

IN THE MATTER of the Petition of Right of

JOHN P. LEGER.....SUPPLIANT;

1909
Sept. 13.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Government railway—Damage caused by fire from locomotive—Liability—Government Railways Act, sec. 5, sub-sec. (j)—Nonfeasance—7 & 8 Edw. VII. c. 31, sec. 2, sub-sec. 2—Application.

While the Minister of Railways and Canals, under the provisions of sec. 5, sub-sec. (j) of the *Government Railways Act*, is empowered to repair buildings used in connection with the Government Railways, he is not compellable to do so; and his omission to make such repairs is not negligence within the meaning of sub-sec. (c) of sec. 20 of the *Exchequer Court Act*.

2. In the absence of liability therefor created by statute the Crown is not liable for mere non-feasance. *Leprohon v. The Queen*, (4 Ex. C. R. 100); *Davies v. The Queen* (6 Ex. C. R. 344); *Sanitary Commissioners of Gibraltar v. Orfila* (L. R. 15 A. C. 400); *McHugh v. The Queen* (6 Ex. C. R. 374); *Hamburg American Packet Co. v. The King* (6 Ex. C. R. 150) (1).

PETITION OF RIGHT for damages arising out of a fire alleged to have been started by a locomotive on a Government railway.

The facts are stated in the reasons for judgment.

June 9th and 10th.

The case came on for hearing at St. John, N.B.

M. G. Teed, K.C., and *F. J. G. Knowlton*, for the suppliant;

J. P. Byrne, for the respondent.

Mr. *Teed*, contended that the evidence showed beyond all doubt that the fire was started by a locomotive on the

(1) NOTE:—In this case no negligence of any officer or servant of the Crown was found, and the provisions of 7 & 8 Edw. VII. c. 31, sec. 2, sub-sec. 2, were applied as to the amount of damages recoverable.

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railway. (Cites *Canada Southern Ry. Co. v Phelps* (1); *Grand Trunk Ry. Co. v. Rainville* (2); *Smith v. London & Southwestern Ry. Co.* (3).

It is upon the Crown to show that its servants have not been negligent under the provisions of 7 & 8 Edw. VII., c. 31, sec. 2, sub-sec. 2. They have not discharged that burden.

The Crown is also liable for not keeping the roof of the shed in repair, on the principle of law that everyone is obliged to so deal with his property as not to injure his neighbor. Operating a railway is a business liable to injure adjoining properties by fire. It is, therefore, incumbent upon the owner of the railway to keep his own buildings in such a state of repair as will minimize the risk of fire spreading to the buildings of his neighbor. Cites *Vaughan v. Menlove* (4); *Beven on Negligence* (5); *Scott v. London Dock Co.* (6).

It was the intention of Parliament to widen the liability of the Crown by adopting the provision of the general Railway Act with regard to fires started on the railway. Cites *Blue v. Red Mountain Ry. Co.* (7).

Mr. *Byrne* argued that but for the new provision as to liability for fires started by locomotives on the railway the suppliant would be out of court. He is therefore entitled to a share of the \$5,000 fixed by the Act 7 & 8 Edw. VII. c. 31 as the maximum amount payable by the Crown in respect of damages arising from a fire started by a locomotive on the railway, and to no more. He has failed to prove negligence against the Crown, and the evidence is that modern and efficient appliance were used in the locomotives to prevent the escape of fire. Cites *Beven on Negligence* (8).

Mr. *Teed* replied.

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| (1) 14 S.C.R., 132. | (5) 3rd Ed. 496. |
| (2) 29 S.C.R., 201. | (6) 3 H. & C. 601; 13 Am. & Eng. |
| (3) L.R. 5 C.P. 98; L.R. 6 C. | Ency. Law 2nd ed. p. 404 vo, "Fire." |
| P. 14. | (7) 12 B. C. R. 460. |
| (4) 3 Bing. N. C. 468. | (8) 3rd ed. p. 309. |

CASSELL. J., now (September 13th, 1909), delivered judgment.

This is a petition of right, the trial of which took place before me at St. John on the 9th June, 1909.

The suppliant claims the sum of \$17,500 as damages by reason of the destruction by fire of his hotel buildings, barns, etc. The buildings of the suppliant were situate at Bathurst, near the station buildings of the Intercolonial Railway. A fire started on the roof of the freight shed in the early morning of the 25th May, 1908, and spread to the buildings of the suppliant, which were completely destroyed.

The suppliant alleges that the fire occurred through sparks or cinders emitted from an engine of the Intercolonial Railway, and that the engine in question was not provided with proper appliances. The suppliant also alleges that the roof of the freight shed was in an improper state of repair, the shingles being loose, allowing cinders to get under them and so making the probability of fire more likely than if it were in a good state of repair. His contention is that it was the duty of the railway authorities to keep the roof of the freight shed in a proper state of repair so as to minimize as far as possible the danger of fire. The contention of the suppliant is that even if the engine were furnished with all the necessary appliances to minimize the escape of sparks or cinders, nevertheless if the fire was caused by sparks or cinders emitted from an engine that the respondent is liable by reason of the negligence of the railway in allowing the roof of the freight shed to get into such a state of disrepair as to make a fire probable.

An alternative claim is based upon the provisions of the statute 7 & 8 Edward VII., cap. 31, section 2, subsection 2.

This sub-section reads as follows :—

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“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.”

In the event of the suppliant being entitled to claim under the provisions of the statute a portion of the \$5,000, and his right, if any, being limited to a claim under this statute, the suppliant, by consent of counsel for suppliant and respondent, is entitled to judgment for the sum of \$3,284.67.

In the event of the suppliant being entitled to damages for the total loss occasioned to him by reason of the destruction of his premises, the question of the amount of damages is to be referred to the Registrar.

Since the trial I have carefully perused the evidence as extended by the stenographer, and also the various exhibits, and I remain of the opinion I expressed at the trial as to the proper finding on the facts. I think on the evidence that the only conclusions that should be arrived at are as follows:—

1. That the fire in question originated from sparks emitted from the engine of the railway. The fire could not have been started in any other way so far as the evidence adduced before me discloses. See *Canada Atlantic Ry. Co. v. Moxley* (1).

2. The engine in question was equipped with all modern and efficient appliances, and the Crown has saved

itself from liability so far as any claim is based upon negligence in operating an engine defectively equipped.

I am of opinion that the roof of the shed in which the fire originated was in a defective state of repair. The shingles were in such a state as to allow cinders to get under them and to make a fire more probable than if it were in good repair.

The first question is whether any duty exists on the part of the Crown towards the suppliant to keep its own buildings in repair so as to minimize the risk of fire to its own premises, and if so, and the fire spreads across the road to the suppliant's premises, is the Crown liable?

The second question is what is the meaning of the sub-section of the statute 7 & 8 Edw. VII., if the previous question is decided in favor of the respondent, and is the suppliant entitled to recover portion of the \$5,000?

In answer to the first question, I am of opinion that the Crown is not liable by reason of the non-repair of the roof of the shed in question. But for the provisions of the statute 7 & 8 Edw. VII., cap. 31, s. 2, s-s. 2, there would, in my opinion, be no liability. This statute creates a liability on the part of the Crown to the extent of \$5,000, notwithstanding that modern and efficient appliances have been used for the prevention of fire, leaving the liability in a case in which the officers and servants of His Majesty have been guilty of negligence as before the passing of the statute. But for statutory provisions the Crown would not be liable.

The Exchequer Court Act, section 20, sub-section (c) provides that the Exchequer Court shall have exclusive original jurisdiction to hear and determine "every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment."

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Does the case come within the purview of this section?

Under the provisions of the statute respecting Government Railways, cap. 36, R. S. C. 1906, it is provided by section 5, sub-section (j) that the Minister may from time to time repair buildings. I know of no principle of law which compels the Minister to do so. I am bound by decisions which decide that the Minister is not an officer or servant of the Crown within the meaning of this section 20, sub-section (c), of the Exchequer Court Act. See *McHugh v. The Queen* (1); *Hamburg American Packet Co. v. The King* (2).

There is no evidence before me of any instructions to any officer or servant of the Crown to repair, or of any funds appropriated for that purpose.

In the absence of liability therefor created by statute the Crown is not liable for mere non-feasance. *Leprohon v. The Queen* (3); *Davies v. The Queen* (4); *Sanitary Commissioners of Gibraltar v. Orfila* (5); *McHugh v. The Queen* (6); *Hamburg American Packet Co. v. The King* (7).

On the other branch of the case I think the suppliant is entitled to succeed. The fire was started by a locomotive working on the railway. See *Jaffrey v. Toronto Grey & Bruce Ry. Co.* (8); *Canada Southern Railway Co. v. Phelps* (9).

The suppliant is entitled to judgment for \$3,284.76, and the costs of the action.

Judgment accordingly.

Solicitor for suppliant: *M. G. Teed.*

Solicitor for respondent: *E. L. Newcombe.*

(1) 6 Ex. C.R. 374.

(2) 7 Ex. C.R. 156, at p. 176.

(3) 4 Ex. C.R. 100, at pp. 110, 112.

(4) 6 Ex. C.R. 344, at p. 350.

(5) L. R. 15 A.C. 400.

(6) 6 Ex. C.R. 374, at p. 382.

(7) 6 Ex. C.R. 150, at p. 176.

(8) 23 U.C.C.P. 553.

(9) 14 S.C.R. 132.