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*Feb. 18.
*March 11.

JOHN F. LEGER (SUPPLIANT) ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Construction of statute—7 & 8 Edw. IV. c. 31, s. 2—Government railway—Fire from engine—Negligence—Damages.

By 7 & 8 Edw. IV. ch. 31, sec. 2, the Government of Canada is liable for damage to property caused by a fire started by a locomotive working on a government railway, whether its officers or servants are or are not negligent, and by a proviso the amount of damages is limited if modern and efficient appliances have been used and the officers or servants "have not otherwise been guilty of any negligence."

Held, Davies J. dissenting, that the expression "have not otherwise been guilty of any negligence" means negligence in any respect and not merely in the use of a locomotive equipped with modern and efficient appliances.

Sparks from a locomotive set fire to the roof of a government building near the railway track and the fire was carried to and destroyed private property. The roof of this building had on several previous occasions caught fire in a similar way and the government officials, though notified on many of such occasions, had only patched it up without repairing it properly.

Held, reversing the judgment of the Exchequer Court (12 Ex. C.R. 389), that the government officials were guilty of negligence in having a building with a roof in such condition so near to the track, and the owner of the property destroyed was entitled to recover the total amount of his loss.

APPEAL from the judgment of the Exchequer Court of Canada(1) in favour of the suppliant, but limit-

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

(1) 12 Ex. C.R. 389.

ing the amount of damages to $5,000 to be apportioned among all the parties injured, the share of the suppliant being $3,284.67.

The claim set forth in the petition of right in this case was based on the provisions of the Act 7 & 8 Edw. VII. ch. 31, section 2, sub-section 2, which is as follows:—

"2. Whenever damage is caused to property, by a fire started by a railway locomotive working on the railway, His Majesty, whether his officers or servants have been guilty of negligence or not, shall be liable for such damages: Provided that, if it is shewn that modern and efficient appliances have been used and that the officers or servants of His Majesty have not otherwise been guilty of any negligence, the total amount of compensation recoverable under this sub-section shall not exceed five thousand dollars, and it shall be apportioned among the parties who suffered the loss as the court or judge determines."

The suppliant's property was destroyed by a fire alleged, and found by the judgment appealed against, to have originated from an engine operating on the Intercolonial Railway at Bathurst, N.B., the sparks from said engine setting fire to the roof of a freight shed adjoining the track and spreading to the property so destroyed. There was evidence, and the Exchequer Court judge found, that this roof was in a defective state. It was also shewn that it had, on several previous occasions, caught fire in the same way, and on most of such occasions the government officials were notified, but only patched it up where it was burned, without repairing it properly.

The suppliant claimed $17,000, damages, but the trial judge held that the engine causing the damage

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was furnished with modern and efficient appliances; that there was no proof that the officers or servants of the government had been "otherwise guilty of negligence" within the meaning of the Act above mentioned; and that the damages should, therefore, be limited to $5,000. The suppliant appealed against this assessment of damages.

Teed K.C. and *Knowlton,* for the appellant. Under the first clause of sub-section 2 of the section in question the Crown is liable to unlimited damages in case of injury by fire from an engine operating on its railway, and must bring itself within the saving clause to get the advantage of the limitation. See *Cincinnati, New Orleans and Texas Railway Co.* v. *Barker*(1); *Red Mountain Railway Co.* v. *Blue*(2).

Any negligence of the officers or servants of the Crown contributing to the injury will deprive it of the benefit of the saving clause, and in this case there was negligence in leaving the roof of the freight shed in such a condition that it would act as a fire trap.

Chrysler K.C. for the respondent. The failure to repair the roof was mere non-feasance for which the Crown is not liable. *Leprohon* v. *The Queen*(3); *Sanitary Commissioners of Gibraltar* v. *Orfila*(4).

The term "otherwise guilty of negligence" in the sub-section means negligence in the operation of the engine and not negligence generally.

(1) 56 Am. & Eng. Rd. Cas. 106.
(2) 39 Can. S.C.R. 399.
(3) 4 Ex. C.R. 100.
(4) 15 App. Cas. 400.

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The Chief Justice.

THE CHIEF JUSTICE.—I am of opinion that the appeal should be allowed for the reasons given by Mr. Justice Duff.

GIROUARD J.—I agree to allow this appeal with costs.

DAVIES J.—This appeal turns upon the construction to be given to section 2, ch. 31 of the Statutes of Canada, 1908.

Sub-section 1 of that section declares the duty of the officers and servants of King with respect to keeping and maintaining the cleared land or right of way free from combustible materials.

Sub-section 2 relates solely to *a fire started by a railway locomotive working on the railway.* It creates first an absolute liability for damages caused thereby without limitation as to amount. The proviso introducing the limitation upon the extent of liability enacts that two things must be shewn to get the benefit of that limitation; one that "modern and efficient appliances have been used"; the other "that the officers and servants have not otherwise been guilty of any negligence." As to the first provision required, the user of modern and efficient appliances, it relates surely only to the particular railway locomotive causing the fire although those words of limitation are not inserted in the clause. No reasonable construction can extend the words beyond. Any proof offered of the user of "modern and efficient appliances" otherwise than with reference to the particular locomotive would be foreign to the question to be tried. So with regard to the second provision requiring proof that the officers and servants have not otherwise been

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guilty of any negligence. The word "otherwise" obviously refers to negligence in the manner of using these modern and efficient appliances. You must have the appliances called for by the statute *first*. Secondly, you must negative any negligence in their user. "Otherwise" cannot in the connection in which it is used apply to negligence of officers and servants not in any way directly concerned in seeing that only proper appliances are used or that, when supplied, they are properly used. It does not seem reasonable to extend the word to embrace negligence of officers or servants not directly concerned with the one dominant idea controlling the enactment. That idea is to impose liability upon the railway for damages caused by fires started by inefficient or negligently operated railway locomotives working on the road. The railway must in any event provide the best locomotives, and they must operate them without negligence. Even when they have so provided and worked their locomotives they must pay for damage up to $5,000 for fires started by locomotives. The damage need not be caused by sparks emitted. It may arise from ashes dropped from the fire box or grate. If carelessly so dropped the damage is unlimited as well as if caused by emitted sparks through the smoke stack.

It may be also that the section is open to the construction that negligence in the performance of the duty enjoined in section 1 of keeping the road-bed clear would entail unlimited liability in case of fire started by a locomotive on such combustible material. Mr. Chrysler seemed rather at the close of his argument to avoid combatting the contention that it was so open.

As the point is one not necessary for us to determine in this case I would not express any opinion upon it.

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As I cannot agree to the construction that the negligence spoken of in the section extends to negligence arising out of the condition of the roof of the station building which caught fire I think this appeal must be dismissed.

IDINGTON J.—The appellant having brought an action in the Exchequer Court for damages sustained by reason of a fire which destroyed his buildings was awarded only the sum of $3,284.67 though the actual loss is claimed to have been $17,500.00.

The action is founded upon 7 & 8 Edw. VII. ch. 31, section 2, sub-section 2, enacted the 3rd April, 1908, which is as follows:—

2. Wherever damage is caused to property, by a fire started by a railway locomotive working on the railway, His Majesty, whether his officers or servants have been guilty of negligence or not, shall be liable for such damages: Provided that, if it is shewn that modern and efficient appliances have been used and that the officers or servants of His Majesty have not otherwise been guilty of any negligence, the total amount of compensation recoverable under this sub-section shall not exceed five thousand dollars, and it shall be apportioned among the parties who suffered the loss as the court or judge determines.

The learned trial judge finds that in fact the fire was started by a railway locomotive working on the respondent's railway setting fire to the shingles on the roof of the freight shed of the said railway at Bathurst, and spreading thence to the appellant's hotel about one hundred and twenty-five feet distant.

The liability to pay, as above provided, five thousand dollars distributable amongst the sufferers is not denied save by the objection made by the respondent's counsel, that as the fire caught first on the roof and spread thence it cannot be said to have been started by the locomotive.

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This statement of the sequence of events presents all there is in the argument for such a view and seems to be met by the plain language of the Act. Such subsidiary argument in support of this objection as was attempted to be drawn from the history of cognate legislation and changes therein seems worthless when we find such changes actually remove the obscurity existent in the prior legislation which might, if at all relevant, have lent a slight colour to some such contention.

The arguable ground taken by the learned trial judge that whilst the Act clearly creates a liability on the facts he finds the damages must as a whole be limited to the sum of five thousand dollars, is, I take it, the real ground of resistance to the appeal.

But when the liability is created by the main part of the sub-section, and by words plainly unlimited, we must see if and how far the respondent is brought within the excepting proviso before we can lessen the responsibility primarily created.

There are just two things expressed as foundation for excuse or relief. Both must exist.

One is that modern and efficient appliances have been used.

I take it as tolerably clear from the language used and the common knowledge of and the history of the risks of fire from the sparks or cinders emitted from the fire necessarily incident to the use of locomotives that the appliances referred to are such as relate to the construction and use of the locomotive, and which may reduce such risks to a minimum.

It is found by the learned trial judge that such appliances were used and that factor is out of the case.

The second requirement to ensure immunity beyond the limit named is "that the officers or servants of His Majesty have not otherwise been guilty of any negligence."

One or two observations seem necessary in regard to the purpose and effect of this requirement. I submit, with respect, it has been misapprehended by the learned trial judge.

In the first place it is, I repeat, the first part of the sub-section that alone creates the liability.

It is not negligence that is the foundation of the obligation at all.

True there may have been negligence which promoted the emission of the sparks.

But whether negligence existed or not a new liability is created, and expressly covers primarily all damages caused to property by fire started by a locomotive in use.

Previously to this enactment there was no liability on the part of the respondent for such claims as this, no matter how much due to the negligence of respondent's servants.

And this new sub-section does not attempt directly to create a new liability by directly resting it upon negligence.

Heretofore the only legal claim against the Crown for damages caused to property by negligence was that to property *on* a public work, and expressly founded upon negligence.

This sub-section was to remedy that gross evil endured so long.

It was, no doubt, intended, and I think manifestly intended to put an end to such a state of things.

It is impossible to conceive when this is rightly

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apprehended that the negligence in this sub-section referred to and had in view was some actionable negligence. The people for whom and their property in respect of which a remedy was needed were not on but beyond the pale of the public work, and absolutely without remedy. Actionable negligence in their relations to the Crown, in such regard had no existence.

To assume actionable negligence as alone that which is meant in this proviso (when and where no such thing exists) is to render the word and term of the proviso a useless absurdity. We must give it a meaning; and giving that conformable to the fundamental rule of its plain ordinary meaning is enough.

Bearing all these considerations in mind, I submit the language of this sub-section is as clear and comprehensive as when read grammatically it is, and doubtless was, intended to be.

The justice of it is manifest. If the servants of the Crown have used proper appliances and not been negligent in, or in respect of, any of these things that may have been conducive to the injury suffered from the working or use of the locomotive, he suffering must bear the inevitable result of such use which is needful for the common good.

On the other hand, if it is not the inevitable, after due care has been taken, which has happened, the consequences must fall where they in justice properly belong.

At the same time, as a matter of expediency, the loss arising from the inevitable has to the limited sum named been imposed with a view to distributing part of the burthen of the loss. As to the absolute justice of this part of the remedy, opinions may differ, but

as to the other, it embodies such absolute justice, we should see it is not weakened in any way.

Let us apply this reasoning to this case.

The roof of the freight house which caught fire that spread to the appellant's property and destroyed it was very old; of shaky and curled up shingles; precisely the sort of thing to catch fire and spread it.

It caught fire seemingly from the use of respondent's locomotive on three different occasions within the seven weeks immediately preceding that of the 25th of May occurrence, now in question. Remonstrances of a most vigorous kind were made on one or more of these occurrences with the local officers of the road, and the need for a new roof pointed out, and these representations apparently were transmitted to proper authority. Beyond patching up, once or twice, some of the holes burnt in this "fire trap" by each fire, we do not hear of a single step having been taken, to watch, to warn, to guard, or to protect property in the neighbourhood, against such manifest danger of fire being started by respondent's working locomotives.

If that is not clear negligence within the plain words used and a breach of this condition that the statute requires to be observed by the officers and servants of the Crown to procure relief from the consequences of starting a fire I am unable to understand how grossly His Majesty's servants and officers must offend before their conduct can be called negligent. Nor do I think we have to find out and accurately determine which man is to blame or what degree of authority he had.

Some one could have stopped the train if need be. Some one could have done something. No one did

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anything. Some one near at hand ought to have had the care assigned him of meeting such an emergency, and if there was not such an one, that was negligence.

I agree with Mr. Justice Cassels that there may be in law no duty to one's neighbour to keep a roof in repair.

There is, however, a duty not to set it on fire when there is a risk of the fire going to the neighbour's property. His Majesty's servants and officers have been long enough exempt from blame on that score. It was high time such a state of things should end. We must now, I submit, see to it that the scandal has ended; if possible, forever.

It was also argued that the negligence referred to in the proviso of this second sub-section must have reference to the negligence legislated against in the first sub-section.

The first sub-section stood substantially as it reads now in the Act for a long time before the second was enacted.

It gave no express right of action; and of such use as it was in the way of protecting any one in respect of his property, that was given by another Act, but confined to property on the railway.

This new sub-section is for the express purpose of protecting people in respect of property off or beyond the railway. In regard to this latter class the first sub-section was of no more use than a painted image.

It has, though accidentally brought near to the other, neither grammatical nor necessary legal relation to the subject matter most directly dealt with by the new sub-section. Yet it may hereafter be of some use in relation to the subject matters dealt with

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by the latter, as for example, in a case where the facts may evoke its use to help but not necessarily to determine whether or not in a limited number of that class of cases, negligence has existed.

It is, however, entirely beyond the range of what we have to deal with in this case unless significance is to be given to the transposition of words which took place in it when the new sub-section was enacted and added meaning given by the words "other unnecessary combustible material."

It seems, I fear, impossible, having regard to the *ejusdem generis* rule, to use these added words or the *whole* sub-section, either to help or hinder the application of a unique new law, which by the second subsection is brought into force over an old barbaric field yet untouched by law, and is not and does not profess in a legal sense any amendment of old law requiring us to fit the old and new.

If, however, the added words "unnecessary combustible material" in the first sub-section can be read as substantial change then they would cover this very case, which I do not think legally possible, though perhaps intended so by some one.

Another argument suggested was that the negligence mentioned in this proviso might be something not covered by modern appliances, but yet relative to the locomotive or its use or management.

I am unable to agree in this. Indeed I am unable to quite comprehend its application or that of the nonfeasance rule to this case, for the most obvious negligence in this case is the unguarded use of the locomotive in such a place, and under such dangerous conditions as had been amply demonstrated to exist to the knowledge of the officers of the road (as the learned

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judge remarked during the trial) whilst no means taken to guard against the consequences of a fourth setting of fire, by its use. It may be possible, by calling things names to indicate passivity instead of activity, to frame an apparently logical, legal proposition that would justify running a train across a half-broken bridge or a locomotive emitting sparks beside a magazine when left wide open and filled with gunpowder. I cannot assent thereto.

I observe the learned judge anticipated a reference if any need arose to fix the amount of the damages and hence we have no other alternative then direct it.

I think the appeal should be allowed with costs, and a judgment entered accordingly directing a reference to ascertain the damages done appellant's property by the fire in question, for executing such a judgment of reference, and the findings thereon and reservation of costs of the reference to be disposed of by the judge of the Exchequer Court.

DUFF J.—I think the enactment in question was designed with a view to making the remedy against the Crown available to persons suffering loss of property by reason of fires started from locomotives on government railways co-extensive with that enjoyed by them under the "Railway Act" as against a railway company in respect of loss caused by fires started from a locomotive on a railway not a government railway.

I think "negligence" in this enactment has the meaning attributed to the word by lawyers — want of care according to the circumstances. The legislature is obviously speaking of *incuria dans locum injuriæ* — to use Lord Cairns' well-known formula; but I think the burden placed on the defence by the statute is to acquit of any such *incuria* all His Majesty's officers

and servants who in the course of their duty are concerned with the construction or working of a Government railway.

I cannot entertain any doubt that the maintenance of the station in the condition disclosed by the evidence, while engines emitting sparks were constantly passing it was negligence in the sense mentioned. Any reasonably careful person must have seen that it was in the circumstances a source of danger; and the failure to take the necessary measures to prevent that comes clearly, to my thinking, within the language used.

To say that there was no duty to repair is merely to beg the question. Nor does it help the matter to describe the default of the department as nonfeasance merely. You cannot properly confine your view to the failure to repair alone; you must take that together with the fact that the station was a part of an operating railway. Moreover, on any strict application of principle the fault charged in this case cannot be described as mere nonfeasance. A private individual or a public body erecting a structure which unless it should be kept in repair would, to the apprehension of reasonable persons, be likely to become a source of danger to property in the neighbourhood would incur an obligation to keep it in repair; and if by reason of the failure to do so the structure should become a nuisance the person or body maintaining it would be responsible as if such person or body had caused the nuisance directly. *Pictou* v. *Geldert*(1). Before the passing of the statute no such liability would have rested upon the Crown in such circumstances; but it was to remedy this grievance that the enactment was passed.

The appeal should be allowed with costs.

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(1) [1893] A.C. 524, at 531.

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ANGLIN J.—This action was brought in the Exchequer Court to recover damages from the Crown for the destruction of the suppliant's hotel premises by fire communicated from the freight sheds of the Intercolonial Railway at Bathurst. The learned trial judge found that the fire originated from sparks emitted from an Intercolonial engine, which was "equipped with all modern and efficient appliances," and that it was established that the respondent was not liable for "negligence in operating an engine defectively equipped." The learned judge further found that the roof of the freight shed was in a defective state of repair, and in such a condition as to make a fire more probable than if it were in good repair. He, however, held that the liability of the respondent was limited to a proper proportion of the sum of $5,000, that being the maximum amount recoverable where

> it is shewn that modern and efficient appliances have been used and that the officers or servants of His Majesty have not otherwise been guilty of negligence (7 & 8 Edw. VII. ch. 31, sec. 2, sub-sec. 2),

his opinion apparently being that the only negligence which the statute requires the Crown to negative is negligence consisting in the use of an engine lacking modern and efficient appliances.

Whatever right of action the plaintiff may have, whether it be for limited or for unrestricted damages, is conferred by the Dominion statute, and the jurisdiction of the Exchequer Court under section 20(*d*), R.S.C. ch. 140, to entertain the suppliant's claim, though questioned by the respondent, is in my opinion incontrovertible.

I am also of opinion that the application of the statute under which the suppliant claims is not confined to fires directly caused by a locomotive, but extends

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to fires communicated from buildings in or upon which fire has been started by a locomotive.

By this appeal the suppliant seeks judgment for the full amount of damages which he has sustained in lieu of the restricted damages awarded in the Exchequer Court. His right to full damages depends on the construction of the words in the statute —

that the officers or servants of His Majesty have not otherwise been guilty of any negligence.

With respect, I am of opinion that the very presence of these words following the words, "if it is shewn that modern and efficient appliances have been used" makes it clear that they were meant to cover negligence other than the use of an engine lacking modern and efficient appliances. If restricted to such negligence they would have no effect whatever, and would be a wholly unnecessary provision. What other negligence are they meant to cover ? In themselves they are broad enough to cover any negligence of any officer or servant of His Majesty which occasioned the damage complained of.

While, as I now read it, I find nothing in the section which would justify restricting the application of this broad and comprehensive language to negligence in the operation of the locomotive, I desire to leave open the question whether other kinds of negligence should or should not be deemed to be included.

Assuming that the provision should be restricted to negligence in the operation of a locomotive — the narrowest construction of which it can possibly admit, — such negligence has, in my opinion, not been disproved; and the statute puts upon the Crown the burden of disproving it. The evidence shews that within four or five weeks before the occurrence of the fire

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in question three other fires were started on the roof of the same freight shed in circumstances which leave practically no room for doubt that they also were caused by sparks from passing locomotives. These fires were all duly reported to the proper railway authorities and repairs were from time to time made of the injuries done to the roof on these occasions. There is in evidence a report made by the station agent at Bathurst to the district superintendent at Campbellton that

> the roof of the shed is in a very bad condition and should be shingled at once or there will be a serious loss some day,

and it is shewn that upon this report a carpenter was sent to make some repairs. He says:—

> I found the roof—a good many shingles were loose; the wire nails had rotted off between the boards and the shingles, as they always do; and I nailed some of them down, but I did not nail the whole roof. * * * I did not nail down all that required nailing. * * * I think it was very bad.

There is no evidence that it was because there was not an appropriation for the purpose or for any other sufficient reason that the roof was not renewed or adequately repaired. Nevertheless, with the roof in this dangerous condition to the knowledge of the responsible officers of the railway, a spark-throwing locomotive was allowed to be operated in immediate proximity to it, and, so far as the evidence discloses, without any instructions being given to take any precaution whatever to prevent fire being thus caused. Not only has the Crown in my opinion failed to shew that there was not negligence in operating the locomotive in these circumstances as it was operated, but, if that be necessary, such negligence is sufficiently established by affirmative evidence.

I would, therefore, allow this appeal and would direct judgment for the suppliant for the full amount of damages sustained by him to be ascertained by a reference in the Exchequer Court as indicated in the judgment of Mr. Justice Cassels. The suppliant should have his costs of this appeal, and of the action in the Exchequer Court including the costs of the reference.

Appeal allowed with costs.

Solicitor for the appellant: *M. G. Teed.*
Solicitor for the respondent: *E. L. Newcombe.*