1921
January 21.

IN THE MATTER OF THE PETITION OF RIGHT OF THE WOLFE COMPANY } SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Exchequer Court Act—Sect. 20—"Public Work"—Definition—Burden of Proof—Interpretation of Statutes.

Held: That in the absence of any definition of a "public work" in the Exchequer Court Act, the phrase as used in section 20 thereof must be construed in its plain and literal meaning, and its construction should not be governed by any definition of the phrase in any Act of the Parliament of Canada, the intendment of which was to limit the meaning of the phrase to the operation of the particular Act.

2. The phrase "public work" appearing in the Public Works Act and in the Expropriation Act should not be construed to include a building occupied under the circumstances peculiar to this case, namely: A building, the basement and first floor of which were used and rented for a recruiting station by the Department of Militia and Defence, either under the War Measures Act or the Militia Act, and solely under its control, with the right to vacate at any time upon giving 14 days notice, and over which the Public Works Department had no control.

3. That the fact that a fire takes place is not of itself evidence of negligence, its occurrence being quite consistent with due care having been taken; there must be some affirmative evidence of negligence, or of some fact from which a proper inference may be drawn.

4. That the burden of proof being upon it and the suppliant having failed to show that the fire was the result of negligence on the part of some officer or servant of the Crown while acting within the scope of his duties or employment the petition could not be entertained.

Semble: That while the phrase "Public Work" as used in the Public Works Act and the Expropriation Act, means property vested in and belonging to Canada, yet all classes of property belonging to Canada are not necessarily public works.

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PETITION OF RIGHT seeking to recover sum of $23,245.85 representing value of stock in trade destroyed by a fire which started in a building occupied by the Crown and communicated to the building where their stock was contained.

December 22nd, 1920.

Case was heard before the Honourable Mr. Justice Audette, at Ottawa.

A. E. Fripp, K.C., for suppliant.

W. D. Hogg, K.C., for respondent.

The points of law involved and the facts are stated in the reasons for judgment.

AUDETTE J. now (January 5, 1921,) delivered judgment.

The suppliant, by its petition of right, seeks to recover the sum of $23,245.85, as representing the value of his stock-in-trade destroyed by fire, on the 13th December, 1917, under the following circumstances:

On the 5th March, 1916, the Department of Militia and Defence rented, from Messrs. A. E. Rea & Company, the Arcade building, at 194 Sparks Street, as a Recruiting Station for soldiers, at $200 a month, with the right to vacate at any time upon giving 14 days notice. There was no formal lease with covenants subscribed between the parties. The contract between the parties, such as it is, is evidenced by Exhibits 1 and 4. While the building was so occupied it was destroyed by fire on the night of the 12th to 13th December, 1917, as well as the adjoining building to the west which was occupied under tenancy by the

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suppliant who was carrying on therein the business of milliner and furrier. It now sues for the value of his stock-in-trade then destroyed and which it estimates at the sum of $23,245.85.

It is well to note, however, that by Exhibit No. 1, Messrs. A. E. Rea Company, Limited, offered to rent for $200 a month, the premises which the Recruiting Station *then occupied*, and that is the *ground floor and the basement*, and further that only these two stories were so occupied. The upper stories would not appear to have been covered by such offer and were not in the mind of the owner.

The question of the *quantum* of damages, is by agreement of all concerned, left over until the question of liability has been determined.

The action in its very essence is grounded on negligence and sounds in tort. In such a case there is no liability on the part of the Crown, unless it is made so liable by statute. To succeed the suppliant must therefore bring his case within the ambit of section 20 of the Exchequer Court Act, as amended, in 1917, by 7-8 Geo. V, ch. 23, whereby sub-sec. (c) of said section now 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 approaching the consideration of the case, and in view of a long series of decisions upon the statute as it stood before the amendment, it is well to bear in mind the amendment of sub-sec. (c) above mentioned, which came into force on the 29th August, 1917; and further, that the injury to this property resulting from the fire took place on the 13th December, 1917.

A number of decisions upon the former state of the law, establishing the rule that to create liability the injury had to be sustained *on* the public work, are not now applicable.

Moreover, under the decision in *Piggot* v. *the King* (1) which is a case decided under the law as it existed prior to 1917, it was established that such a claim as the present could not be sustained under paragraphs (a) and (b) of sec. 20. It was decided there that these two paragraphs dealt with the question of compensation and not damages, and that "compensation," as stated by His Lordship, the Chief Justice of Canada, "is the indemnity which the statute provides to the owner of lands which are compulsorily taken under, or injuriously affected by, the exercise of statutory powers."

Does the case come under sub-sec. (c) of section 20, as amended in 1917?

To bring this case within the provisions of sub-section (c), as amended in 1917, the injury to property must result 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 other words the three following requirements are necessary: 1st, a public work; (2nd) negligence of the Crown officer thereon; (3rd) and the injury must be the result of such negligence.

Now it is contended at bar, on behalf of the suppliant, that the Arcade building was a *public work* while rented and occupied by the Crown as a Recruiting Station for soldiers, and that the officers in charge were guilty of negligence in, *inter alia*, building small beaver board partitions and in placing stoves, called Quebec heaters, close to the same, and furthermore in not keeping a watchman or caretaker over night in the building.

(1) 19 Ex. C.R. 485; 53 S.C.R. 626.

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The first question to answer is whether or not this Recruiting Station, under the circumstances, was a "public work" of the Dominion of Canada.

There is no description or definition of a "public work" in the Exchequer Court Act which provides for the liability above mentioned under this amended section 20.

On behalf of the suppliant it is then contended that for the determination of what is a "public work," reference should be had to the Public Works Act, (ch. 39, R.S.C. 1906) sub-sec. (c) of sec. 3 thereof, which reads as follows: "(c) 'public work' or 'public works' means and includes any work or property under the *control of the Minister.*" This section, however, must be read conjointly with sections 9 and 10 of this Act. Section 9 especially qualifies and determines what is to be under the control and management of the Minister by stating: "The Minister shall have the management, charge and direction of the following properties *belonging* to Canada, etc." That is, he is to have the control of properties belonging to Canada. That is as a condition precedent the property must belong to Canada.

Then section 10, sub-sec. (c) enacts that: "Nothing in the last preceding Section shall be deemed to confer upon the minister the management, charge or direction of such public works as are *by or under the authority of this Act or any other Act of the Parliament of Canada, placed under the control and management of any other Minister of or Department.*"

Now, it has been established by the evidence that the Arcade building used as a Recruiting Station in 1917, was not at any time, under the control and superintendence of the Public Works Department

which had nothing whatever to do with it, and that the Department of Militia and Defence, acting either under the War Measures Act, 1914, or under section 8 of the Militia Act (R.S.C., ch. 41) had full control over it.

Therefore, it results that the Public Works Act becomes and is of no help for the determination of the question as to whether these premises were or were not a "public work" within the meaning of the Exchequer Court Act.

Subsection (d) of sec. 2 of the Expropriation Act (ch. 143, R.S.C., 1906) enacts the following definition of a public work, viz.:

"(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, 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."

This definition, however, again applies to the Expropriation Act, and the question now before the Court is not one involving the doctrine of eminent domain.

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Whether these descriptions, minute and wide in their scope, can be applied to the present case is one not without controversy. However, it would seem to primarily result from this that a "public work" of Canada, would be a property vested in and belonging to Canada. The jurisprudence upon this point has been quite extensive, and I desire now to cite the most apposite decisions upon the question.

In the case of *The City of Quebec* v. *The Queen* (1), a case that had to deal with injury to persons under sec. 20 (then sec. 16) of the Exchequer Court Act, it was held that the rock, or land upon which the citadel was constructed, although owned by the Crown, was not a "public work." Taschereau J., there said: "The rock upon which the citadel of Quebec rests is not, in my opinion, *a public work or work at all within the meaning of the statute.*"

Burbidge J., in *Macdonald* v. *the King* (2), adopted that view and citing the language above mentioned, says: "The rock on which the citadel of Quebec rests, is not a public work, or a work at all within the meaning of the statute, though it was undoubtedly at the time *public property* vested in the Crown in the right of the Dominion, and he adds (p. 398): "The fact that certain property is vested in the Crown in the right of the Dominion *is not*, it appears, conclusive of the question as to whether such property is a public work or not within the meaning of the statute. It constitutes, however, in each case an important consideration and a matter always to be borne in mind."

Then at page 399: "The fact is that there is no ground for any contention that the place where the accident happened was a *public work* within the mean-

(1) 24 S.C.R. 420, at 448. (2) 10 Ex. C.R. 394, at 397.

ing of the statute because public money had been there expended, etc. In that respect it is not so strong a case as that of the *Hamburg American Packet Company* v. *the King* (1), where it was held that the channel of the river St. Lawrence, near Cap à la Roche, between Montreal and Quebec was not a 'public work,'—after spending money in widening and deepening it, and notwithstanding that sub-sec. (a) of sec. 9 of the Public Works Act places under the control of the Minister "works for improving the navigation of any water."

In *Laroše* v. *the King* (2) Taschereau J., at p. 208 says: "The property occupied by this range has been *leased* by the Government from one D.... under authority of an order in council..... The Judge of the Exchequer Court dismissed the action upon the ground that the rifle range *was not a public work* within the meaning of that term as used in the Exchequer Court Act."

In *Brown* v. *the Queen* (3) Burbidge J. held that a fish-way in a mill dam constructed by and at the expense of the Crown, was not a *public work* within the meaning of the Exchequer Court Act.

In the case of *Paul* v. *the King* (4) it was held that a Government steam-tug and a scow, its tow, working in conjunction with a Government dredge, and which caused a collision, while engaged in improving the ship channel of the St. Lawrence, *was not a public work.* Yet it must not be overlooked that sec. 9 of the Public Works Act (ch. 39, R.S.C., 1906) read with sub-sec. (c) of sec. 3 thereof, places under the control of the Minister bringing them under the class defined by sec. 3, "vessels, dredges, scows, tools, implements, and machinery for the improvement of navigation..... and works for improving the navigation of any water."

(1) 7 Ex. C.R. 150 and 33 S.C.R. 252.
(2) 6 Ex. C.R. 425 and 31 S. C.R. 206.
(3) 3 Ex. C.R. 79.
(4) 38 S.C.R. 126.

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Sir Louis Davies, J. (now Chief Justice) (1) commenting upon this expression "public work," in the *Paul case* (*ubi supra*) said, at p. 131: "To hold the Crown liable in this case of collision for injuries to the suppliant's steamer arising out of the collision, we would be obliged to construe the words of the section so as to embrace injuries caused by the negligence of the Crown's officials *not as limited* by the statute 'on any public work,' but in the carrying on of any operations for the improvement of the navigation of *public harbours* or rivers. In other words, we would be obliged to hold that all operations for the dredging of *these harbours* or rivers or the improvement of navigation, and all analogous operations carried on by the Government were either in themselves public works, which needs, I think, only to be stated to refute the argument, or to hold that the instruments by or through which the operations were carried on were such public works.

"If we were to uphold the latter contention I would find great difficulty in acceding to the distinction drawn by Burbidge, J., between the dredge which dug up the mud while so engaged and the tug which carried it to the dumping ground while so engaged. Both dredge and tug are alike engaged in one operation, one in excavating the material and the other in carrying it away.

"But even if we could find reasons to justify such a distinction, which I frankly say I cannot.....I think a careful and reasonable construction of the clause 16 (now 20) (c) must lead to the conclusion that the public works mentioned in it....are *public works* of some definite area, as distinct from those operations undertaken by the Government for the improvement of navigation or analogous purposes, not confined to any definite area of physical work or structure."

(1) Also cited in Coleman *vs.* The King, 18 Ex. C.R. 263, at p. 268.

In *Montgomery* v. *the King* (1) following the views expressed by the judges of the Supreme Court of Canada in the case of *Paul* v. *the King* (*ubi supra*) it was held that a dredge belonging to the Dominion Government is not a "public work" within the meaning of section 20 of the Exchequer Court Act.

In the recent case of *La Compagnie Generale d'Entreprises Publiques* v. *the King* (2) Anglin J., speaking of sec. 20 of the Exchequer Court Act, said: "It does not seem to me to involve any undue straining of the language of the statute to hold that it covers a claim for injury to property so employed. 'Public work' may, and I think should, be read as meaning 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."

In *Courteau* v. *the King* (3) it was held that an injury suffered while taking a Crown vessel on launch-ways owned and operated by a company on *land leased* from the Crown is not an injury happening on "a public work" of Canada,—although the vessel was being hauled at the cost of the Government and upon the latter making all the necessary repairs to the launch-ways for that purpose.

The case of *the King* v. *Lafrancois* (4), was cited at bar by the suppliant, but that case has no application because it deals with the Intercolonial Railway which has been made and declared "a public work of Canada" by a special statute (5).

(1) 15 Ex. C.R. 374.
(2) 57 S.C.R. 532.
(3) 17 Ex. C.R. 352.
(4) 40 S.C.R. 431.
(5) R.S.C. 1906, ch. 36, sec. 55.

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Therefore, in the light of the statutes and the long series of decisions above referred to, I have come to the conclusion that it would be doing violence both to the English language and to common sense to hold that the Arcade building was a public work of Canada, while the basement and ground floor thereof were occupied by the Militia Department as a Recruiting Station for soldiers under an agreement to vacate at any time upon giving 14 days' notice. It was neither in law or fact a public work. To avoid a *reductio ad absurdum* it must be found that it was at no time the intendment or intention of the Parliament of Canada, in enacting the statutes above referred to, any more to make a public work of this building under the circumstances of the case, than it was to make of a pick or shovel belonging to the Crown a public work, because the word "tools" is comprised in the nomenclature to be found in section 9 of the Public Works Act (R.S.C. 1906, ch. 39) which, as I have already said, must be read conjointly with sec. 3, of the same Act. Finding otherwise would be for the court to overlook and disregard the true intent, meaning and spirit (Interpretation Act R.S.C., ch. 1, sec. 15) of the legislation enacted by Parliament.

The words "public work" mentioned in sec. 20 of the Exchequer Court Act must be taken to be used as verily contemplating a public work in truth and in reality, and not that which is mentioned in the Public Works Act or in the Expropriation Act for the purposes of each Act. Moreover, each definition given in these two Acts is prefaced by the words "In this Act, unless the context otherwise requires," that is to say it is limited to each Act. Indeed for the purposes of each Act that definition is obviously acceptable, because it is used, so to speak, as a key to what comes

within the ambit or provision of each Act. However, it does not follow that it can be accepted as a general definition in all cases. It is not because a desk and chair belong to and are used in the Department of Public Works that it must therefore be construed as a public work, any more than the same furniture, the property of the Department of Militia, can be called military works, military engines.

The Crown's liability cannot be enlarged except by express words or necessary implication—*City of Quebec* v. *the Queen* (1)—and all properties belonging to the Crown are not necessarily public works. (Idem. 24, S.C.R. 448).

While desirous of doing justice between the parties, I see no reason to condemn the Crown because it is the Crown and thereby mulct His Majesty's liege subjects with large damages.

Why should we depart from the general and plain meaning of these specific words "public work," which are of a common and dominant feature, to endeavour, for the convenience of a case, to extend to them a meaning which, to every one, would appear so strained as to amount to an absurdity on its very face.

Where a statutory definition is found in an Act and that it is said to apply to that Act, it is well to remember that it is not a legal definition forming part of the law of Medes and Persians and that whenever such defined words are met outside of that Act, it does not necessarily carry the meaning assigned to it by that special statute.

Moreover, as above mentioned, the trend of decisions in our courts upon these very words suggests a decision more in harmony with such a view.

(1) 2 Ex. C.R. 270.

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Having found that the Arcade building was not a public work of Canada, it might be thought unnecessary to go into the question of negligence. However, for the better understanding of the case, as a whole, it is considered advisable to pass also upon that question.

The Militia Department, at the time of the fire, occupied the ground floor and the basement of the Arcade building, which, entering from Sparks street, presented a large door in the centre and two large display windows on each side.

On coming in at the front from Sparks street, there was an open space of about 40 feet, followed by several rooms partitioned off. Then, as described by Major Woodside, from about the centre of the building, travelling south towards Queen street, we enter upon the rear portion of the building, occupied by the medical men, which was partitioned in small stalls between 6 by 8 feet, and 8 and 8 feet, with a table and stove in some of them.

The place was heated by stoves called Quebec heaters. Witness Woodside testified there were six or seven stoves, and witness Sewell said nine or more. There was a central fire or furnace in the building, but, for one reason or another, it was not being used—it was not in good repair, said witness Woodside.

The southeast corner of the building, on Queen street, deserves some special mention, in view of the testimony of the chief of the fire brigade, the fire inspector, and witness Sewell. On entering the building from Queen street, there is also a door in the centre and display windows on each side, and on coming inside there was a hallway, and to the right hand side a beaver board partition with a door in it leading into one of these small rooms, with beaver board partitions on the north and the west. The main wall of the building formed the eastern side of

that room and the window the southern end. In that room, with two sides of beaver board, as above described, there was a large "Quebec heater which stood near the partition against the window,—about one foot away from the partition," as stated by witness Sewell, and two feet as said by witness Latimer.

Major Woodside, who was in charge and command of the building at the time of the fire, says the "Stoves were placed too close to the partition to suit me." However, he was in charge and adds he did *everything in his power to avoid any danger*. He contends that notwithstanding he was in charge that he did not place the stoves in the building, that he did not interfere with the Medical Board's work, who laid them out to suit themselves. While he said he did not interfere with the medical gentlemen, he did not let them do as they liked. *He had stoves moved when they were placed too close to partitions*, and asked the contractor to place metal behind. Witness Sewell said he knew of two stoves around which there was tin to protect the partition.

Major Woodside thought the place was a fire trap and complained about it twice to the officer in charge of the district, at Kingston, once to the Public Works Department, and once to the Inspector of Fires at Ottawa. And he adds, he received no answer from Kingston, and is it to be wondered at. Surely, he was himself in charge—he was the better judge as to whether or not these stoves were not in a proper place, and the Kingston people would not probably, and rightly so, be pestered with such petty questions which should come within the absolute scope of the officer in charge. If he had the courage of his opinion, he should have attended to it himself. Too much seems to have been made of these details.

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Now, as many as 200 men or soldiers were passed by the doctors some days, and although smoking was not legally allowed, says witness Woodside, these men were smoking cigarettes, and this is an important point to be borne in mind.

Coming to the question of the engagment of the caretaker Sewell, which was made by Major Woodside, the Major contends that Sewell's duties were to attend to the firing of the stoves, and that he was to remain in and guard the building at night. On the other hand Sewell contends that he did not accept the occupation of watchman, but that his duties, as assigned to him by Major Woodside, were to look after the heaters, clean the offices at night when the doctors were through with their work and nothing else; but that he was not to stay there over night. That at the time of his engagement nothing was said about his staying over night.

On the night of the fire, after clearing up and attending to the stoves he left for his home somewhere around midnight, and says that nothing was then different from any other night.

Constable Coombs, who was on duty on Sparks street, noticed the fire somewhere around 3.40 to 3.45 in the morning of the 13th, when he found the front part of the ground floor of the Arcade building on Queen street was on fire and he gave the alarm. At that time no other building on Queen street was on fire, and he did not go to Sparks street at the time.

Constable Feeny, who was on duty on Bank street, noticed the fire also at about 3.45 a.m. on the 13th and says that when he arrived the fire was flaming out of the ground floor windows on Queen street,—the bottom story, as he puts it, was on fire—and about a quarter of an hour afterwards the fire had spread on each side of the building on Queen street.

We also had the evidence of Chief Graham, who testified he reached the place about three minutes after the alarm had been given, and on arrival found that the Arcade building alone was on fire, and that the fire had then reached the fourth story of the building.

Then he went to Sparks street and ascertained the fire was still only in the Arcade, and that afterwards the Wolfe and Powers Building, on the western side of the Arcade, took fire from behind.

The Chief offers as his opinion and belief that the fire originated on Queen street, on the southeast corner of the building, but adds he does not know the origin of the fire. It is his surmise.

Witness Latimer, the fire inspector, was heard, and he testified he had been in the building four days before the fire, and described the condition of the building and found fault, among other things, with the basement of the building where there was rubbish, cotton and show cases,—but there was no fire and no stove in the basement. His surmise of the fire, sharing the Chief's view, is that the fire originated in the southeast corner of the building on Queen street on account of the stove being too close to the window sill,—only two feet—but a stove *per se* is not defective, and there is no evidence that any of these stoves were defective.

However, the Inspector further testified that after the fire was over, the floor where that stove stood, in the southeast corner, was not burnt,—"that part of the floor was all right and the woodwork around there was there still. The woodwork, excepting a piece of the ledge of the window, was intact."

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Now, under these circumstances, and with the above evidence can it be found that the fire resulted from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon the premises.

Would it be reasonable to jump at a conclusion based upon the mere conjecture of the Chief of the fire brigade and the inspector, and find that the stove in the southeast corner of the building, on Queen street, did set the fire, when it was placed at two feet distance from the partition and that when after the fire is over the floor and the woodwork around the stove is still intact, with only a small portion of the ledge of the window being burnt.

Asking the question is answering it.

Had Sewell been in the building on that night, would the fire have been avoided? The answer again can only amount to a mere conjecture. He might and he might not. Fire in a number of cases occur every day in buildings where there are caretakers or watchmen, and even in homes where whole families sleep. He might perhaps or perhaps not have headed the constable in giving the alarm.

The fact that the fire took place is not of itself evidence of negligence, because its occurrence is quite consistent with due care having been taken. To find negligence under the circumstances, there must be some affirmative evidence of negligence, or of some fact from which a forcible inference of negligence may be drawn. The conjecture or surmise built upon in this case are too aleatory and uncertain.

We are told that as many as 200 men were passed in a day by the doctors, and that smoking was not stopped. There is as much possibility or probability

that the fire might have originated from a stub of a cigar, or from a cigarette thrown somewhere in a corner, as is customary especially with an irresponsible class of young men, and that the fire had started even in day-time and was smouldering for quite a while before spreading out. That possibility or probability is just as fair an inference as the other conjecture that the fire would have originated from stoves that had been there for months and had given perfect and entire satisfaction.

Or again the fire might have originated from the wiring for the electric light or otherwise. There is no knowing. It was an accidental fire and no one knows how it started.

The burden of proving negligence was upon the suppliant who has failed to do so.

Under the circumstances I am unable to find negligence as required by the statute.

There will be judgment finding that the suppliant is not entitled to the relief sought by his Petition of Right.

Judgment accordingly.

Solicitors for suppliant: *Fripp & McGee.*

Solicitors for respondent: *Hogg & Hogg.*