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THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS). } APPELLANTS;

AND

ALEXANDER KERR AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

*Oct. 30, 31.
*Nov. 10.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Action — Damages — Timber on pre-empted lands — Rights of pre-emptor—B.C. "Land Act," R.S.B.C., 1911, c. 129, ss. 77 et seq. and 132—Issue on appeal—Practice—Negligence—Fire set by railway locomotive—Assessment of damages—Findings of trial judge.

A pre-emptor of Crown lands, under the provisions of the British Columbia "Land Act," R.S.C., 1911, ch. 129, who has not forfeited his rights, is entitled to maintain an action for such damages as he has sustained in consequence of the destruction of timber growing upon his pre-empted lands.

As to the quantum of damages, the trial judge, following *Schmidt* v. *Miller* (46 Can. S.C.R. 45), held that the respondent was entitled to recover the full value of the standing timber destroyed. All evidence bearing upon the question of respondent's interest was omitted in printing the case on appeal and the point was not taken in the Court of Appeal or in the appellant's factum on the present appeal. The decision of the Supreme Court of Canada in *Schmidt* v. *Miller* was, subsequently, reversed on appeal to the Privy Council, and the point was raised upon the hearing of the present appeal that the respondent's damages should be reduced in consequence of his limited interest in the timber destroyed.

Held, that, in these circumstances, the contention in respect to the pre-emptor's limited interest in the property destroyed (the evidence bearing upon it having been omitted from the appeal case) was not open for consideration in the Supreme Court of Canada.

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

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The court refused to disturb findings of the trial judge, based upon sufficient evidence, or the assessment of damages made by him as limited by section 298 of the "Railway Act," R.S.C., 1906, ch. 37. The judgment appealed from (12 D.L.R. 425) was affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of Clement J., at the trial, by which the actions of the plaintiffs, respectively, were maintained with costs.

The actions affected by this appeal were brought, respectively, by the five respondents, claiming damages for the destruction of timber growing upon their lands, in East Kootenay, B.C., by fire alleged to have originated from a locomotive engine of the appellant company. The trial judge found that the fire had been caused by sparks from an engine operated by the company on their line of railway, which passed the locality where the fire took place, shortly before the fire was observed; he also found that the engine was equipped with proper modern appliances, and he awarded damages in favour of the plaintiffs, respectively, aggregating $4,500, according to the limitation provided by section 298 of the "Railway Act," ch. 37, R.S.C., 1906. This decision was affirmed by the judgment now appealed from.

The issues raised on the appeal are sufficiently set out in the judgments now reported.

Hellmuth K.C. for the appellants.

Travers Lewis K.C. and *A. B. MacDonald* for the respondents.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs. The plaintiff

(1) 12 D.L.R. 425.

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had a right of action although the *quantum* of damages might depend on the character of his title. (See ch. 129, sec. 132, R.S.B.C.) Also *Dinan* v. *Breakey* (1). Could that question be raised on this record? I am very doubtful. (See *Hamelin* v. *Bannerman* (2).)

The origin of the fire is fixed by the witness Anderson beyond dispute. The material elements of fact from which the inference of negligence was drawn were: an unusually hot Summer and a consequently parched surface in the immediate neighbourhood of the railway track. The engine went by the place at which the fire was first seen at ten minutes to two in the afternoon, when there was no fire. Ten minutes afterwards the fire was seen by Anderson, and five minutes later by the engineer of the next train. I think the fair inference was drawn by the judge and we should not interfere. *Vide Smith* v. *London and Southwestern Railway Co.* (3).

DAVIES J.—In my opinion the finding that the sparks which escaped from the appellants' engine which passed the locality at a quarter to two o'clock were the cause of the fire which subsequently destroyed the property of the plaintiff was a reasonable inference from the facts proved and was not, as contended, mere conjecture. The evidence of Anderson, the foreman of the company's fire brigade, and that of Johnson and Cummings as to the place where and when the fire was first seen, its size at that time, and the kind and condition of the woods and debris among which it started, the time when the train passed the

(1) 7 Q.L.R. 120. (2) 31 Can. S.C.R. 534.
(3) L.R. 5 C.P. 98.

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spot before Anderson reached it, the absence of any proof whatever that any campers, fishermen or others were on that day seen in the vicinity combine to convince me that there was sufficient proof to enable such a reasonable inference to be drawn and to exclude any other fair inference.

I think, as a pre-emptor, the plaintiff, Kerr, had a right of action against the defendants for damages for the property burned upon his pre-emption. As to the quantum of such damages, we have not the evidence before us to pass judgment upon. — It is not in the record. — We cannot say that the amount allowed was clearly excessive.

The concurring judgment of the trial judge and the Court of Appeal should not be disturbed.

IDINGTON J.—When a plaintiff complaining of the destruction of property by a fire started by a railway-locomotive proves that the fire in question was not apparent to any one there present until after the locomotive charged with being the cause thereof had passed the place of the fire's origin, and immediately, or within half-an-hour thereafter, the fire is discovered to have been but recently started within a hundred feet or so of the railway track so run over, and no other cause thereof is visible, a *primâ facie* case has been established which must be met by something more than idle suggestion or guesses about the effect of the ordinary currents of the wind in collision or conflict with the current created by the speed of the train and that radiating from the smoke-stack; or the possibilities from the pipe ashes of a possible hunter, where no one hunted, or of the cigarettes or matches of a possible fisherman, where there were no fish, or other imaginary causes of the fire.

Nor is such a cause of action so proven to be defeated by the adoption by the railway company of "modern and efficient appliances."

In such latter case and in the absence of being guilty of any negligence the company complained of is absolved from any greater liability than five thousand dollars.

I think the learned trial judge and the Court of Appeal appreciated the evidence and applied the law correctly in this regard.

We are asked now, though no such ground was taken in the appeal below and it is not even mentioned in the appellants' factum, to entertain an appeal in regard to respondent Kerr's damages because he is only a resident pre-emptor.

He sued as such and claimed damages accordingly.

The learned trial judge, as well as the parties, proceeded throughout upon the basis of the party entitled to recover having his damages assessed according to the value of the timber destroyed on his land.

Kerr, being in occupation of his land and in good standing as pre-emptor, clearly was entitled to most substantial damages for the destruction of the timber. Whether the mere speculative chance that he might fail to complete his purchase or not should affect or lessen the claim for full value of the timber never entered the minds of any of those concerned at the trial.

Such a view or possibility should not be entertained now after all that has transpired.

The alleged reversal of this court in the recent case of the *National Trust Co.* v. *Miller*(1), apparently relied upon by the learned trial judge, does not affect the matter of such a claim as, I assume, the plaintiff here sets up by his pleadings.

(1) 46 Can. S.C.R. 45.

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For my part, in that case, I happened to dissent from the majority, yet pointed out the possibility of a claim being so founded even by the owner of a licensed location.

I agree with the learned trial judge, the pre-emptor in good standing and in possession stands on much higher ground, and I think his claim in such case can fall little below that of an absolute owner; at all events, so near to that as to render it necessary to have raised the distinction at the trial.

I may point out he is given, by section 132 of the "Crown Lands Act," an action for trespass as if absolutely seized of the land, indicating how extensive the rights are which he holds in relation to the timber on the land.

In my view, it is not necessary to pursue the inquiry further and determine exactly how far his contract, read in light of this section, might carry the respondent, though this is not an action for trespass.

The appeal should be dismissed with costs.

DUFF J.—I think there is sufficient evidence to support the inference drawn by the learned trial judge as to the origin of the fire.

A point is raised by Mr. Hellmuth as to the damages. Kerr appears to have held his land as a pre-emption under the British Columbia "Land Act." The learned trial judge upon the authority of the judgment of this court in *Schmidt* v. *Miller*(1), held that Kerr was entitled to the value of the timber destroyed; in other words the learned trial judge held that the decision in question involved the proposition that where standing timber is destroyed or taken away

(1) 46 Can. S.C.R. 45.

through or by a wrongful act, the person who is in possession of the land upon which the timber stands is entitled to recover the full value of it from the wrongdoer, notwithstanding the fact that he has only a limited interest in the timber, such, for example, as a non-exclusive right to make use of it for a limited purpose. Assuming that to be the proper interpretation of the decision of this court in that case, the proposition cannot, I think, in view of the decision of the Privy Council reversing the judgment of this court, any longer be maintained. On the other hand, there can be no doubt that, subject to the special provisions of section 298 of the "Railway Act," a plaintiff in the position of Kerr is entitled to recover the actual loss suffered by him through the destruction of timber on his pre-emption; in other words, he is entitled to recover the value of his interest in the timber destroyed.

Section 132 of the British Columbia "Land Act" applies only to actions for "the recovery of possession" and actions of "trespass." Kerr's action was not an action falling within either description unless "trespass" should be construed as including "trespass on the case." Further, it may be doubted whether section 132 deals with the measure of damages; and if so there would still remain the question whether or not the plaintiff's rights under section 298 of the "Railway Act" could properly be measured by the extent of his rights under the "Land Act."

It is unnecessary to pass upon this question of the effect of the provisions of the "Land Act" because, in my opinion, the point is not open to the appellant. The point was not raised in the Court of Appeal for British Columbia and all evidence bearing upon the question of the value of Kerr's interest in the timber

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was excluded from the appeal book; it was mentioned in this court for the first time on the oral argument. As a general rule an appellant is entitled, no doubt, to bring before this court for the first time a point of law not raised at an earlier stage when all material necessary for the full examination of the point is before the court and the respondent has not been prejudiced by the course taken by the appellant. *McKelvey* v. *Le Roi Mining Co.* (1), at page 666. I concur, however, with the view of the majority of the court that, in the circumstances of this case, the contention Mr. Hellmuth now seeks to advance must be taken to have been abandoned.

I think the appeal should be dismissed with costs.

ANGLIN J.—There was ample evidence of facts upon which, without conjecture, but by what was not an unreasonable inference, the jury could properly find that the fire in question in this action was caused by the defendants' locomotive.

Under the authority of *Hamelin* v. *Bannerman* (2) I would be disposed to preclude the appellants from raising the question here as to the quantum of the interest of the respondent Kerr, that question not having been presented by him in the Court of Appeal or in his factum. Apparently, because no issue of this kind was to be presented, the evidence bearing on it was omitted from the record in the Court of Appeal and is not now before us. The question at the trial appears to have been not whether, because of his limited interest as a pre-emptor in the timber which was destroyed, the quantum of the plaintiff's recovery should be restricted, but whether he had any right of action or re-

(1) 32 Can. S.C.R. 664. (2) 31 Can. S.C.R. 534, at p. 537.

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covery at all. Under section 123 of the Revised Statutes of British Columbia, chapter 129, the plaintiff, Kerr, as a pre-emptor, had a right of action against the defendants. It may be that the quantum of the damages to which he was entitled would be substantially less than if he had full ownership of the land which was burned or of the timber upon it; but, without the evidence which has been omitted from the record, we are not in a position to determine the proper quantum, or to say that the amount allowed is clearly excessive.

I would dismiss the appeal with costs.

BRODEUR J.—This is an action by different persons who claim damages from a railway company under section 298 of the "Railway Act."

Under the provisions of that section, if damages are caused to lands by fire started by a railway locomotive, the company shall be liable for such damages, whether there is negligence or not.

The plaintiffs had to prove that the fire had been set by a locomotive of the company defendant. It is a question of fact about which the trial judge and the judges of the Court of Appeal are unanimous. It would not do for us to reach a different conclusion than the one reached unanimously by the courts below. The jurisprudence of this court is to the effect that the finding of a trial judge, confirmed by the Court of Appeal, should not be disturbed.

Now, as to one of the plaintiffs, it is argued that he was not the owner of the property destroyed by the fire, but simply a licensee under the provisions of the "Crown Lands Act" of British Columbia. That question does not seem to have been discussed before

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the Court of Appeal. We have been informed by counsel at bar that all the evidence in relation to that feature of the case was not printed by consent of the parties. The only inference to be drawn from that is that the parties were satisfied with the judgment of the Supreme Court of the province in that regard. It would not be fair to the parties to pass judgment on that issue that seems to have been abandoned.

In those circumstances, the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants: *J. E. McMullin.*

Solicitors for respondents, Kerr and Cummings: *Lawe & Fisher.*

Solicitor for respondent Laidlaw: *A. B. MacDonald.*

Solicitor for respondents, Farquharson and Boisjoli: *H. W. Herchmer.*