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DOMINION OF CANADA

In the Supreme Court of Canada

(OTTAWA)

On Appeal from Judgment of the Exchequer Court

BETWEEN:—

HIS MAJESTY THE KING,

(Respondent in the Exchequer Court),

APPELLANT,

— and —

CANADA & DOMINION SUGAR COMPANY LIMITED,

(Suppliant in the Exchequer Court),

RESPONDENT.

— and —

CANADA STEAMSHIP LINES LIMITED,

(Third Party in the Exchequer Court),

THIRD PARTY.

RESPONDENT'S FACTUM

**O'BRIEN, STEWART,
HALL & NOLAN,
Attorneys for Respondent.**

**CLARK, ROBERTSON,
MACDONALD & CONNOLLY,
Ottawa Agents.**

U. PERRAULT & CIE, PRINTERS, MONTREAL, HA. 3080

INDEX

Respondent's Factum 1

PART I — 1

PART II — 5

PART III — 6

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PART I

Appellant has appealed from a judgment of the Exchequer Court of Canada rendered on the 13th day of November 1948, by the Honourable Mr. Justice Angers, which judgment held that Respondent was entitled to recover from Appellant the sum of $108,310.83 and costs to be taxed.

By its Petition of Right Respondent sought to recover from Appellant the sum of $108,310.83, representing the price and

value of fine granulated sugar destroyed by fire on May 5th 1944, in a shed belonging to Appellant in the City of Montreal.

Appellant has admitted (Case p. 47, line 40) that the loss caused to Respondent was in fact $108,310.83, so that the only question in issue before the Exchequer Court of Canada, or now before this Honourable Court, is that of the liability of Appellant 10 for the damage.

On May 5th 1944, Isaie Coté, who was in the employ of Appellant as a burner and welder and was then acting as an officer or servant of the Appellant within the scope of his duties or employment, as admitted by Appellant (Case p. 52, line 10 and following) was working in and about the shed belonging to Appellant and in which Respondent's sugar was contained. Apparently the hinge on a large door on the shed required attention 20 and it was found necessary to enlarge the hole in a steel beam back of the hinge in order to permit of insertion of a larger bolt than had been used prior to that time. The enlargement of the hole in this beam could have been effected by using a reamer, but the employees charged with the job apparently came to the conclusion that there would be less effort required if the hole were enlarged by the use of the burning torch which Isaie Coté had been using for other purposes.

Inside the shed,, immediately opposite the beam in which 30 this hole was to be enlarged, were piled many bales of cotton waste. The heat at the tip of the burning torch to be used is about 6000° Fahrenheit (Case p. 72, line 30 and p. 74, line 20), and when applied to metal throws sparks or molten metal with a temperature of over 2000° Fahrenheit (Case p. 74, line 34). These sparks and particles of molten metal, according to experts (A. Royston Mitchell at p. 73, line 10; G. E. Newill, p. 76, line 20 and following) will riccochet if they hit a solid substance, and are the cause of frequent fires.

40 Isaie Coté states that he went inside the shed and saw the bales of cotton waste, which he says were about ten feet back from the beam (Case p. 57, line 39). Other witnesses testified that the bales of cotton waste were only three to five feet from the beam. (Mr. Wood at P. 65, line 25; at P. 67, line 45, and Mr. Fauteux at P. 83, line 33.) Coté obviously saw the need of precautions. The precautions he took were to place against the beam in which the hole was being widened, a plank, which was not as long as the beam and left an opening at the top near the roof and

at the bottom for some distance above the floor. Another employee of Appellant stood on top of the bales of cotton waste and placed an ordinary pail of water on the floor for use in case of necessity (Case p. 62, line 12 and p. 80, line 48). The employee atop the bales of cotton waste, one J. A. Fauteux, stated that he saw sparks falling inside from the work being done by Coté on the beam (Case p. 82, line 28), and then seeing flame in the
10 air he ran away, leaving the pail of water (Case p. 84, line 9 and following). He said that the spark he saw flying was about eight feet from the floor, that it passed over his head and fell on the bales (Case p. 86, line 30). Within a few seconds all of the cotton waste was aflame and before the assistance of the Montreal Fire Department could be secured the shed and its contents were completely destroyed.

Arthur Royston Mitchell, erection superintendent for the Dominion Bridge Company, who is in charge of operations re-
20 quiring the use of oxacetylene torches for that company, stated (Case, p. 70, line 28) that a reamer could have been used to enlarge the hole in question and that it was most improper to use a torch with inflammable material about (Case p. 70, line 48). He said that he did not know what precautions could have been taken to prevent a fire if a torch were used under the circumstances, but that if he were obliged to use a torch he would have refused to do the job until the bales of cotton were moved away and would then have required fire protection "in the shape of
30 sheet-iron, or a hose pipe, running water, fire extinguishers around". (Case p. 71, line 6). He said that when cutting a circular hole in a beam with a torch such as that used the sparks "will fly out at a tangent all the way around" (Case p. 72, line 45). He said that the precautions taken were not adequate (Case p. 73, line 8).

George Newill, consulting engineer, testified (Case p. 73, line 44) that for the last fifteen years his time had been largely occupied in investigating and appraising fire losses for insurance
40 companies. He said that the proper way to have enlarged the hole in the beam in question was with a drill or reamer and that such an operation would have been a very easy one (Case p. 75, line 17). He said that the use of the burner torch was foolhardy (Case p. 76, line 7). He said that the precautions taken were inadequate (Case p. 76, line 35) and in reply to a question put as to whether the torch should have been used in the circumstances he said "I say definitely that no competent workman should have done it" (Case p. 79, line 21).

Appellant did not call any witnesses in contradiction of the evidence of the witnesses Mitchell and Newill.

In the Petition of Right lodged by Respondent it was alleged that the operation in which the employees of Appellant were engaged at the time of the fire was an extremely dangerous one, requiring great care, and that the said danger was known
10 or should have been known to said employees and that the work could have been easily and readily done without the use of the torch and the flame and without incurring any danger of fire. It was also alleged that the employees had not taken proper precautions to see that the molten metal and sparks from the operation being carried on did not enter into the shed and that they did not take proper precautions to see that any of the molten metal and sparks entring the shed did not ignite the merchandise therein, and that they had failed to move the inflammable merchandise from within the range of the flame and the sparks and
20 failed to provide adequate fireproof covering for the merchandise. It was further alleged that they did not take reasonable steps to extinguish the fire nor to prevent it from spreading.

Respondent also alleged that the fire and the damages caused thereby were caused by the torch and the flame, which were then and there under the care of officers, servants, agents and employees of the Crown, and were due also to the fault, negligence, imprudence, neglect and want of skill of said officers,
30 servants, agents and employees while acting within the scope of their duties or employment and in the performance of the work for which they were employed.

Appellant in his statement of defence denied the allegations of the Petition of Right and alleged that there was no fault or negligence attributable to anyone for whom Appellant was in law responsible, that the work was being carried on in a proper and prudent manner and all reasonable precautions had been taken, and that if the damage was caused by a thing under
40 the care of an employee of the Crown the circumstances were such that it was impossible by reasonable means to prevent the act which caused the damage.

Appellant further alleged in its statement of defence that if Respondent had any rights to exercise against Appellant the same were barred in virtue of the terms of the clause of a lease between Appellant and Canada Steamship Lines Limited, which clause is alleged to read as follows:—

"7. That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed."

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Appellant, by way of a third party notice, claimed against Canada Steamship Lines Limited, that if Appellant were adjudged responsible for the damages suffered by Respondent Canada Steamship Lines Limited would be obliged to indemnify Appellant in virtue of an agreement contained in a lease between Appellant and Canada Steamship Lines Limited. Respondent is not interested in these third party proceedings.

As may be noted from the judgment of the Exchequer
20 Court of Canada, the findings of that Court on fact are very short and conclusive. The Court (Case p. 320, line 31) finds that the evidence of the witnesses Mitchell and Newill "independent and disinterested witnesses" is categorical and cogent and the Court finds that their evidence has not been contradicted. The Court finds that, on the evidence, there had been disclosed gross negligence by officers or servants of the Crown while acting within the scope of their duties and employment. As to the allegation in the statement of defence, that it was impossible by
30 reasonable means to prevent the act which caused the damage, the Court found that the claim was not tenable and that counsel for Appellant had rightly abstained from setting it forth.

As to the clause in the lease between Appellant and Canada Steamship Lines Limited alleged in Appellant's statement of defence, the Court found (Case p. 337, line 40) that this clause did not exempt Appellant from responsibility in connection with the damages suffered by Respondent as a consequence of the fire.

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PART II

The points in issue in this appeal are:—

1. That the evidence has established without contradiction that the damages caused to Respondent were caused by the negligence of officers, servants, agents and employees of the Crown, who were then acting within the scope of their duties and employment;

2. That the burning torch and the fire therefrom were things under the care of Appellant and, the damage having been caused by these things, Appellant is responsible for said damage unless it alleges and proves that it was impossible to prevent the damage;

3. That Appellant did not discharge the burden of proving
10 that it was impossible to prevent the damage.

PART III.

Apart from the allegation found in paragraph 5 of Appellant's statement of defence (Case p. 44, line 40) the questions in issue in this appeal are pure questions of fact.

It is admitted by Appellant that the employees working in and about the shed in connection with the repairs which caused
20 the fire were employees of Appellant then acting within the scope of their duties and employment (Case p. 52, line 10). It is admitted that the damages suffered by Respondent amounted to $108,310.83.

It is proved without contradiction that said damages were caused by fire from a torch being used by Appellant's said employees, that it was gross negligence on the part of said employees to use fire under the circumstances, and that the precautions
30 taken to prevent said fire from causing damage were inadequate. The trial judge found as a fact that said employees of Appellant were grossly negligent, but even without this finding no other conclusion, it is submitted, is reasonably possible under the circumstances.

Although upon the evidence it is unnecessary to go further than to state that there is overwhelming proof as to negligence, there does remain the fact that the damage was caused by the burning torch and flame from that torch, both of which were
40 under the care of the Appellant. The result is to bring into play Article 1054 of the Civil Code which provides that persons are responsible for damage caused by things under their care, unless they establish that they were unable to prevent the act that had caused the damage. There has been no attempt to prove the impossibility of preventing the act here, and indeed such proof was impossible under the circumstances.

At the trial counsel for Appellant did not urge the allegations contained in paragraph 5 of the statement of defence. In-

asmuch as it remains in the pleadings, however, it requires some comment. The clause there alleged is a clause in a lease with Canada Steamship Lines Limited and provides that the latter shall not have any claim against Appellant for damage caused to Canada Steamship Lines Limited. How an agreement between Appellant and a third party could affect the rights of Respondent, who is not alleged to be a party to the agreement, is dif-
10 ficult, if not impossible, to understand. However, assuming for the purposes of argument that such an agreement might have some effect, the clause alleged only precludes Canada Steamship Lines Limited from claiming and by its terms would have no relation to the present case.

As noted, Respondent has no interest in the third party proceedings.

Respondent therefore respectfully submits that Appellant's
20 appeal should be dismissed with costs.

Montreal, January 12th, 1950.

O'Brien, Stewart, Hall & Nolan,
Attorneys for Respondent.

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