THE NORTH SHORE RAILWAY COMPANY, (DEFENDANT)..... } APPELLANT ;

AND

JOHN McWILLIE *et al.*,(PLAINTIFFS)...RESPONDENTS.

1890

*Mar. 4.

*June 13.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH (APPEAL SIDE) FOR LOWER CANADA.

Railway — Damages caused by sparks from locomotive — Responsibility of company—R.S.C. c. 109 *sec.* 27—51 *Vic. ch.* 29 *s.* 287—*Limitation of actions for damages.*

Running a train too heavily laden on an up-grade, when there was a strong wind, caused an unusual quantity of sparks to escape from the locomotive, whereby the respondents' barn, situated in close proximity to the railway track, was set on fire and destroyed.

Held, affirming the judgments of the courts below, that there was sufficient evidence of negligence to make the railway company liable for the damage caused by the fire.

Per Gwynne J.—That the "damage" referred to in sec. 27, of chap. 109, R.S.C, and sec. 287 of 51 Vic., ch. 29, is "damage" done by the railway itself, and not by reason of the default or neglect of the company running the railway, or of a company having running powers over it, and therefore the prescription of six months referred to in said sections is not available in an action like the present.

APPEAL from the judgment of the Court of Queen's Bench (Appeal side) confirming a judgment of the Superior Court, District of Montreal.

The action in the court of first instance was to recover the value of houses, barns and other buildings, on a farm in the parish of St. Laurent, and their contents, destroyed by fire caused by an engine of the company appellant.

To this action the company pleaded:

1. Prescription of six months enacted by c. 109. sec. 27 R.S.C.

*PRESENT:—Sir W. J. Ritchie C.J., and Fournier, Taschereau, Gwynne and Patterson JJ.

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2. Besides the general issue a special denial that the fire had been set by their engine, and that even if said fire was caused by sparks from the engine the defendants were guilty of no negligence but, on the contrary, had used every precaution and diligence possible in the running of said engine.

From the evidence it appeared that the train was composed of fifteen loaded cars and that when the train was passing respondents' buildings, situated within fifty feet from the line of rails, there was an unusual quantity of sparks emitted by the engine, because there was too heavy a load for the engine to draw on such an up-grade and that the sparks set fire to respondents' buildings. It also appeared by the evidence that at this particular part of the railroad, the railroad is narrowed in order to save the expense of expropriating and paying for the building, through parts of which the railway boundary line would have passed had it been at its full width.

Brosseau for appellant and *Robinson* Q.C., and *Geoffrion* Q.C. for respondents.

On the argument counsel for the appellant did not insist on the plea of prescription, but argued at some length that the appellant company were not liable having used every precaution and diligence possible in the running of the engine.

SIR W. J RITCHIE C.J.—The question raised in this case was a pure question of fact and there was, in my opinion, ample evidence to justify the respective courts in coming to the conclusion at which they have arrived. I do not see how they could have come to any other conclusion. Therefore I think this appeal should be dismissed.

FOURNIER J.—I am of opinion that the appeal

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should be dismissed. It is very evident from the evidence that the fire was set by sparks, which were emitted from the appellant company's locomotive, several witnesses, who were present saw the sparks and state that the fire broke out immediately. On this question of fact there can be no doubt that the judgments appealed from should be confirmed.

There was another question raised by the pleadings, viz.: prescription, but on the present appeal the counsel for appellant did not rely upon that. I will only add that I concur fully in the judgment of Mr. Justice Cimon on this point, whose judgment was concurred in by the Court of Queen's Bench.

TASCHEREAU J.—I am also of opinion that the appeal should be dismissed for the reasons given by the judges of the Court of Appeal.

GWYNNE J.—In the argument before us this case resolved itself into a mere question of fact, namely, whether certain premises of the plaintiff, at St. Laurent, which were burned down on the 24th August, 1883, were set fire to by an engine of the defendants, running upon that part of the Canadian Pacific Railway which lies between St. Martin's and Montreal, the learned judge who tried the case found the fact in the affirmative in favour of the plaintiff and certainly the evidence was abundantly sufficient to support that judgment. There was a plea of prescription upon the record as to which, although the point raised by it was not pressed before us, it may perhaps be as well to say that, in my opinion, neither sec. 27 of ch. 109 of the Revised Statutes of Canada, nor sec. 287 of 51 Vic. ch. 29, have any reference to an action like the present, which is for damage, not occasioned by reason of the railway, but by reason of sparks being suffered

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to escape from an engine running upon it, by the default and neglect of the company whose engine causes the damage which, as in the present case, may not be the company owning the railway. The provision in those sections that the defendants charged with having *caused damage by reason of the railway* may prove that what was done in pursuance of and by the authority of the act, or of the special act, shows that what is meant is damage done by the railway itself and not by reason of the default or neglect of the company owning the railway, or of a company having running powers over it, by reason of insufficiency in the construction of the engines used, or of negligence in the manner of running them upon the railway. This latter damage is no more damage "sustained by reason of the railway" than damage to goods being carried upon the railway by reason of negligence in the manner of running a train is. I concur that the appeal must be dismissed with costs.

PATTERSON J.—The only question argued was one of fact, and it is only on that question that I give any opinion.

I agree that the appeal must be dismissed. Indeed, I noted my opinion at the argument that it might properly have been dismissed on Mr. Brosseau's statement of the evidence.

Appeal dismissed with costs.

Solicitors for appellant: *Lacoste, Bisaillon, Brosseau & Lajoie.*

Solicitors for respondents: *Lunn & Cramp.*