GEORGE LANDELS AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

THOMAS R. CHRISTIE AND HERBERT O. CHRISTIE (PLAINTIFFS) ..... } RESPONDENTS.

1922
*Oct. 18
*Nov. 27

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Negligence—Loss by fire—Finding of trial judge—Inference from facts—Concurrent judicial findings—Interference on appeal.

In an action claiming damages for loss of property by negligence the trial judge held that "the facts proved are more consistent with negligence * * * than with a mere accident." His judgment for the plaintiffs was affirmed by the full court.

Held, that the circumstances disclosed on the trial were such that the courts below were justified in drawing the inference they did and this second appellate court should not disturb the conclusion they reached.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of the plaintiff.

The facts of the case and the question for decision on the appeal are sufficiently indicated by the head-note.

Jenks K.C. and *McKenzie K.C.* for the appellants. The cause of the fire can only be conjectured and is not proved by direct evidence. See *Montreal Rolling Mills* v. *Corcoran* (1); *Canada Paint Co.* v. *Trainor* (2).

It is not a case of *res ipsa loquitur*. *Grand Trunk Ry. Co.* v. *Griffith* (3); *McArthur* v. *Dominion Cartridge Co.* (4).

Milner K.C. for the respondents. Under the facts proved the inference as to the cause of the fire and the consequent negligence of the defendants is almost irresistible. See *Swansea Vale* v. *Rice* (5) per Lord Loreburn; *Richard Evans & Co.* v. *Astley* (6) at page 678.

(1) 26 Can. S.C.R. 595.
(2) 28 Can. S.C.R. 352.
(3) 45 Can. S.C.R. 380.
(4) [1905] A.C. 72.
(5) [1912] A.C. 238.
(6) [1911] A.C. 674.

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

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The Chief Justice.

THE CHIEF JUSTICE.—After hearing the argument at bar I felt very doubtful whether the plaintiffs respondents had established their case.

A careful reading of the evidence did not remove my doubts.

The trial judge dismissed the action as against Landels, one of the original defendants, and from that dismissal there was no appeal. As against the other two defendants the trial judge found

> that the facts proved were more consistent with negligence on their part than with a mere accident,

and that

> there was sufficient evidence of negligence to enable the plaintiffs to recover.

I confess that if I had been trying the action in the first instance, I would have found great difficulty in reaching such a conclusion, but the case was appealed to the Supreme Court of Nova Scotia sitting *en banc* and four of the five judges who heard the appeal dismissed it, and so confirmed the judgment of the trial judge on the ground, as I understand their judgments, that the trial judge's decision

> that the available facts were such that an inference of negligence was more reasonable than that there was no negligence

was correct.

I do not feel, however, so clearly convinced that this inference drawn by the two courts was such an improper one as to justify me in reversing it and allowing the appeal.

IDINGTON J.—I think this appeal should be dismissed with costs.

DUFF J.—I cannot agree that the learned trial judge had not before him facts capable of supporting a finding against the appellants. There was evidence which, if believed, supplied a possible explanation of the origin of the fire in the probability of there being hot ashes in the boiler room. The dismissal of the action as against Landels presents a difficulty but the trial judge seems to have

treated the action against Landels as based upon the assumption that he was a party to the contract of hiring and consequently as failing when that assumption fell.

Other explanations were suggested but there was nothing in the facts pointing to any of them as an agency actually or probably operative and my conclusion is that there is sufficient preponderance of probability in the circumstances proved in favour of the trial judge's conclusion to cast the burden of explanation upon the appellants—a burden of which the trial judge held they have not acquitted themselves.

The appeal should be dismissed with costs.

ANGLIN J.—With some doubt I concur in the dismissal of this appeal. I am not satisfied that the learned trial judge and the majority of the learned judges on appeal were clearly wrong in holding that, upon such facts as the evidence discloses, it is a more reasonable inference that the fire, which destroyed the plaintiff's mill, was attributable to some negligence of the defendant's than that it was due to some cause for which blame cannot be imputed. If the matter were *res integra* the contrary view taken by the learned Chief Justice of Nova Scotia would not improbably commend itself to my judgment.

BRODEUR J.—The appellants as lessees of the mill belonging to the respondents Christie were bound to exercise care and see that no risk would, in the ordinary course of events, ensue. The fire which destroyed this mill is due to circumstances which render the cause of it unknown. But the evidence in the record is such that a reasonable inference leads us to the conclusion that the fire is due to the negligence of the lessees.

It is the conclusion reached by the trial judge and by the majority of the court *en banc.*

The lessees had left live ashes on the floor which could easily be carried by the wind to the place where the fire was first seen. No person was left there to look after the building. I would not go so far as to say that the doctrine of *res ipsa loquitur* should apply, because all the surrounding circumstances are not entirely within the

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defendants' control and the fire might be the result of a simple accident or the work of an incendiary. But the facts available are such that negligence on the part of the defendants is the more reasonable inference (Halsbury, Laws of England, vol. 21, p. 752).

This appeal then should be dismissed with costs.

MIGNAULT J.—This case comes here after two courts have found the appellants, Fauquier and Porter, liable for the destruction by fire of respondents' mill at River Hébert, N.S. In the appellate court the learned Chief Justice dissented, but the other judges, not however without expressing some doubt, confirmed the judgment of the trial judge who sat without a jury.

The respondents claimed from George Landels and from Gilbert E. Fauquier and Johnson P. Porter, carrying on business under the firm name of Fauquier and Porter, $158 for the use of a saw mill in sawing 316,000 feet of lumber, and damages for the destruction by fire of another saw mill belonging to the respondents, alleging further that the appellants had agreed to rebuild the mill. Landels, acting on behalf of Fauquier and Porter, had entered into an agreement with the respondents for the use of their mill to saw lumber belonging to Fauquier and Porter for the price of 50 cents per thousand feet. This mill was destroyed by fire on November 27th, 1917, while in the occupation of the appellants. The latter paid for the lumber which they had sawn up to the time of the fire, and the following spring erected a new but smaller mill on the same location where they cut some 316,000 feet of lumber. Regarding the new mill as belonging to the respondents by annexation to the freehold, the learned trial judge condemned Fauquier and Porter to pay $158 for this sawing, and $2,757 as damages for the destruction of the mill, in all $2,915. The action was dismissed as to Landels because he had acted as agent for Fauquier and Porter, the learned trial judge apparently not considering whether or not he was personally liable for the destruction of the mill. The respondents did not appeal from the dismissal of the action with respect to Landels.

I see no reason for disturbing the judgment as to the item of $158 for use of the new mill which must be considered as belonging to the respondents.

The difficulty is as to the damages granted for the destruction of the old mill. The respondents alleged in their statement of claim that the appellants so negligently conducted themselves, or their agent and servant Landels so negligently conducted himself, as to cause a fire in the mill by reason of which it was totally destroyed. As I have said, the action was dismissed as to Landels and no appeal was taken from that part of the judgment. The appellants contend that if Landels is not liable for negligence his principals cannot be so held. I would not however deal with the case on so narrow a ground, for the liability of Landels was not considered by the learned trial judge, and the other defendants could have been sued without there being any necessity to make their agent a party to the proceedings.

As to the other defendants, I think the onus was clearly on the plaintiffs to prove negligence. Apparently the plaintiffs considered that it would be sufficient to establish the mere fact of the fire, for that is all they did. The learned trial judge however refused to dismiss the action at the close of the plaintiffs' case, probably because some proof had been made of a promise by the defendants to rebuild the mill. The defendants then called witnesses to testify to the circumstances of the fire and it is on that evidence alone that their liability must now be determined.

The conclusions of the learned trial judge on the issue of negligence may be given in his own words:

> Mr. Milner contends that the defendants are liable for the loss of the mill; that this is one of the cases where the occurrence is itself evidence of negligence; and moreover, that the defendants were negligent in not having proper appliances to put out fires, and in not having a watchman on duty during the night. Mr. McKenzie for the defendants claims that the maxim *res ipsa loquitur* does not apply and that there is no evidence of negligence on the part of defendants. Taking all the circumstances into consideration, I think the facts proved are more consistent with negligence on the part of the defendants than with a mere accident. I think that there is sufficient evidence of negligence to enable the plaintiffs to recover.

This passage of the learned trial judge's reasons for judgment was much discussed at bar, but I think a fair

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construction is that in the opinion of the learned judge, taking all the circumstances into consideration, the negligence of the defendants was more consistent with the proved facts than that the fire was caused by a mere accident. It is true that there is no finding as to the specific act of negligence which caused the fire, but that is no reason why the whole evidence should not be carefully examined to see whether the learned trial judge could find it more consistent with the liability of the defendants than with the theory that the fire was an accidental one.

None of the learned judges in the appellate court thought that the mere fact of the fire was *prima facie* evidence of negligence and I quite agree with them. This disposes of the so called rule *res ipsa loquitur* as applicable to a case like the one under consideration. And had the learned trial judge, at the close of the plaintiff's case, decided the issue of negligence in favour of the defendants, I would have thought that his judgment could not have been assailed. Of course the evidence adduced by the defendants must be considered on this appeal.

We have now before us all the circumstances of the fire and both courts have inferred negligence therefrom. The defendants had been in possession of the mill for about a week, Landels having been placed in control of their sawing operations. The boiler with its furnace was in a shed alongside the main building and the engine room was in the centre of the mill. There were no lamps and the men worked as long as daylight permitted. On the evening in question the men left the mill between five and half-past five. Avard Christie, the fireman, went away with the others but returned about six o'clock, or a little later, and filled the boiler with water. Landels went to the mill at about a quarter to nine. He says he went into the boiler (probably the boiler room) as far as the injector and had a look around. He found that the boiler was warm and that everything was quiet. He then left to go to the cook house but being called by Mr. Christie, one of the plaintiffs, he went into his house, and had been there but a few minutes when Mr. Christie looked out the window and said the mill was on fire. They ran out and first saw the fire at the back of the boiler on the side of

the mill proper. Nothing could then be done to save the building and in about fifteen minutes, Landel says, it was all over.

The impression which the evidence leaves on my mind is that the fire was caused by the hot ashes which the practice, McClary, the engineer, testifies, was to leave in front of the furnace, right in the building, after throwing water on them to extinguish the flames. These ashes were not carried outside as it would have been prudent to do. The night of the fire was quite windy and the mill was all open, McClary says, so the wind no doubt could reach the pile of ashes and scatter embers about. The fire was first seen at the back of the boiler, and the fact that no other cause of fire is suggested renders it probable that the fire was ignited by the hot ashes. The furnace had been cleaned out some time that day, the usual practice as to the ashes no doubt having been followed.

Under these circumstances, the inference appears reasonable that the fire was caused by these hot ashes. It was negligence to leave them at night where they were and where the wind could scatter them about. My conclusion therefore is that the courts below could infer that the fire was caused by the negligence of the defendants. The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *John S. Smiley.*

Solicitor for the respondents: *H. A. Purdy.*