SALMO INVESTMENTS LIMITED (SUPPLIANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1939
* June 5.
* Dec. 22.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Jurisdiction of Exchequer Court—Exchequer Court Act, R.S.C., 1927, c. 34, s. 19 (c) (as it stood in 1934)—"Public work"—Claim against Dominion Government for damage by fire through alleged negligence of persons employed on project organized and executed by Dominion Government, for construction, etc., on provincial highway, under The Relief Act, 1933 (Dom., 23-24 Geo. V, c. 18) and agreement (under authority of that Act) between Dominion and Province—Whether persons guilty of alleged negligence were "officers or servants of the Crown acting within the scope of their duties or employment" upon a "public work" within said s. 19 (c).

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

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The Government of Canada, under authority of *The Relief Act, 1933* (Dom., 23-24 Geo. V, c. 18), entered into an agreement, dated August 21, 1933, with the Government of the Province of British Columbia, by which the Dominion agreed to assume responsibility for the care of all "physically fit homeless men" and for that purpose to organize and execute relief projects. In consequence of an agreement and request by the Province under said agreement of August 21, 1933, the Dominion instituted the project now in question, which consisted, by arrangement with the Province, of carrying out certain improvements, such as grading, widening and straightening, to a certain provincially-owned highway. The arrangements provided that the Provincial authorities would indicate the nature of the work to be done, such as the line of any re-routing, the extent of widening, etc., but the actual work would be carried out by the men on the strength of the project. All personnel connected with the project were so connected either as labourers or in an administrative or supervisory capacity under the authority of and conditions set out in certain Dominion Orders in Council, which provided, *inter alia,* for recruiting and organizing labour, and for transportation, accommodation, subsistence, care, equipment and allowance for the men employed, and included a provision empowering the Minister of National Defence, through the officers of his department, "to select and employ" "administrative and supervisory personnel." Appellant claimed against the Dominion Government for damage to appellant's property by fire, which damage, it was assumed for the purpose of certain questions of law raised, was sustained from a fire which originated from slash burning operations carried on by the project, the slash burning being done under provincial fire permit issued to the member of the project personnel then in charge of the work and the fire escaping through the negligence of such personnel in failing effectively to observe the directions as to patrol laid down by the permit.

Held: The persons employed on the project were "officers or servants of the Crown acting within the scope of their duties or employment" upon a "public work," within the meaning of s. 19 (*c*) of the *Exchequer Court Act,* R.S.C., 1927, c. 34, as it stood at the relevant time (1934). (Judgment of Maclean J., [1939] Ex. C.R. 228, holding that the project was not a "public work" within the meaning of said s. 19 (*c*), reversed).

The phrase "public work" ("chantier public" in the French version) as used in said s. 19 (*c*) discussed, with references to statutory definitions of the phrase, the history of the section, and *The King* v. *Dubois,* [1935] S.C.R. 378, and other cases.

For a work to be a "public work" within said s. 19 (*c*), it is not necessary that the work or its site be property of the Crown in the right of Canada. It is sufficient to bring the work now in question within the designation if (in the words of the definition in the *Expropriation Act,* to which reference should be had in ascertaining the classes of things contemplated by "public work" in said s. 19 (*c*)) it was a work for the "construction, repairing, extending, enlarging or improving" of which public moneys had been "voted and appropriated by Parliament," and if at the same time such public moneys were not appropriated "as a subsidy only." Sec. 9 of *The Relief Act, 1933* (enacting that "any obligation or

liability incurred or created under the authority of this Act * * * may be paid and discharged out of the Consolidated Revenue Fund") is a sufficient voting and appropriation within the sense of this condition, and the moneys voted to defray the cost of the work in question were not "appropriated as a subsidy only."

It was a fair inference from the agreement, the Orders in Council and the agreed statement of facts that the particular area upon which the employees of the Defence Department were engaged was sufficiently defined by the arrangement between the representatives of the Dominion Government and the representatives of the Provincial Government to bring it within the conditions of the decision in *The King* v. *Dubois, supra.*

APPEAL by the suppliant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing the suppliant's petition of right in which it claimed $24,692.85 for damage to its property by fire caused, it was alleged, by negligence of officers and servants of the Crown (in the Right of the Dominion of Canada) employed on a certain relief project, consisting of highway construction in improving and enlarging the provincially-owned Nelson-Spokane highway between Salmo, British Columbia, and the United States boundary, organized and executed under the authority of *The Relief Act, 1933* (Dom., 23-24 Geo. V, c. 18) and an agreement (made under the authority of that Act) between the Government of the Dominion of Canada and the Government of the Province of British Columbia.

Under an order made in the Exchequer Court, points of law raised by the pleadings were argued before Maclean J. For the purpose of the argument a statement of facts was agreed to on behalf of the parties. After hearing argument on said points of law, Maclean J. (1) held that the project in question was not a "public work" within the meaning of s. 19 (*c*) of the *Exchequer Court Act,* R.S.C., 1927, c. 34, as it stood at the relevant time (1934), and dismissed the petition of right for want of jurisdiction.

The material facts of the case and the questions of law are sufficiently stated in the reasons for judgment now reported. The appeal to this Court was allowed and the judgment of the Exchequer Court set aside; it was directed that judgment be given declaring that the parts of the Nelson and Spokane highway affected by the improvements known as project No. 65 constituted a public work

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within the meaning of s. 19 (*c*) of the *Exchequer Court Act* as it stood before the amendment of 1938, and that the "personnel" engaged "in the slash burning operations" carried on by project No. 65 as stated in par. 5 of the agreed statement of facts were, when so engaged, "officers or servants of the Crown * * * acting within the scope of their duties or employment upon a public work" within the meaning of the said s. 19 (*c*); appellant to have its costs throughout.

E. F. Newcombe K.C. for the appellant.

F. P. Varcoe K.C. for the respondent.

The judgment of the Chief Justice and Davis, Kerwin and Hudson JJ. was delivered by

THE CHIEF JUSTICE—In order to understand the questions arising on this appeal it is necessary that the following facts should be stated:

A statute, known as *The Relief Act, 1933,* was enacted in that year by the Parliament of Canada and it provided, *inter alia,* that the Governor in Council may

> 2. (*a*) Upon such terms and conditions as may be agreed upon,—enter into agreements with any of the provinces respecting relief measures therein;

and made provision also for

> special relief, works and undertakings in the National Parks of Canada and elsewhere.

By section 9, it was enacted that

> any obligation or liability incurred or created under the authority of this Act * * * may be paid and discharged out of the Consolidated Revenue Fund * * *

On the 21st of August, 1933, the Government of Canada, represented by the Minister of Labour, entered into an agreement with the Government of the Province of British Columbia, reciting the enactment of section 2 (*a*) just quoted as well as section 9 and stipulating *inter alia:*

> 2. The Dominion will assume responsibility for the care of all "physically fit homeless men," and will for that purpose organize and execute relief projects consisting of works for the general advantage of Canada which otherwise would not have been undertaken at this time. The conditions under which these relief projects will be carried out are the following:

(1) Shelter, clothing and food will be provided in kind and an allowance not exceeding twenty cents per diem for each day worked will be issued in cash.

(2) Eight hours per day will be worked; Sundays and Statutory Holidays will be observed, and Saturday afternoons may be used for recreation.

(3) Persons leaving voluntarily except for the purpose of accepting other employment offered or for the reason that they no longer require relief and those discharged for cause will thereafter be ineligible for reinstatement.

(4) Free transportation will be given from place of engagement and return thereto on discharge except for misconduct.

(5) No military discipline or training will be instituted; the status of the personnel will remain civilian in all respects.

* * *

4. The Dominion may initiate such works for the general advantage of Canada as may be decided upon by the Dominion, and the Province may propose other works of a similar character for the purpose of providing occupation for physically fit homeless men.

In the agreed statement of facts it is said:

2. The Province of British Columbia upon the recommendation of the Chief Engineer of the Department of Public Works of that province agreed and requested that the Dominion should initiate work upon the Nelson-Ymir-Salmo-Nelway Road and in consequence of such agreement and request the Dominion instituted a project known as No. 65, the project mentioned in paragraphs 6 *et seq.* of the Petition of Right.

3. The project in question consisted, by arrangement with the Province of British Columbia, of carrying out certain improvements, such as grading, widening and straightening, to the provincially-owned Nelson-Spokane highway; the arrangements provide that the provincial authorities would indicate the nature of the work to be done such as the line which any re-routing of the road would take, the extent to which the same would be widened, etc., but the actual work would be carried out by the men on the strength of the project.

4. All personnel connected with project 65 were so connected either as labourers or in an administrative or supervisory capacity under the authority of and conditions set out in Orders in Council P.C. 2248 of 8th October, 1932, P.C. 2543 of 19th November, 1932, and P.C. 422 of 20th March, 1933, which Orders in Council respectively provide, *inter alia,* as follows:—

(P.C. 2248). "3. The Minister of National Defence to recruit and organize the requisite labour from those in receipt of relief from federal, provincial or municipal sources and to provide for transportation, accommodation, subsistence and care thereof. Each individual so employed to be issued with an allowance for each day of employment at a rate not exceeding twenty cents, this allowance to be issuable under such conditions as are from time to time determined by the said Minister.

4. The Department of National Defence to make available from its surplus stock of clothing, equipment and tools such items as are required and available."

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(P.C. 2543). "The Ministers further recommend that in this and the other works already authorized by the aforesaid Orders in Council of the 8th October, 1932 (P.C. 2248) there be paid by way of relief allowances in cash and kind to such administrative and supervisory personnel as in the opinion of the Minister of National Defence are required in connection with the said works the following:

Foremen	$60 00	per month with board and lodging.
Gang Bosses or sub-foremen	40 00	
Cooks	50 00	
Storemen	30 00	
Clerks or Timekeepers	20 00	

and that the Minister of National Defence, through the officers of his Department, be empowered to select and employ the personnel in question pursuant to such conditions as he shall prescribe."

to which were added, by P.C. 422, clauses with professional qualifications—

". . . presently unemployed and in need of relief . . . . . with the allowance as set out . . . . .:—

Engineer	$100 00	per month with board and lodging.
Assistant Engineer	80 00	
Medical Officer	70 00	
Assistant Medical Officer	60 00	
Accountant	50 00	

The conditions set out in these Orders in Council; these conditions generally were kept effective from time to time by various Orders in Council up to and including P.C. 1506 of 14th July, 1934.

5. For the purpose of this argument and such purpose alone it is to be assumed that the damage claimed was sustained from a fire which originated from slash burning operations carried on by project No. 65, the slash burning being done under provincial fire permit issued to the member of the project personnel then in charge of the work and the fire escaping through the negligence of such personnel in failing effectively to observe the directions as to patrol laid down by the permit.

It ought to be observed before proceeding further that this highway (the Nelson-Spokane Highway) with which project No. 65 was concerned, had not been declared by the Parliament of Canada to be a work for the general advantage of Canada, but both Governments proceeded upon the footing that it was such a work within the intendment of the agreement between them; and it seems quite clear that the phrase "works for the general advantage of Canada" in the agreement does not solely contemplate works which have been declared to be for the general advantage of Canada, by the Parliament of Canada, for the purpose of giving the Dominion Parliament legislative control over them under sections 91 and 92 of the *British North America Act*.

Two questions arise; first, whether the persons "employed" (to adopt the term used by the Order in Council) on project No. 65, were "officers or servants of the Crown acting within the scope of their duties or employment" as such within the meaning of section 19 (*c*) of the *Exchequer Court Act* (R.S.C., 1927, cap. 34) as it stood prior to the amendment of 1938.

As to the first question, although the ultimate purpose of the statute, the Orders in Council and the agreement and of the whole plan was the relief of distress, it seems to me that the fair inference from the facts is that the relationship between the personnel and the Government was one of contract and that the contract was one of employment. The men employed there were there by common consent of the Crown and themselves and the benefits they received must, I think, from the legal point of view, be regarded as remuneration for their labour.

As regards the administrative and supervisory personnel, the Order in Council of the 19th of November, 1932, provides that the Minister of National Defence, through the officers of his Department, is empowered to select and employ such personnel pursuant to such conditions as he shall prescribe. It would be difficult to contend that these persons so selected and employed or the men under them were independent contractors. I think they fall within the classes of persons for whose negligence the Crown is made responsible by the enactment in question.

As to the second question, the meaning of the phrase "public work" was very fully considered in *The King* v. *Dubois* (1) and *The King* v. *Moscovitz* (2). Judgments were delivered in those cases which were the judgments of the majority of this Court. It was pointed out in the judgment in the *Dubois* case (1) that the French version of the statute could not be entirely ignored and that the two versions, English and French, must be read together for determining the scope and application of the subsection, and attention was called to a significant change in the phraseology of the French version which was introduced into the *Exchequer Court Act* by the revision of 1927. It is, perhaps, convenient to quote paragraphs (*b*) and (*c*) of section 19 as they appear in the Revised

(1) [1935] S.C.R. 378. (2) [1935] S.C.R. 404.

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Statutes and as they stood when the events occurred out of which the present claim arises, that is to say, prior to the amendment of 1938. They are as follows:

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(*b*) Every claim against the Crown for damage to property injuriously affected by the construction of any public work;

(*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;

and, in the French version:

19. La cour de l'Echiquier a aussi juridiction exclusive en première instance pour entendre et juger les matières suivantes:

(*b*) Toute réclamation contre la Couronne pour dommages à des propriétés causés par l'exécution de travaux publics;

(*c*) Toute réclamation contre la Couronne provenant de la mort de quelqu'un ou de blessures à la personne ou de dommages à la propriété, résultant de la négligence de tout employé ou serviteur de la Couronne pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi dans tout chantier public;

In order to appreciate the nature of the change that took place in 1927, it is necessary to look at subsection (*c*) as enacted by the statute of 1917. It is in these words (in English):

(*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.

and (in French):

(*c*) Toute réclamation contre la Couronne provenant de la mort de quelqu'un ou de blessures à la personne ou de dommages à la propriété, résultant de la négligence de tout employé ou serviteur de la Couronne pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi sur tout ouvrage public.

In 1927, it is seen, "chantier public" was substituted for "ouvrage public." In the judgments mentioned, it was laid down (and this was an essential element in the ratio of the decision in each case) that the phrases "public work" and "chantier public" connote physical things of defined area and ascertained locality and do not include public services, although, for the reasons there given, it is not essential (to bring any given case within the scope of subsection (*c*)) that the act of negligence should have

been committed during the presence on a public work of the negligent officer or servant. We said, at page 402:

> The phrase "pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi dans tout chantier public" is plainly inconsistent with any construction of the phrase "public work" which has the effect of extending its meaning in such a way as to include public services. The rule for the construction of the parent enactment (50-51 Vict., c. 16, s. 16 (*c*)), laid down in *Paul* v. *The King* (1), that the phrase "public work" includes physical things of defined area and ascertained locality and does not include public services, is plainly sanctioned and adopted by these words as the rule applicable to the construction of section 19 in the Revised Statutes of 1927.
>
> "Chantier," in this connection, implies defined area and locality and is incapable of application in such a way as to include public services, as such.

The observations at page 403 may also be referred to.

It was also laid down in the judgment in *The King* v. *Dubois* (2) that in ascertaining the classes of things contemplated by the term "public work" reference should be had to the definition of public work in the *Expropriation Act*. I do not feel any difficulty in holding that the provincially-owned highway, the Nelson-Spokane highway, with which project No. 65 was concerned, satisfies the description of "work" and "chantier" as employed in R.S.C., 1927, cap. 34, s. 19 (*c*). The real question is whether it constitutes a "public work" or a "chantier public" within the contemplation of that enactment.

It is not necessary, to bring the work within that category, that the work itself or the site of it should be the property of the Crown in the right of Canada. In *Mason's* case (3), which was considered and affirmed in *Dubois'* case (4), the work in question was an excavation in the bed of the sea of defined area and locality and the question of the ownership of the bed of the harbour was not considered. It was regarded as immaterial. And I think it is sufficient to bring the work with which we are now concerned within the designations "public work" and "chantier public" if, to quote the words of the *Expropriation Act* (R.S.C., 1927, cap. 64), it was a "work for the construction, repairing, extending, enlarging or improving of which public moneys" had been "voted and

(1) (1906) 38 Can. S.C.R. 126. (2) [1935] S.C.R. 378.
(3) *The King* v. *Mason*, [1933] S.C.R. 332.
(4) [1935] S.C.R. 378.

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appropriated by Parliament," and if at the same time such "public moneys" were not appropriated "as a subsidy only."

Now, it appears to me that section 9 of *The Relief Act, 1933,* is a sufficient voting and appropriation within the sense of this condition and I think this appropriation is not a "subsidy merely." Where you have a work with which the Dominion Government has nothing to do except to pay a subsidy and, of course, to take the necessary steps to see that the conditions of the subsidy are fulfilled,—where the connection of the Dominion with the work is thus limited, then you are within these words of exclusion.

Here the Dominion Government undertook by its officers and servants to construct or improve the work as the case might be; and the moneys voted to defray the cost were not, I think, "appropriated as a subsidy only" as these words of the *Expropriation Act* ought to be understood. I think it is a fair inference from the agreement, the Orders in Council and the statement of facts that the particular area upon which the employees of the Defence Department were engaged was sufficiently defined by the arrangement between the representatives of the Dominion Government and the representatives of the provincial government to bring it within the conditions of the decision in *The King* v. *Dubois* (1).

The appeal should be allowed with costs throughout.

CROCKET J.—This is another appeal from the Exchequer Court involving the much discussed problem of the liability of the Crown for injury to property resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment upon a public work under the relevant section of the *Exchequer Court Act,* as it read after the amendment of 1917, by which the words "on any public work" were removed from their position in the original section and, with the substitution of the preposition "upon" for "on," placed at the end of the section after the words "while acting within the scope of his duties or employment." The section remained as thus amended until Parliament in 1938

(1) [1935] S.C.R. 378.

finally, and, if I may say so, very sensibly, removed the troublesome words "upon any public work" entirely from the section, and thereby established the doctrine of *respondeat superior* as regards the Crown, and rendered it liable for the negligence of its servants in the course of their employment, in the same way as any other master would be liable for the negligence of his or its servants.

Although the petition of right, upon which the present problem arises, is dated January 31st, 1938, the damage to the suppliant's property claimed for occurred in July, 1934, so that we are again confronted, as the learned President of the Exchequer Court was confronted, with the same old problem as to what the words "upon any public work" really mean, and whether the suppliant's specific claim falls within the intendment of the section, as it stood in 1934.

The appeal comes before us from a judgment of the learned President of the Court, dismissing the petition of right for want of jurisdiction, as the result of a hearing before him of the point of law raised by the pleadings under Rule 149, that the case did not fall within the purview of the section already referred to, upon which the original exclusive jurisdiction of the Exchequer Court to hear and determine it depended.

The argument before His Lordship seems to have been based upon an agreed statement of facts, made, of course, solely for the purpose of the argument, and a series of 14 Orders in Council, purporting to have been passed under the provisions of the Dominion *Relief Act, 1933,* and which were produced before him with the agreed statement of facts. His Lordship set out in his judgment all the relevant facts. From this it appears that the damage claimed for was caused by the destruction by fire of a large area of standing timber owned by the suppliant in the District of Kootenay, B.C., as the result of slack burning along the Nelson-Spokane provincial highway in the execution of relief Project No. 65 for the improvement and enlargement of the highway, which the Dominion Government had, in an agreement with the Government of British Columbia, agreed to organize and execute as a relief project under the supervision of the Department of National Defence.

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Paragraph 4 of the principal agreement provided that the Dominion might initiate such works for the general advantage of Canada as might be decided upon by the Dominion, and that the Province might propose other works of a similar character for the purpose of providing occupation for physically fit, homeless men. The agreement also provided that the Province should provide all necessary rights of way or property, whether owned by the Province or private individuals, which might be required for the proper execution of such projects. Also, that the Province would make available for the use of the Dominion without charge during the period of the agreement all relief camps established by the Province, camp equipment, tools, stores and supplies thereat or held in reserve therefor, such machinery as might be necessary and available for the proper execution of such projects and the apparatus for such machinery, and the assistance of such members of the permanent engineering staff of the Province as could be made available from time to time as required. It was also arranged that the provincial authorities would indicate the nature of the work to be done, such as the line which any re-routing of the highway would take, the extent to which the same should be widened, but that the actual work would be carried out by the men on the strength of the project. The requisite labour was to be recruited from those in receipt of relief from federal, provincial or municipal sources under terms and conditions set out in the Orders in Council. The administrative and supervisory personnel was to be selected by the Minister of National Defence through the officers of his Department, pursuant to such conditions as he should prescribe. The Dominion Government was to provide transportation, accommodation, subsistence and care for all men employed on the work, including an allowance for each day of employment at a rate not exceeding 20 cents,—this necessarily, of course, out of an appropriation voted by Parliament for unemployment.

Upon these admitted and undisputed facts the learned President held that the project in question was not a public work within the meaning of that enactment. "The highway," His Lordship said (1),

(1) [1939] Ex. C.R. at 234.

was owned by the Province, the Project was proposed by the Province and was carried out by the Dominion at the request, and with the agreement, of the Province. In essence it was financial assistance rendered the Province in carrying out necessary relief measures. That it took the form of highway improvement, and was carried out by and under the direction of the Dominion, does not alter the substance of the arrangement, and its real purpose. It may have been in the national interest that the Dominion should support and supplement the relief measures of the Province but that would not, I think, make the Project a "public work" in the sense of the statute. It was really a Provincial work.

His Lordship in his reasons for judgment seems to have based his conclusion upon the judgment of this Court in *The King* v. *Dubois* (1). It is true, as he points out, that in the reasons for that judgment, this Court distinctly laid it down, as a result of the transfer to the Exchequer Court of the jurisdiction conferred upon the Official Arbitrators by the *Official Arbitrators Act* of 1870 and the decisions of the Exchequer Court and of this Court upon the meaning of the term "public work," that the expression must be read and construed by reference to its definition, as given in the interpretation sections of the *Official Arbitrators Act,* ch. 40, R.S.C. (1886), and the *Expropriation Act,* ch. 39, R.S.C. (1886), and that the amendment of 1917 above referred to effected no change in its meaning. That case also reaffirmed the principle that "public work" denotes, not a mere service or undertaking, but some physical thing having a fixed situs and a defined area. It did not, however, lay it down or suggest that the amendment, made by Parliament in 1917, did not effect any change in the application of the entire section. To my mind the transposition of the words "upon any public work" did effect a very material change in its application. Previously it had been held by the Exchequer Court and by this Court in *Chamberlin* v. *The King* (2) and *Piggott* v. *The King* (3) that the words "on a public work" in the section, immediately following as they did the words "person or property," were descriptive of locality and that to make the Crown liable for injury to property under that section, such property must be situated on the work when injured. As Mignault, J., in his reasons in *Wolfe* v. *The King* (4) said, the amendment having been made in the year follow-

(1) [1935] S.C.R. 378.
(2) (1909) 42 Can. S.C.R. 350.
(3) (1916) 53 Can. S.C.R. 626.
(4) (1921) 63 Can. S.C.R. 141, at 152.

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ing the decision in the *Piggott* case (1), it is not unreasonable to suppose that the intention was to bring such a claim within the ambit of the amended clause, and in *The King* v. *Schrobounst* (2), it was unanimously held by Anglin, C.J.C., and Duff, Mignault and Rinfret, JJ., and McGee, J. (*ad hoc*), that as the section then stood (since the amendment of 1917), it was no longer necessary, in order to create liability, that the person or property injured should be upon the public work at the time; that the words "upon any public work" qualify the employment, not the physical presence of the negligent officer or servant thereon; and that the driver of a motor truck (employed by a Government Department) carrying Government employees to a public work was so employed.

The learned Chief Justice in delivering the judgment of the Court in the *Dubois* case (3) discussed both the *Wolfe* (4) and the *Schrobounst* (2) judgments as well as that of this Court in *The King* v. *Mason* (5), and said nothing that to my mind detracts from the soundness or authority of any of them. Indeed, I think it clearly appears from what he said that, although the meaning of "public work" itself remained unaffected by the amendment of 1917, that amendment had materially enlarged the scope of the section by making, not the site of the public work itself, or the presence or position upon it of the person or property injured, but the employment of the officer or servant of the Crown in relation to it, the test of liability, so that if death or injury to the person or to property results from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, the Crown may be held to be liable, if such duties and employment are found to have been "upon any public work," that is to say, as I take it, directly connected with its construction, repairing, improvement, etc.

I think Mr. Newcombe has correctly summed up the conditions necessary to constitute a "public work," as laid down in the *Dubois* case (6), viz.: it must be a physical thing, not a mere service or undertaking; it must have a

(1) (1916) 53 Can. S.C.R. 626.
(2) [1925] S.C.R. 458.
(3) [1935] S.C.R. 378.
(4) (1921) 63 Can. S.C.R. 141.
(5) [1933] S.C.R. 332.
(6) [1935] S.C.R. 378.

fixed situs and a defined area; and it must come within the definition of "public work" as contained in the *Official Arbitrators Act* and the *Expropriation Act* of 1886.

This definition is as follows:

> The expression "public work" or "public works" means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharves, piers and works for improving the navigation of any water—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, 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 money is 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 language, in my opinion, does not require that the physical thing, whatever it may be, should belong to the Dominion, though the first half of the paragraph ending with the words "and all other property which now belong to Canada" undoubtedly applies only to Dominion property. The definition, however, does not end there, but immediately goes on with the words

> 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 money is voted and appropriated by Parliament,* and every work required for any such purpose.

The last half of the paragraph seems to me plainly to comprehend works and properties other than those which the Dominion owns or may acquire, and to make, not the ownership of the work or property, but the expenditure of public money provided by Parliament the real criterion for determining whether a work is or is not "a public work." As pointed out in the reasons of the learned Chief Justice in the *Dubois* case (1), s. 1 of the *Official Arbitrators Act* of 1870, by which the Official Arbitrators were originally invested with jurisdiction in matters of this kind, provided that where there was a supposed claim against the Crown

> arising out of any death, or any injury to person or property on any railway, canal, or public work *under the control and management of the Government of Canada,*

(1) [1935] S.C.R. 378.

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the claim might by the head of the Department concerned therewith be referred to the Official Arbitrators, who should have power to hear and make an award upon such claim. So that, under the provisions of the *Official Arbitrators Act* of 1870, from which s. 19 (*c*) of the *Exchequer Court Act* originated, it would appear that it was the control and management by the Government of Canada, rather than the ownership of the work or property, which determined the jurisdiction of the Official Arbitrators as well as the liability of the Crown.

I thought at first there might be some question as to whether the last clause of the definition reproduced from the *Official Arbitrators Act,* R.S.C. (1886), does not exclude the project now under consideration, but I have concluded that it has no other effect than to except from the operation of the words immediately preceding any work for which money is appropriated by Parliament "as a subsidy only" and that this clause has no application to a case of this kind, where the Government, purporting to act under the authority of an Act of Parliament respecting relief measures generally throughout the entire country, has, through one of its Departments, agreed to execute a particular work and to assume the whole responsibility therefor.

The crucial question, in my opinion, is, not whether the highway, which the Dominion undertook to enlarge, repair and improve, and, in case of the Province proposing any diversions thereof, to construct, was a highway which was owned by the Dominion or by the Province, but whether the project, which the Dominion undertook, not only to initiate, but to organize and execute in a defined area, was or was not a "public work" within the meaning of the above definition. I have reached the conclusion after anxious consideration that it was, as it was executed at the expense of Canada, so far as the expenditure of public money is concerned, and under the sole control and management of a Department of the Federal Government.

For these reasons I would allow the appeal with costs.

Appeal allowed with costs.

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Solicitor for the respondent: *W. S. Edwards.*