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*March 17.
*April 7.

THE HALIFAX AND SOUTH WESTERN RAILWAY (DEFENDANTS) .... } APPELLANTS;

AND

MARTHA SCHWARTZ, ADMINISTRATRIX OF THE ESTATE OF FRANK SCHWARTZ (PLAINTIFF) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Statute—Construction—Railway company—Right of way—Combustible materials—R.S.N.S. [1900] *c.* 91, *s.* 9.

Chapter 91, section 9, of the Revised Statutes of Nova Scotia, 1900, provides that "when railways pass through woods the railway company shall clean from off the sides of the roadway the combustible material by careful burning at a safe time or otherwise."

Held, that this provision is imperative and obliges the company at all times to keep its right-of-way so clear of combustible material that it will not be a source of danger from fire. Clearing it at certain periods only is not a compliance with such provision.

Duff J. dissented on the ground that it was not proved that the fire in this case originated on the right-of-way.

Judgment appealed from (46 N.S. Rep. 20) affirmed.

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

The action in this case was to recover damages for loss of property of the late Frank Schwartz by fire, alleged to have been caused by sparks from an engine of the defendants. The jury found that the fire so originated and started on defendants' right-of-way; that combustible material on the right-of-way was the

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

(1) 46 N.S. Rep. 20.

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cause of the fire and its subsequent spread to the property destroyed; and they assessed the damages at $1,950. The verdict entered for that amount was maintained by the full court below and the defendants then appealed to the Supreme Court of Canada.

Mellish K.C. for the appellants.
W. J. O'Hearn for the respondent.

THE CHIEF JUSTICE.—The only arguable question on this appeal is: Can the finding of the jury as to the place of origin of the fire be supported on the evidence? The court below accepted that finding, and although the evidence is not very satisfactory, I do not think we can say that it so strongly preponderates against the conclusion reached by the jury as to justify us in holding that they did not understand it, or that they wilfully disregarded it. There certainly was an accumulation of brush and dry grass on the track from the previous year in which the fire started almost immediately after the engine passed by. Whether the fire started on the respondent's property and then spread to the track and came back again to the place of origin, or whether it originated on the right-of-way and then travelled over to the respondent's property is the point in dispute. There is no doubt that the fire was caused by sparks from the company's engine and that it spread and caused the damage because of the accumulation of brush and dry grass on the right-of-way, and, in my opinion, it was negligence, in the circumstances of this case, to have allowed that combustible material to remain on the company's right-of-way from the previous year. The evidence of Dauphinée and Fox may not be very conclusive, but

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they both say that the locomotive set the fire on the right-of-way, and the jurors were entitled to accept or reject that evidence. They did accept it, and I do not feel justified in refusing to give effect to their conclusion concurred in by the court of appeal.

I would dismiss with costs.

DAVIES J.—Two questions were discussed upon the appeal. One was as to the duty of the railway company under the Provincial Statute, R.S.N.S., [1900] ch. 91, sec. 9, "Of the Protection of Woods against Fires," and the other was whether there was evidence from which the jury could fairly find that the fire which caused the damages complained of started upon the defendant's right-of-way and was caused by sparks emitted from the company's engine.

The jury found that

> the fire started on the right-of-way and inside the fence and was caused by sparks carried from the defendant's engine.

They further found that

> inside the right-of-way was an accumulation of dried ferns, grass, bushes and turf.

After reading over the evidence given I am not prepared to say that there was not evidence from which a jury might fairly find as this jury did.

The evidence is, of course, not positive. It would be almost impossible to produce such. But I think it quite sufficient.

On the other branch of the case as to the statutory duty of the company, I agree with the court below that such a duty is an absolute and not a qualified one discharged by an annual clearing up as suggested.

The section says:—

Where railways pass through woods, the railway company shall clean from off the sides of the roadway the combustible material, by careful burning at a safe time or otherwise.

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Davies J.

It is imperative. I cannot read it as meaning that when the company has once obeyed it, then it is absolved from the further duty of keeping the right-of-way clear for some unknown or indefinite time; or that the statute was intended to limit the common law duty of the company. The object of the statute, cleaning from the sides of the railway combustible material, is surely not discharged by doing it once or even by doing it once a year. Such combustible material will accumulate from time to time by the growth of grass, ferns, bushes, etc., and from other causes, and these accumulations must be removed as and when necessary to carry out the evident and plain object of the Act, namely, to prevent fires. I cannot place any other construction upon the company's duty in this regard than that it is an absolute one and necessary for the protection of the property of persons adjacent to the railway line. Any other construction would, it seems to me, defeat the object and purpose of the Act.

The appeal should be dismissed with costs.

IDINGTON J.—This appeal seems hardly arguable unless we are to become so astute as to render the statute a subject of mere critical examination regardless of what its obvious purpose was.

The ground taken on the facts seems to so conflict with the unanimous opinion of all the judges who have heard the case, that it is not open for us to interfere.

DUFF J. (dissenting).—There is evidence sufficient to support the inference that the fire started from one of the locomotives. Whether it started in the

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right-of-way or outside the right-of-way is, I think, purely matter of conjecture. The facts proved appear to be equally consistent with both hypotheses, or if the balance incline a little in one direction rather than another it is in so slight a degree as to make it worthless as a foundation for a verdict.

ANGLIN J.—I would dismiss this appeal with costs for the reasons given by Graham and Russell JJ.

BRODEUR J.—The question that we have to decide is as to the construction of section 9 of chapter 91 of the Revised Statutes of Nova Scotia. That section deals with the protection of woods against fires and the section 9 has for its object to prevent railways from setting fire to the adjoining property and reads as follows:—

> 9. Where railways pass through woods the railway company shall clean from off the sides of the roadway the combustible material by careful burning at a safe time or otherwise.

In this case it has been found by the jury that there was on the appellants' right-of-way combustible materials and that the fire that destroyed respondent's property started from there.

Under the common law as it was decided in the case of *Grand Trunk Railway Co.* v. *Rainville*(1), a railway company is required to keep its track free from combustible and inflammable substances which are likely to be ignited by sparks from passing engines and to communicate fire to adjacent property.

The fact of having combustible material on its right-of-way would, in certain circumstances, constitute negligence on the part of the company and would render it liable.

(1) 29 Can. S.C.R. 201, at p. 204.

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Brodeur J.

In this case the plaintiffs could have proceeded to recover under the common law and with the evidence that has been adduced would likely have recovered. But the case as it is brought before us rested upon the construction of the statute above quoted.

That statute imposes upon a railway company the obligation of keeping the sides of its right-of-way clean of combustible material and to remove or burn it.

When a statute declares that something shall be done the language is considered imperative and the thing must be done, especially when the thing to be done is for the public benefit.

There was then an imperative duty on the part of the appellants to clean from their right-of-way all the combustible material that was there for some months, and I would not be disposed to reverse the decision of the courts below.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Fulton.*
Solicitor for the respondent: *W. J. O'Hearn.*