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*Oct. 14, 15.
*Nov. 20.

THE RED MOUNTAIN RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

LOUIS BLUE AND JOSEPH S. DESCHAMPS, TRADING TOGETHER UNDER THE NAME AND STYLE OF BLUE & DESCHAMPS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Operation of railway—Unnecessary combustibles left on right of way—"Railway Act, 1903" secs. 118(j) and 239—R.S.C. (1906) ch. 37, secs. 151(j) and 297—Damages by fire—Point of origin—Charge by judge—Finding by jury—New trial—Practice—New evidence on appeal—Supreme Court Act, secs. 51 and 73.

The question for the jury was, whether or not the place of the origin of the fire which caused the damages was within the limits of the "right of way" which the defendants were, by the "Railway Act, 1903," obliged to keep free from unnecessary combustible matter, and their finding was that it did, but the charge of the judge was calculated to leave the impression that any space where trees had been cut, under the powers conferred by sec. 118(j) of that Act, might be treated as included within the "right of way," and, in effect, made a direction, on issues not raised by the pleadings or at the trial, as to negligent exercise of the privilege conferred by that section.

Held, that, in consequence of the want of more explicit directions to the jury on the question of law and the misdirection as to the issues, the defendants were entitled to a new trial.

The court refused an application by the respondents, on the hearing of the appeal, for leave to supplement the appeal case by the production of plans of the right of way which had not been produced at the trial, as being contrary to the established course of the court.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

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APPEAL from the judgment of the Supreme Court of British Columbia(1), affirming the judgment of Morrison J., at the trial, by which the plaintiffs' action was maintained with costs.

The material circumstances of the case are stated in the judgments now reported.

A. H. MacNeill K.C. for the appellants.

Nesbitt K.C. and *C. R. Hamilton K.C.* for the respondents.

THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Duff, although with some hesitation. I wish at the same time to express my regret that it is not possible for us to entertain the application of the respondent to add to the case on appeal a map or plan of the completed railway and of the land taken or obtained for the use thereof, deposited, as alleged, with the Department of Railways and Canals pursuant to the "Railway Act of 1888," 51 Vict. ch. 29, sec. 134.

The jurisprudence of the court is well settled by a long line of decisions that an appeal to the Supreme Court must be decided solely upon the evidence contained in the case certified to the registrar by the clerk of the court appealed from. *Providence Washington Ins. Co.* v. *Gerow*(2); *Ætna Ins. Co.* v. *Brodie* (3); *Confederation Life Association* v. *O'Donnell* (4); *Exchange Bank* v. *Gilman*(5); *City of Montreal* v.

(1) 12 B.C. Rep. 460.
(2) 14 Can. S.C.R. 731.
(3) Cass. Dig. (2 ed.) 673; Cout. Dig. 1099.
(4) 10 Can. S.C.R. 92
(5) 17 Can. S.C.R. 108.

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Hogan (1). In the Privy Council, Macqueen's Practice, page 765; *Banco de Portugal* v. *Waddell* (2).

In addition to the above cases I have had the registrar look up the papers in an unreported decision of the court in 1893, in a case of *Ross* v. *Ross,* in which I was engaged. This was a petition to the court asking to have added to the case on appeal four certain deeds which the petitioners claimed they had discovered since the judgment given by the court of appeal, and which had, it was claimed, an important bearing upon the matters in controversy. After reserving judgment, the motion having been referred to the full court by the Honourable Mr. Justice Fournier, to whom the application was first made, the court, without calling upon counsel to shew cause against the application, refused to make the order asked for.

This jurisprudence is based upon the provisions of section 73 of the "Supreme Court Act," which reads in part as follows:—

> The appeal shall be upon a case to be stated by the parties, or, in the event of difference, to be settled by the court appealed from or a judge thereof.

Section 51 of the Act provides that the Supreme Court may

> give the judgment and award the process or other proceedings which the court, whose decision is appealed against, should have given or awarded.

This section contemplates that the case in the Supreme Court shall be the same case as was under consideration in the court appealed from, for how, otherwise,

(1) 31 Can. S.C.R. 1. (2) 5 App. Cas. 161.

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could this court reverse the court below on the ground that it should have given the judgment which is ultimately given by the Supreme Court, when the court below had not before it the material upon which the judgment of the Supreme Court is founded?

I do not wish to express any opinion as to the bearing the plan might have upon the case; but I wish to express my regret that we have no authority to receive the plan because it is conceivable that, on the statements made by counsel, both parties might be saved the trouble and expense of another trial. This, however, must be accepted as an expression of opinion personal to myself.

DAVIES J.—I agree in the opinion stated by Mr. Justice Duff.

IDINGTON J.—I concur in the judgment of my brother Mr. Justice Duff.

As to the motion to admit plans, they could not properly help us here and, therefore, the motion ought not to be acceded to, even if we had the power which, it is said, has been denied. But, upon that question, I express no opinion.

MACLENNAN J.—I agree with my brother Mr. Justice Duff.

DUFF J.—I find myself after the careful consideration of the whole of this case unable to resist the conclusion that the appellant company is entitled to a new trial.

The plaintiff's claim is a claim for damages caused by a fire which is alleged to have originated on the

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defendant company's right of way near Rossland, B.C.; and the liability of the defendant company (if any) rests upon this—that the fire in question is attributable to the failure of the company to perform its statutory duty to keep its right of way clear of combustible materials.

The enactment imposing this duty(1) (section 297 of the "Railway Act") is in the following words:—

> 297. The company shall at all times maintain and keep its right of way free from dead or dry grass, weeds and other unnecessary combustible matter.

The plaintiffs alleged in their pleadings and at the trial assumed the burden of proving that the fire had its origin in the ignition of some such combustible material on the defendant company's right of way. In regard to this point the controversy turned upon the question whether or not a place ascertained as the place of origin of the fire, is within the limits of the right of way. This question is obviously in part—in so far, that is to say, as it involves a definition of the term the "right of way" as used in the enactment quoted—a question of law; and upon that the jury were entitled to the guidance of the court. The learned judge did not explain to the jury the meaning of this term; but told them that if the defendants felled trees on the land adjoining their line and left them or other materials there in a combustible state that would be evidence of negligence. The defendants had by virtue of the enactment corresponding to section 151(*j*)(2) the right to fell trees standing within 100 feet of either side of their right of way

(1) R.S. [1906] ch. 37; and see "Railway Act, 1903," sec. 239.

(2) "Railway Act, 1903," sec. 118(*j*).

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for the protection of their line; and this the jury was told by the learned judge at the request of the counsel for the defendant company. But the observations of the learned judge at that point in his charge could, I think, leave in the minds of the jury no room for doubt, that if, in exercising this statutory power the defendants left material which was likely to become and which afterwards became ignited by sparks emitted from their locomotives, that would be evidence of actionable negligence to which they might give effect by a verdict in this action for the plaintiff.

I should not in the least disagree with this statement of the law; but it had no application to the case which the learned judge and the jury were engaged in trying. The plaintiff's action is based, as I have said, upon the allegation that the fire had its commencement in combustible material left by the company (in breach of the statutory duty referred to) within the limits of its right of way; and the issue raised by that allegation was the issue to which the evidence was directed. The defendants were not called upon to meet and made no effort to meet a case of negligent exercise of their powers under section 151 (*j*). In effect, therefore, the learned trial judge left to the jury a case which was not raised by the pleadings and not tried; while upon the real issue of fact upon the determination of which the plaintiff's case rested the jury were not given the necessary assistance to enable them properly to appreciate what the question was which they were called upon to decide.

There was evidence, unquestionably, from which the jury might have found that the defendant company had cleared a continuous strip of land in which they had placed their road-bed and track; and it would

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I think have been a proper direction that if the jury found that this strip was occupied or appropriated by the defendant company as its way or part of its way then they should, in the absence of better evidence, for the purposes of this action treat it as included within the limits of the defendant company's right of way within the meaning of the enactment I have quoted. But the defendants were clearly, I think, entitled to have the jury pass upon the question whether in point of fact there was a strip so cleared as to lead to the inference that it was occupied or appropriated as a way of the company's railway. And it was their clear right also to have the opinion of the jury whether or not, given such a strip, the place where the fire commenced was within it. In effect the jury were directed that if the fire originated in combustible material left by the defendant company in any space cut or slashed by them whether as part of their way or otherwise they are in this action responsible for the ensuing damage.

There is, it is true, in answer to a question put to the jury an express finding that the fire originated within the right of way. But the charge was, I think, calculated to convey to the minds of the jury the impression that any space so cut or slashed might properly be, for the purpose of arriving at an answer to that question, treated as included within the right of way; and thus the very point which it was essential that they should determine in order intelligently to answer the question—the limit of the right of way in relation to a place where the fire originated—was in effect withdrawn from them. The defendant company was not only entitled to a finding upon that question; it was entitled to such a finding arrived at under a proper direction.

If one could on the evidence as it stands for one's self come to the conclusion that there was a strip of such a character that in the absence of better evidence of the extent of the right of way the defendant company ought to be held to have appropriated it as such, and that the fire originated within that strip, that would, I think, be a sufficient ground for holding that, there being no substantial prejudice to the appellant, a new trial should be refused; but while the first of these questions would to me present no difficulty, I am unable upon this record to reach a conclusion in favour of the plaintiff on the second. I do not mean to suggest that there is such a lack of evidence as to the exact position of the point of origin of the fire as would have justified the trial judge withdrawing the case from the jury; but in the evidence disclosed by the record I am not able to find sufficient material to enable me to reach a conclusion upon it. In these circumstances the defendant company is, I think, entitled to have the issues in the action submitted to another jury.

The appeal should be allowed with costs of the appeal to this court and the full court. The costs of the abortive trial should abide the event of a new trial.

Appeal allowed with costs.

Solicitor for the appellants: *A. H. MacNeill.*
Solicitor for the respondents: *C. R. Hamilton.*