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*Feb. 17.
*March 2.

THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF) ..... APPELLANT;

AND

THE CITY OF SYDNEY (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

"Militia Act"—R.S.C. [1896] *c.* 41—*"Senior officer * * * present at any locality"—Military district—Right of action—*4 *Edw. VII. c.* 23, *s.* 86—*Statute—Retrospective effect.*

By sec. 16 of the "Militia Act" (R.S.C. [1896] ch. 41) Canada is divided into military districts of which the Province of Nova Scotia is one. By sec. 34 "the senior officer present at any locality" may, on requisition from three justices of the peace, call out the troops in aid of the civil power wherever a riot or disturbance of the peace has occurred or is anticipated.

Held, Brodeur J. dissenting, that the "senior officer present at any locality" is not necessarily the senior officer of a corps stationed at the place where the riot occurs or is likely to occur. The justices, in their discretion, may requisition the senior officer of any available force.

By sec. 34, sub-sec. 6, of the above Act the officer commanding the troops so called out may, in his own name, take action against the municipality in which the riot occurred to recover the amount of the expenses thereby incurred which are to be paid to His Majesty when recovered. By 4 Edw. VII. ch. 23, sec. 86, this right of action was vested in His Majesty.

Held, that the latter being a procedure Act is retrospective and an action was properly brought in the name of the Attorney-General of Canada to recover the expenses of calling out the troops on the occasion of an industrial strike in the City of Sydney, part of which expenses were incurred before, and part after, the last mentioned Act came into force.

Judgment appealed from (46 N.S. Rep. 527), reversed, Brodeur J. dissenting.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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APPEAL from a decision of the Supreme Court of Nova Scotia (1), reversing the judgment at the trial in favour of the plaintiff.

The two questions of law raised on this appeal are stated in the above head-note. The material sections of the "Militia Act" will be found in the opinion of Mr. Justice Idington.

Newcombe K.C. for the appellant.

Finlay Macdonald for the respondent.

THE CHIEF JUSTICE.—This is an action to recover the sum of $5,309.09 advanced by the Crown out of the Consolidated Revenue Fund of Canada to defray the expenditure incurred in connection with the pay and allowances of the militia force called out to aid the civil power to suppress a riot or disturbance within the municipality of the City of Sydney.

There is no dispute as to the facts. They are all found in favour of the Crown.

It appears that in July, 1904, there were riots and civil disturbances in Sydney, and the local authorities, unable to cope with them, found it necessary to summon a large military force to their assistance. Requisitions were accordingly made upon three separate military officers. Colonel Irving, the officer commanding at Halifax, District No. 9, which comprises the Province of Nova Scotia, was the only one who brought his forces to Sydney and performed the services required.

The trial judge maintained the action except as to one item of $20 for legal expenses. On appeal, this

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judgment was reversed on the sole ground that Colonel Irving was not

> the senior officer of the active militia present at any locality

within the meaning of section 34 of the "Militia Act." Mr. Justice Ritchie, who delivered the judgment of the court, substitutes for this expression by interpretation, the words

> the senior officer at or nearest the place where the riot has occurred or is anticipated.

And upon the assumption that there was an officer at Sydney or nearer to Sydney than Halifax, the claim is disallowed.

It appears to me obvious that, speaking generally, the statute contemplates real and effective proceedings to put down disturbances by aid of the militia power when the forces under the control of the local civil authorities are insufficient, and the section in question provides that the initial step must be taken by the civil authorities. It is for those authorities to judge of the magnitude of the disturbance, the necessity for aid and, in the first instance, the strength of the force required to quell it. The section properly provides, therefore, that the requisitions must be made by those who are immediately associated with the locality where the trouble has arisen and in which the services of the militia are required. They are in a moment of urgency authorized to impose a heavy tax upon the ratepayers; hence the words used in that section authorize the senior officer to act "when thereunto required in writing" by the chairman.

These authorities, charged with the duty of maintaining order in *the* localities where the disturbances have arisen apply to the senior officer of the active militia at "*any* locality." Here there are no qualify-

ing words as in the case of the civil authorities for the obvious reason that there may not be in the locality in which the riot occurs any active militia, or there may be serious reasons why in a local disturbance the local militia should not be called upon to interfere. Hence, the necessity for leaving a wide discretion with the local civil authorities.

There must have been in this case a serious and wide-spread disturbance, because the magistrates considered it necessary to summon assistance from three different quarters and the senior officer of the active militia who was in command, as I have already said, over the whole district, answered that summons and directed his subordinates to await his further orders.

I do not wish to be understood as saying that the municipal authorities might not have limited their requisition to the officer commanding the militia force at Baddeck or in Sydney. My point is that the statute confers a power upon the local authorities responsible for the maintenance of the peace which they exercise at their discretion in view of the necessities of the situation and they may requisition any officer in the province, and if the outbreak is sufficiently serious, they might go to headquarters and put the general officer commanding in a position to call out the whole militia force of the country.

The word "locality" as used in the section is perhaps somewhat indefinite, but it must be interpreted in such a way as not to unduly limit and possibly destroy the discretion which is undoubtedly conferred upon the civil authorities, and they having, in the exercise of their undoubted discretion, called upon the senior officer of the active militia for the district which included the scene of the disturbance, it was for

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him to determine how that requisition was to be met. This is made abundantly clear by reference to section 78 of the Act, which gives the officer commanding any military district authority, upon any sudden emergency, to call out the whole or any part of the militia within his command.

The "Interpretation Act," section 31, paragraph (*e*), provides that

> if a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed from time to time as occasion requires.

The active militia may be called out for service either within or without the municipality in which it is raised (sec. 34, sub-sec. 1).

The respondents contend that the action should have been brought in the name of the commanding officer of the corps because the militia were called out under the provisions of chapter 41, section 34, R.S.C. 1886, sub-sec. 5, which provides that the pay and allowances are to be recovered by the commanding officer. There are many answers to this objection in the circumstances of this case, but the most effective is given by Mr. Justice Anglin.

It appears by the particulars that the disbursements were all made by the Government during the period from August 6th, 1904, to February, 1905, and this action was brought in 1910. At that time, the statute of 1904 (4 Edw. VII., ch. 23) was in force and sections 86 and 87 provide that such sums, as are in question here, may be recovered as a debt due to the Crown by the municipality. This is a mere question of procedure. In *Gardner* v. *Lucas* (1), Lord Blackburn said at page 603:—

(1) 3 App. Cas. 582.

For instance, I think it is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way; clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.

I entertain no doubt that the City of Sydney is a separate and distinct municipality from the County of Cape Breton and, as such, obliged to pay for the services of the militia duly requisitioned (sec. 3, ch. 70, R.S.N.S. 1900).

The appeal should be allowed with costs.

IDINGTON J.—The claim made herein is to recover from respondent, which is a municipality, payment for services rendered by the active militia called out in aid of the civil power under section 34 of the "Militia Act."

I am unable to construe that section as the Supreme Court of Nova Scotia has in support of its judgment allowing the appeal from the judgment of the learned trial judge.

With great respect it seems to me rather narrow ground to proceed upon the possible meaning to be found in the words of part of one sub-section out of half a dozen such sub-sections and especially so when those words are at best of dubious import.

I think we must look at the scope of the whole of this section and see if there has been a substantial compliance with its meaning and whether or not the action taken has been an illegal or legal proceeding.

For if illegal then if those men so engaged or any one of them in suppressing a riot or disturbance had happened to take human life, a charge of man-

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slaughter or worse might have lain against those responsible for such result.

Such like considerations may well arrest our attention in determining whether or not this calling out of the active militia fell within the meaning of what the statute prescribes. For if by the reasonable interpretation of this section the legality of the action of Lt.-Col. Irving and the magistrates making the requisition upon him cannot be maintained assuredly no action will lie for the recovery of the payments made.

And on the other hand if what was done can be justified under and by virtue of the statute as legally done, it seems to me the recovery sought must be allowed.

It is admitted that Lt.-Col. Irving was, during the time in question, District Officer commanding No. 9 Military District within which the City of Sydney lies.

There were other officers each commanding a regiment in the district, upon each of whom a requisition was made by the magistrate at the same time as the requisition made upon Lt.-Col. Irving. These other commanding officers were, I take it, under the command of Lt.-Col. Irving.

The first sub-section of section 34 provides that:—

> The active militia, or any corps thereof, shall be liable to be called out * * * in aid of the civil power in any case in which a riot, disturbance of the peace, or other emergency requiring such service occurs, or * * * whether such riot, disturbance or other emergency occurs, or is so anticipated within or without the municipality in which such corps is raised or organized.

Sub-section 2 declares that:—

> The senior officer of the active militia present at any locality shall call out the same or such portion thereof as he considers neces-

sary for the purpose of preventing or suppressing any such actual or anticipated riot or disturbance, etc., * * * when thereunto required in writing by

the several judicial personages defined, etc.

Sub-section 3 provides that every such requisition shall express on its face the actual facts or the anticipation thereof

requiring such service of the active militia in aid of the civil power for the suppression thereof.

Sub-section 4 provides that:—

Every officer and man of such active militia, or any portion thereof, shall, on every such occasion, obey the orders of his commanding officer, etc., etc.

Then sub-section 5 provides that:—

When the active militia, or any corps thereof, is so called out in aid of the civil power, the municipality in which their services are required shall pay them, etc., etc., etc.

Sub-section 6 provides for Government advancing expenses, etc.

I have only quoted the parts of the language used that are material to test the correctness of the judgment here in question which seems to put the entire application of the section upon the meaning of the words quoted from the second sub-section. Such an interpretation would, if followed to its logical consequences be apt to reduce the whole section to a most impotent absurdity.

If the only person who may be requisitioned is as suggested, the senior officer nearest to the scene of the disturbance, then the captain of a company might be the only one answerable to such requisition, and his company not even all within reach of his summons and all the rest of the active militia be miles away.

Counsel for respondent when asked how more re-

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mote forces were to be brought in if needed suggested that the local officer could call for them. By what authority he was unable to tell us. It is quite clear he would have no such authority. And no one else would until duly and properly requisitioned by the civil authority.

According to the construction adopted by the court below in reversing the learned trial judge, the civil authority could not direct any one but the senior officer nearest the scene of disturbance.

The language I have quoted is express in imposing the duty not only upon a single corps, but upon the "active militia" and to my mind demonstrates that the contention made by respondent is untenable and unworkable.

All that the language of section 2 on which stress is laid to maintain this contention indicates is that magistrates and officers should each act in a reasonable and due orderly manner.

The locality is not defined, but the closing language of the first sub-section clearly shews that the corps need not be within the municipality.

And the word "locality" must be given a reasonable and common sense construction.

The magistrates of the county of whom one may be mayor or other head of the municipality concerned are alone entrusted with the power, and they are neither confined to their own county nor to a single corps. They would certainly be expected from the language used to exercise common sense. But they are entrusted with a high duty carrying with it great power and responsibility and I do not think we can supervise their action much less reduce them to the impotent state contended for.

Indeed, we have no such evidence before us as would warrant us in criticising their conduct in the premises. I presume it was what respectable men thought was reasonable and necessary to meet the emergency presented to them.

Counsel for respondent, as he was entitled to do, raised the question of the right of the Attorney-General to sue instead of the commanding officer suing as was provided by the Act as it stood at the time in question.

In view of the amendment making provision for the Attorney-General suing I do not think the objection is now tenable.

Indeed, I cannot get rid of the impression that the money being ultimately payable to the Crown it was always competent for the Attorney-General to have sued so far as the facts established that the Crown was ultimately entitled to recover.

The case of *Crewe-Read* v. *Cape Breton*(1) only decides that the officer suing by virtue of the statute, having died, his administratrix could revive and continue the action he had begun.

Nor can I find that the action should have been brought against the county.

And if the company most directly interested in the protection of the militia are, as the factum alleges, free from taxation, I suspect that must be a situation created by respondent and not by the county.

The protection of property outside the city was no doubt because that was connected with the city and something the county derived no benefit from.

The appeal should be allowed with costs.

(1) 14 Can. S.C.R. 8.

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DUFF J.—The action out of which this appeal arises was brought by the Attorney-General of the Dominion to recover a sum of $5,309.09 advanced by the Dominion Government to pay the expenses of certain militia forces requisitioned in aid of the civil power under the provision of sec. 34, ch. 41, of the Revised Statutes of 1886. I think the only points that require discussion are two: first, it is said that the magistrate who professed to act under the authority of section 34 had no authority to requisition the troops that were requisitioned; and, secondly, that if they had such authority that the Attorney-General has no status to sue for the advances made. As touching the first point the facts appear to be that the magistrate requisitioned Col. McRae, of Baddeck, and Col. Irving, who was district officer commanding at Halifax for the district of Nova Scotia; troops were sent by Col. Irving from Halifax, but the troops at Baddeck, although mobilized, were not sent forward. The argument appears to be that the power of requisitioning troops given by sec. 34 applies only to troops in the locality in which the disturbance occurs or in some adjacent locality. The Supreme Court of Nova Scotia held that locality in the second sub-section of section 34 means the locality nearest the seat of disturbance. The effect of this construction would be that the requisition to Col. Irving at all events was beyond the power of the magistrates.

I think with great respect that it is impossible to support this view of the statute. The language of the introductory clause of section 34 is general, and whether some limitation may or may not be justified by the context or the subject-matter of the section I think it is impossible to read it in the restricted sense in which it was read in the court below. The effect of

that construction would seriously limit the operation of these provisions. It would make it impossible for the magistrates to call in more than a strictly limited number (generally not more than one) of bodies of troops, no matter how inadequate such forces might be, no matter how clearly undesirable the employment of those particular forces, or any of them might be in the particular circumstances. The argument that the provisions construed as the Government contends are liable to abuse is one that no doubt deserves consideration, but, on the other hand, Parliament may have well felt that it was better to rely upon the good sense of the magistrates and the military authorities than to impose restrictions which, in easily conceivable cases, might entirely neutralize these provisions.

The facts bearing upon the second point are these. The "Militia Act" to which I have already referred was superseded, in 1904, by a statute which was chapter 23 of the statutes of that year. That Act came into force on the 1st of November. Of the advances sued for a considerable proportion were made prior to that date. As to these advances it is contended that chapter 41 of the Revised Statutes, 1886, applies and if so the proper person to sue for them is the commanding officer and not the Attorney-General. I think this contention must be rejected for the reason advanced by Mr. Newcombe, viz., that the commanding officer, in suing for the recovery of advances under sub-section 6 of section 34 of the earlier Act, sued as trustee for the Crown, and that, consequently, the provision of the later Act, section 87, which authorizes an action on behalf of and in the name of the Crown is strictly a provision relating to procedure only.

This is a sufficient answer to the objection, but there

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is another answer which would be equally effective. There appears to be nothing in the practice of the Supreme Court of Nova Scotia to prevent the commanding officer now being added as a party (*The "Duke of Buccleuch"* (1)), and the suggestion that his claim would be barred to the Statute of Limitations, falls to the ground when one remembers that the right of action asserted by him is not on his own behalf, but on the behalf of the Consolidated Revenue Fund. In the circumstances it would not be proper to impose any terms as to costs as a condition of such amendment.

The appeal should be allowed with costs here and below; there should be judgment for the Attorney-General with costs of the action.

ANGLIN J.—The court *en banc,* reversing the trial judge, dismissed this action on the ground that the officers on whom the requisitions calling out the militia were made were not then present at the locality of the riot or disturbance, actual or anticipated. With respect, I think the court has placed a wrong construction on the words "present at any locality" in sub-section 2 of section 34 of chapter 41 of the R.S.C. 1886. This adjectival phrase qualifies either "the senior officer" or "the active militia" — I think the latter — but it is not very material which. The "locality" referred to is not that where the riot or disturbance occurs — there might be no active militia whatever there; the available force might be quite inadequate — but that where the officer requisitioned or the body of active militia which he commanded is

(1) [1892] P. 201.

stationed. The phrase "at any locality" was used advisedly. The words which immediately follow,

> shall call out the same or such portion thereof as he considers necessary,

obviously refer to the body of active militia under the command of the "senior officer" requisitioned. The contrast between the words "present at any locality" and the words,

> the municipality or county in which such riot, or disturbance or other emergency occurs or is anticipated,

found in the same section, I think removes any possible doubt that the application and meaning which I give to the words "any locality" is what Parliament intended they should have. It follows that the requisitions addressed to Colonel Irving and Colonel McRae were within the authority conferred by section 34 of chapter 41.

The respondent further insists that the right of action was, by the statute in force when most of the payments were made, given exclusively to the commanding officer, who was required to sue in his own name, although payment had already been made out of the Consolidated Revenue Fund, R.S.C., 1886, ch. 41, sec. 34, sub-secs. 5 and 6. But by an amendment of 1904 the right to sue for the recovery of money so expended was given to His Majesty (4 Edw. VII., ch. 23, sec. 86). That right is exercisable by the Attorney-General. No new right of action was created by this amendment; no new liability was imposed. Under the former statute when the money had been paid out of the Consolidated Revenue Fund the commanding officer who sued was bound to pay the

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amount recovered over to His Majesty. The statute of 1904 merely effects a change in the procedure to be followed in the recovery of the money. It was in force when the action was brought and as a statute regulating procedure applied to it. I think the right of the Attorney-General to maintain this action is clear.

As to the small item of expenditure incurred in protecting the source of supply of the waterworks of the Dominion Steel Company ($36) there is a little more difficulty. The source of supply of these waterworks is outside the town limit; but the works of the steel company are within the City of Sydney, and the danger to the water supply arose from rioting and disturbance within the city. It was to prevent injury likely to arise out of that rioting and disturbance that the services of the militia were required. I do not think that it is beyond the scope of the statute that the municipal corporation of the City of Sydney should be required to pay for the services rendered under such circumstances at the source of the water supply.

I would allow this appeal with costs in this court and in the court *en banc,* and would restore the judgment of the trial judge.

BRODEUR J.—I am of opinion that this appeal should be dismissed for the reasons given by Mr. Justice Ritchie.

Appeal allowed with costs.

Solicitor for the appellant: *R. T. MacIlreith.*
Solicitor for the respondent: *Finlay Macdonald.*