Stephenson*[25].

But while I think the learned judge was right in withdrawing the case from the jury, I think the judgment on the main issue should have been for the plaintiff. I think the defendant did illegally refuse to submit the petition, although not maliciously or wrong- fully, and that the plaintiff should have judgment on that issue, with one dollar damages, he having refused to accept the larger sum.

I think the action in other respects should be dismissed, but the judgments as to costs, at the trial and in appeal, should stand, and that there should be no costs of this appeal.

DUFF J.—I am in accord with the majority of the judges of the full court in the opinion, (which seems also to have been the opinion of Erle C.J. as indicated in his judgment in *Irwin v. Grey*[26] at page 637,) that by virtue of the Crown Procedure Act an obligation rests upon the Provincial Secretary, with whom a petition of right has been left, to submit it to the Lieutenant—Governor, and that for his refusal to perform that obligation an action lies at the suit of the suppliant. The contention—vigorously pressed upon us—that the duty of the Provincial Secretary under the statute is discharged when, after consideration of the petition, it is decided by him and his colleagues of the Executive Council not to recommend that a fiat be granted,—leaves out of account two things;—1st. That the statute speaks of a submission to the Lieutenant-Governor, a consideration by the Lieutenant-Governor, the grant of a fiat by the Lieutenant-Governor;—and, 2ndly. That, while His Majesty or (in a province of Canada,) His Majesty's representative, cannot under the constitution act without the advice of a responsible minister or ministers, and while the decision in all questions of administration must ultimately rest with those who will be responsible, still the constitutional function of any particular minister or ministers of the Crown is to inform and advise and not to dictate.

It seems necessary to point out that to this last stage the development of cabinet rule has not yet come; and it is, perhaps, not superfluous to mention that the Provincial Secretary's statutable obligation to submit the petition is something altogether different from the political obligation he owes to the Crown as its officer and one of its advisers, in respect of advice and otherwise, wherein he is not accountable at the suit of any individual.

That the plaintiff left with the defendant, as Provincial Secretary, his petition of right, or that there is evidence upon which a jury might properly find that prior to the commencement of the action the defendant refused to submit it to the Lieutenant—Governor is not disputed.

It is to be observed that the plaintiff does not rest his title to relief upon the neglect of the defendant to submit the petition, but upon his express refusal to perform his statutable obligation. The plaintiff's case is that, upon this refusal, a cause of action vested in him, and I am, consequently, unable to concur in the view, expressed by the learned Chief Justice of British Columbia and by the learned trial judge, that the submission of the petition, six weeks after the cause of action arose and the action had been commenced, is an answer to the plaintiff's claim.

It is quite true that not every neglect to submit a petition would so prejudice a suppliant in his legal rights as to give rise to a right of action. The suppliant's right is not to have his petition submitted instantane. The Provincial Secretary has his duties as a minister of the Crown, and considerations regarding the orderly conduct of business would indicate the desirability that, on the submission of a petition to the Lieutenant-Governor, it should be accompanied by the advice of his minister or minister's, together with such information as should enable him intelligently to appreciate the grounds of that advice. The time necessary to get such information and to consider and consult respecting such advice, the Provincial Secretary is unquestionably entitled to take.

But no such justification seems to be suggested here.

It was, on the evidence at least, open to the jury to find that the defendant's refusal was a decisive refusal to submit the petition, in any event, a refusal in denial of the plaintiff's right to have it submitted.

If, upon that refusal, the plaintiff was not entitled to sue, how long was he bound to wait?

And, to concede that he could then sue is surely to concede that he had then a right of action.

It does not, indeed, seem to be contested that the plaintiff's evidence would have supported a right of action if nothing further had happened;—a right of action, that is to say, for damages founded on the defendant's wrongful act in refusing to submit his petition.

Such a right of action, once vested, cannot, I think, be got rid of except by a release or by satisfaction of it;—and the subsequent submission cannot, I think, be said to be either of these.

The plaintiff having presented evidence upon which a jury might not improperly have found that he had, at the hands of the defendant, suffered an actionable wrong, it was his right to have his case submitted to the jury, with—at the lowest—a direction that, if they should so find, he would be entitled to a verdict for nominal damages; and, on such a finding, it would be his right to have judgment against the defendant for such sum as the jury should under that direction award. In point of fact, the plaintiff's case was not submitted to the jury; and his action was dismissed. It is argued that, in these circumstances, the plaintiff can now have no relief, because, it is said, the evidence clearly shews that no jury acting within its duty, could award more than nominal damages. This view seems to have met with the approval of Martin J. in the court below.

With great respect, I cannot agree with it. Assuming it to be clear on the evidence that nominal damages only could properly be awarded, it is at least as clear that the plaintiff has not had judgment pronounced upon the issues of fact involved in the action. The tribunal appointed to try those issues—the jury—has had no opportunity of passing upon them; and assuming it to be the rule that in such a case a new trial should not be granted, if on the evidence the only proper verdict would be a verdict for such damages, the basis of the rule must be that in such a case the court of appeal has power to enter such a verdict and will do so. Somewhere, by some tribunal, the plaintiff is entitled to have the validity of his claim determined by a judgment in the action he has brought. *Ubi jus ibi remedium*. A cause of action which—its constituent facts having been proved in a proper proceeding—the courts will not enforce, seems to be a contradiction in terms. The plaintiff would, therefore, be entitled, even in this view, to have the judgment dismissing the action set aside; and judgment entered in his favour for nominal damages. But I wish to express no opinion upon the question—where, that is to say, the jury has not had an opportunity of passing upon the case, whether or not the court of appeal can, under the practice at present in force in British Columbia, against the will of either party, enter such a verdict; in my opinion it is unnecessary.

I am unable to come to the conclusion that there is not evidence fit for the consideration of a jury upon the question whether or not they should award the plaintiff nominal damages only. Very cogent arguments may unquestionably be urged in favour of the view that an affirmative answer should be given to that question; but I think it should be left to the jury to pass upon the validity of them.

The plaintiff is, therefore, entitled to a new trial. He should also have the costs of the appeals to this court and to the full court.

Appeal allowed with costs.

Solicitor for the appellant: E. J. Deacon.

Solicitor for the respondent: D. G. Marshall.

[1] 12 B.C. Rep. 476.

[2] 38 Can. S.C.R. 165.

[3] 12 Can. S.C.R. 706.

[4] 23 Can.S.C.R. 307.

[5] 17. O.R. 610.

[6] 24 O.R. 358, at p. 364.

[7] 29 U.C.C.P. 563.

[8] 22 Can. S.C.R. 132.

[9] 1 Sm. L., Cas. (11 ed.) , 240, at p. 263.

[10] 53 L.J.Q.B. 229.

[11] 15 L.J., Ch. 461.

[12] 2 E. & B. 856.

[13] (1898) 1 Ch. 73.

[14] 9 Cl. And F. 251.

[15] 5 Taunt. 442.

[16] 3 F. & F. 635.

[17] 23 Con . S.C.R. 307.

[18] 20 Con. S.C.R. 174.

[19] 4 Ont. L.R. 650.

[20] 80 L.T 624.

[21] (1891 1 Q.B. 444.

[22] 6 Times. L.R. 396.

[23] 1 Taunt. 121.

[24] 9 B.C. Rep. 270.

[25] 33 Can. S.C.R. 323.

[26] 3 F. & F. 635.

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Prepared on 25 October 2026 · Esheria