Between

HERBERT MOLESWORTH PRICE.....PLAINTIFF; 1906 Jan. 25.

AND

HIS MAJESTY THE KING .....RESPONDENT.

Public work—Injury to adjoining property by fire—Liability of Crown under sec. 16 (c) of The Exchequer Court Act—Injury not actually happening on the public work.

It is sufficient to bring a case within the provisions of sec. 16 (c) of *The Exchequer Court Act* to show that the injury complained of arose from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment on a public work. It is not necessary to show that the injury was actually done or suffered upon the public work itself. *Letourneux* v. *The Queen* (7 Ex. C. R. 1; 33 S. C. R. 335) followed.

THIS was a claim for the recovery of damages against the Crown for the destruction of property by fire, alleged to be due to the negligence of servants of the Crown on a public work.

The case came on for hearing and was referred to the Registrar as a referee for enquiry and report.

October 25th, 1905.

The Registrar now made his report in the following terms:

WHEREAS by an order made herein on the 12th day of May, A.D. 1905, it was ordered that the matters in question in this case be referred to Louis Arthur Audette, Registrar of the Exchequer Court of Canada, for enquiry and report under the provisions of section 26 of *The Exchequer Court Act*, the rules of court and the amendments thereto in respect of the same;

AND WHEREAS the reference was proceeded with at the City of Quebec, before the undersigned, on the

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26th and 27th days of May, on the 26th and 27th days of June, and on the 4th day of July, A.D. 1905, in presence of Geo. F. Henderson, Esq., and L. A. Cannon, Esq., of counsel for the plaintiff, and C. E. Dorion, Esq., of counsel for His Majesty the King; and upon hearing the pleadings, and upon hearing the evidence adduced and what was alleged by counsel aforesaid, the undersigned submits as follows:

The case comes before this court on a reference, from the Department of Railways and Canals, made under the provisions of section 23 of *The Exchequer Court Act*, of the plaintiff's claim by which he seeks to recover the sum of $70,777 for alleged loss and destruction by fire of a large quantity of pulp wood and hemlock bark, and damage to certain timber lands situate in the Township of Blandford, in the Counties of Nicolet and Arthabaska, in the Province of Quebec, which lands are intersected by the line of the Intercolonial Railway of Canada. The amount claimed also includes the wages of a number of men employed by the plaintiff to fight the fire.

It is alleged by the plaintiff that fires occurred during the months of April, May and June, 1903, which were caused by sparks coming from the engines used in the operation of the said railway, or by live coals dumped from such engines along the said line of railway; that the fires originated on the railway track or the right of way, and spread over on to his lands through the negligence of the officers and servants of the Crown while acting within the scope of their duties or employment.

The Crown denies the material allegations of the plaintiff's statement of claim, and pleads, *inter alia*, that all such lumber, pulpwood and other materials deposited on its property were there at the risk of the

owner, and further that the plaintiff's claim is prescribed.

It will be well at the threshold to dispose of this question of prescription. The fires complained of, which are alleged to have caused the damage, the amount of which the plaintiff seeks to recover, occurred during the months of April, May and June, 1903, and the case was referred to this court on the 11th day of October, 1904. Actions of this nature are prescribed by two years under Art. 2261 C C. L. C. Thus, as two years had not run between the periods mentioned, the plea of prescription is declared not founded in law.

Now the plaintiff in a case of this nature, under the provisions of sub-section (c) of section 16 of 50-51 Vict. ch. 16, must, to be entitled to succeed, prove and establish, 1st, that the Intercolonial Railway is a public work of Canada; 2ndly, That the fires were caused by the operation of the said railway; and 3rdly, That the fire was so caused through the negligence of an employee or servant of the Crown while acting within the scope of his duties or employment.

Both under the pleadings, and under the evidence adduced herein, the undersigned finds that the plaintiff's lands in question herein are intersected by a branch of railway which was formerly known under the name of The Drummond County Railway, and which under section 1, ch. 6 of 62-63 Vict., became, and was in the year 1903, part of the Intercolonial Railway, the property of the Government, and a public work of the Dominion of Canada. Section 45 of *The Government Railway Act*, R. S. C. ch 28, sec. 45, reads as follows:—"All Government Railways are, and shall be, public works of Canada" *Leprohon* v. *The Queen* (1).

Passing to the second branch of the case, it is perhaps advisable to preface anything to be said with

(1) 4 Ex. C. R. 100.

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respect to the question as to whether or not the fire was caused by the railway, by stating that the spring of the year 1903 was extraordinarily dry from April to June, when a serious drought prevailed all through that section of the country.

It appears clearly from the evidence that the right of way and railway track in this section of the country was, in 1903, in a very bad state. Stumps, which were left on the right of way ever since it had been opened about 8 or 10 years ago, had become very dry, and in fact, as one of the witnesses puts it, were like tinder and would be easily ignited by a spark, adding that tinder fire will sometimes lie dormant in a stump for a long time, when a wind will come on and fan it into a flame and blow the sparks from a stump of that kind into the adjacent forest and set fire. Stumps, dry grass, and weeds, dead bodies, pieces of wood and branches were also left on the right of way. Old grass was allowed to remain over from previous years notwithstanding section 45 of *The Government Railway Act*, and that instructions were given to the section men by the road-master to burn that grass every spring and keep the road in good order. This statement with respect to the condition of the right of way applies to all the country adjoining plaintiff's property.

The plaintiff, on the 25th of April, 1903, while riding on the rear platform of the drawing-room car, after leaving Moose Park, saw fires starting in two or three places on the right of way. He then wrote to the superintendent of the road, as will appear by Exhibit No. 2, calling his attention to fires on the line, alleging that they were caused by sparks coming from the locomotives, and that unless great care were taken, as everything was very dry, fires would occur. Mr. Dubé, the Superintendent of the I. C. R. between Montreal and St. Flavie, acknowledged receipt of this letter,

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stating that he had taken up the matter with the mechanical department, and instructed them to see that the nettings of the engines be examined and if found to be defective to be put in perfect order at once.

Mr. Joly, whose father is proprietor of lands in the neighbourhood, and who manages the estate, says that he frequently has seen engines throwing sparks from the funnel, and wrote to that effect to Mr. Pottinger. During the spring of 1903 he kept two gangs of men with two railway bicycles protecting his property and patrolling over twelve miles. Following up an engine while so patrolling, he says they might put out behind that engine, five or six fires, originating on the right of way. Before the railway came through their property there was never any question of fire, and from time immemorial there never had been any fires until the railway was put in operation.

Fires were continually and daily occurring upon the railway track, and the witnesses heard herein testify they were caused by the railway.

The section men testified that the locomotives when passing were throwing sparks that were burning their clothes. Some of the sparks were sometimes falling on their necks and burning them.

Now, let us be more precise and deal with the fire of the 9th of May, 1903, at Moose Park, the largest of them all and the one first mentioned in the evidence. The drought had then been prevailing for twenty-five days. On that day, as appears from the evidence of the chief train despatcher, a freight train hauled by engine No. 14, which has a deep ash pan, passed Moose Park at about 1.14, in the afternoon, on its way towards Montreal, travelling west. There is an up grade on leaving Moose Park going in the western direction for about twelve acres, when the grade changes and inclines downwards. At about 1.30 p.m.,

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about a quarter of an hour after the passing of this special or freight train, the Reverend Mr. Manceau, the parish priest at Moose Park, having noticed smoke rising quite rapidly in the west at about a dozen of acres from Moose Park, and fearing the fire, as he says, on account of the drought then prevailing and the ordinary danger of locomotives setting fire, went with one Xénophen Marier, a section man then on sick leave, to the place where the fire was, and found it at about thirty feet from the rails, but still on the Government property, and testifies that at that very place there was grass (herbage), rotten stumps and pieces of wood on the right of way. There was nobody in the neighbourhood of the fire, no tramp, no shanty, saw nobody, excepting foreman Hilaire Bergevin, Phillipe LeMay and Alphonse Ferland, the three section men whose section began at Moose Park and ran east, and who were then at the station, and Kirouac, who was loading a car near where the section men were working, and they were almost together and at about a dozen of acres from the fire. When father Manceau and Marier arrived they found the fire had covered a space of about four or five feet and had taken at two places, and the former said to Marier, "You notice, don't you, that the fire is on the I. C. R. " land, and that it is the train which has just passed " that has set the fire."

Reverend Mr. Manceau had seen the train leaving the station and was at about five acres from where the fire originated when the train passed him. Asked if he is convinced that the fire in question originated from the train, he answers " Certainly ".

Xénophen Marier corroborates the testimony of Rev. Mr. Manceau and says that both the parish priest and himself left Hamilton's store for the fire, he going first, and the parish priest following up on his bicycle

and going ahead of him, and that on his (Marier's) way to the fire he had to pass by the station, where he met Kirouac who said to him: "How do "you find that, Marier, there is fire there, and I ask "Mr. Bergevin to go and put out the fire and he does "not want to go, he says he has no business to go "there because it is Mr. Taillon's section" Marier then said: "Yes"? and turning toward Bergevin he said: "You should go, Mr. Bergevin. You well un- "derstand, even supposing you as well as another "you should go, because if the fire burns us, it is not "a question,—you should go to the fire at once." Then Bergevin said: "If it were any other but Taillon, "I would go,—you know your Taillon."

Taillon is the foreman of the section beginnning at Moose Park and running west and upon whose section the fire had started.

He further says that the track at the place where the fire started is excavated, and the fire was about 25 feet from the side which is about three feet high. The fire had taken in several stumps, and was also running in the dry grass. On his way back from the fire, passing at the station, Bergevin asked him: "How is the fire"?, and he said: "The "fire is on the top of the grade and when we arrived "it was beginning to run towards the woods, I quite "believe you have delayed a little too much, it will "be difficult to stop it." Marier is of opinion the fire should have been taken in hand much sooner than it has been.

Cyriaque Kirouac corroborates the facts respecting the passing of the freight train which in his opinion caused the fire that day in the above mentioned manner, and also the further fact of the refusal of section foreman Bergevin to go and put out the fire on a section which was not his own.

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Kirouac while loading his car at the station was quite close to Bergevin and his two men who were working at the track, and says that 15 or 20 minutes after the "*special*" had gone towards Montreal, smoke began to rise on the track. Realizing that there was fire on the line, he said to Bergevin: "There is fire "along the line, it would be prudent to see to it, I "suppose." But Bergevin answered it was not upon his section, and that he had no business to go there. ("*Il n'était pas obligé à çà*).

Shortly afterwards the parish priest came and told him, he thinks, there is fire on the line,—let us go. He answered that he had commanded the Government people to go, but they refused, adding that he was not an employee and he was not going. Kirouac was shocked at the employee's refusal. Then the parish priest and Marier proceeded to the fire. It was before Rev. Mr. Manceau went to the fire that Kirouac asked Bergevin to go, and the fire appeared to him to be still on the track. The fire could then have been controlled.

Kirouac's opinion is that if Bergevin had gone to the fire when he commanded him to go, he could have put out the fire. The wind was not extraordinary (to use his own language) at the time, and there were three men. He said he had already been working for the Drummond Lumber Company along the line and they had often put out fires where it had not spread too much. He cannot see that anything else but the train could have set the fire. Before the train left there was no smoke, no fire, and after the train passed the fire started. The track was in a bad condition, it was strewn with stumps, rotten wood, dead trunks of trees, dry hay, hay from previous years which had remained on the track and had dried up, which is inflammable like tinder.

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Edward Champoux, section man on Taillon's section, which runs west from Moose Park, testifies that on the 9th of May, 1903, he, with other section men, worked at a fire at the western end of the section and helped to put out fires all day on Lacharité's section, at Route Siding. This would show that it was not only the duty, but even the practice, of section men to put out fires on sections other than their own. George Taillon corroborates witness Champoux and states that ordinarily when they see smoke they go at once to the fire as soon as possible.

Hilaire Bergevin was heard and said it was the women who called, a lady who called him first, and upon being asked if it was not Kirouac who asked him to go to the fire, said: "Beg pardon, it was a "lady who called me first." He does not, however, deny that Kirouac spoke to him about it. He said he could not go to the fire at once as he was placing ties; that he spiked the two ties and went to the fire. If he had only two ties to place, as he says, there was no reason for delay because it should have taken only between three or four minutes to do so according to Houston's testimony, from whose evidence, one would further gather that if there were only a couple of ties out he could have left at once. Two ties out at a station would not make the road-bed dangerous. When Bergevin went to the fire quite a while after it had started, he ascertained the fire had originated on the railway track, and had then reached the plaintiff's property.

Mr. Houston, the road-master, being asked: "What "is the duty of a section man if he sees a fire a mile "away, but not on his section?" Answers: "His duty "is to proceed there at once. Q. And if he waits a con- "siderable length of time before doing so, telling some- "body in the meantime that it is not on his section, or

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"none of his affairs, do you think he is doing his "duty?"—A. No, he certainly would not."

Mr. Houston, the road-master of No. 9 Division (covering the territory in question) sent and addressed to the section foreman of his division the following circular letter of instructions, dated the 4th April, 1903, and filed herein as Exhibit No. 20, viz:

"Date 6/4/03.

"To all section foremen on No. 9 Division:

"You will please have all the old ties gathered and "put in piles along the track at once and burned as "soon as the weather will permit. Also all the grass "and weeds burned. This must be done before the "weather gets too dry. This is important and must "be attended to without further notice. Every spring "we have some trouble with fire on the line and it is "generally proven that the fire commences on the "company's property, and I want to avoid this trouble "this spring. Some time ago I issued instructions to "have all the large pieces of coal that are scattered "along the track picked up and taken to the station. "I noticed the coal on some sections is all gathered up "and on other sections is not. All sections where the "coal is not picked up must do so at once. It is an "easy matter to take two or three pieces each day on "the pumper when going home at night, and this will "keep the road clean.

"Acknowledge receipt.

"(Sgd.) W. HOUSTON."

Alphonse Ferland, a section man working under Bergevin, when asked if he did not believe it was worth the trouble to leave his work aside and go to the fire, answered: "As a man I was obliged to abide "by the advice of my foreman." In his opinion he does not see any other reason but an engine which could have set the fire.

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Phillipe Lemay, the other section man working with Bergevin, states that after the train left the station between 1.15 and 1.30 they saw the fire, but they did not go at once, but he thinks he only went at about 3 o'clock in the afternoon, and did not go before because his foreman did not command him to do so. Kirouac said they went later than that. There was nobody there, no camp, and he cannot see that it could be anything else but the cars which would have set the fire which took in the (fardoches) underbrush, bushes and trees.

Then, William Houston, the trackmaster of this division, testifies he gave instructions to all foremen of sections to go and put out fire wherever they see it. Whether the fire is on their own section or the adjoining one, "they have got to go and put out the fire." He further says it is the duty of the foreman of a section as acting within the scope of his duty, to go and put out a fire on any other section than the one over which he is foreman.

There was a great deal of discussion with respect to the construction of the several locomotives in use on the I. C. R. between Levis and Montreal, and we have upon that subject some important evidence.

Francis J. Lozo, residing at Rivière du Loup, master mechanic in charge of the mechanical department of the I. C. R. from Campbellton to Montreal, tells us there are two openings or dampers in the ash-pan; one in front which is kept closed during the winter to prevent snow from coming in; and one to the back which at that season is kept open for draft. In the first part of April, instructions are given to close the back damper, and on or about the 15th of April of each year instructions issue to place a netting at the back damper for the summer. *If the engine left after that date without the back damper fastened down or the netting*

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in the pan, it would be negligence on the part of the employees of the shops from where it came out.

Engine No. 163 which had a deep ash-pan was without netting at the time. The opening in a deep ash-pan would begin at about eight inches from the bottom of the ash-pan itself. This engine had the reputation of shifting her fire.

The witness contended, differing in opinion with locomotive engineers Harry W. Sharpe and Joseph Ryan, that a netting is not absolutely necessary in the case of a deep ash-pan, because the eight inches underneath are supposed to collect the cinders, preventing them going out through the door; and he is asked:

"Q. But, if that eight inches is allowed to become "choked with ashes there is nothing to prevent the "cinders coming right out through the back damper "that is open?—A. Certainly not."

"Q. If the ash-pan gets filled up to the level there "is always a danger of the cinders, the vibration of "the engine shaking out the cinders on to the track "through the damper?—A. Yes."

George Finley, the locomotive engineer, who drove engine No. 163 on train No. 152, on the 8th of May, 1903, says this locomotive did shift her fire, and when in heavy service she had a tendency of drawing her fire from the back, from the high section of grates where the fire was light, to the fore, and back it up at the front of the fire-box against the tube sheets * *, and that would destroy the draft. He would then work out the moving grates, and the result would be an unusual accumulation in the ash-pan which would fill more quickly than under ordinary circumstances, with a greater tendency of shaking out cinders or live coals. Another way of clearing draft under these circumstances would be by poking down through the fire door,—a very dangerous method.

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Moïse Normand, locomotive engineer on engine No. 183, on the 8th May, 1903, says they sometimes take out the clinkers from the fire box with an iron bar from the hind door, and when they throw the clinkers from the fire door, they generally throw water upon them if they are very inflammable, and sometimes they leave them there.

He further says that it happens that engines throw sparks.

Samuel Knowles, the plaintiff's manager or agent, says he has seen large clinkers, from the size of an egg to a good sized turnip, all along the line between the stations in the territory in question. It is, he says, a common thing, when walking along the line, to have our attention attracted to the ties, to the state in which they are, the surface being burned and charred.

Joseph Ryan, a locomotive foreman of I. C. R. at Hadlow, in charge in 1903 of the round-house or shop where the engines simply get running or minor repairs and are inspected, informs us that engine No. 163 used to cause them trouble. She lifted her fire, with the effect as already explained, of filling the ash-pan with live coals and dumping its contents on the track. *On the 9th of May*, 1903, *Ryan says there was no netting on the ashpan door of engine No.* 163, and four or five days, probably seven, afterwards he received a telegram from Lozo to have a netting put on back ash-pan door of engine No. 163, surmising at the time Lozo was out on the road somewhere and had noticed No. 163 without netting. He would indeed be very much surprised if Lozo told the court in this case that there was no necessity to put netting on No. 163. Why, his telegram shows the very reverse, and from the report dated July 16, 1902, which was handed to him on reference it even appears that the ash-pan of engine

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No. 163 was repaired, and a netting placed over the back damper.

On the 8th of May engine No. 163 came in to the Hadlow shops with the back damper unlocked and open. He says they would send out the locomotives with the back damper door closed, and they would come back unlocked and opened. No doubt the engine drivers would open them to have better draft. When engine No. 163 came in, on the 9th of May, 1903, he remembers that the ash-pan was pretty full of fire, that is ashes and what had fallen down through the grates. it was almost level with the back door. There were in 1903 four other engines like No. 163, with inclined grates, and he had to pay more attention to them than the others because they gave trouble, and he has since changed the grates to overcome that trouble.

This fire on the 9th of May remained in the woods, changing its direction from time to time with the change of wind, and eventually burned the plantiff's lands. Mr. Knowles is quite positive the same fire was burning all the time, and that the fire which burnt some of plaintiff's property on the 3rd of June was a continuation of the fire of the 9th of May.

FIRE OF 8TH OF MAY, 1903.

Elzéar Desjardins, the Chief Train Despatcher, gives us, as follows, some of the trains which passed between Forestdale and Moose Park on the 8th of May, 1903, viz :

Train No.	152,	Eng. No.	163,	Engr.	George Finley.
"	33	"	172	"	J. Fohy.
"	34	"	173	"	R. Mitchell.
"	148	"	183	"	M. Normand.
"	152	"	200	"	Jos. Belleau.

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Now, this is the day on which engine No. 163 came into Ryan's shops with the back damper unlocked and opened and without netting.

Emmanuel Lacharité, foreman of section No. 134, extending about two miles east of Forestdale and three miles west of the same station, and including Route Siding, having a section of about six miles long, has with him to look after it Louis Champoux and David Dureau. He says that train No 33 usually passed at about three o'clock in the afternoon, and added "two o'clock, nine after two". No. 148 passes sometimes before, sometimes after, cannot say whether on that day it was on time or not. Then train No. 34 usually passes at 3.22 P.M., but he cannot say whether it was late on that date. However, after its passage they saw smoke and the fire in the direction of Route Siding when they at once went to the place and endeavoured to put it out. From what he could see, when arriving there, the fire had taken, originated, on the track; there was no more fire on the track when he arrived, but it had spread from the track to the adjoining land and was still on the right of way. On that day some wood piled outside the Government property and belonging to Mr. Price was burned at that fire. When he had passed Route Siding in the morning there was no fire there; it only started after the passing of the trains, and as there was no tramp, nobody camping there and no shanty, he does not see anything else but the train that would have set the fire, although it is pretty hard to say, as he did not actually see it. Asked if the track was clear (clair) he says it is pretty hard to be clear everywhere because it is through the forest. *The track was in a bad condition there, there was some hay, underbrush, stumps, rotten wood. In autumn they cut the underbrush, and burn it in the spring; but sometimes when it is not perfectly dry, it*

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does not all burn, and some of it was then left on the track.

Alexis Cantin, a witness heard in the case, speaks of fires during the month of May, 1903, but while the date of the 8th is not specifically mentioned the undersigned takes for granted it was the date to which he referred, although his testimony does not offer anything new, but only by way of corroborating what we have already heard. He was engaged by Mr. Knowles to look after the fire between Forestdale and Route Siding and the village, and he says that during April, May and June of 1903 he was putting out fires every day, and is of opinion the locomotives set the fires.

Now, this train No. 34 had engine No. 173, which is mentioned by Ryan as being of the same make and type as No. 163, and was one of those which required looking after and caused trouble, and which was at *that time running without netting, contrary to orders.*

Richard Mitchell, locomotive engineer on that train, at that date, says he has seen fire on the right of way, and that it would be a pretty hard thing for him to swear that he did not leave any fire behind. There is always a chance that a spark may drop from the stack of the engine. He would not swear to any engine not throwing fire, unless he could examine it personally.

FIRE OF 28TH APRIL, 1903.

Elzéar Desjardins, the chief train despatcher, tells us as follows the numbers of the trains which passed at Forestdale on the 28th April, 1903, viz:

Passed 5.20 P.M.—Train No. 148, Engine No. 183, Engineer, M. Normand.

Passed 11.11 P.M.—Train No. 152, Engine No. 200, Engineer, Geo. Finley.

Arr. 11 55. Lv. At noon. } Train No. 147, Engine No. 182, Engineer Geo. Cloutier.

Lv. 12.50. } Special, Engine No. 137, Engineer W. Kelly.

Arr. 12.19.
Lv. 1.05 P.M. } Special, Engine No. 208.

No. 149.....

Samuel Knowles was manager of the Drummond Lumber Company up to 1st May, 1903, when he entered the plaintiff's service as his agent. He was, however, looking after Mr. Price's business for a short period previous to that date during the last few weeks of his time with the company, having promised to look after Mr. Price's interests to whatever extent he could, provided it did not clash with that of the Drummond Lumber Company, thus overlapping the last few weeks he served with the company.

He was, at about noon, on the 28th April, 1903, at the Forestdale Station, when he first saw a fire at half a mile east of Forestdale, on the left hand side of the track, on the Government property. When he got to the fire it was still burning on the right of way; it had not yet got into the woods. He says he was sufficiently close to that portion of the right of way to be perfectly satisfied there was no fire there in the forenoon, and the fire only started after the passing of the trains, one was No. 152, a regular passenger train, and the other was either a "special" or No. 148, the two trains passing within a short time of each other, about 20 to 30 minutes, and he says the fire started within half an hour afterwards. There was nothing there to set fire except the trains, and from his experience he has no hesitation whatever in saying that innumerable fires were set by the passing trains in that section about that time, and he has no doubt as to how this particular fire was set.

Now, on that day, the road-bed or Government land was far from being in proper condition. All along the

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road there were stumps, some of them very old, rotten and inflammable; there were also in some instances brush, grass and weeds. (See sec. 51 of *The Government Railways Act.*) In some places he saw the grass and weeds which had been cut by the officials of the road, or through their orders, and which, more often than not, remain where they are and lie on the ground after being cut. It becomes very much drier than if it had not been cut, and for that reason is more subject to fire if a slight spark happens to fall upon it. And when it takes on fire it spreads so rapidly that if it is not fought at the beginning, it is practicably impossible to stop its progress.

When he arrived at the place where the fire was, the grass, stumps and leaves were burning, and there were some 100 to 125 feet in length by 20 to 30 feet in width that had been burned when he arrived, and the stuff he had been speaking about was burning; and had it not been there and if the right of way had been cleared up as it should have been, it would have been utterly impossible for the fire to spread as fast. He further says that all the fire was, however, still on the right of way at that time, and within an hour after he saw the fire, it had reached the woods. He was then with two men, endeavouring to check the fire with pails of water. They checked it for a while, but it got impossible to stop its progress. This fire burned some of the plaintiff's limits, but no pulp wood or bark on that day.

The law upon the subject now before us, respecting the liability of railway companies setting fire either by sparks escaping from the funnel of the locomotive, or by fire thrown in some other way from the engine, has been elaborately discussed of late in the Province of Quebec. And this has happened more especially in view of the decision of His Majesty's Privy Council

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in the case of the *Canadian Pacific Railway Co.* v. *Roy* (1).

At common law the railway company would be liable irrespective of the question of negligence. But the use of locomotives has been made lawful by the statute permitting the same and the operation of the railway; but while it has done so it has not vested the railway with that immunity which will relieve it from any liability for any damage occurring through its negligence.

While, indeed, a number of authorities have been cited in this case; the law which will govern will be no other than sec. 16 of *The Exchequer Court Act*, as the case must be brought within the four corners of that statute; and the authorities so cited can only help in ascertaining the different elements of negligence and what will amount to negligence. (*Letourneux* v. *The Queen* (2).

Now, in view of the overwhelming weight of the evidence adduced, showing a series of negligent acts on the part of the officers of the Crown, the specific testimony of a number of section men whose daily work takes them so often upon the railway track and who testified that their clothes and their skin had been burned by sparks issuing from locomotives, and that in their opinion, as well as that of the other witnesses, the fire was caused by the locomotives, as there was nothing else to do so; the additional fact that some of these locomotives in operation at that time, such as Nos. 163 and 173, and a couple of others, according to Mr. Ryan's testimony, were giving trouble and were travelling without netting contrary to orders; the further fact that the right of way was in a most improper condition; the undersigned must say

(1) [1902] A. C. 220.

(2) 7 Ex. C. R. at p. 7; 33 S. C. R. 335.

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that the common sense conclusion he must necessarily arrive at is that the fire on the several occasions mentioned was set by the locomotives, and originated in all cases on a public work.

Dealing with the fire on the 9th of May, 1903, the undersigned finds, it being unnecessary to mention any other act of negligence in that respect, that section foreman Bergevin was guilty of negligence while acting within the scope of his duties or employment, in refusing to go and put out the fire which had originated on the right of way on a neighbouring section when asked to do so; and that, had he gone at the beginning when he saw the fire, with his two men at his disposal and the necessary appliances in his possession, he could have stamped out the fire which proved so disastrous, and for that act of negligence will hold the Crown liable under sub-sec. (*c*), sec. 16 of ch. 16, 50-51 Vict. (*Letourneux* v. *The King* (1).

Dealing next with the fire of the 8th of May, 1903, which appears to have been set by engine No. 173, the undersigned, in view of what has already been said, must take the common sense view on the question of fact that the locomotive set this fire on the right of way; and further that there was negligence on the part of section men acting within the scope of their duties or employment in keeping the right of way in the above mentioned improper condition covered with dry grass, hay, stumps, etc., contrary to orders given by the proper authority, coupled with the further fact that engine No. 173, similar in make to No. 163, was at the time without netting at the back damper of the ash-pan, although orders had been given to place same long before, according to Superintendent Lozo's evidence. It was on that day that engine No. 163 came in to Hadlow with the back damper of the ash-pan

(1) 7 Ex. C. R. p. 1; 23 S. C. R. 335.

unlocked and opened, and when front and back dampers of the ash-pan are so opened the draft can easily throw live coals on the track. In view of the above mentioned circumstances showing negligence, the Crown will also be held liable under the same statute. (*C. P. R.* v. *St. Jean*, a case decided during June last by Judge Dunlop, in which he held the company liable for damages because dry grass had been left on the track. A similar case was also decided in the same manner by the Court of Review at Montreal, during October, 1905, as appeared in the "Montreal Star" of the 16th instant; *Grand Trunk Ry.* v. *Rainville* (1); *McMurchy & Denison's Canadian Ry. Cases* (2); *Pigott* v. *Eastern Counties Ry. Co.* (3); *Michigan Central Ry. Co.* v. *Whealleans* (4); *Letourneux* v. *The King* (5)).

Dealing finally with the fire of the 28th of April, 1903, the undersigned also finds under the evidence that the locomotive set the fire on the right of way in the manner mentioned by witness Knowles; and that there was negligence on the part of the section men in allowing inflammable material to remain on the right of way as mentioned *supra*. (Same authorities as above). The Crown is also held liable for the damages resulting from this fire. (*Letourneux* v. *The King* (6).

DAMAGES.

The plaintiff, who was formerly in partnership with Peter P. Hall and carried on business under the name and style of Hall & Price, was prior to the dissolution of the partnership, joint owner of the property in question, which he purchased from the legatees Hall at the time of the dissolution of the partnership in

(1) 29 S. C. R. 201.
(2) Vol. 1, pp. 113, 129, 208, 211.
(3) 3 C. B. 229.
(4) 24 S. C. R. 309.
(5) 7 Ex. C. R. 1; 23 S.C. R. 335.
(6) 7 Ex. C. R. 1; 23 S.C. R. 335.

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1892, and paid for the same about $1.00 per acre, with, he says, some other consideration made at the time. In September of the same year he sold to the Drummond Lumber Company the exclusive right, for a period of nine years and a half, to cut all the timber of every kind and description on some 38,000 acres thereof for the consideration of $30,000 cash, and the further consideration that the company would build a railway running through the Township of Blandford, and return to him these lands at the rate of 4,000 acres odd, or the ninth part of the 38,000 acres, per annum, whether they had exercised their right of cutting upon them or not, with the view, as he says, of receiving his township developed by a railway at the termination of the contract. The railway was for a while running in a kind of *cul-de-sac*, having no connection with the big lines; but after having obtained Government subsidies, the company built the road as far as Levis, and called it the Drummond County Railway, which was subsequently sold to the I. C. R. and now forms part of same. The effect of all this the plaintiff claims was to enhance materially the value of his property. The value of pulp wood had not at the early period of the lease the value it had at the time of the fire. While wood was not in 1892 cut below six inches in diameter, it is now cut as low as four and five inches.

The plaintiff testified that the Drummond Lumber Co. returned to him the last portion of these lands in 1902, and during the first few years of the lease the company did not cut to the full capacity of the lot; the cutting was so limited in consequence of the price of wood being unfavourable. He reckons there were from two and one half to three cords of wood per acre on the 38,000 acres immediately preceding the fire, expecting to make $2.00 a cord out of

it. Witness Pennington places a similar value, $2.00 per cord, after the fire upon the same quantity of cords.

According to the evidence, there is a yearly growth of 3 per cent. on such limits, and the estimate is made that cutting as it was cut and returned in the manner above mentioned, the land should, in 1903, carry 2¾ to 3 cords per acre. Mitchell says that the smallest dimension cut in 1900 was five inches, and 14 years ago they were not taking one third of what they are taking to-day,—cutting now down to four inches.

Alfred Langlois, a bush-ranger and explorer, who lived and was brought up in this section of the country and whose reputation as an explorer seems to be quite well established, says he went through Mr. Price's property before the fire. He went through it at Mr. Knowles' request, after the fire, to ascertain the damages, and made his report to him which Mr. Knowles has put in writing and filed as Exhibit No 18. One Evangelist Finlay, a bush-ranger on M. Joly's property, also in this section of the country, appears to have been sent by the Government, after those fires. to ascertain the extent of the damages occasioned by the same; and Langlois, having been asked to take him around, went a third time over this territory with Finlay.

It will be well to note here that there was no evidence adduced on behalf of the Crown with respect to the quantum and extent of damages alleged to have been suffered by the plaintiff. The evidence adduced by the plaintiff on this subject remains uncontroverted. Even Finlay was not called. Would not the necessary conclusion to be derived from this fact be that Langlois' estimate is satisfactory?

It is, indeed, a very difficult thing to ascertain to the acre the very extent burned, according to Langlois himself, but he estimates that there were between 27,000

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and 27,600 acres damages by fire. These figures were not arrived at by actual measurement, but is an estimate after seeing the property. The undersigned will allow, under the circumstances, 27,300 acres. Now Langlois, at p. 198, values the property before the fire at $4.00 per acre, and after the fire at $1.00; at pp. 334, 335, he places the same value of $4.00 per acre before the fire, and at the top of page 335, the value after the fire at $2.00 to $2.50; then in the middle of the same page he says it is only worth $1.50*. Were these lots really worth $4.00 per acre before the fire?

In arriving at the fair market value of these lands one must look at it in the light of all the surrounding circumstances. Indeed this property was acquired in 1892 at $1 per acre, and then the right to cut upon some 38,000 acres thereof was sold for the sum of $30,000, as above mentioned.

One Albert Daigle bought from Mr. Price after the fire, on the 11th of August, 1903, a certain piece of the burned land upon which he says there was only about between one-half to three-quarters burnt, for the sum of $1.15 per acre, and the same property was offered to him by Mr. Price, in the spring of the same year, before the fire, for $3.00 per acre Mr. Price who was called in rebuttal, explains this sale and qualifies it by saying he had been asked by Mr. Manceau to sell lots in that district with the view of starting a parish there, a fact which would give an enhanced price to the balance of the township.

Alphonse Grégoire purchased from Mr. Price, after the fire, on the 2nd December, 1903, for $1.39 an acre. The Moose Park Lumber Company, on 4th December, 1903, at $1.20 per acre. On the 19th of December, 1904, Joseph Savigny paid $4.00 odd per acre for eleven lots, of which two only were burnt; and on the 19th July, 1903, Joseph Charette bought from Mr.

*REPORTER'S NOTE:—The pages here cited refer to the evidence taken before the Referee.

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Price seven lots and a half perfectly intact, not one of them burned and paid about $1.10 per acre. The deeds of sale covering these transactions are filed of record as Exhibit No. 17.

Some evidence has also been adduced showing that if these limits when returned to the plaintiff, after the wood had been cut upon them by the Drummond Lumber Company, had been operated upon and worked before the fire, they would have still returned between two and a half to three cords per acre, with a profit of $2.00 a cord, and great stress seems to have been placed upon this estimate of value. While this might be used to some extent in arriving at the value of the property, there are indeed too many contingencies to be reckoned with before the wood is cut and taken out of the forest, to adopt it as a true criterion of value. If that rule were followed in arriving at the value of a farm or other property by taking into consideration its utmost capabilities one could arrive at a fabulous price by devising in that manner. Take for instance a farm of 100 acres, and suppose every acre of it being developed or worked on the basis of a vegetable garden,—why the returns that farm might yield in one year would about equal its market and saleable value.

No, in arriving at the actual value of a property, actual transactions in the neighbourhood or with respect to the same property, if available, will be a better test and a better guidance; and in view of the evidence with respect to the above mentioned sales and the testimony of Langlois who places the value upon this property before the fire at $4.00, and since the fire at $1.00, $1,50, $2.00, $2.50, and in the light of all the surrounding circumstances, the undersigned is of opinion that the fair price of that property after the fire was $2.00 an acre as against $4.00 before the fire.

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The plaintiff will be allowed 27,300 acres at $2.00 per acre..... $54,600 00

It is further claimed by the plaintiff who has adduced evidence in support thereof, that the fires further destroyed the following quantity of wood, viz:—

70 cords of pulpwood at Forestdale
252 " " Moose Park.
119 " " Route Siding.

441

Less 230 for which he gives credit as having been insured.

211.

Leaving 211. But the plaintiff only claims 208 cords, which he states were worth $5.50 per cord.

It is in evidence that in 1903 $4.50 to $5.25 were the highest prices paid for such wood purchased from farmers. (Knowles evidence, p. 294).

$5.00 per cord will be allowed, viz:..... 1,040 00

Then 4,000 bundles of hemlock bark were destroyed at the same time, for which he claims and proved that the purchase price paid was $6 00 a hundred, the whole amounting to the sum of $240.00.

It appears, however, that about 10 per cent. of this hemlock was piled on the Government property, notwithstanding that notice had been posted up forbidding the same and stating that in such case the wood would be so placed at the owner's risk. Mr. Knowles had seen these notices. Whether or not such notices had been posted up and had been seen by Mr.

Knowles, it does not, in the opinion of the undersigned, make any difference. The owner, in thus placing the wood upon the Government property was a trespasser, and an action for the recovery of the value of such wood that has been destroyed thereon must be denied him.

Then 10 per cent. must be deducted from the sum of $240.00 leaving the net sum of. 216 00

Then the plaintiff claims the sum of $190.50 for amounts paid during the progress of the fire to men working or guarding his property against fire and extinguishing or endeavouring to extinguish the same. He has proved such expenditure. It has not, however, been proved that this expenditure saved any of the plaintiff's property from fire. Quite the contrary, it is in evidence that his men abandoned fighting the fire when it got beyond control. The full amount of the damages suffered by the plaintiff has been allowed. What more can be expected from the one who caused the damage? We are not assessing penal damages, but actual damages, and while perhaps in equity in a case where it would be shown that such expenditure had actually saved some property it might be allowed, the undersigned is of opinion that in a court of law under the present circumstances no more than the actual amount of the damages suffered is recoverable. The plaintiff cannot recover this expenditure.

The general principle which should guide in an enquiry of this kind is whether the damage complained of is the natural and

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reasonable result of the defendant's act; it must flow from the defendant's act. If this element does not exist, the damage is said to be too remote, as in the present instance. (*Mayne on Damages*, p. 49.)

The total amount which the plaintiff is entitled to recover is then the sum of..... $55,856 00

TITLE.

It may be stated in a general way that the plaintiff has established and proved his title in a satisfactory manner. True, in his chain of title, as will appear by reference to Exhibit No. 11, it appears that the firm of Hall and Price, of which the plaintiff was a partner, acquired from the latter's wife a certain piece of real or immovable property. Contract of sale between husband and wife is prohibited by Art. 1483 C. C. L. C. It is said that the sale was made to the commercial firm of Hall & Price, and not to Mr. Price himself. Could that argument be set up with any avail in view of the fact that the husband was one of the partners; that it took place at the time of the dissolution of the partnership; and further that sales of this nature cannot be made either directly or indirectly by interposed parties?

At the conclusion of the argument, counsel for plaintiff declared that if the latter were found entitled to recover, that he would undertake to have his client's wife give a release to the Crown in any deed or acquittance which it might become necessary to sign.

In view of this undertaking the amount which the plaintiff is entiled to recover will be made payable to him upon his wife's intervening in the execution of the acquittance, and giving a release to the Crown of all claims she may have had or has in respect of the property in question.

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Therefore the undersigned has the honour humbly to report and find that the plaintiff, under the circumstances, is entitled, under the provisions of sub-section (*c*) sec. 16 of ch. 16, 50-51 Vict., to recover from His Majesty the King the sum of $55,856.00, with interest thereon at the rate of five per centum per annum from the 11th day of October, 1904, (*St. Louis* v. *The Queen* (1); *Lainé* v. *The Queen* (2) for damages suffered by him through the negligence of the servants or officers of the Crown while acting within the scope of their duties or employment, upon giving to the Crown a good and sufficient discharge, acquittance and release both by his wife and himself of all claim or claims they or either of them may have had, or has, in respect of the above mentioned damages to the property in question herein. The plaintiff will also be entitled to his costs.

In witness whereof the undersigned has set his hand at Ottawa, this 25th day of October, A.D. 1905.

(Sgd.) L. A. AUDETTE,
Registrar and Referee.

November 11th, 1905

The case came on for argument upon a motion by the plaintiff to confirm the report, and a motion by the defendant by way of appeal therefrom.

C. E. Dorion, for the defendant, contended that the plaintiff was not entitled to the compensation because he had no title to the property as a whole. Part of the land was conveyed by the wife of the plaintiff to the firm in which the plaintiff was a partner, and this was a nullity under Art. 1483 of C. C. L. C.

[*Mr. Henderson*, of counsel for the plaintiff here asked for leave to add Mrs. Price as a party. Granted.]

On the question of liability, I submit that the case of *Letourneux* v. *The King* (3) does not apply.

(1) 25 S. C. R. 649 (2) 5 Ex. C. R. at pp. 128, 129.
(3) 7 Ex. C. R. 1.

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The damages did not result from anything inherent in a public work. It was at most a matter of personal negligence on the part of the railway officials, and as such not recoverable against the Crown. *Rex non potest peccare.* The Crown neither commits nor sanctions a wrong done as a matter of common law. It is only by statute that you get a remedy against the Crown for negligence.

Again, the plaintiff was guilty of contributory negligence. He knew that brush and inflammable material were on the right of way, and so liable to take fire. More than that, the branches and tops of trees cut on his own land were left there to dry, and so became a source of danger in case of fire getting into his property. (*Am. & Eng. Ency. of Law* (1).

G. F. Henderson, for the plaintiff, contended that the essence of the Crown's liability under the statute was the personal negligence of its officers or servants. The Crown under the statute was not liable for personal negligence, not only on the theory of *respondeat superior.*

The injury need not happen on the public work, but it must be derived from negligence on a public work. That is the case here. (*Letourneux* v. *The King* (2).

As to contributory negligence, there is no evidence showing that the fire could not have destroyed the plaintiff's property if he had not been guilty of negligence himself. It was not the plaintiff but third persons, who left chips and bark near where the wood was corded.

L. A. Cannon, following for the plaintiff, contended that as to the title Mr. Price had conveyed not to the husband but to the firm of Hall & Price under a con-

(1) 2nd ed. vol. vii., p. 371. (2) 7 Ex. C. R. 1.

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tract of sale, which was valid. Art. 1488 of *C. C. L. C.* did not apply to such a case. The suppliant has been in possession for ten years, and, moreover, the provisions of the Article cited could only be set up by the owner. The Crown cannot raise the objection here.

Under *Letourneux* v. *The King* (1), the Crown must be held liable in this case; and the damages for which it is liable must be fixed under the principles of the law of Quebec. (*Pouliot* v. *The Queen* (2).

The Crown was negligent in allowing combustible material to lie on the right of way. (*Grand Trunk Ry. Co.* v. *Rainville* (3); *Canadian Pacific Ry. Co.* v. *Roy* (4).

Mr. *Dorion* replied.

THE JUDGE OF THE EXCHEQUER COURT (now January 25th, 1906) delivered judgment.

The plaintiff in this action claims the sum of $70,777 for loss and damage alleged to have been occasioned by fires that occured in April, May and June, 1903, on the line of the Intercolonial Railway and spread to and over certain timber lands belonging to him situated in the Township of Blandford in the counties of Nicolet and Arthabaska, in the Province of Quebec. The Registrar of the Court, to whom the matter was referred for inquiry and report, has found that he is entitled to succeed for an amount of $55,856 and interest from the 11th day of October, 1904. Against that report the Crown appeals on the following grounds :—

1st. Because the plaintiff has not proved his title to the property alleged to have been injured.

2nd. Because the plaintiff has not proved that the said property was on any public work when injured.

(1) 7 Ex. C. R. 1.
(2) 1 Ex. C. R. 313.
(3) 29 S. C. R. 201.
(4) 1 Can. Ry. Cas. 196 (note, p. 211.)

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3rd. Because the plaintiff has not proved that the said injury did result from the negligence of any officer or servant of the Crown while acting within the scope of his duty or employment.

4th. Because the plaintiff has not proved that he is entitled to recover the sum of $55,856 from His Majesty the King, as stated in the said report.

5th. Because, even if the plaintiff is at all entitled to recover from the Crown, the above mentioned sum is highly in excess of the injury proved to have been suffered by him.

6th. Because the plaintiff's claim is prescribed.

The sixth ground of appeal, namely, that the claim is prescribed, was abandoned at the argument.

With regard to the first ground of appeal it is contended that the plaintiff's title to the timber lands injured is defective because as to a part interest therein the title is derived from his wife (1). The plaintiff, without conceding the validity of the objection, meets it by an application on behalf of Mrs. Price to be made a party to the action, and she agrees to be bound by any judgment rendered therein. I think the application should be granted, and that Mrs. Price should be added as a party to the action.

With respect to the second and third grounds of appeal, it is well settled that the plaintiff's claim cannot be maintained unless it falls within clause (*c*) of the sixteenth section of *The Exchequer Court Act* (2); whereby it is provided that the Exchequer Court shall have exclusive original jurisdiction to hear and determine every claim against the Crown arising out of the 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. The objection

(1) Civil Code L. C. Art. 1483. (2) 50-51 Vict. c. 16, s. 16.

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raised by the second ground of appeal is that the injury complained of did not occur on a public work, and the Crown relies upon the views expressed in the case of *The City of Quebec* v. *The Queen* (1) by Mr. Justice Gwynne and Mr Justice King as to the construction of these words. But the case of *Letourneux* v. *The King* was also one in which the injury did not occur on the public work, and in that case the suppliant's claim was maintained (2). It was sought to distinguish the present case from that last mentioned, but with regard to the question as to whether it is necessary that the injury should occur upon the public work in order to bring the case within the statute, I am not able to distinguish them. I may, perhaps, add that my own view is, as I have stated elsewhere, that it is sufficient to bring a case within the statute if the cause of the injury is or arises on a public work (3).

The injury complained of here was caused by fires, and there is, I think, no room for doubt that such fires commenced on the line or permanent way of the Intercolonial Railway and spread from there to the plaintiff's lands. But that these fires resulted from the negligence of the Crown's servants who operated the railway is a matter of inference rather than of direct proof. It does appear, however, that there was some neglect and want of care in keeping one at least, if not more, of the engines that ran upon this part of the line in a proper condition and state of repair; and there is also some evidence that the right of way where the fires occured was not kept as clean and free from inflammable materials as it ought to have been. The season was an exceptionally dry one, and fires were very frequent, demanding on the part of everyone great care and watchfulness in order to prevent them from occurring, or to extinguish them when once started. With reference to the duty of the section men and others to

(1) 24 S. C. R. 420.
(2) 33 S. C. R. 335.
(3) *Letourneux* v. *The Queen* 7 Ex. C. R. at p. 7.

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extinguish fires occuring on the right of way the evidence discloses one instance of a flagrant neglect of that duty, and that happened in respect of the fire that caused the greatest damage to the plaintiff's property. On the whole, I agree with the finding that the injury complained of resulted from the negligence of certain of the Crown's servants while acting within the scope of their duties or employment.

With regard to the amount at which the damages have been assessed, if one were to confine his attention to the price paid for the timber lands in question, and the use that had been made of them since in cutting the wood growing thereon, he would, I think, come to the conclusion that the sum allowed was liberal. But there is no doubt that such lands have of late years been increasing in value, and under all the circumstances I am not prepared to say that the sum of two dollars an acre for the damage done to each acre burnt is excessive. The case, on this branch of it, rests wholly on the evidence adduced by the plaintiff, although it appears that the defendant caused some investigation as to the amount of damage done to be made. And the finding of the Registrar is no doubt supported by the evidence.

There was also a motion on the part of the plaintiff for judgment in accordance with the Registrar's report, and that motion will be granted except as to the interest allowed. No interest was asked for, or claimed, in the amended statement of claim; and in any event the case does not appear to me to be one in which interest should be allowed before judgment.

There will be judgment for the plaintiffs for the sum of fifty-five thousand eight hundred and fifty-six dollars ($55,856.00); and costs, to be taxed.

Judgment accordingly.

Solicitor for the plaintiff: *L. A. Cannon.*

Solicitor for the defendant: *C. E. Dorion.*