JAMES T. LAIDLAW AND GEORGE A. LAURIE (PLAINTIFFS) .... APPELLANTS;

1909
*Oct. 5, 6.
*Nov. 2.

AND

THE CROWSNEST SOUTHERN RAILWAY COMPANY (DEFENDANTS) .... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Railways—British Columbia Railway Act—Fire on right-of-way—Combustible matter on berm—Origin of fire—Damage to adjoining property — Negligence — Evidence — Practice — New points raised on appeal.

In an action against a railway company subject to the British Columbit Railway Act, if there is no evidence that the company had knowledge or notice of the existence of a fire on their right-of-way, not caused by the operation of the railway, the fact that the condition of the right-of-way facilitated the spread of the fire to adjoining property which was destroyed by it does not amount to actionable negligence.

Where a matter relied upon to support the action was not urged at the trial nor asserted on an appeal to the provincial court it is too late to put it forward for the first time on an appeal to the Supreme Court of Canada.

Judgment appealed from (14 B.C. Rep. 169) affirmed, Idington J. dissenting.

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

The case is stated in the judgments now reported.

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

(1) 14 B.C. Rep. 169.

1909

LAIDLAW
v.
CROWSNEST
SOUTHERN
RY. Co.

S. S. Taylor K.C. for the appellants.

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

The Chief Justice.

THE CHIEF JUSTICE.—I agree that this appeal should be dismissed with costs.

DAVIES J.—I concur in the reasons stated by Mr. Justice Anglin.

IDINGTON J. (dissenting).—The findings of facts having been unanimously agreed upon below should not be lightly disturbed.

I, therefore, agree that appellants' claim, so far as rested upon the charge that the fire in question was the result of sparks from the respondents' engine or engines, should stand as disposed of by the courts below.

There remains, however, the question of respondents' liability for permitting the fire, however it may have arisen, on a part of its right of way covered with fallen timber and dry brush of a very inflammable character, to continue burning and unattended from about half-past seven A.M. to about one P.M., whilst easily extinguishable, and obviously liable to spread as it did on the rising of the slightest breeze, to the neighbouring timbered lands.

The law bearing upon this as I conceive it was not correctly presented to the courts below, nor, as far as I can see, was the evidence now relied upon directly called attention to. And, as a result of these omissions, I rather think the question now raised was by the judgments overlooked entirely. Counsel for the respondents very properly and candidly admits the legal question

involved was discussed, and, I suspect from his statement, was correctly apprehended by the learned Chief Justice. But through overlooking the evidence now pressed upon our attention the court could not come to any other conclusion than it did. In fact, in giving judgment, the majority seem to have ignored the question entirely; and Mr. Justice Clement, I submit with respect, misapprehended the pleadings in this regard, for paragraphs four and six seem sufficient.

This is not a case of a party so deliberately abandoning a claim in appeal that he or it cannot now be heard in respect to it.

At common law the liability of a possessor of land for the spreading of fire originating on his land was practically so great as to render him an insurer.

By 6 Anne, ch. 31, sec. 6, this was modified and, later, was replaced by 14 Geo. III., ch. 78, sec. 86, which provides as follows:

No action, suit or process whatever shall be had, maintained or presented against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall * * * accidently begin, nor shall any recompense be made by any such person for any damage suffered thereby; any law, usage or custom to the contrary notwithstanding.

This clearly does not abrogate the entire common law relative to liability for fire once started whether accidentally or otherwise. The owner of land is merely relieved from the inevitable consequences of such an accident. It leaves the avoidable consequences to be dealt with by applying those well-known principles of justice and reason which are represented by the maxim *"sic utere tuo ut alienum non lædas."*

Was it reasonable or just for the respondents to have, to the knowledge of their employees (as the answers of their secretary to interrogatories shew was

1909
LAIDLAW
v.
CROWSNEST
SOUTHERN
RY. CO.
Idington J.

done), the extinguishable fire in question on their premises from

early in the morning of the 7th day of September and at other times in the forenoon of the 7th day of September?

The case of *Furlong* v. *Carroll*(1), in the judgment of Mr. Justice Patterson reviews the growth of the law.

Must the appellants be deprived of their rights because too confident of one cause of action they overlooked accidentally their other cause of action, though that other was on record and supported by evidence but not fully presented or in law correctly presented ? I submit not. I think the appeal and causes of action so far as rested upon the charge that the fire originated from the respondents' engine should be dismissed with costs throughout, and such to include the general costs of the cause save what were incidental to paragraphs four and six of the statement of claim. I think a new trial of the issues arising thereon should be granted and that the costs of the last trial incidental thereto and of the new trial be in the discretion of the learned trial judge.

DUFF J. concurred with Anglin J.

ANGLIN J.—The plaintiffs' action was brought to recover damages sustained by them through the destruction by fire of a portion of a valuable timber limit. They charged that the fire in question originated on the right-of-way of the defendant railway company and was caused by sparks of fire negligently allowed to escape from an engine. They also charged that the

(1) 7 Ont. App. R. 145.

right-of-way was encumbered with combustible material facilitating the spread of the fire; and, finally, that the defendants were negligent in not preventing the spread of the fire and in allowing it to reach the plaintiffs' land.

At the trial the attention of all parties was directed to the effort made by the plaintiffs to establish that the fire was caused by sparks or fire which escaped from an engine of the defendant company. The learned trial judge held that the plaintiffs had failed to establish that this was the origin of the fire, although they probably had established that the fire was first seen upon the defendants' right-of-way. The learned judge was of opinion that unless the fire was shewn to have originated from the operation of an engine the condition of the right-of-way did not constitute actionable negligence. No other ground of action appears to have been urged at the trial. Nothing was there said in argument of the allegation now put forward that the defendants through their servants had notice of the existence upon their right-of-way of the fire which eventually spread to the plaintiffs' lands and were guilty of actionable negligence in not extinguishing it. Neither is any such cause of action alluded to in the notice of appeal to the Supreme Court of British Columbia, which affirmed the judgment in favour of the defendants.

It is quite impossible upon the evidence before us to interfere with the finding that the evidence does not establish that the origin of the fire was the escape of sparks, ashes or fire from a locomotive operated by the defendants.

The duty of the defendants to maintain a clear right-of-way is inseparably connected with the opera-

1909

LAIDLAW
v.
CROWSNEST
SOUTHERN
RY. Co.

Anglin J.

tion of their railway. There is no such duty imposed upon them as mere landowners and, without proof of knowledge or notice of the existence of a fire, not shewn to have been caused by the operation of their railway, the fact that the condition of their right of way facilitated its spread does not, in my opinion, amount to actionable negligence. Upon both these grounds, therefore, the plaintiffs' appeal is hopeless.

Nor do I think that it would be a wise or proper exercise of discretion on the part of this court to permit the plaintiffs now to bring forward a cause of action which is evidently an afterthought. Upon the condition of the record before us they would certainly not be entitled to judgment upon this allegation of negligence and could, at best, ask that the case should be sent back for a new trial upon proper terms. If this cause of action had been presented to the trial judge, or, even though not there presented, if it had been made a ground of appeal to the Supreme Court of British Columbia, the present application to the discretion of this court might have been more favourably entertained. But where the plaintiffs have allowed the trial to come to a close without setting up the cause of action on which they now rely and have not asserted it on their application to the provincial court of appeal, it is too late to ask to be permitted to put it forward in this court.

The appeal, in my opinion, should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Harvey, McCarter & Macdonald.*

Solicitor for the respondents: *Albert Howard MacNeill.*