JOSEPH E. JACKSON (PLAINTIFF).....APPELLANT; 1902

AND *Mar. 26,27.
*May 6.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Railway—Sparks from engine—Evidence—Findings of jury—Defective construction.

Fire was discovered on J's farm a short time after a train of the Grand Trunk Railway had passed it drawn by two engines one having a long, and the other a short, or medium, smoke-box. In an action against the company for damages it was proved that the former was perfectly constructed. Two witnesses considered the other defective, but nine men, experienced in the construction of engines, swore that a larger smoke-box would have been unsuited to the size of the engine. The jury found that the fire was caused by sparks from one engine and they believed it was from that with the short smoke-box; and that the use of said box constituted negligence in the company which had not taken the proper means to prevent emission of sparks.

Held, affirming the judgment of the Court of Appeal (2 Ont. L.R. 689) that the latter finding was not justified by the evidence and the verdict for plaintiff at the trial was properly set aside.

APPEAL from a decision of the Court of Appeal for Ontario (1) setting aside the verdict for the plaintiff at the trial and dismissing the action.

The facts are sufficiently stated in the above headnote and in the judgments on this appeal.

Robinson K.C. and *Montgomery* for the appellant.

Nesbitt K.C. and *Rose* for the respondent.

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* PRESENT :—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

(1) 2 Ont. L. R. 689.

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TASCHEREAU J.—This is an action whereby the plaintiff, appellant, whose farm adjoins the tracks of the respondent company, claims damages for the destruction of his barns by a fire, which he contends was caused by sparks from one of their engines on the 27th day of April, 1899.

It appears from the evidence that within a few minutes after the passing of a train, during a dry season, fire was discovered at two places in the grass on the appellant's farm near his barns to which it soon spread. The said train was hauled by two engines, differing in construction, one, the largest, No. 531, having what is called "a long smoke-box," while engine No. 215, had a shorter smoke-box known as "the short smoke box," or "the medium smoke-box." No. 531 was in front.

The statement of claim alleges that

On the said date while the engines were being driven along the defendants' said line of railway near the plaintiff's said farm, under the management and control of the defendants, the defendants so negligently and unskilfully managed said engines and the fire and the burning material therein contained, and the said engines or one of them, were or was so insufficiently or improperly constructed and operated, were or was in such an improper condition or state of repair, that sparks or cinders from the said fire and burning matter escaped therefrom to and upon the plaintiff's premises by reason whereof the said plaintiff's barns, stables, sheds and chattel property were set on fire, and were totally burned and destroyed.

The respondents pleaded "Not guilty by statute."

The following are the questions put to the jury at the trial, and their answers:

First. Was the fire in question caused by a spark or sparks from either of the engines 215 or 531?

Answer. Yes. Unanimous answer.

Second. If so, from which of them?

Answer. We believe that it was 215.

Third. If so, did such spark or sparks escape by reason of the negligence of the defendants?

Answer. Yes.

Fourth. If so, wherein did such negligence consist?

Answer. Smoke-box.

Fifth. Did the defendants, under all the circumstances, take fair and reasonable precautions, and exercise reasonable care to have their engines and appliances for preventing the omission of fire properly constructed?

Answer. No.

No objection was made to the charge to the jury, and, upon the said answers to the above questions, the learned judge who presided directed judgment to be entered for the appellant for the sum agreed upon of five thousand eight hundred and fifty dollars. The respondents appealed against the said judgment and verdict to the Court of Appeal for Ontario, and the said appeal was allowed upon the majority opinion of the judges of that court and the appellant's action was dismissed with costs, the Honourable the Chief Justice of Ontario dissenting (1). It is from that judgment that the appellant now appeals, and asks that it be set aside and the judgment of the trial judge restored, or that, at least, a new trial should be granted.

In my opinion the judgment appealed from should be affirmed.

The law that governs cases of this nature is now so well settled, (*Qui jure suo utitur neminem laedit. Nemo damnum facit nisi facit quod facere jus non habet*;" *Oatman* v. *Michigan Central Railway Co.* (2); *New Brunswick Railway Co.* v. *Robinson* (3); *The Canada Atlantic Railway Co.* v. *Moxley* (4); *Canada Southern Railway Co.* v. *Phelps* (5); *Canadian Pacific Railway Co.* v. *Roy*; that there is no room for controversy in the case in that respect, and the appellant fairly admitted at bar that if he has not succeeded in proving that the company were guilty of negligence, as he alleges

(1) 2 Ont. L.R. 689.
(2) 1 Ont. L. R. 145 and cases there cited.
(3) 11 Can. S. C. R. 688.
(4) 15 Can. S. C. R. 145.
(5) 14 Can. S. C. R. 132.
(6) [1902] A. C. 220.

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in his statement of claim, he is out of court. His only contention is

> that the respondents were guilty of negligence, and that such negligence consisted in the defective character of the smoke box of engine No. 215, both as regards its length and its internal arrangements.

The charges against engine No. 531 are withdrawn. She was admitted, at the trial, to have been perfect in every respect. So that if she caused the damage the appellant has no redress against the company. The jury, however, have found, in answer to the second question, that, as contended by the appellant, it was engine No. 215 that caused the fire. Now, that finding is exclusively based on the defectiveness of that engine; there is absolutely nothing else to support that answer; the jury have inferred the fact that she, of the two, was the guilty one exclusively from the fact that she was defective and the other one perfect. Was she proved to have been defective, is consequently the question to be considered *in limine*, in connection with the jury's answer to the second question, for, if she was not defective, the jury could not, it being conceded that every engine throws sparks, reasonably attempt to say which of the two engines caused the damage, and the case is at an end. Then had the appellant been able to prove directly that the sparks came from No. 215, that would have been of no assistance to him if No. 215 was not defective. If both 215 and 531 were perfect, it matters not from which of them the sparks came, or if they came from both.

And to put the case in another form, leaving No. 531 out of the question, supposing that No. 215 had been the only one hauling this train, so that the jury's answer to the second question was fully justified, that alone would not entitle the appellant to recover. He would have had to prove the negligence charged

against the company as to the smoke-box, and he has not done so. The jury's answers to the third, fourth and fifth questions cannot be supported. They must either have disregarded the evidence or else completely failed to understand it. Assuming that sufficient evidence had been brought by the appellant to throw the onus upon the respondents of proving that they had not been guilty of negligence and to justify the refusal of a non-suit at the conclusion of the case, they have overwhelmingly proved that engine No. 215 was as perfect and in as good order and condition in all respects as engine No. 531. All that the law requires from railway companies is not that they use engines which do not emit sparks, for that is so far an impossibility, but that they use the best practicable means that can reasonably be required according to modern science and knowledge to avoid doing damage to the property through which the statute allows them to run.

Here, it is clearly proved that the smoke-box of engine No. 215 was constructed, as to size, in proportion to the engine itself, and that it had all the appliances that practical experience could suggest for the prevention of fires. Morse, an experienced engineer, says that a long box, as No. 531 had, on No. 215 would have been of no use whatever to lessen the emission of sparks. And Willa, the superintendent of tests of the Baldwin Locomotive Works of Philadelphia, says that the present tendency is to shorten up smoke-boxes, and that the old idea of lengthening the smoke-boxes to entrap the sparks had to be given up as not bringing the result expected. This evidence is fully corroborated by that of a number of other witnesses, to which I deem it unnecessary to refer in detail. I fail to see how it can be contended that the respondents were guilty of negligence in the construction of this smoke-

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box, when they adopted, as proved, the appliances that a number of the most eminent engineers in America, if called together as experts to advise them in the matter, must have reported to be the best and most reliable known in the world. *Earl of Shaftsbury* v. *London & South Western Railway Co.* (1).

The Canada Atlantic Railway Co v. *Moxley* (2), relied upon by the appellant, has no application. It was clearly proved in that case that one of the company's engines was defective. Then, the appeal to this court was from the judgment of two courts in both of which the findings of the jury against the appellant had been upheld. Consequently, following the rule laid down by the Privy Council in *Lambkin* v. *The South Eastern Railway Co.* (3), in the Privy Council, the question of the verdict being against the weight of evidence was not open to the appellant.

As to the appellant's motion for a new trial, it was rightly refused by the Court of Appeal. There is no suggestion that any new evidence could be brought. The question is one of law; it is a question of fact which, in law, must be answered in favour of the respondents, and which no jury would have the right, in law, to find against them; and this is the same thing as a question of law.

I would dismiss the appeal with costs.

SEDGEWICK and GIROUARD JJ. concurred.

DAVIES J.—This was an action brought against the defendants (respondents), to recover damages sustained by the plaintiff from a fire caused by a spark or sparks which escaped, as alleged, from one of the defendants' engines while drawing a train past the plaintiff's

(1) 11 Times L R. 269. (2) 15 Can. S. C. R. 145.
(3) 5 App. Cas. 352.

farm contiguous to the line of the defendants' railway. The damages suffered by the plaintiff (appellant), were agreed upon between the parties at the trial at five thousand eight hundred and fifty dollars.

The train in question was one being drawn by two locomotives known as numbers 531 and 215, respectively. The leading and larger engine was 531 and as to it no question of any kind arises either as to its construction or its working.

The complaint of the plaintiff was practically that the engine No. 215 was negligently constructed and with a "smoke-box" too small for its purposes and which was not, on account of its length, best calculated to prevent the emission of sparks.

The jury, in answer to questions put to them at the trial by the learned judge, found; that the fire was caused by a spark or sparks from one of the engines, which they believed to be number 215; that the defendants' negligence consisted in the "smoke-box;" and, that the defendants did not take reasonable precautions and exercise reasonable care to have their engines and appliances for preventing the emission of fire properly constructed.

Although the answer of the jury did not specifically point out in what respect the smoke-box was negligently constructed, it was clear from the evidence given at the trial that they must have meant that the smoke-box should have been a longer one.

The argument at bar proceeded almost altogether upon this one point, as to whether or not the box was sufficiently long for its purposes.

Was there evidence from which a jury might reasonably find (*a*) that the smoke-box of number 215 was less efficient for its purpose of preventing the emission of sparks than a longer and larger one would

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have been, and (*b*) that in permitting its use the defendants were guilty of negligence?

As to the law which governs the liability of railway corporations, in cases of this kind, there was not much dispute. In the case of *The Port Glasgow and Newark Sailcloth Co.* v. *The Caledonia Railway Company* (1), on appeal to the House of Lords where the injury and damage were the result of a spark from one of the defendant's engines, the Lord Chancellor Herschell said:

> It is now well settled law that in order to establish a case of liability against a railway company, under such circumstances, it is essential for the pursuers to establish negligence. The railway company having the statutory power of running along the line with locomotive engines which, in the course of their running, are apt to discharge sparks, no liability rests upon the company merely because the sparks emitted by an engine have set fire to an adjoining property. But the defenders, although possessing this statutory power, are undoubtedly bound to exercise it reasonably and properly, and the test whether they exercise this power reasonably and properly appears to be this. They are aware that locomotive engines running along the line are apt to emit sparks. Knowing this they are bound to use the best practicable means according to the then state of knowledge, to avoid the emission of sparks which may be dangerous to adjoining property, and if they, knowing that the engines are thus liable to discharge sparks, do not adopt that reasonable precaution they are guilty of negligence.

This may be taken as a sufficiently clear and comprehensive statement of the law with respect to the appeal now before us. The questions we have to decide are: Have the appellants made out such a case of negligence? Was the verdict one which, viewing the whole evidence reasonably, the jury could not properly find?

It is not a question as to how far this court concurs in the finding, nor simply that the verdict was against

(1) 20 Ct. of Sess. 4 Ser. 35.

the weight of evidence, but whether or not, there being some conflicting evidence, the jury might reasonably have arrived at the conclusions they did. *Metropolitan Railway Company* v. *Wright* (1).

As to the origin of the fire, the evidence as to its having been caused by sparks from one or the other of the engines of the defendants' train is such that I do not think any court would interfere with the jury's finding. A much more difficult question arises as to which engine the fatal spark or sparks came from. No complaint was made as against engine No. 531, and, of course, if the sparks came from that engine, the defendants were not liable. The jury found that the sparks came from the engine 215, as to which there was the evidence of Clark and Pink, that its smoke-box was defective. It cannot be said, therefore, that there was no evidence from which a reasonable inference might not be drawn that the fire escaped from the engine alleged to be defective, though the defendants' contention that it was pure conjecture was strong. Looking, however, at the evidence as a whole, an appeal court would greatly hesitate to set aside the verdict on that ground. But, admitting that finding to be one which should not be set aside, the plaintiff's case is only advanced one step. It still remains for him to show some evidence from which reasonable minds might properly find that there were defects in the smoke box of engine No. 215, fairly attributable to the negligence of the defendants. Even if the devices used to prevent the emission of sparks from this engine No. 215 were defective in any respect, there must be evidence of negligence on defendants' part in not using other or better devices. Where is that evidence here?

The plaintiff relied upon the testimony of two men of some experience, Messrs. Clark and Pink, who both

(1) 11 App. Cas. 152.

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testified that, in their opinion, a longer smoke-box would have been safer and more effective. The value of this evidence was attacked by the defendants owing to the alleged want of recent experience on the part of these witnesses, and it was strongly urged that their opinions, both as to the proper length the smoke-box on such an engine should be, and also as to the practice of railway companies in recent years in lengthening or shortening the boxes, was completely refuted by the testimony of nine experienced experts called for the defence. The testimony of these experts certainly went to show most strongly that the modern tendency is rather to shorten than to lengthen the box and that the length of the particular box in question in this case was all right, or as some of them put it "good practice."

To my mind, their evidence established, beyond reasonable doubt, that the engine No. 215, in its various parts, was the mechanical equivalent of engine No. 531. And, further, that, if the smoke-box of No. 215 had been as long as contended for by the witness Clark, the result would have been that it would have automatically reduced itself to a much shorter size; that, in other words, experience has shown that there is a practical limitation to the length of smoke boxes which may be used and that, if the box is too long, cinders will accumulate in the front which may, in certain cases, become themselves a source of danger and which will, by making a solid bank of cinders, automatically shorten the box.

These witnesses were, further, all of the opinion that this engine No. 215 had all the appliances which practical experience could suggest for the prevention of the emission of sparks, but that no locomotive has yet been built which will not throw sparks. Mr. Justice Lister has collated much of this evidence in

his judgment in the Court of Appeal for Ontario. But assuming that, in the opinion of this Court, the weight of testimony was in favour of these opinions, that would not justify us in setting the verdict of the jury aside and entering judgment for the defendants. Before taking such a course of interfering with the findings of a jury in a matter unquestionably within their province to decide, this Court must, as all the more recent authorities determine, be satisfied that the finding is one which a jury "viewing the whole evidence, reasonably could not properly find." In such a case only should the finding be interfered with. *Metropolitan Railway Co.* v. *Wright* (1); *Allcock* v. *Hall*, (2).

But, assuming for the present that there was some evidence to justify a finding that engine No 215 was defective as having too small a smoke-box, where is there the slightest evidence to show any negligence on the part of the defendants? In determining the proper length of this smoke-box they acted on the professional judgment of their expert advisers These are men of great experience, whose business it is carefully to study all these appliances which experience and skill devise to reduce to a minimum the danger arising from the emission of sparks. They advised that the length of box used was the proper length. The jury, it is true, found that the defendants' negligence consisted in the use of this smoke-box—but on what evidence?

The defendants' expert advisers thought differently, and how, I ask, could the defendants be found guilty of want of reasonable skill or knowledge when all, or nearly all, the experienced engineers and experts called at the trial agreed with them? There were examined at the trial for the defence, Mr. Morse, the superintendent of motive power of the Grand Trunk Railway,

(1) 11 App. Cas. 152. (2) [1891] 1 Q.B. 444.

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under whose charge are all the company's locomotives; Mr. Willa, the superintendent of tests of the Baldwin Locomotive Works of Philadelphia, one of the largest locomotive works in America. This gentleman, in addition to his extensive experience, is a graduate of Cornell University where he took an engineering course. He commenced work in the shops where he gained a practical knowledge of construction, and has occupied position after position in the service of the company until he became, four or five years ago, superintendent of tests; Mr. Gentry, the assistant superintendent of the Richmond Locomotive Works, Virginia; Mr. Lane, chief draughtsman of Locomotive Works at Schenectady, New York; Mr. Joughins, master mechanic of the International Railway, a position stated to be equivalent to that of superintendent of motive power on the Grand Trunk Railway.

These witnesses, together with Mr. Alexander Maver, the superintendent of locomotives at London, Ontario, for the defendants, and several other mechanics of experience called by them, were all of the opinion that the smoke box was all right as to length, and that any longer box would only accumulate cinders in front which might be a source of danger and would automatically shorten itself to a proper length after steaming a few miles. It must be borne in mind that the evidence showed conclusively that there was no hard or fast rule as to the length of a smoke box, that it depends upon the length which the practice shows is necessary to secure easy working and give the space required for the exhaust pipes, the deflector and the necessary amount of wire netting, and the expert witnesses for the defence all concurred in testifying that the additional length of box suggested by Mr. Clark and Mr. Pink was of no practical

utility, while several of them thought that it might possibly add to the danger.

How, let me ask, could any jury, in the face of all this evidence, find, not only that the box should have been longer, but that the defendants were guilty of negligence in not knowing that and acting on that knowledge? How can it be successfully contended that they ought to have known that a longer box was better and safer and that the best thing was not done to minimize the danger from sparks when their own scientific and expert employees, not only did not know it, but thought the contrary; and when, in addition to that, the experts and scientific witnesses whose experience and training best qualify them to form an opinion, state explicitly, after hearing the evidence of Clark and Pink, that their suggested change would not be beneficial.

If, as was well put during the argument, the defendants' board of directors had met to discuss the question whether or not the engine No. 215 ought to be altered, and had called in all the witnesses examined at the trial, and heard their statements and acted on the judgment of the great body of experts, whose business it is to consider just such questions, disregarding the suggestions of Messrs. Clark and Pink, could it have been inferred that they acted negligently? I think not. But, on the other hand, if they had accepted the advice of Clark and Pink, and disregarded that of their own and other expert and scientific witnesses, and a fire had occurred they might possibly have been open to such a charge.

It must be remembered that Messrs. Clark and Pink, after giving their evidence for the plaintiff, were not recalled to contradict, qualify or explain any of the statements made by these experts with reference to

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any or either of the three salient and important facts testified to by them, namely:—

(*a*) That the user of the engine 215, with a smoke-box of forty-six inches long and the wire netting of the size used was "good practice."

(*b*) That while no hard and fast rule existed as to the proper length of a smoke box, such being determined largely by practice, the smoke box and engine of No. 215 were the mechanical equivalents of engine No. 531, which was, admittedly, not open to objection.

(*c*) That they would not have advised the user of the larger smoke box suggested, as it would probably accumulate a bank of cinders in the front (which might in themselves be a source of danger) and which would automatically shorten the box.

(*d*) And that the tendency in recent years is rather towards shortening than lengthening the size of these boxes.

On a general and careful review of the entire evidence I am of the opinion that the verdict of negligence on the part of the defendants was one which the jury, viewing the whole evidence reasonably, could not properly find; that, in point of law, there was no evidence of negligence at all or any evidence from which it could be properly inferred by reasonable men and, therefore, under the authorities, I think the appeal should be dismissed. *Earl of Shaftsbury* v *London and Southwestern Railway Co.* (1); *Port Glasgow and Newark Sailcloth Co.* v *The Caledonian Railway Co.* (2); *Jackson* v *Hyde* (3).

MILLS J.—The plaintiff here is the appellant. His farm joins the line of the respondent. His barn was destroyed by a spark from one or other of two engines,

(1) 11 Times L.R., 269.
(2) 19 Court of Sess., (4 ser.) 608. (Affirmed in the H. of L. 20 Court of Sess. (4 ser.) 35.)
(3) 28 U.C.Q.B. 294.

in April, 1899. Almost immediately after the train had passed the premises of the appellant fire was discovered near Jackson's buildings, which soon extended to them, and by which they were destroyed.

At the trial the plaintiff charged that the defendants, by their negligent and unskilful management, set fire to his barns and stables, sheds and chattel property, by which they were totally destroyed. The respondents pleaded "Not guilty by statute."

The judge put to the jury at the trial the following questions:—

(1) Was the fire in question caused by a spark or sparks from either of the engines numbered 215 and 531? (2) If so, which of them? (3) Did such spark or sparks escape by reason of negligence of the defendants? (4) If so, wherein did such negligence consist? (5) Did the defendants, under all the circumstances, take fair and reasonable precautions and exercise reasonable care to have their engines and appliances for preventing the emission of fire properly constructed?

To the first of these questions, the jury answered "Yes." To the second they replied, "We believe that it was 215." To the third they answered, "Yes." To the fourth their answer is, "Smoke-box." And to the fifth, their answer is, "No."

Upon these findings of the jury the judge entered judgment for the sum of $5,860, and an appeal was taken by the company to the Court of Appeal for Ontario. The appellant's action was dismissed with costs, Chief Justice Armour dissenting. The appellant asks that the judgment of the trial judge should be restored, or that a new trial should be granted.

The law which governs cases of this sort and the responsibility of railway companies is now well settled, and it is this;—where there is no negligence there is no responsibility on the part of the company.

The appellant endeavoured to establish that the smoke-box of the engine, No. 215, was too short;

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that it was due to this defect that sparks were emitted, and that it was from sparks emitted from this engine that the fire emanated that destroyed Jackson's buildings. I think it was overwhelmingly established that No. 215 was not defective in this particular; that the size of the smoke-box was in proper proportion to the size of the engine; that it was as perfect as that of the engine No. 531, and that, had it been made longer, it would, in running a very short distance, have become partly filled with ashes and cinders until it was shortened up to the required length. There was no actual evidence that the fire originated in sparks from engine No. 215. This was a matter of inference by the jury from the assumption that the smoke-box of No. 215 was too short; that the engine was defective in this respect; that the use of an engine so defective was negligence, and that such negligence established responsibility.

In the case of *The Port Glasgow Co. and others* v. *The Caledonian Railway Co.*(1) which was ultimately decided by the House of Lords, it was held that, to establish liability against a railway company, negligence must be established. There is negligence where a company does not use the best practicable means, according to the then state of knowledge, to prevent the emission of sparks, which may be dangerous to adjoining property. See *Metropolitan Railway Co.* v. *Wright* (2); *Allcock* v. *Hall* (3); *Jackson* v. *Hyde* (4).

I do not think that in this case, any negligence on the part of the company was established, and I do not think we are warranted in coming to any other conclusion than that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Montgomery, Fleury & Montgomery.*

Solicitor for the respondent: *John Bell.*

(1) 19 Ct. of Sess. (4 ser.) 608; 20 Ct. of Sess. (4 ser.) 35.
(2) 11 App. Cas. 152.
(3) [1891] 1 Q. B. 444.
(4) 28 U. C. Q. B. 294.