IN THE MATTER OF THE PETITION OF RIGHT OF

1915
April 21.

WILLIAM MONTGOMERY,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

No. 2.

Exchequer Court Act, R.S. 1906, c. 140, sec. 20(a)—"Public Work"—Dredge belonging to Dominion Government.

Held, following the views expressed by the judges of the Supreme Court in the case of *Paul* v. *The King*, (38 S.C.R. 126), that a dredge belonging to the Dominion Government is not a "public work" within the meaning of sec. 20(c) of the *Exchequer Court Act*.

PETITION OF RIGHT for the recovery of damages arising out of an alleged act of negligence by a servant of the Crown.

The facts are stated in the reasons for judgment.

March 3rd, 1915.

The case was tried in Toronto before the Honourable Mr. Justice Cassels.

J. Birnie, K.C., for suppliant;

A. E. H. Creswick, K.C., for respondent.

CASSELS, J. now (21st April, 1915) delivered judgment.

This case was tried before me in Toronto on the 3rd March, last.

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The petition was filed on behalf of the suppliant claiming that in the month of January or February, 1913, the suppliant was duly hired by the captain of the Dredge *Industry*, belonging to the Dominion Government, to oil the engines and keep them in running order.

He alleges that on or about the 15th August, 1913, the suppliant sustained an injury whilst cutting a swing wire cable on the dredge, under orders from the captain, which the suppliant was bound to obey.

He also alleges that the cable had to be brought from the top part of the deck down into the drum in the engine room, and when the said cable was all set in place it was found twelve feet had to be cut off.

He further alleges that the usual method of cutting was to heat the cable, and that the captain was asked "should not the cable be heated," whereupon the captain informed him not to mind heating the cable but to go on and cut it as quickly as possible with a cold chisel.

He then proceeded as alleged, and whilst cutting the cable, a chip came off and hit him in the right eye completely destroying the sight thereof.

The ground of negligence alleged in the petition was that the suppliant should not have been ordered to cut the cable, having no previous experience or knowledge of the matter; that the cable should have been heated before any one attempted to cut it; and that the instructions furnished for the cutting of the cable were not proper or suitable for the purpose. These are the grounds of liability alleged in the petition of right. Subsequently the counsel for the suppliant gave notice, that he would apply for leave to amend his petition at the trial by setting up the following:—

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"That the said cable was not properly seized before the suppliant proceeded to cut it and by the orders of the said Captain a strain was improperly and dangerously put upon the cable while it was being cut, by seizing one end fast to the winch-engine and starting up the engine, and that the place where the suppliant was ordered to cut the said cable was an improper and unsuitable place, with not sufficient light and room."

At the opening of the case I pointed out to counsel for the suppliant that I was afraid that under the authorities as they stand there was no remedy in that the accident in question did not occur on a public work.

As the witnesses were present and no objection being raised by the counsel for the Crown, I allowed the evidence to be given so that in the event of the counsel for the suppliant being able to satisfy the Supreme Court that their judgment in the *Paul*(1) case was erroneous, it would not be necessary to have a new trial in the event of the findings in his favour on the merits.

At the trial I formed an opinion that on the facts of the case the suppliant was not entitled to succeed. The unfortunate man has suffered a severe injury resulting in the loss of the sight of one of his eyes. I fail to see that he has sustained the charge put forward by him of negligence. Dealing with his alleged cause of complaint, I am of opinion that he fails in the allegation that before cutting the cable it should have been heated. It is clear from the evidence that the heating of the cable destroys to a certain extent the temper of the cable and has an injurious effect upon its strength. According to the suppliant there were

(1) 38 S.C.R. 126.

three occasions on which cables were cut during his employment on the dredge; in only one of the three was the cable heated. In two of the three cases the cable was cut cold—and I think the evidence of the defendant's witnesses shows that there is no negligence whatever in directing the cable to be cut cold. The allegation in the petition of right that the instruments furnished for the cutting of the cable were not proper and suitable for the purpose completely fails on the evidence.

When we come down to the amendment, while the contention is properly before the court, it is not unimportant to note that the ground taken, namely, that the cable was not properly seized, was an afterthought, and I do not think there is anything in this contention. The cable in question in this particular case was about 1½ inches in diameter. The cable is composed of some six strands, each strand is composed of about twenty-five wires. The plan of seizing, or binding, is with the view of preventing the wires from unravelling and so losing a portion of the iron rope. In the case before the Court, what was being cut off was a piece about 12 feet in length, which the drum around which the cable was being wound could not carry. It is admitted on all sides that this piece of 12 feet in length was valueless, and therefore while they seized or bound that part of the cable which was to be utilized so as to avoid the wires unravelling there was no object in seizing the end of that portion which was being cast away as useless.

It is alleged that the effect of seizing on both sides would have the effect of preventing splinters from flying. I do not agree with this contention. Dowers, a witness for the suppliant, puts it in this way:—

"Q. Would seizing on both sides of the cut have "anything to do with that, or would it prevent it or

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"not (Referring to the liability of splinters to fly)?—A. The seizing I don't think would have any cause to "stop the splinters from flying."

"Q. You don't think the seizing on both sides would "have anything to do with preventing the splinters "from flying?—A. No.

"Q. Then with regard to this accident, according to "your evidence the seizing of the cable did not have "any effect one way or the other?—A. No.

Later on in cross-examination he explains the effect of the heating on the wire.

Bunting, another witness for the suppliant, deposes as follows:—

"Q. What effect does the seizing have?—A. It keeps "the wire from unlaying.

"Q. What effect would it have on a thread if it is not "seized, supposing you cut each thread?—A. It would "be the same thing.

"Q. It is apt to fly if it is not seized and I suppose it "would be more apt to throw splinters?—A. Not any "more, but it would be just as apt to throw splinters."

Another ground of complaint is that before the wire was cut, it was strained by a pressure of about two tons weight, and it is alleged that this made the operation more dangerous. It certainly would facilitate the cutting of the wire. The danger apprehended is that where such a strain is placed upon the wire, when it is cut through, the end of the wire is apt to spring back and cause injury to a person who may be hit by the wire. This may be so but there is no complaint of any such thing happening in this case. No injury was caused by the springing back of the wire.

On the whole I fail to see how the suppliant has brought himself within the terms of the statute proving negligence on the part of an officer of the Crown.

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While I deal with the merits, I may as well point out that as at present advised I do not see how this case can be distinguished from *Paul* v. *The King* (1). The main opinion of the court was delivered by Sir Louis Davies, J. and he points out (2) that "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 Burbridge 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."

According to Mr. Justice Idington, the interpretation given to the words "public works" in the *Public Works Act* cannot be applied.

It is quite true, as stated by Mr. Birnie, that in one of the cases referred to in the *Paul* case, i.e. *Chambers v. Whitehaven Harbour Commissioners*, (3) A. L. Smith,

(1) 38 S.C.R. 126.

(2) See p. 131.

(3) (1899) 2 Q.B. p. 132.

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L.J. does state that the man was not killed on the dredge; if he had been I am inclined to think that he would have been within the Act, but I do not decide it. He was killed while employed on the hopper which was in a similar position to the cart in the cases cited.

The *Paul* case was very similar to the *Chambers* case. In the case before me there is a difference in that the accident happened on the dredge. However, it is quite clear from the *Paul* case that the Supreme Court intended to hold that a dredge utilized for the deepening of a harbour was not a public work within the meaning of sec. 20 of the *Exchequer Court Act.*

A further difficulty would confront the suppliant by the case of *Ryder* v *The King,* (1) if the Supreme Court holds it to be still good law. I reserve to myself the right to consider in any future case that may arise the question whether or not the law as laid down in the *Ryder* case has not by subsequent decisions of the Supreme Court been over ruled. In the case before me, the defence of common employment would be a good defence. The suppliant would be forced to rely upon the *Workmen's Compensation Act* in force at the time of the right of action accruing. According to the decision in the *Ryder* case, the suppliant would have no cause of action under the *Workmen's Compensation Act,* because that Act did not apply to the Crown.(1)

On the whole, I regret the suppliant is not entitled to the redress as his injury has been a serious one. No other course is open to me than to dismiss the petition with costs.

Judgment accordingly.

Solicitor for suppliant: *J. Birnie.*

Solicitor for respondent: *A. E. H. Creswicke.*

(1) 36 S.C. 462.

(1) EDITOR NOTE.—See *Gauthier v. The King, infra* for a further discussion of this point.