

1911
 Nov. 13.

IN THE MATTER OF THE PETITION OF RIGHT OF
 GEORGE A. DUCLOS. SUPPLIANT;
 AND
 THE KING. RESPONDENT.

Government Railway—Fire occasioned by cinders from engine—Damages—Government Railways Act as amended by 9-10 Edw. VII c., 24—Application.

The suppliant's property was destroyed by fire caused by cinders carried in smoke emitted by an engine on the Intercolonial Railway. There was no negligence proved against the employees of the Dominion Government in charge of the train, and it was established that the engine in question was of a most approved type, and was equipped with all modern and efficient appliances for the prevention of the escape of sparks.

Held, that the case fell within the provisions of sub-section 2 of sec. 61 of *The Government Railways Act* as amended by 9-10 Edw. VII c. 24; and that the damages must be limited to the sum of \$5000 to be divided amongst the suppliant and others who had suffered loss by the fire.

PETITION OF RIGHT for damages from loss by fire alleged to have been occasioned by a locomotive on the Intercolonial Railway.

The facts of the case are stated in the reasons for judgment.

May 31st, 1911.

The case came on for trial at Quebec.

J. E. Perreault and *A. A. Magee* appeared for the suppliant.

The Honourable J. Bureau, K.C. (Solicitor-General) and *A. Leblanc* appeared for the respondent.

The argument was adjourned to take place at Ottawa.

November 7th, 1911.

The case now came on for argument.

A. A. Magee, for the suppliant;

E. L. Newcombe, K.C., for the respondent.

CASSELS, J. now (November 13th, 1911) delivered judgment.

Prior to the argument of the case before me on the 7th November, instant, I had carefully perused the evidence taken at the trial. Since the argument I have re-perused the evidence with the view to appreciating the argument of counsel. I see no reason to change the view which I entertained after the close of the trial. To my mind there can be no reasonable doubt that the fire in question was occasioned by cinders from the smoke-stack of the engine drawing the special freight train. The fire occurred somewhere about 1.30 p.m., of the 21st. of August, 1908. On the day in question and about the time of the fire there was a strong wind blowing from a direction westerly or north westerly towards the east or south east. The season had been a peculiarly dry one. The fire seems to have started in the third or fourth tiers of cordwood situate on the premises of the owner of the mill. It started on top of the piles in two or three places. These piles were from five to five and a half feet above the surface of the ground; and they were situate somewhere about fifty feet east of the highway which ran in front of the premises from north to south. There is no other possible explanation of the origin of the fire than that the cinders were carried in the smoke which on the evidence was carried directly in the direction of this cordwood, and alighted on top of the cordwood. There would no doubt be gathered a considerable quantity of loose wood or bark on top of the piles owing to the peculiar dryness of the season, and this material would become very inflammable.

I think the evidence of Madame Chandonnet in reference to two young men, who where said to have

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been smoking cigarettes—while it may be accepted so far as the fact that the cigarettes were being smoked, could not by any possibility have the effect of inducing me to draw the conclusion that the fire originated from these cigarettes. In the first place the road down which the young men were walking, was in the neighbourhood of about 130 feet from the highway—certainly more than 60 feet from the piles of cordwood in question. Moreover, all the witnesses agree that there was a very strong wind blowing away from the wood piles. It is difficult to comprehend how by any possibility any fire could have been occasioned by these young men. I do not place much credit on the evidence of the witness Laliberté. I think the fire unquestionably took place after the engine had reached the point marked “U” on the plan. I think the suppliant is entitled to a judgment to the extent of five thousand dollars, to be apportioned among the parties who suffered the loss. This is provided for by the Act to amend subsection 2 of section 61 of the *Government Railways Act*, viz., 9 & 10 Edward 7th, chapter 24.

In *Moxley vs. The Canadian Atlantic Railway Company* (1) Mr. Justice Patterson is reported as stating: “We have been accustomed to take it to be a fact so well established as to be judicially recognized, that no spark arresting contrivance which can be used without interfering with the working of the engine, will altogether prevent the escape of sparks capable of setting fire to combustible matter”—citing numerous authorities in favour of the proposition. This case was affirmed by the Supreme Court (2). This proposition seems to be recognized by Parliament in enacting 9 and 10 Edward VII.

(1) 14 O.A.R., at p. 312.

(2) 15 S.C.R., 145.

I think the crown has absolved itself from any question of negligence. The engine in question was of a most approved type, and had all modern and efficient appliances; and I fail to see in what respect any negligence has been proved or should be inferred as against the Crown.

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The argument that the ashpan was out of order, is I think, not in accordance with the facts. Moreover, it would have been impossible that the fire should have been occasioned on top of the wood piles from live cinders dropped from the fire-box on to the right of way. There is no evidence whatever that any fire started on the right of way; and the supposition that shavings might have taken fire and have been blown on top of the wood piles is an ingenious theory of counsel but not based on any evidence or any probabilities that such a thing would happen. I think the claim of the suppliant must be limited to the sum of five thousand dollars. As counsel for the suppliant and the Crown agree that others are interested in this fund, there must, unless the matter is settled between themselves, be a reference to the Registrar to ascertain who are entitled to share in the five thousand dollars, and in what proportions.

I think the suppliant is entitled to his costs of the action. The order can be drawn so that upon the report of the referee, in the event of there being no appeal, the judgment will direct the payment of this amount without further order to those who may be entitled thereto.

Judgment accordingly

Solicitor for Suppliant : *Perrault & Perrault.*

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