[HIGH COURT OF AUSTRALIA.]

SERMON . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMISSIONER OF RAILWAYS . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 31; *Nov.* 1; *Dec.* 2.

Griffith C.J., Barton and Isaacs JJ.

Fire caused by sparks from engine—Statutory authority—"Any kind of fuel"—Dangerous fuel—Reasonable precautions—Government Railways Act 1904 (*W.A.*) (3 *Edw. VII. No.* 23), *sec.* 20—*Statutory discretion, how to be exercised.*

The *Government Railways Act* 1904 (W.A.) conferred upon railway authorities a discretion to use in their engines "any kind of fuel."

Held, that an action could not be maintained against them for negligence alleged to consist in the choice of a kind of fuel more likely to cause damage by fire than other available kinds of fuel, provided that the best known safety appliances and proper care were employed in its use.

Per Griffith C.J.—In order to determine the meaning of a statutory authorization giving a discretion to carry out works by certain general means, the circumstances of the country at the time of legislation may be considered.

Decision of the Supreme Court of Western Australia affirmed.

THE facts and the statutory enactments material to the case are stated in the judgments hereunder.

Pilkington K.C. (with him *Stawell*), for the appellant. *Parker* C.J. erroneously refused to draw the inference that the sparks from the engine started the fire, because he felt suspicious of two

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men who were on the spot when the fire started, and thought, without any evidence, that it might possibly have been caused by them. In this His Honor was properly overruled by the Full Court. The engine was burning a dangerous class of coal when there were other safe classes of coal available. The Commissioner is admittedly empowered by sec. 20 of the *Government Railways Act* 1904 to use any kind of fuel; but that does not exempt him from liability for the negligent exercise of that authority.

"Locomotive engines consuming any kind of fuel" is a phrase descriptive of steam engines which burn fuel; it does not authorize the indiscriminate use of all sorts of fuel, irrespective of dangerous circumstances, such as dry grass plains, and hot winds. For fuel in the engines wood or oil may be used, as well as coal, but the ordinary law of negligence still applies.

The use of the best and safest coal in an obsolete and dangerous engine would be negligent; similarly the use of the most dangerous coal, even in the best and safest engine, would be negligent, being an unreasonable use of a statutory power. Collie coal is dangerous by reason of its emitting sparks, even through the most improved spark arrester; and the Commissioner is authorized by the Act only to use such coal at his peril on a dangerous day such as that on which the fire arose. Such an authority is limited to reasonable user: *Roberts* v. *Charing Cross, Euston and Hamstead Railway Co.* (1); *Coats* v. *Clarence Railway Co.* (2); *Southwark and Vauxhall Water Co.* v. *Wandsworth District Board of Works* (3); *London, Brighton and South Coast Railway Co.* v. *Truman* (4); *Metropolitan Asylum District, Managers of* v. *Hill* (5); *Canadian Pacific Railway* v. *Roy* (6).

[ISAACS J.—*Canadian Pacific Railway* v. *Parke* (7) may draw the distinction you desire.]

The Statute must give a specific authority to make lawful the unreasonable or negligent exercise of the power given: *Vaughan* v. *Taff Vale Railway Co.* (8); *Gas Light and Coke Co.* v. *Vestry*

(1) (1903) W.N., 13; 87 L.T., 732.
(2) 1 Russ. & M., 181.
(3) (1898) 2 Ch., 603.
(4) 11 App. Cas., 45.
(5) 6 App. Cas., 193.
(6) (1902) A.C., 220.
(7) (1899) A.C., 535.
(8) 5 H. & N., 679, at p. 685.

of St. Mary Abbott's, Kensington (1); *Francis* v. *Maas* (2); *Geddis* v. *Proprietors of Bann Reservoir* (3); *Evans* v. *Manchester and Lincolnshire and Sheffield Railway Co.* (4); *Goldberg & Son Ltd.* v. *Mayor &c. of Liverpool* (5).

[GRIFFITH C.J.—You do not allow any weight to the fact that this is a Western Australian Statute, and that Collie coal is the only indigenous coal in Western Australia.]

No extraneous fact can make specific those words which are otherwise quite general.

The *Railways Act* 1897, sec. 2, enacted that the then Commissioners might "at all times" run locomotive engines consuming any kind of fuel. These words "at all times" were evidently omitted from sec. 20 of the 1904 Act in order to impose the duty of extraordinary care at dangerous times of the year. Where a power is given, the exercise of that power must be carried out with due regard for private rights, unless the enabling words expressly or necessarily authorize interference therewith: *Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.* (6).

Northmore, for the respondent. The finding of *Parker* C.J. upon the facts should not be disturbed; the inference was properly drawn, and was compatible with the evidence, that the fire was started by some agency other than the defendant's engine: *Smith* v. *London and South Western Railway Co.* (7).

Sec. 20 of the 1904 Act, or rather its prototype, sec. 2 of the 1897 Act, was passed under circumstances and at a time which show that it was intended to authorize the use of the Collie coal with the same impunity as the safest coal, so long as proper diligence was shown in installing the best safety appliances for spark arresting. This is apparent from contemporary legislation: *Collie Railway Act* 1895 (No. 33), which was passed to connect the Collie coal mines with the State railways. "Consuming any kind of fuel" is therefore not merely descriptive of engines.

[ISAACS J. referred to *Public Works Act* 1902 (W.A.) (1 Edw.

(1) 15 Q.B.D., 1.
(2) 3 Q.B.D., 341.
(3) 3 App. Cas., 430.
(4) 36 Ch. D., 626.
(5) 82 L.T., 362, at p. 367.
(6) 7 App. Cas., 178, at p. 189.
(7) L.R. 6 C.P., 14.

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VII., No. 47), sec. 99 (1.) (*a*). The Minister for Works may run locomotive engines over any land acquired for a railway "and any kind of fuel may be used" for such engines.]

The power given to the Commissioner will be liberally construed, as it is given to enable him to work the railways in the public interest, and not that of individuals. *Coats* v. *Clarence Railway Co.* (1); and *Roberts* v. *Charing Cross, Euston and Hamstead Railway Co.* (2) are distinguishable; they dealt only with the construction of railways, not the working of traffic: *Hood* v. *North Eastern Railway Co.* (3). There was actual negligence in the use of the statutory power in *Geddis* v. *Proprietors of Bann Reservoir* (4), and *London, Brighton and South Coast Railway Co.* v. *Truman* (5) turned on the same principle, *i.e.*, that the Commissioner would be answerable for negligence in the use of whatever kind of fuel he chose for the engines; but he would not be liable for choosing to use any one of a number of authorized kinds of fuel: *Vaughan* v. *Taff Vale Railway Co.* (6).

[ISAACS J. referred to *The Mayor of East Fremantle* v. *Annois* (7).]

If the Commissioner were *intra vires* in using Collie coal, he does not do so at his peril. He can use Collie coal wherever that use is reasonable; the evidence was that Collie coal is very nearly as safe as Newcastle coal, and the lower cost must also be considered in the question of what was reasonable. It had to be proved that it was so much more dangerous that it was negligence to use it with the best spark arresters: *Longman* v. *Grand Junction Canal Co.* (8).

Draper in reply. This Court can draw the inference that it was unreasonable to use dangerous coal under the circumstances when the fire was caused; this is open on the evidence. If this Court is not entitled to draw that inference, a new trial should be held to enable that fact to be established: *Dimmock* v. *North Staffordshire Railway* (9).

(1) 1 Russ. & M., 181.
(2) (1903) W.N., 13; 87 L.T., 732.
(3) L.R. 11 Eq., 116.
(4) 3 App. Cas., 430.
(5) 11 App. Cas., 45.
(6) 5 H. & N., 679.
(7) (1902) A.C., 213, at p. 217.
(8) 3 F. & F., 736.
(9) 4 F. & F., 1058.

No specific authority can be drawn from sec. 20 to use Collie coal; it authorizes the use of local or imported fuel, but still binds the Commissioner and his servants to use due care in consuming dangerous fuel at dangerous times and places. [He referred to *Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.* (1); *London County Council* v. *Great Eastern Railway Co.* (2); *Goldberg & Son Ltd.* v. *Mayor &c. of Liverpool* (3).]

Cur. adv. vult.

The following judgments were read:—

Dec. 2.

GRIFFITH C.J. This is an action for damages alleged to have been sustained by the appellant by the negligence of the defendant in the use of a locomotive engine, in consequence of which the plaintiff's grass was burnt. The 6th paragraph of the statement of claim was as follows:—"The said fire was caused by the defendant's negligence in using a class of coal more likely to cause fires along the railway and upon adjoining lands than other coal in the possession of or reasonably procurable by the defendant for use upon the railway while passing through the said agricultural district, as the defendant was well aware, and in using the said coal during dry and hot weather when the grass and other growth were dry and easily set on fire, and in using the said coal upon an engine not fitted with a soft coal chimney, and in failing to take reasonable precaution to prevent damage by fire caused by sparks emitted from or dropped by his engine."

The allegations of negligence in using the coal upon an engine not fitted with a soft coal chimney and in failing to take reasonable precautions to prevent damage by fire caused by sparks, so far as such precautions depend upon matters of internal construction, were abandoned either at the trial or before the Full Court, so that the only negligence now to be considered consists in the use of the class of coal which was actually used at a time and under circumstances when that class of coal was likely to be dangerous, and not in the manner of its use if that use was lawful.

(1) 7 App. Cas., 178, at p. 189. (2) (1906) 2 K.B., 312.
(3) 82 L.T., 362.

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The case was tried before *Parker* C.J. without a jury. He was not satisfied that the plaintiff had established that the fire which occasioned the damage was caused by sparks emitted from the defendant's locomotive. But he was also of opinion that the use of the coal was authorized by law. He therefore on both grounds gave judgment for the defendant. The Full Court were of opinion that the evidence showed that the fire was caused by sparks emitted from the defendant's engine, but the majority of the Court (*McMillan* and *Burnside* JJ., *Rooth* J. diss.) agreed with the learned Chief Justice that the use of the coal was authorized by law. They therefore dismissed the appeal.

Numerous authorities were cited to us, but there is really no room for controversy as to the law. The defendant relies on sec. 20 of the *Government Railways Act* 1904 (3 Edw. VII. No. 23). By that Act the Commissioner for Railways is constituted a corporation sole, and is charged with the management, maintenance and control of the government railways. Section 20 enacts that the Commissioner "may use on any railway locomotive engines consuming any kind of fuel." The fuel in use when the damage complained of was occasioned consisted of a mixture of equal proportions of Collie coal, (the product of coal mines in the south western part of the State of Western Australia), and Newcastle coal (from New South Wales). It is conceded that this mixture was less likely to emit sparks than Collie coal alone. The respondent contends that authority to use "any kind of fuel" includes authority to use Collie coal as fuel, either alone or mixed with other coal, and that, the use being lawful, and there being no negligence in the manner of the use, an action will not lie. The appellant contends that the words "consuming any kind of fuel" are a mere description of the kinds of locomotives that may be used, and do not confer any authority which would not follow from the mere permission to use locomotives, and, further, that if they do authorize the use of any kind of fuel, still the Commissioner may be guilty of negligence in the choice or selection of the kind of fuel which he will use, so that, if he selects a kind which is more likely to emit sparks than another which he might reasonably have used, he is guilty of negligence,

which is established by the mere fact of the selection of such coal. I will deal first with the latter construction.

There is no doubt that the Commissioner is responsible for negligence in the exercise of his statutory authority, and it is not disputed that if, being authorized to use Collie coal, he used it negligently he would be liable. But no such case is made. The alleged negligence consists in the mere fact of use. It may be taken to be established by the evidence that Collie coal is more likely to emit sparks than some other coal which is also used by the Commissioner, such as Newcastle coal imported by sea from the other side of the continent of Australia. It is said that this is sufficient evidence of negligence, that is, of want of reasonable care. In this view of the case, however, there has been no finding of the necessary fact that under the circumstances it was not reasonable to use Collie coal, which is an inference of fact and not of law.

The respondent's case, on the other hand, is that the Statute entitles him to select what kind of fuel he will use, and that an action will not lie against him for the manner in which he exercises that power of selection. The distinction between liability for negligence in the use of an authorized instrument and negligence in the selection of one from among several authorized instruments is clearly pointed out in the case of *London, Brighton and South Coast Railway Co.* v. *Truman* (1). In that case a railway company, who were authorized by their Act to acquire land for cattle yards in such places as should be deemed eligible, bought land and used it for that purpose in a place where the noise occasioned by the use was a nuisance which, but for the Act, would have been actionable. *North* J. and the Court of Appeal held that the company could be restrained from using the land for the purpose, but this decision was reversed by the House of Lords. Lord *Halsbury* L.C., said (2):—"Neither the statement of claim nor any finding by the learned Judge suggests that the defendants were guilty of any negligence in the use of the cattle pens and dockyard, as distinguished from the selection of its site, and the whole question turns on the right of the railway company to select and use that

(1) 11 App. Cas., 45.

(2) 11 App. Cas., 45, at p. 50.

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site, although its use may involve a nuisance to the neighbouring proprietors. That question must depend upon the authority which Parliament has granted to the railway company.

"The ground upon which *North* J. has proceeded in that respect, supported by the Court of Appeal, although for different reasons, has been, that it being competent to the company to select another site more convenient and less injurious to the plaintiffs, they have selected a site which has caused the injury of which the plaintiffs complain. It cannot now be doubted that a railway company constituted for the purpose of carrying passengers, or goods, or cattle, are protected in the use of the functions with which Parliament has entrusted them, if the use they make of these functions necessarily involves the creation of what would otherwise be a nuisance at common law. Ever since the decision of *Rex* v. *Pease* (1) in 1832, it has been established so firmly by repeated decisions that that proposition is no longer within the region of controversy, and if these cattle pens and dockyards had been within the original limits of deviation, or what was equivalent to the limits of deviation in modern Acts when the line was first authorized, and had been erected within those limits, I do not understand that any of the learned Judges would have doubted that the company were acting within their powers, and were protected upon the principle I have stated above."

The question for decision in the present case is, therefore, whether the Statute confers on the Commissioner an unqualified authority to select what kind of fuel he will use. This is a mere matter of construction.

It is not disputed that the words "any kind of fuel" have at least as extensive a meaning as if the words "coal, wood or oil" had been used in the place of them. It follows that on the principle stated in *Truman's Case* (2), the Commissioner would not be liable to an action merely because he selected and used wood as a fuel, although, as appears by the evidence in this case, wood is more likely to emit sparks than coal. But it is said that the permissible choice is only between what were called genera, such as coal, wood and oil, and not between species of the same

(1) 4 B. & Ad., 30. (2) 11 App. Cas., 45.

genus, such as anthracite coal, lignite, bituminous coal, and Collie coal, and that in making a choice between the different species the Commissioner must use reasonable care. There is no suggestion in any reported case that any such contention has ever been set up in Great Britain. It was, indeed, referred to by *Darling* J. in the *London County Council* v. *Great Eastern Railway Co.* (1), as an obviously impossible contention. Assuming, however, that the section is open to this construction, I proceed to inquire what is the real meaning. The duty of the Court is to ascertain the intention of the legislature, and in doing so regard must be had to the circumstances of the country at the time when the Act was passed.

It appears that coal had been discovered on the Collie coalfield at some time before 1895. In that year an Act was passed authorizing the construction by the Government of a line of railway to connect the coalfield with the government railways. In 1897 an Act (61 Vict. No. 32), entitled "An Act to further amend the Railways Act 1878" was passed, section 2 of which enacted that "The Commissioner may at all times run locomotive engines consuming any kind of fuel . . . . . upon any railway," &c. The only other provisions in the Act related to gates at level crossings, and to an amendment of the provisions of the Principal Act as to arbitration. Section 2, therefore, appears to have been at least one of the chief objects of legislation, and it is *primâ facie* difficult to regard it as merely meaning that the Commissioner might run locomotives adapted to use either coal, wood or oil, which in fact were the only kinds of locomotives then known.

It appears in evidence that from a time very soon after the passing of this Act Collie coal has been used on the government railways.

In 1902 the legislature passed an Act called the *Public Works Act* 1902, (2 Edw. VII. No. 47), which consolidated the laws relating to the construction of public works, including railways, by the Government. Section 99 of that Act confers various powers upon the Minister in respect of any railways authorized by special Act. The first sub-paragraph authorizes entry upon any land necessary for the construction, and adds "and locomotive

(1) (1906) 2 K.B., 312.

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engines, machines, carriages, . . . may be used upon and run over any land entered upon or taken or acquired . . . and any kind of fuel may be used for any such locomotive engines or machines." It is, I think, impossible to read these last words otherwise than as giving the Minister an absolute choice of the fuel to be used on locomotive engines or other machines used in the construction of railways.

Then in 1904 the Act now in force, which is a consolidating Act, was passed, containing section 20 in its present form. At this time Collie coal had been in use for at least four years. Its use was, as I have shown, authorized on locomotives used in the construction of railways, and I cannot bring myself to believe that the legislature, by the use of a slightly different form of words in an Act relating to maintenance and management of railways, intended to effect a different result.

An additional fact, which, in my judgment, is very material in the inquiry as to the intention of the legislature, is that coal of the class of the Collie coal is the only coal which has yet been found in Western Australia. To read the words "any kind of fuel" as not including the only coal found within a distance of some thousands of miles is, I think, to do violence to all probabilities.

As to the argument that the choice given by the Statute is only between genera and not between species, I can find no foundation for it in reason or etymology. Why should it be said that all coal, whether imported from Wales, from different districts of New South Wales, where the quality of the coal produced from different mines greatly varies, from Queensland, where the qualities again differ, or from New Zealand, is the same "kind of fuel" as local Western Australian coal? No doubt in some contexts the word "kind" might bear that meaning. But in an enabling Act such as this I do not think that it is the literal or the probable meaning.

As for the first construction contended for by the appellant, I think that it gives no effect at all to the words "consuming any kind of fuel." The words "locomotive engines," standing alone, would have the same meaning as that contended for. It may be observed, however, that it is a well known fact, and indeed,

appears in evidence, that different kinds of coal require special adaptations to be made in the engine in which they are burnt, so that, if the word "consuming" is read "adapted to consume," as suggested, the right of choice of fuel is equally conferred.

For these reasons I am of opinion that the decision of the Full Court was right, and that this appeal must be dismissed.

BARTON J. The plaintiff's grass and feed had been set on fire by sparks from an engine under the defendant's control attached to a train. The cause of the emission of sparks from which the fire originated was alleged to be the defendant's "negligence in using a class of coal more likely to cause fires along the railway and upon adjoining lands than other coal in the possession of or reasonably procurable by the defendant." Negligence was also alleged in the failure of the defendant to take reasonable precaution to prevent damage by fire caused by sparks emitted from or dropped by his engine, and in the use by the defendant of the coal mentioned upon an engine not fitted with a soft coal chimney. The plaintiff failed at the trial. The learned Chief Justice of Western Australia, who tried the case without a jury, held against him on each of the grounds stated, being of opinion (1) that the coal used was a "kind of fuel" which the Commissioner was authorized by Statute to use, (2) that the Commissioner had taken all reasonable precaution to prevent damage by fire caused by sparks emitted from his locomotives, which in His Honor's view were suited for the consumption of the kind of fuel used, and (3) that the soft coal chimney was not as effective for the prevention of the emission of sparks as the appliances affixed to the engine on the date of the fire. On a fourth question His Honor found as a fact that the plaintiff had not satisfied him that the fire arose at all from sparks from the engine. In the last finding the Full Court did not support His Honor, and I take a view of this case which renders it unnecessary to consider which was right on that particular point, for, assuming the sparks from the engine to have kindled the fire, I still do not think the defendant liable. Now on the appeal to the Full Court the plaintiff abandoned his third ground, that the defendant should have used a soft coal chimney, and before this Court

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he has virtually abandoned the second ground, that the defendant failed to use all reasonable precautions. The only ground of negligence then that we have now to consider is the first mentioned, namely, that of negligence in the fact of the user of the particular coal burned on the day of the fire. I may at this stage say that I think that, in view of the strength of the evidence, the plaintiff has done wisely in virtually admitting that the soft coal chimney would not have been as good a preventive as the spark-arresters actually used, and that all reasonable precautions were taken by the Commissioner for the minimising of the sparks that must necessarily be emitted if steam is to be kept up. The sole ground of attack left is the choice of Collie coal, or, as will be seen, the choice of a mixture of Collie coal with Newcastle coal, for use in passing through an agricultural district in very dry hot weather. If the defendant Commissioner, the respondent, is protected by Statute, as he maintains that he is, in the choice of the fuel used, then he contends than he cannot be held liable for negligence because of the mere exercise of his right of selection in that regard, and that, as he has admittedly not been guilty of negligence in the manner in which he used the fuel chosen, he stands absolved altogether. What then was the fuel used on this occasion?

The *Collie Coalfields Railway Act* 1895 (59 Vict. No. 33) authorizes the construction of a railway from the South Western line to the Collie Coalfields (sec. 2), terminating at the Government Reserve for coal. From about March 1900, if not earlier, coal from these fields was, as the Chief Mechanical Engineer testified, used by the Commissioner's engines. To what extent, if at all, it was usually mixed with other coal we are not told. The witnesses speak of no other coal than that from Collie and that imported from Newcastle, about 2,500 miles from Fremantle. There may however be some difference between the products of Collie mines in the matter of "sparking." When the Commissioner began to use Collie coal he had the engines fitted to consume it, and their fitness to consume it without any reasonably avoidable risk is no longer in controversy. On 20th December 1904, the engine, after leaving Fremantle, burned only Collie coal until it reached Spencer's Brook. The unquestioned evidence

of the engine-driver shows that after leaving that junction, and thence on to Beverley—that is, while traversing the length of road on which the fire occurred—the engine was burning a mixture of Collie and Newcastle coals in the proportion of about half of each. To sustain his case, therefore, the appellant has to argue that the use of such a mixture is not authorized by the Statute, and that its consumption by the respondent is therefore negligent on the ground that it was more dangerous than Newcastle coal alone, though less dangerous than Collie coal alone. In testing this contention it must be taken, and I think it has been shown, as a state of fact, that the Collie coal emits many more sparks than the Newcastle coal, and that the mixture used on the day of the fire between Spencer's Brook and Beverley was less dangerous than the first-named coal and more dangerous than the last-named.

The argument therefore amounts to this, that if there is a coal to be found which emits fewer sparks than another, then as between those two there is negligence actionable if damage be caused thereby in the mere fact of using the coal which emits the greater proportion of sparks, if the other is "reasonably procurable." That accessibility being postulated, the proposition probably expresses the position at common law. But if it remains true since the Statute law came, as the Commissioner thinks, to his rescue, then the Statute law has effected nothing in the authorization it is supposed to have given him. Let us see then what the Statute law is on which the respondent relies.

The *Railways Amendment Act* 1897 (61 Vict. No. 32), a short amending enactment, says (sec. 2): "the Commissioner may at all times run locomotive engines consuming any kind of fuel, either with or without any carriages" on any railway or siding. This enactment, passed two years after the *Collie Coalfields Railway Act*, was probably passed by the legislature with keen recollections that it had practically opened the local coalfields by that piece of legislation, and with full consciousness that the Collie coal must sooner or later be largely used on the railways, if its use, as well as the use of other fuels, were sanctioned. Then the *Government Railways Act* 1904 (3 Edw. VII. No. 23), a consolidating and an amending Statute, authorizes the Commissioner

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by sec. 20 to "use on any railway locomotive engines consuming any kind of fuel," and to "draw or propel thereby carriages, wagons, machines, appliances and plant of every kind." It is contended for the appellant that the word "kind" means no more than genus, and that Collie coal is a species of the fuel generically called coal, and is therefore not authorized, because within the genus authorized it is still necessary to use care in the selection of the species, in the sense that the absence of such care will be actionable negligence if the species chosen, however carefully used, does cause damage that could have been avoided by the choice of another species within the same genus. Coal, it is said, is a kind of fuel, and Collie coal only a species of coal. The first is authorized, the second not so if it is reasonably possible to obtain a safer species of coal.

The argument is ingenious and was skilfully urged, but I am of opinion that it cannot prevail. It seems to me to have been the intention of the legislature to give the Commissioner complete liberty in the choice of the fuel for his engines, subject only to the duty of care in the use of the particular fuel chosen. I see no reason why in this connection the word "kind" should mean only genus. But there is a very strong reason, which *McMillan* J. has mentioned, why its meaning should not be restricted in that sense, for the result would be most anomalous. The Commissioner could burn wood for fuel, provided his engines were made reasonably fit for its consumption and he chose the least dangerous species of wood. But the least dangerous wood will emit many more sparks, and consequently will cause much more risk than the most dangerous species of coal. Is it then possible that the Commissioner is to be scatheless when he burns the more dangerous fuel, and liable in damages when he chooses the less dangerous? I do not think we can possibly adopt a construction that would impute folly to the legislature, in face of the reasonable construction which is equally open to us. Accordingly I am of opinion that the law has authorized the Commissioner to choose Collie coal for fuel if he uses it with due care by adopting the best appliances procurable for minimising the risk attendant on its use.

What effect the use of a mixture of Collie and Newcastle coals

has on the argument which would restrict the Commissioner's authority to the choice of the genus, but not of the species, is a question which would provide an interesting subject of discussion. But the inquiry is not necessary in view of the fact that the Commissioner, had he chosen, might have used Collie coal by itself.

Reference was made during the argument to the *Public Works Act* 1902, sec. 99. That provision, in my opinion, relates to railways in course of construction by the constructing authority, the Minister, and not to railways constructed and handed over to the Commissioner, which are regulated by the *Government Railways Act*. Sec. 99 of the former Act gives the Minister in respect of the use of engines and fuel very wide powers. But though conveyed in more words, I doubt whether they are any ampler in practice than those conferred on the Commissioner by the provision now in question.

In my opinion, this case comes within the principle so clearly expressed by *Cockburn* C.J. in the case of *Vaughan* v. *Taff Vale Railway Co.* (1): "Although it may be true, that if a person keeps an animal of known dangerous propensities, or a dangerous instrument, he will be responsible to those who are thereby injured, independently of any negligence in the mode of dealing with the animal or using the instrument; yet when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that if damage results from the use of such thing independently of negligence, the party using it is not responsible." So in this case, although in the absence of the statutory authorization the Commissioner, though he used all care, would be liable in an action of nuisance for damage done by his mere use of Collie coal, yet since the Statute that liability no longer exists, but his liability for damage caused by a negligent manner of use of the thing sanctioned still survives. In *London, Brighton and South Coast Ry. Co.* v. *Truman* (2), Lord *Halsbury* L.C. has stated the same principle in the words quoted by the Chief Justice.

(1) 5 H. & N., 679, at p. 685.

(2) 11 App. Cas., 45, at p. 50.

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And in the case of *The Mayor &c. of East Fremantle* v. *Annois* (1), Lord *Macnaghten*, in delivering the judgment of the Judicial Committee, said:—"The law has been settled for the last hundred years. If persons in the position of the appellants," (who were in the position of the Commissioner in the present case), "acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the Statute." And his Lordship went on to quote the words of the then Master of the Rolls, now Lord *Collins*, in a recent case (2):—"the only obligation on the defendants was to use reasonable care to do no unnecessary damage to the plaintiff."

In the same judgment the Judicial Committee distinguished two cases which in the present appeal have been cited in favour of the plaintiff. It was pointed out that in *Geddis* v. *Proprietors of Bann Reservoir* (3), the defendants had done the particular act complained of without any statutory authority, and that the same *discrimen* applied to the case of *Metropolitan Asylum District, Managers of* v. *Hill* (4).

For the reasons given I am of opinion that this appeal must be dismissed.

ISAACS J. With considerable reluctance I am forced to the conclusion that the defendant must succeed.

The rule of law applicable to such a case as this is succinctly and authoritatively stated by Lord *Macnaghten*, who delivered the judgment of the Privy Council in *The Mayor &c. of East Fremantle* v. *Annois* (1). The passage has been already read by my learned brother *Barton*, and I need not again quote it.

The defendant occupies the position described by Lord *Macnaghten*, and the real question in controversy here is, what has the Act authorized? Is it the use of Collie coal whenever the Commissioner chooses, or is he only authorized to use it when the circumstances do not render it more dangerous than other coal which is then reasonably procurable?

(1) (1902) A.C., 213, at p. 217.
(2) (1902) A.C., 213, at p. 218.
(3) 3 App. Cas., 430.
(4) 6 App. Cas., 193.

The answer depends altogether on the intention of the legislature, and as Lord *Blackburn* said in *Metropolitan Asylum District, Managers of* v. *Hill* (1):—"What was the intention of the legislature in any particular Act is a question of the construction of the Act." I do not therefore stop to consider or compare the construction given in other cases to other Acts, the relevant rule of law deducible from the decisions having been crystallized in the passage I have quoted from *The Mayor &c. of East Fremantle* v. *Annois* (2).

Turning then to the Statute No. 23 of 1904, sec. 20 in its primary signification appears to expressly authorize the Commissioner to use any kind of fuel he desires, without any limitation of time, place, or circumstance, so long as there is no negligence in the mode of using it. If it be used "in a proper manner," that is taking reasonable care that in using it no unnecessary damage is done, the Commissioner is not liable for whatever injury in fact arises, even though less damage or none at all might have resulted if other fuel had been used, and it is in this case conceded that, unless the mere use of Collie coal was in the circumstances negligent, there was no negligence.

The words "any kind of fuel" are inserted in the section, not merely as descriptive of the locomotive engines, but as part of the general authorization applying to the use of engines and the nature of fuel. Reference to the rest of the Act in no way weakens the primary meaning of the words. Besides the imperative nature of the authority created, its scope is so wide as to rather strengthen the notion that the powers conferred on the Commissioner with respect to the choice of fuel were intended to be of the broadest character. Parliament has invested him as an expert with the control and management of the great public department, and in view apparently of the nature and situation of the country, and taking into consideration its finances, resources, and development, has reposed in the Commissioner the right and the duty of selecting the fuel necessary or desirable to work the railways, and accordingly has left him free to choose. At all events there are no considerations I can discern which cut down the primary meaning of the words relied on by the defendant.

(1) 6 App. Cas., 193, at p. 203. (2) (1902) A.C., 213.

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Isaacs J.

If legislation *in pari materia* is looked at, the view I have taken is confirmed. In the *Public Works Act* 1902, sec. 99 dealing with railway construction, the words are "and any kind of fuel may be used for any such locomotive engine or machine." It would be difficult to contend that the constructing authority at all events had not full power to select Collie coal at any time. That Act was passed simultaneously with what I may call the *Commissioner's Act* 1902 No. 35, and these enactments separated construction and user. In Act 1902 No. 35, the Commissioner was given, *inter alia*, all the powers contained in sec. 2 of the *Railways Amendment Act* (No. 32 of 1897). That section began thus, "The Commissioner may at all times run locomotive engines consuming any kind of fuel." It is extremely improbable that Parliament intended to give a more limited meaning to the words "any kind of fuel" in one of these Statutes, than is attached to the same words in the other. Some argument was rested on the fact that in the *Government Railways Act* 1904 the words "at all times" have been omitted, but, as no qualifying words have been introduced, the meaning is the same. It would be an impossible construction of the Act to limit the times when the Commissioner could run locomotives, and yet that is what the contention would lead to.

The Commissioner, in my opinion, may at his discretion use at any time coal, wood, oil or any other kind of fuel he pleases, because he is expressly authorized to do so. Being authorized, and being under a duty to exercise his powers, it cannot be said that what is so authorized is unlawful. Wood is very much more dangerous in hot weather than any coal, and if he can with impunity use wood, it follows necessarily that he cannot be fixed with liability merely because he used Collie coal instead of Newcastle coal.

Upon the whole, therefore, I agree that the interpretation of sec. 20 adopted by the learned Chief Justice and the majority of the Full Court of Western Australia is correct, and that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for appellants, *Stone & Burt*, for *Kidston & Forbes*, Northam.

Solicitor, for respondent, *Barker* (Crown Solicitor).

N. G. P.

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SERMON v. THE COMMISSIONER OF RAILWAYS.

[PRIVY COUNCIL.]

THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA . . . . } APPELLANT;

AND

THE MAYOR &c. OF THE CITY OF MELBOURNE . . . . . } RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.* 1907.

July 31.

Electric Light and Power Act 1896 (*Vict.*) (*No.* 1413), *secs.* 13 (*d*), 38, 39, 52—*Charge for supply of electricity—Preference—Uniform charge—Alternative rates—Option given to customer—"Flat rate"—"Maximum demand rate."*

Undertakers under the *Electric Light and Power Act* 1896 had two scales under which they charged consumers for the supply of electricity, and all consumers had the option of which rate they would select. Under one scale, called the "flat rate," consumers were charged for the actual quantity of electricity supplied at the uniform rate of 4½d. per unit. Under the other scale, called the "maximum demand rate," consumers were charged at the rate of 7d. per unit as to such portion of the electricity supplied to them as was equal to a consumption for a period of 45 hours per calendar month at the highest rate of consumption during the month, and, as to the remainder of the electricity so supplied during the month, at the rate of 2d. per unit.

Held: That the words "a supply on the same terms" in sec. 38 of the *Electric Light and Power Act* 1896 bear their natural meaning and include price; that the "preference" prohibited by sec. 39 is a preference between customers dealing under similar circumstances, and not between customers dealing under two different systems of supply, either of which they are free to select, and therefore dealing under entirely different circumstances; and that therefore the charges were lawful.

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* Present.—The Lord Chancellor, Lord Macnaghten, Lord Atkinson, Lord Collins, Sir Arthur Wilson.