HIS MAJESTY THE KING (DEFENDANT)..APPELLANT; 1922

*Oct. 13, 16.
Feb. 6.

AND

J. S. ZORNES (SUPPLIANT).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

*Crown—Liability of—Government Telephone System—Person injured by driving into loose wire—Negligence of Crown's servants—"The Public Utilities Act" (Alta.) S. (1915) c. 6—"Interpretation Act" (Alta.) S. (1906) c. 3—Alta. S. (1917) c. 3, s. 30.*

Section 2 (b) of the Alberta Public Utilities Act provided that "the expression 'public utility' means and includes every corporation * * * "; and in 1917, the following words were added by the legislature (c. 3, s. 30): "also the Alberta Government telephones, now managed and operated by the Department of Railways and Telephones." Section 31 (2) of the same Act provides that "the public utility shall be responsible for all unnecessary damage which it causes in carrying out, maintaining or operating any of its said works."

*Held,* Davies C.J. and Mignault J. dissenting, that the Crown, as represented by the Government of Alberta, is liable in damages, upon proceedings by petition of right, for personal injuries sustained by reason of the negligence of its servants in allowing a loose wire forming part of the Government Telephone System to fall and lie upon a public highway.

Judgment of the Appellate Division ([1922] 1 W.W.R. 907) affirmed, Davies C.J. and Mignault J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Ives J., and maintaining the respondent's petition of right.

The respondent in his petition alleged that he was driving over a public highway along which the Crown through the Minister of the Department of Railways and Telephones of the Province of Alberta owned and operated a telephone line subject to the provisions of "The Public Utilities Act, 1915," c. 6, and that he was injured by reason of his automobile becoming entangled in a loose

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) [1922] 1 W.W.R. 907.

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wire which the department, its officers or servants, had negligently, carelessly and illegally allowed to lie upon the highway. A fiat had been granted by the Attorney-General under "The Alberta Petition of Right Act, 1906, c. 20," but when the case came on for trial and before any evidence had been taken, the objection raised by counsel for the Crown that no action could lie for a tort was sustained, and the action was dismissed with costs. The Appellate Division reversed this judgment and ordered a new trial.

*Eug. Lafleur K.C.* and *R. A. Smith* for the appellant.

*S. R. Wallace* and *Louis Côté* for the respondent.

THE CHIEF JUSTICE (dissenting).—I concur with Mr. Justice Mignault and would allow the appeal.

IDINGTON J.—I am of the opinion that subsection 2 of section 31 of the Public Utilities Act of Alberta, which reads as follows

> the public utility shall be responsible for all unnecessary damage which it causes in carrying out, maintaining or operating any of its said works.

means just what it says, and that it was intended to mean that, and to furnish a remedy for such like incidents as in question herein, when arising from want of due care and hence causing unnecessary damage.

I do not see why a remedy for damages arising from want of due care in the operation of any public utility, should be something which appellant, in his wide sphere of activities in Alberta, should be advised against providing, or refused the consent of the Legislative Assembly therefor.

I therefore assume the needed remedy was furnished in said language and its obviously legal effect, if to be given any, is that I have above suggested.

Some effect is usually sought to be given the language used by the legislature, and I can see nothing more apt to apply such language to, when found in such relation as it is, than to furnish the needed remedy I suggest.

I do not see any reason for disturbing the learned trial judge's findings of fact and, agreeing as I do with the reason-

ing of Mr. Justice Stuart and Mr. Justice Beck as well as that of the learned trial judge presented respectively in the proceedings below, when finding, in said subsection 2 of section 31 above quoted, a remedy for what is complained of, I need not say more than I have done, except to add that I think this appeal should be dismissed with costs.

DUFF J.—This appeal raises a question touching the effect of section 31 (2) of the Alberta Public Utilities Act:

> The public utility shall be responsible for all unnecessary damage which it causes in carrying out, maintaining or operating any of its works.

Assuming that "public utility" comprehends the province of Alberta (His Majesty the King in right of his province of Alberta) as owner of the Alberta Government Telephones, I can only say, with the greatest respect for other opinions, that this enactment does not (on that assumption) appear to me to be of doubtful meaning. "Responsible" in such a context in a statutory enactment can, I think, be no less comprehensive than "responsible in damages." There is moreover ample evidence that the default through which the respondents suffered the damage complained of was a default in "carrying out, maintaining or operating" the telephone system.

That being so, it follows, I think—still proceeding upon the same assumption that "public utility" comprehends the province in its character as owner of "Government Telephones"—that petition of right is the appropriate procedure for asserting the Crown's responsibility. Normally petition of right does not lie for tort; but that rests upon the ground that in point of substantive law the Crown is not liable, that is to say, the Crown owes no duty to the sufferer to make reparation for the torts of its servants. Section 31 (2) creates the duty to make reparation with its correlative right; and *ubi jus ibi remedium*. One cannot conceive the legislature vainly creating an unenforceable right to recover damages. It is implied that the courts of the province have jurisdiction to enforce the right and to do so by the appropriate procedure. The law in such cases makes the necessary implications to avoid the injustice and the scandal of the denial of substantive rights because of technical defects in procedure.

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The objection that petition of right does not lie for the enforcement of statutory rights is without substance. The Petition of Rights Act gives jurisdiction to the court to award damages and I think that should be construed as extending to all cases in which a duty reposes upon the Crown by law to pay damages.

The critical question, therefore, is this: Does "public utility" in section 31, ss. 2, bear a sense which imposes upon the province—the Crown in right of the province—the responsibility established as against such bodies generally by the subsection? And this is the point upon which naturally Mr. Lafleur directed the weight of his argument. The question subdivides itself into two branches.

The first, is whether "public utility" in this context and construed with reference to the interpretation section (section 2, s.s. b) does, upon a fair interpretation of these provisions, denote among other "corporations, firms and persons" to which it applies, the province of Alberta in its character of owner of the "Alberta Government Telephones"; and the second branch of the question is whether, assuming that to be so, there is here in this provision, when it is read in light of the Act as a whole, a clear and plain manifestation of legislative intent to impose such a responsibility upon the Crown.

These points may be considered in the order in which I have stated them. Subsection (b) of section 2 must be quoted in full. These are the words:—

(*b*) The expression "public utility" means and includes every corporation other than municipal corporations (unless such municipal corporation voluntarily comes under this Act in the manner hereinafter provided), and every firm, person or association of persons, the business and operations whereof are subject to the legislative authority of this province, their lessees, trustees, liquidators, or receivers, appointed by any court that now or hereafter own, operate, manage or control any system, works, plant or equipment for the conveyance of telegraph or telephone messages or for the conveyance of travellers or goods over a railway, street railway or tramway, or for the production, transmission, delivery or furnishing of water, gas, heat, light, or power, either directly or indirectly, to or from the public; also the Alberta Government telephones, now managed and operated by the Department of Railways and Telephones.

The last clause is due to an enactment of 1917 (section 30 of c. 3 of the statutes of that year). This enactment simply added the words

also the Alberta Government Telephones now managed and operated by the Department of Railways and Telephones.

By a statute of 1906 (the general Interpretation Act) "Alberta Government" means, generally speaking, His Majesty in right of the province of Alberta, and the phrase "the Alberta Government Telephones" is virtually the equivalent of "the Telephones of His Majesty in right of the province." The only admissible view, I think, of the effect of this enactment of 1917 is that the Provincial Government Telephone System is added as a concrete addition to the "systems, works, plants, equipments," comprised in the general description immediately preceding. I think that is the correct reading of the enactment because the only alternative reading is to treat the enactment as directing the construction of the phrase "public utility" wherever it appears in the Act, in such a manner as to include "the Alberta Government Telephones" as a "public utility." This alternative is forbidden, I think, because as regards a considerable number of the most important provisions of the statute, the effect of such a substitution would be to make nonsense of the provision unless we are to treat the amending enactment as conferring upon the Government system legal personality, an implication which I think would not be justified. Section 20, for example, which defines the jurisdiction of the board uses "Public Utility" in subsections b, c, d, e, f, and g, in a sense necessarily implying in the object denoted by the phrase, a legal entity, capable of acting juridically, capable of being a party to legal proceedings, a party to contracts, and generally of ownership of property and of being the subject of rights and duties. If the Province as owner of a telephone system falls within the operation of these clauses as a "public utility" then no difficulty arises in respect of the application of them. On the other hand, if it is the system as a system which is brought by the amendment within the class denoted by "public utility" the alternatives are obvious. Either the system has been endowed with legal personality in which case the language of the clauses would be sensible with reference to the system or, on the other hand, the system is entirely excluded from the operation of them. To give to the enactment of 1917 such

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a construction as to exclude "the Government telephones" from these provisions of the Act, would be to render the enactment of 1917 largely nugatory and the courts will go very far in supplying omissions in elliptical phraseology and in discarding redundancies in order to avoid such a result. *Salmon* v. *Duncombe* (1).

The other alternative, the alternative of implying the creation of a legal personality must, as I have already said, also be rejected.

If the enactment is read in the manner which I have suggested the "corporations, persons and firms" comprehended within the class "public utility" are, by this reading, made to include the corporations or persons owning or operating "the Government telephones," and the words "Alberta Government" having by statute the significance above pointed out, no technical or other difficulty arises in reading the word corporation or the word person as including His Majesty in right of the Province. The Crown is technically a corporation sole, and is of course in the legal sense a person capable of being a subject of rights and duties.

There is some ineptitude in the phrasing of the amendment of 1917, but for the reasons I have mentioned the reading is, I think, amply justified.

I come now to the question upon which the appeal really turns. Looking at the provisions of the statute as a whole, is an intention manifested with sufficient clearness to bring the Provincial Government within the scope of s.s. 2 of section 31 to satisfy the rule of construction, a rule based upon good sense and upon inveterate legislative practice as well as judicial authority, that responsibility is not to be deemed to be imposed upon the Crown by legislative enactment, unless the intention to do so has been expressed in language which is unmistakable? I quite agree that even though the argument on the exegetical side were more rigorous than it is, still if from the purview of the statute as a whole, sufficient evidence of a contrary intention appeared to create a real doubt as to the effect of the section when read in light of the other parts of the Act, the answer to the question just propounded must be in

(1) [1886] 11 App. Cas. 627.

the negative. The question is one by no means free from difficulty. Mr. Lafleur did, I think, make good his point that there are many provisions of the statute, and in particular those relating to the enforcement of orders of the board for the payment of money and those relating to penalties which obviously could not be put into operation against the Crown.

This is a circumstance of weight which, however, is not conclusive. The definitions of the interpretation clause are not applied when such application produces inconsistency or absurdity and in the sections referred to such would be the result of the literal application of the definition of public utility in its entirety. No such difficulty arises respecting section 31 (2). There is nothing absurd or even startling in bringing the Crown in its character of owner of such enterprises within the scope of such a provision.

At this point s.s. (a) of section 3 becomes very significant. The Act is thereby declared to be applicable to "public utilities" as defined

> which are now or may hereafter be owned or operated by or under the control of the Government of the province.

A statutory corporation, therefore, consisting of members nominated by the Government, or a joint stock corporation controlled by the Government through ownership of its shares, if answering the definition of "public utility" is not to be excluded from the provisions of the Act, and I can see no reason why, in such a case, the provisions of the Act generally (including section 31, subsection 2) should be held not to be operative. This is evidence, I think, that the scheme of the Act proceeds upon the policy that "public utilities" fairly coming within the description furnished by the interpretation section are, except where the context or the subject matter of the provision otherwise requires, to be subject to each of the provisions of the Act. This again throws light upon the enactment of 1917, and I think the proper inference is that the Government telephones were brought within the orbit of the system established and that the provisions of the Act must be held to be operative in relation to the Government telephones and to the Crown as owner of them according

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to the natural meaning of the words in which they are framed with the exception of those provisions in which some absurdity or inconsistency would thereby be produced.

The appeal should be dismissed.

ANGLIN J.—For the reasons stated by Mr. Justice Stuart in his opinion of the 22nd June, 1922, I am satisfied that the finding of the trial court that the injury sustained by the plaintiff was due to negligence in the maintaining and operating of the Government telephone lines cannot be disturbed. There appears also to have been a breach of the duty imposed by section 31 (c) of the Public Utilities Act (1915, c. 6), which prescribes that

all poles shall be as nearly as possible straight and perpendicular.

A consequence of such negligence and breach of statutory duty was an undue interference with the public right of travel in contravention of section 31 (a), resulting in the injury of which the plaintiff complains.

In my opinion, the damage suffered by the plaintiff was "unnecessary damage" caused in maintaining and operating a work which would have entailed responsibility under section 31 (2) of the Public Utilities Act on the public utility controlling it, if a private person, firm or body corporate. I cannot accede to the view that the application of section 31 (2) is confined to cases in which there has been an exercise of statutory powers in excess of what is reasonably necessary for the accomplishment of the purpose for which they are conferred. I see no reason for so restricting the operation of that provision. Though not required to fix any other "public utility" with responsibility for injuries caused by negligence, it is necessary for that purpose in the case of Government telephones, and, for the reasons indicated by Mr. Justice Beck, I think it should be so applied. Where telephone wires of a public utility fall because of negligence either in maintaining or replacing, or in failure to replace in due season the poles which carry them, or because of a breach of clause (c) of subsection 1 of section 31, and as a result injury is caused to persons using a highway, we have a case of damage

caused in the maintaining or operating of the works of the telephone system and, in my opinion, the fact that the falling of the wires and allowing them to interfere with traffic on a highway was due to negligence or to breach of a statutory duty necessarily implies that the damage thereby caused was "unnecessary." If the application of subsection 2 should be confined to cases of damage caused by a breach of one of the clauses of subsection 1 of section 31, such a case is here presented. There was a breach of clause (c) which at least contributed to the fall of the pole and the consequent presence of wires on the highway in contravention of clause (a).

The wording of the concluding clause of the definition of "public utility" (s. 2 (b))

also the Alberta Government telephones now managed by the Department of Railways and Telephones

is no doubt awkward and unsatisfactory. But a perusal of the Public Utilities Act makes it reasonably certain that the effect given to those words by Mr. Justice Stuart in his opinion of the 22nd of February, 1922, as meaning not telephones operated by the Government, but the Alberta Government itself and therefore "H.M. The King in his right as exercised by the province of Alberta," must be what the legislature meant them to have. It was never intended, for instance, to create a liability *in rem* in the case of the Government Telephone System (s. 31 (2)). Sections 20 (c) and 40 further indicate the difficulties that would ensue from a strict construction of the concluding clause of the definition such as the appellant contends for. Moreover upon that construction s. 3 (a) would seem to be quite superfluous. Applying s.s. 7 of s. 7 of the Interpretation Act (c. 3 of 1906) as we should, we have in s. 31 (2) of the Public Utilities Act an enactment that "H.M. The King acting for the Province" of Alberta shall be responsible (i.e. answerable to a person injured whether in body or in property) for damage caused by the negligent carrying out, maintaining or operating of (*inter alia*) the Alberta Government telephones in my opinion sufficient to overcome the prerogative exemption of the Crown from liability for torts of its servants recognized at common law.

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In the Alberta Petition of Right Act we find provisions which, though probably not designed to confer a right to recover from the Crown in respect of torts, are quite wide enough to furnish a procedure by which such a right, when otherwise created, may be exercised. As Mr. Justice Beck points out we have in the Privy Council decisions in *Attorney General of the Straits Settlement* v. *Wemyss* (1), and *Farnell* v. *Bowman* (2), the highest authority for the utilization of the procedure by petition of right to obtain relief to which the Public Utilities Act confers the right.

I find it unnecessary to express any opinion upon the question whether a consequence of the Dominion or a Provincial Government engaging in a commercial enterprise is a *pro tanto* abrogation of the prerogative exemption from responsibility for tort: *The Queen* v. *McLeod* (3); *Farnell* v. *Bowman* (2); *Attorney General of Straits Settlements* v. *Wemyss* (1). The Crown, when empowered by statute to enter upon an undertaking, does so subject to the limitations, restrictions and conditions which the legislature has imposed upon the carrying of it out. *Attorney General* v. *De Keyser's Royal Hotel* (4).

The appeal in my opinion fails.

BRODEUR J.—The respondent Zornes has presented a petition of right claiming that he has suffered damages on account of the negligent construction and operation of the telephone system owned by the Alberta Government.

The latter denies liability on the ground that the King could not be sued in tort.

That is the issue which is now submitted to our consideration.

As a general proposition, there is no remedy against the King for compensation in damages; but they can be obtained from the officer who did the wrong. *Canterbury* v. *Attorney General* (5).

But in many countries and provinces the governments are in the habit of undertaking works which are usually performed by private individuals and companies; and it

(1) [1888] 13 App. Cas. 192.
(2) [1887] 12 App. Cas. 643.
(3) [1882] 8 Can. S.C.R. 1.
(4) [1920] A.C. 508, at p. 540.
(5) 12 L.J. Ch. 281.

is then found expedient to provide remedies for injuries suffered in the course of these works. *Attorney General of Straits Settlement* v. *Wemyss* (1).

The telephone system in Alberta was operated for some years by a private company. But the legislature decided to acquire this telephone system and to have it operated by the government; and it was put under the management of the Department of Railways and Telephones.

In 1915 the Public Utilities Act was passed and a board of Public Utility Commissioners was created; and it was declared that the Alberta Government telephones would be considered as a "public utility."

Section 31 of the Act provided that any public utility having for its object the construction, working and maintaining of the telephone lines should be submitted to the orders of the Commission and should not interfere with the public right of travel, that the wires should not be less than 16 feet above any highway; that all the poles should be as nearly as possible straight and perpendicular; and an article was added as subsection 2:

The public utility shall be responsible for all unnecessary damage which it causes in carrying out, maintaining or operating any of the said works.

It is alleged in the petition of right and found in the verdict rendered after trial that the Alberta Government telephone has been the cause of damage to the respondent on account of a defective wire which broke and became loose on the road, and that there were telephone poles down on the road which had caused the accident in question.

Taking into consideration the general proposition which I have enunciated above concerning the liability of the Crown for tort, I am of the view that the provisions of The Public Utilities Act, and mainly of s. 31, create a liability affecting the Government and rendering the latter responsible for the torts which it caused in the carrying out of its telephone system. If some governments want to undertake works which are not considered of a governmental purpose, it is no wonder that the legislature should apply to those governments the same liability which is applied to private individuals or companies carrying on the same works. It is clear to me that the legislature

(1) 13 App. Cas., 192.

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of Alberta has imposed upon the government the liability for damages which is now claimed by the respondent.

For those reasons the appeal fails and should be dismissed with costs.

MIGNAULT J. (dissenting).—All of the judges of the court below were of the opinion that the claim of the respondent against the Crown, being of the nature of an action in tort, could not be justified under the provisions of the Alberta Petition of Right Act (c. 20 of the statutes of 1906). In this I agree. The Petition of Right Act provides a remedy where liability of the Crown exists by law and creates no new responsibility. There being no liability of the Crown for a tort committed by its servants, and the latter alone being responsible for the consequent damages, such a tort confers no right of action which can be asserted against the Crown by means of this remedy.

The majority of the appellate court however considered that the Alberta Public Utilities Act (c. 6 of the statutes of 1915) created a liability which could be invoked against the Crown by petition of right. With this conclusion I find myself unable to agree.

It is of course a fundamental principle of law that the Crown is not bound by a statute unless it be specially mentioned therein. (Beal, Legal Interpretation, 2nd ed., p. 292). And in Alberta the statute of which the object is to give to the subject a right of action against the Crown by petition of right, does not include the right to sue the Crown in tort, and it thus differs from the Exchequer Court Act, sec. 20, which expressly confers on the Exchequer Court jurisdiction to hear and determine, among other matters, every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work. It would therefore seem surprising, may I say so with all possible deference, that the right of an action *ex delicto* against the Crown, which the Petition of Right Act does not confer, should be found in another statute the object of which is certainly not to enlarge the remedies of the subject against

the Crown. I will therefore very carefully examine this statute in order to see whether it is open to the construction which has been placed upon it.

The Alberta Public Utilities Act is a type of statute which is derived, I believe, from the United States, but which has been widely adopted in the different provinces of Canada. Its object is to deal with certain public services in which the community at large has a great interest, such as transportation, telegraph or telephone lines, and the furnishing of water, heat, light or power. The statute defines the words "public utility"—I abbreviate—as meaning and including corporations, firms, persons or associations of persons that own, operate or control any system or works for the conveyance of telegraph or telephone messages, or for the conveyance of travellers or goods over a railway, street railway or tramway, or for the production or furnishing of water, gas, heat, light or power to or for the public. The statute creates a board known as the Board of Public Utility Commissioners, which has jurisdiction over these public services or public utilities, the powers of which utilities are carefully restricted, the whole for the better protection of the public. It would certainly seem most unlikely that in such a statute should be found any interference with, or modification of, the constitutional principle that the King can do no wrong.

But in Alberta, as well as in some of the other provinces, the provincial government has undertaken to carry on some of the public services to which I have referred. In 1908 a statute (c. 14) was passed by the Alberta Legislature empowering the Government to purchase, lease, construct and operate telephone or telegraph systems, and we are informed that under this authority the Government took over the Bell long distance telephone line, so that, outside some municipal or local lines, the telephone service of the province is practically controlled and carried on by the Government.

So when the Public Utilities Act was adopted in 1915 the definition of "public utility" in section 2 was made to include

also the Alberta Government telephones now managed and operated by the Department of Railways and Telephones.

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And the argument is that inasmuch as by subsection 7 of section 7 of the Interpretation Act (Alberta) c. 3 of the statutes of 1906 the expression "Government," "government of the province" or "Alberta Government" used in any Act whenever enacted means His Majesty the King acting for the province, the words I have quoted from the definition of "public utility" must be read as if the definition said "also His Majesty's telephones in Alberta now managed and operated by the Department of Railways and Telephones."

It is sometimes fallacious to rely too strongly and without sufficient discrimination on a statutory definition for, as is expressly stated in section 2, such a definition does not apply where the context otherwise requires. And when this Public Utilities Act is carefully read, it becomes obvious that in many of its sections the expression "public utility" cannot be construed as meaning the Alberta Government telephones, or His Majesty's telephones in Alberta. I could give a number of instances, but will mention only a few. Thus sections 33 and 75 refer to municipal corporations owning or operating any public utility within the meaning of this Act. This obviously cannot mean the government telephone system. Sections 51 and following deal with orders made by the Board of Public Utility Commissioners, which may be orders for the payment of money to be levied by the sheriff, and which when registered shall constitute a lien and charge upon the lands of the party ordered to pay. This clearly seems inapplicable to government property. Moreover penalties are provided by sections 80 and following against persons and public utilities affected by orders of the board, and it can scarcely have been contemplated that these penalties could be levied from the Crown by reason of anything contained in the definition of "public utility" in the Act.

We now come to section 31 by which it is claimed that the Crown's liability to answer for the torts of its servants has been expressly enacted by the legislature. I will quote the whole section down to and including subsection 2.

In the case of a public utility which has for its object the construction, working or maintaining of telegraph, telephone or transmission lines,

or the delivery or sale of water, gas, heat, light or power, the following conditions shall be fulfilled, over and above those which may be prescribed by the board, that is to say:—

(*a*) The public utility shall not interfere with the public right of travel, or in any way obstruct the entrance to any door or gateway or free access to any building;

(*b*) The public utility shall not permit any wire to be less than sixteen feet above such highway or public place, or erect more than one line of poles along any highway;

(*c*) All poles shall be as nearly as possible straight and perpendicular;

(*d*) The public utility shall not unnecessarily cut down or mutilate any shade, fruit or ornamental tree;

(*e*) The opening up of any street, square or other public place, for the erection of poles, or for the carrying of wires underground, shall be subject to the supervision of such person as the municipal council may appoint, and such street, square or other public place, shall, without unnecessary delay, be restored as far as possible to its former condition;

(*f*) If, in the exercise of the public right of travel, it is necessary that the said wires or poles be temporarily removed by cutting or otherwise, the public utility shall, at its own expense, upon reasonable notice in writing from any person requiring it, remove such wires and poles; and in default of the public utility so doing such person may remove such wires and poles at the expense of the public utility.

(2) The public utility shall be responsible for all unnecessary damage which it causes in carrying out, maintaining or operating any of its said works.

This section is in the part of the statute bearing the title "Restriction on powers of public utilities." Subsection 2 assumes that in carrying out, maintaining and operating any of its works the public utility may cause some damage or inconvenience, and its responsibility only begins when the damage caused is "unnecessary," that is to say in excess of any damage which may be incident to the carrying out or operation of the work. In so far as public utilities generally are concerned, no such provision is required to render them liable for their torts, or for the negligent exercise of their statutory powers. These powers are not charters to commit torts, and so, even in the absence of the subsection, there is no doubt that under the common law the plaintiff, in a case like this one, would have an action against the public utility which the latter could not defeat by pleading the statute.

The question, however, is whether he has such an action against the Crown when it operates a public utility, and whether subsection 2 of section 31 takes away the King's prerogative of not being liable for the torts of his servants. Bearing in mind that the prerogatives and rights of the

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Crown are not affected by a statute unless they are specially mentioned therein, I would not be disposed to give to s.s. 2—even considering the Alberta Government Telephones as comprised in the meaning of the term "public utility"—the effect of conferring a right of action *ex delicto* against the Crown, the more so as this subsection in no way refers to claims against the Crown, but merely, and probably unnecessarily, makes public utilities generally responsible for unnecessary damage caused by their operations. This distinguishes this case from the decisions of the Judicial Committee in *Farnell* v. *Bowman* (1), and *Attorney General of the Straits Settlement* v. *Wemyss* (2), where a statute dealing expressly with claims against the Crown was construed as giving a right of action in tort.

It is suggested that when the Crown undertakes a commercial enterprise it should be subject to the same liability as private individuals. This, however, is a matter of policy for the consideration of the legislature, for, without appropriate legislation, the court is powerless to interfere. In the court below it was considered that sec. 31 gave a right of action in tort against the Crown, for the learned judges recognized that there must be apt legislation to permit of such action. With regret, for the respondent's claim seems to be a meritorious one, I am unable to place this construction upon the statute.

I therefore see no escape from the conclusion that the appeal should be allowed with costs throughout and the respondent's action dismissed.

*Appeal dismissed with costs.*

Solicitor for the appellant: *R. Andrew Smith.*

Solicitors for the respondent: *Joseph A. Clarke & Co.*

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(1) 12 App. Cas. 643.

(2) 13 App. Cas. 192.