THE WOLFE COMPANY (SUPPLIANT)..... APPELLANT;

1921
*Nov. 16.
*Dec. 9.

AND

HIS MAJESTY THE KING (RESPONDENT)..... RESPONDENT.

JOHN POWERS AND GEORGE POWERS (SUPPLIANTS)..... APPELLANTS;

AND

HIS MAJESTY THE KING (RESPONDENT)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA:

Crown—Public work—Injury to property—Negligence of Crown officials—Exchequer Court Act—R.S.C. [1906] s. 20; 7-8 Geo. V, c. 23.

Under a lease for an indefinite period and terminable on fourteen days' notice the Government of Canada occupied the basement and first floor of a building as a recruiting station in 1916-17. A fire originating on the premises while so occupied destroyed property belonging to the tenants of adjacent premises who claimed compensation by petition of right.

Held, affirming the judgment of the Exchequer Court (20 Ex. C.R. 306) Duff J. dissenting, that the portion of the building so occupied by the Government was not a "public work" within the meaning of that term as used in subsec. (c) of sec. 20 of the Exchequer Court Act.

Per Duff J.: The meaning of "public work" as that term is used in subsec. (c) is not confined to property of which the Crown has a title not less ample than a title in fee simple or to property constructed or in course of construction by the Crown.

Per Anglin and Mignault JJ.: It includes any operation undertaken by or on behalf of the Crown in constructing, repairing or maintaining public property.

PRESENT:—Sir Louis Davies CJ. and Idington, Duff, Anglin and Mignault JJ.

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APPEAL from the judgment of the Exchequer Court of Canada (1) in favour of the Crown.

The material question raised by the appeal and the facts on which it depends are stated in the head-note. As to whether or not the fire which destroyed the suppliant's property was caused by the negligence of an officer or servant of the Crown the opinion of the majority of the Court appears to be against the judgment appealed from.

Fripp K.C. for the appellants. The fire was caused by negligence of servants of the Crown in placing a stove close to inflammable woodwork. See *Scott* v. *London and St. Katherine Dock Co.* (2). *McLean* v. *Rhodes Curry & Co.* (3).

The recruiting station was a public work for the purposes of the Exchequer Court Act. The provisions of the Public Works Act may be applied to construe subsection (c) and leave no doubt on the matter.

Hogg K.C. for the respondent referred to *Larose* v. *The Queen* (4); *City of Quebec* v. *The Queen* (5)

THE CHIEF JUSTICE.—The suppliants in each of these cases in their respective petitions of right claimed damages against the Crown, the former to the extent of $23,245.85 and the latter to the extent of $18,800.00, on the grounds that they were carrying on business in Ottawa on the 13th of December, 1917, and for some years previously and that as stated in their petition

(1) 20 Ex. C.R. 306
(2) 3 H. & C. 596.
(3) 10 D.L.R. 791.
(4) 6 Ex. C.R. 425; 31 Can. S.C.R. 206.
(5) 24 Can. S.C.R. 420 at p. 448.

on the said 13th day of December, A.D. 1917, the Department of Militia and Defence occupied the adjoining premises, a public work of Canada, and, owing to the negligence and want of proper care on the part of the said Department, its servants and agents, by using a defective stove and pipes and by negligence over-heating of the same and by neglect of a watchman in charge of said stove in leaving the premises while the stoves and pipes were overheated, the said premises were carelessly and negligently set on fire, destroying the said building and premises so occupied by the Department, and also the stock-in-trade of the suppliants.

The two appeals were by order consolidated and heard together.

The two questions on which the appeals turned were whether the premises occupied by the Department of Militia and Defence at the time of the fire were a public work within the meaning of the Exchequer Court Act, or the Public Works Act of Canada, and, if so, whether the fire originated from the negligence of the officials of the department acting within the scope of their duties or employment.

Mr. Justice Audette of the Exchequer Court held adversely to the appellants on both grounds and after giving the arguments at bar and the evidence every consideration, I have reached the conclusion that he was right.

As a fact it appears that the Department of Militia occupied only the basement and ground floor of the Arcade Building as a recruiting station for soldiers under an agreement to vacate at any time after giving fourteen days' notice. The Arcade Building itself was not leased nor occupied by the department but only the ground floor and basement, and the occupation was merely temporary, determinable on giving fourteen days' notice.

It may be, I admit, somewhat difficult to decide in some cases what is or is not a public work within the meaning of the Act and I do not think it desirable to attempt any definite interpretation of the words "public work". Every case arising must be deter-

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mined on its own special facts. But in the cases now before us it is sufficient to say, and I have no hesitation in holding, that the temporary occupation of the basement and ground floor of the Arcade Building subject to its being determined on a fourteen days notice could not constitute the whole building a public work or, apart from the whole building, make the basement which was occupied such a work. To my mind such a conclusion offends one's common sense and I agree with the finding of Audette J. when he says:

> The words "public work" mentioned in section 20 of *The Exchequer Court Act* must be taken to be used as verily contemplating a public work in truth and reality, and not that which is mentioned in *The Public Works Act* or in *The Expropriation Act* for the purposes of each Act.

This conclusion makes it, perhaps, unnecessary to determine the other point of alleged negligence on the part of the Crown officials causing the fire. I feel bound to say, however, after a close examination of the evidence, that I am unable, like the learned trial judge, to discover any such negligence. The evidence given by the fire inspector, Latimer, as to conditions found by him after the fire was over, was that the stove standing in the south-east corner of the basement and which it was suggested caused the fire, had not burnt the floor on which it stood; "that part of the floor", he said "was all right and the wood-work around there was there still. The wood-work, except a piece of the ledge of the window, was intact". Altogether I could not help being satisfied from this and other evidence that the surmise of some witnesses of the fire having originated from the stove in the south-east corner of the basement could not be upheld. On the contrary, it is my opinion that the fire originated from other causes unknown.

I would, therefore, dismiss the appeal with costs.

IDINGTON J.—I have read the evidence in this case to see if by any possibility there was any evidence upon which to rest the claims herein of negligence on the part of those in respondent's service being the cause of the fire in question.

I can find none. The mere surmise or suspicion of a fire inspector is far from proof of anything.

We cannot hold, even if a negligent state of things exist in a given place, that a fire which started in that place must of necessity be attributable to such negligence.

It needs something else to establish legal liability and I cannot find such facts existent herein as to justify the inference we are asked to draw.

These appeals should therefore be dismissed with costs.

DUFF J. (dissenting).—The Department of Militia and Defence leased and occupied the basement and first floor of the Arcade Building at a rental of $200 a month, a term of the agreement being that the department was to be at liberty to vacate the premises so leased at any time upon giving 14 days notice to the owner of their intention to do so. The three flats above the first floor in the same building were vacant. The Militia Department used the building as a recruiting office and for that purpose occupied it during the years 1916-7. On the 13th December, 1917, these premises were destroyed by fire and the appellants, Wolfe & Co. and Powers Bros., who occupied the premises immediately adjoining on either side, had their several stocks in trade destroyed by a fire which indisputably originated in the recruiting office.

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The question to be determined is whether a right of action against the Crown has been established within the scope of section 20 of the Exchequer Court Act as amended in 1917. As a result of that amendment s.s. (c) of that section takes the following form:—

> 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 a person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

The first point for examination, and indeed it is the point upon which Mr. Hogg chiefly relied, is whether, assuming the allegation that the fire in question arose from the negligence of some officer or servant of the Crown while acting within the scope of his duties in the recruiting office, that office, that is to say, the basement and the first floor of the Arcade building occupied by the Militia Department for the purposes of that office, was a "public work" within the meaning of this subsection. Public money, it may be mentioned, had been expended upon improving and fitting the premises in order to adapt them to the purposes for which they were occupied.

I have little difficulty in reaching the conclusion that these premises were a "public work" within the meaning of the enactment under consideration. The term "public work" is defined in at least two statutes, the Public Works Act and the Expropriation Act. In the Public Works Act it includes "the public buildings", "property, * * repaired and improved at the expense of Canada". And by definition in the Expropriation Act it also includes in the same terms "the public buildings" and "property repaired or improved at the expense of Canada". The defin-

itions of the term "public work" to be found in these two statutes (they are substantially, if not quite, the same) have immediate statutory effect only in the interpretation of the enactments in which they are found; but they may very properly be resorted to for the purpose of throwing light upon the meaning of the same phrase found in another enactment with no legislative interpretation expressly attached to it. *Prima facie* it appears to me that the meaning of the phrase in the Exchequer Court Act is no less comprehensive than that to be gathered from these two definitions. *Prima facie* therefore the premises in question were a "public work" within the meaning of the Exchequer Court Act. Two points, however, are raised for consideration by the argument. 1st, it is argued that a "public work" within the meaning of this provision means a work of which the Dominion Government is proprietor and by that is meant, I presume, a work vested in the Crown by virtue of an estate not less ample than an estate in fee simple.

That appears to me to be a contention which must be rejected. It would exclude from the operation of this clause a building erected by the Crown under the provisions of a building lease giving a right of occupation for a very extended term and it is difficult to understand how a restriction involving such a consequence can be discovered in or attached to the general language employed by the Act. Sub-section 2 of section 8 of the Expropriation Act makes provision for taking lands compulsorily, for the purpose of constructing a public work, for a limited period only. It is a provision which appears to be sufficiently comprehensive to entitle the Crown to take such premises as those under consideration for a limited period.

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The word "land" in the Expropriation Act is comprehensively defined to include "all real estate" and consequently includes erections upon land as well as the soil itself. I can see no reason why the basement and first floor of the Arcade Building might not have been expropriated by the Crown; and if so, there is no question that the Crown could have taken those premises compulsorily upon the very terms upon which they were occupied by the agreement with the owner. Why that property so taken should not be embraced within the meaning of the phrase "public work" as well as a building actually constructed by the Crown, I am unable to comprehend, and it can make no possible difference that the property was not compulsorily acquired but procured through private treaty.

The other point raised for consideration rests upon the language of s.s. (b) of sec. 20 of the Exchequer Court Act. That Act gives jurisdiction to the court to entertain claims for damage to property injuriously affected by the "construction of any public work." It is suggested that in some way which I do not fully comprehend the juxtaposition of s.s. c with this s.s. b is a reason for limiting the scope of the phrase "public work" in the first named sub-section. It is quite true that s.s. b applies only to cases where something falling within the category "public work" has been constructed or is being constructed but it seems an extraordinary conclusion from this that the class of things denoted by "public work" is limited to those members of that class to which s.s. b applies. It seems an unwarranted conclusion. The meaning of "public work" is not limited by s.s. b, it is only the application of this sub-section which is necessarily limited by the language defining the class

of cases to which it applies. My conclusion is that these premises were a "public work" within the meaning of the Act.

The last question for consideration is, was there evidence of facts giving a cause of action? On this point I think the learned judge of the Exchequer Court has failed to take account of this, namely, that the fact being established that a fire originated on these premises, and that is not disputed, the onus rested upon the occupier to exculpate himself by shewing that the fault neither of the occupier nor of the occupier's servants nor of his contractor, was the cause of the fire. *Becquet* v. *MacCarthy* (1). Therefore if on the facts the matter is left in doubt the occupier does not escape responsibility.

The appeal should be allowed.

ANGLIN J.—I have had the advantage of reading the opinion to be delivered by my brother Mignault. I concur in his conclusions and, speaking generally, with the reasons on which they are based. If the building in which the fire that destroyed the appellant's property originated had been a "public work" within the meaning of that term as used in s.s. (c) of s. 20 of the Exchequer Court Act I should, with respect, have inclined to the view that the proper inference from the evidence, taken as a whole, is that it was ascribable to the negligence of some

officer and servant of the Crown, while acting within the scope of his duties or employment.

If s.s. (c) of s. 20 as enacted by 7 & 8 Geo. V. c. 23, stood alone I should be disposed to give to the words "upon any public work" a very wide meaning—

(1) 2 B. & Ad. 951 at p. 958.

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to treat them as equivalent to "while engaged in any public undertaking." But in the construction of clause (c) we must not lose sight of the fact that Parliament has placed it in juxtaposition to clause (b) which confers jurisdiction on the Exchequer Court to entertain

every claim against the crown for damage to property injuriously affected by the construction of any public work.

The words "any public work" in this subsection are undoubtedly limited to physical works which are the subject of "construction". I am, with respect however, not inclined to accept the view that the jurisdiction conferred by clause (b) is restricted to claims for compensation against the Crown for injurious affection of property occasioned by the exercise of powers to take land, etc., under the Expropriation Act. I would prefer to leave that question open. I am therefore not prepared, for the present at least, to accept the definition of "public work" in clause (d) of s. 2 of the Expropriation Act as applicable to s.ss. (b) and (c) of s. 20 of the Exchequer Court Act. While, because the phrase "any public work" is found in s.s. (b) of the Exchequer Court Act as well as in s.s. (c) its construction in the latter phrase should be governed largely by that given to it in the former, *Blackwood* v. *The Queen* (1) at page 94, I find nothing in either clause at all inconsistent with the construction which, in *Compagnie Générale d'Enterprises Publiques* v. *The King* (2) at page 532, I placed on the words "any public work" as used in s.s. (c) as it stood before the amendment of 1917, viz.,

not merely some building or other erection or structure belonging to the public, but any operation undertaken by or on behalf of the Government in constructing, repairing or maintaining public property.

(1) 8 App. Cas. 82.

(2) 57 Can. S.C.R. 527.

To that view I respectfully adhere. The Arcade Building temporarily occupied as a recruiting station did not in my opinion fall within the purview of the phrase "any public work" as used in s.s. (c) even with the extended meaning which I would be disposed to place on it.

MIGNAULT J.—These two petitions of right were argued together. The same evidence applies to both, and both involve the question whether under the circumstances an action in tort lies against the Crown. The learned trial judge dismissed both petitions of right, holding that the cases did not come within subsection (c) of section 20 of the Exchequer Court Act. He also held that the fire which caused damage to the appellants was of an accidental character and that negligence had not been proved. These two questions are the only ones which call for determination on this appeal.

First question. Does the cause of action come within the terms of subsection (c) of section 20 of the Exchequer Court Act?

The object of section 20 is to determine in what matters the Exchequer Court has exclusive original jurisdiction, although of course it also creates liability. Subsection (c) as amended in 1917, by 7-8 Geo. V., ch. 23, reads as follows:—

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

In the French version the words "any public work" are translated by "tout ouvrage public".

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Before this amendment subsection (c) was as follows (R.S.C. ch. 140):—

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

The change in subsection (c) was effected by the transposition of the words "on (upon) any public work". Before the amendment an action lay against the Crown for any death or injury to the person or to property *on any public work*, resulting from the negligence, etc. Now an action lies for any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting, etc., *upon any public work*.

Before the amendment, in *Piggott* v. *The King* (1) servants of the Crown engaged in building a cement dock on the Detroit River caused damage by their blasting operations to the suppliant's dock adjoining the work carried on by the Crown. The Exchequer Court and this court held that to render the Crown liable under subsection (c) for injury to property such property must be *on a public work* when injured. Some of the learned judges criticised the law as it then stood, holding that the words "on any public work" were misplaced. The amendment having been made in the year following this decision, it is not unreasonable to suppose that the intention was to bring such a claim as the one dismissed in *Piggott* v. *The King* (1) within the ambit of the amended clause.

The learned trial judge however held himself bound by the construction of the words "any public work" in a series of decisions enumerated in his reasons for judgment.

(1) [1916] 53 Can. S.C.R. 626.

Before referring to these decisions it will be well to mention that the appellants' claims arise out of the following circumstances. In March, 1916, the Department of Militia and Defence rented, from Messrs. A. E. Rea & Co., the ground floor and the basement of the Arcade Building, 194 Sparks Street, Ottawa, as a recruiting station for soldiers, the rent being $200.00 per month and the tenancy being terminable at any time on fourteen days notice. While the building was thus occupied, it was destroyed by fire on the night of the 12th to the 13th December, 1917, as well as the adjoining buildings occupied by the appellants, and it was alleged that their stock in trade was destroyed. The petitions of right claimed damages.

I have very carefully examined the following decisions of this court, referred to by the learned trial judge, where the construction and effect of subsection (c) before its amendment were considered.

City of Quebec v. *The Queen* (1); *The Queen* v. *Filion* (2); *Larose* v. *The King* (3); *Hamburg American Packet Company* v. *The King* (4); *Letourneux* v. *The King* (5); *Paul* v. *The King* (6); *The King* v. *Lefrançois* (7); *Chamberlin* v. *The King* (8); *Compagnie Generale d'Enterprises Publiques* v. *The King* (9).

In all these cases the collocation of the words "any public work", in subsection (c) before its amendment—which words were considered as descriptive of the locality in which the death or injury occurred—was held to govern their construction, and consequently recovery was restricted to cases where the death or

(1) [1894] 24 Can. S.C.R. 448.
(2) [1894] 24 Can. S.C.R. 482.
(3) [1901] 31 Can. S.C.R. 206.
(4) [1902] 33 Can. S.C.R. 252.
(5) [1903] 33 Can. S.C.R. 335.
(6) [1906] 38 Can. S.C.R. 126.
(7) [1908] 40 Can. S.C.R. 431.
(8) [1909] 42 Can. S.C.R. 350.
(9) [1917] 57 Can. S.C.R. 527.

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damage took place "on a public work". The words themselves were not construed independently of their collocation, but in the last mentioned case it was suggested by Mr. Justice Anglin that "public work" might be read as meaning not merely some building or other erection or structure belonging to the public, but any operations undertaken by or on behalf of the Government in constructing, repairing or maintaining public property.

It is to be observed that subsection (b) of section 20 of the Exchequer Court Act, which has not been amended, also contains the words "any public work". This subsection gives the Exchequer Court exclusive original jurisdiction as to

> every claim against the Crown for damage to property injuriously affected by the construction of any public work.

In view of the collocation of the words "any public work" in subsection (c) with the same words in subsection (b), it follows that, according to the familiar rule of legal construction, these words should, if possible, receive the same construction in both subsections. Maxwell, Interpretation of Statutes, pp. 56, 57.

I think that subsections (a) and (b) deal with claims for compensation against the Crown in the exercise by the latter of statutory powers, and not with claims for damages against the Crown in respect of a tort, the latter being the subject of subsection (c) (see opinion of Fitzpatrick C. J. in *Piggott* v. *The King* (1), but this does not present any obstacle to giving to the words "any public work" in subsections (b) and (c) the same construction which no doubt was in the mind of Parliament when it enacted section 20.

(1) 53 Can. S.C.R. 626.

It appears obvious that the "public work" mentioned in subsection (b)—the construction of which might injuriously affect property and thereby cause damage— is a public work coming within the definition of "public work" and "public works" in section 2 of the Expropriation Act (R.S.C. ch. 143), to which Act subsections (a) and (b) of section 20 of the Exchequer Court Act are properly referable. It is noticeable that no definition of a public work is contained in the latter statute, and I cannot doubt that the public work referred to in subsection (b) is the public work contemplated in the Expropriation Act, for we find, in sections 22, 25, 26 and 30 of the Expropriation Act, the very words

property injuriously affected by the construction of any public work

which are in subsection (b), which property, so affected, is a subject for compensation.

The definition of the words "public work" in section 2 of the Expropriation Act is very comprehensive, and I think, for the reason stated, that we can take it as indicating the meaning of the words "any public work" in subsection (b) and also, because of their collocation, in subsection (c) of section 20 of the Exchequer Court Act. It would at all events be impossible to give a wider meaning to these words in subsection (c) than in subsection (b).

The definition in question reads as follows:—

(d) 'public work' or 'public works' means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharfs, piers, docks and works for improving the navigation of any water, the lighthouses and beacons, the slides, dams, piers, booms and other works for facilitating the transmission of timber, the roads and bridges, the public buildings, the telegraph lines, Government railways, canals, locks, dry-docks, fortifications and other works of defence, and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing,

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extending, enlarging or improving of which any public moneys are voted and appropriated by Parliament, and every work required for any such purpose, but not any work for which money is appropriated as a subsidy only;

Can it be said that the Arcade Building was a building repaired or improved at the expense of Canada?

If these words stood alone, such a contention might be possible, but they must be taken with the words which precede and which, to quote the whole sentence, are:

> * * * and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada.

It seems impossible to contend that any repairing or improving of the Arcade Building, under a lease terminable at any time on fourteen days notice, for the purposes of a recruiting office in connection with the late war, would come within the description of the property referred to in the words I have just quoted. And if I am right in this view, I think it cannot be said that the cause of action in these two cases comes within the meaning of subsection (c). It must not be forgotten that without this subsection no action would lie against the Crown in respect of a tort, and the only recourse would be against the tortfeasor if the latter could not answer that he had exercised a statutory power and was therefore not liable. As to such a defence, I may refer to what I said in *Salt* v. *Cardston* (1) at page 621.

I have therefore come to the conclusion—and but for the collocation of the words "any public work" in subsection (c) with the same words in subsection (b) I would have been inclined to adopt the contrary view— that the first question must be answered adversely to the contentions of the appellants.

(1) 60 Can. S.C.R. 612.

Under these circumstances, it becomes unnecessary to answer the second question, but, having carefully read the whole evidence, I may perhaps say that I would have had great difficulty in considering the fire as purely accidental and not as having been caused by the negligence of officers and servants of the Crown in placing the stoves in too close proximity to inflammable partitions in the part of the premises where the medical examinations were held.

The appeals must be dismissed with costs.

Appeals dismissed with costs.

Solicitors for the appellants: *Fripp & Burritt.*

Solicitors for the respondent: *Hogg & Hogg.*