THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANT)..... APPELLANT;

AND

ALEXANDER RAINVILLE AND ELIZABETH RAINVILLE (PLAINTIFFS)..... RESPONDENTS.

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*Oct. 31.

*Nov. 21.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Findings of jury—Evidence—Concurrent findings of courts appealed from.

In an action against a railway company for damages in consequence of plaintiffs' property being destroyed by fire alleged to be caused by sparks from an engine of the company the jury found, though there was no direct evidence of how the fire occurred, that the company negligently permitted an accumulation of grass or rubbish on their road opposite plaintiffs' property which, in case of emission of sparks or cinders would be dangerous; that the fire originated from or by reason of a spark or cinder from an engine; and that the fire was communicated by the spark or cinder falling on the company's premises and spreading to plaintiffs' property. A verdict against the company was sustained by the Court of Appeal.

Held, affirming the judgment of the latter court (25 Ont. App. R. 242.) and following *Sénécac* v. *Central Vermont Railway Co.* (26 Can. S. C. R. 641); *George Matthews Co.* v. *Bouchard* (28 Can. S. C. R. 580); that the jury having found that the accumulation of rubbish along the railway property caused the damages, of which there was some evidence, and the finding having been affirmed by the trial court and Court of Appeal, it should not be disturbed by a second appellate court.

APPEAL from the decision of the Court of Appeal for Ontario (1) affirming the judgment of Mr. Justice Ferguson at the trial in favour of the plaintiffs.

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 25 Ont. App. R. 242.

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The facts of the case may be stated as follows: The plaintiffs reside at the Village of Stony Point, in the township of Tilbury North, in the County of Essex, and adjoining the right of way of the defendants. On the 25th day of October, 1895, shortly after the passage of a locomotive along the defendants' line of railway, certain barns the property of the plaintiffs were observed to be on fire. The fire very rapidly spread and ultimately destroyed these buildings together with other property of the plaintiffs. The barns were situated about eight to ten feet from the fence bounding the company's right of way. Dry grass, the natural growth of that season, was on the company's right of way, and also on the plaintiffs' land between the said fence and barns.

The following were the questions submitted to the jury and their answers thereto:

"1. Was there any negligence on the part of the defendants in the construction or management of the engine? A.—No, except that the master mechanic admits that any engine will emit sparks and cinders."

"2. Did the defendants negligently permit an accumulation of grass or rubbish or both on their road opposite the plaintiffs' place which in the case of the emission of sparks or cinders would be dangerous? A.—Yes."

"3. Did the fire in question originate from or by reason of a spark or cinder from the engine? A.—Yes."

"4. If so, was the spark or cinder communicated directly by means of a high wind from the engine to the barn, or stack of the plaintiffs, or was the communication by way of a spark or cinder falling upon the defendants' land and the fire then running by reason of dry material from the place where the spark or cinder fell to the fence and then to the plaintiffs' property? A.—By falling on the company's premises, then to the plaintiffs' property."

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"In any case assess the value of the buildings and the value of the chattel property separately? A.— Award to plaintiff on buildings $725. Award on chattels $440 with costs."

A verdict for the above amounts was entered for the plaintiffs and was sustained on appeal to the Court of Appeal. The defendant company then appealed to this court.

Osler Q.C. for the appellant, argued that the evidence was not sufficient to warrant the verdict and relied on *Sénésac* v. *Central Vermont Railway Co.* (1).

Cowan for the respondents, referred to *Smith* v. *London and South Western Railway Co.* (2); *Canada Atlantic Railway Co.* v. *Moxley* (3).

The judgment of the court was delivered by:

GIROUARD J.—The respondents reside at the village of Stony Point, in the County of Essex, and at a distance from the railway of the appellants of only a few feet. On the 25th October, 1895, shortly after the passage of a fast express, the premises of the respondents were observed to be on fire, and were soon entirely destroyed. The present action was instituted to recover the amount of the loss, namely, $1,500.

The principles of law governing cases of this kind are well known. A railway company, like an individual, is liable for the consequences of its negligence only when that negligence is the cause of the damage, or at least has materially contributed to it. That is the general rule. It is submitted on the part of the appellants that where they use the most perfect locomotives, and are not otherwise guilty of negligence, which was certainly the cause of the accident, they are not liable, a proposition which is supported by

(1) 26 Can. S. C. R. 641. (2) L. R. 5 C. P. 98.
(3) 15 Can. S. C. R. 145.

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considerable authority and seems to have received the sanction of this court in *The New Brunswick Railway Co.* v. *Robinson* (1). This particular point, however, does not present itself in the present instance, as the jury have found negligence on the part of the appellants which was the cause of the damage. The questions submitted to them and their answers are as follows:

1. Was there any negligence on the part of the defendants in the construction or management of the engine? A.—No, except that the master mechanic admits that any engine will emit sparks and cinders.

2. Did the defendants negligently permit an accumulation of grass or rubbish or both on their road opposite the plaintiffs' place which in the case of the emission of sparks or cinders would be dangerous? A.—Yes.

3. Did the fire in question originate from or by reason of a spark or cinder from the engine? A.—Yes.

4. If so, was the spark or cinder communicated directly by means of a high wind from the engine to the barn or stack of the plaintiffs', or was the communication by way of a spark or cinder falling upon the defendants' land and the fire then running by reason of dry material from the place where the spark or cinder fell to the fence and then to the plaintiffs' property? A.—By falling on the company's premises, then to the plaintiffs' property.

It must be conceded that the evidence in support of the last finding is weak, and it is not therefore surprising that the trial judge (Ferguson J.) charged the jury in favour of the defendants, but being of the opinion that there were relevant circumstances given in evidence to go to them, he refused a non-suit; and in appeal his judgment was unanimously maintained (Burton C.J. and Osler, Maclennan and Moss JJ.A.)

The appellants have relied upon the recent decision of this court in *Sénésac* v. *Central Vermont Railway Co.* (2) as supporting their contentions. If it has any application, it is against them. There the origin of the fire was a mystery; so two courts had found, and

(1) 11 Can. S. C. R. 688. (2) 26 Can. S. C. R. 641.

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we declared that in a case of that kind where mere questions of fact were involved, the jurisprudence of the Privy Council and of this court was not to disturb the unanimous findings of two courts; and in other cases we decided that it was especially so when they were returned by a jury, unless clearly wrong or erroneous.

In the present instance, we agree with the courts below that there is some evidence of negligence which in the opinion of the jury, affirmed by the two courts below, was the cause of the damage, namely, the accumulation of the dry rubbish along the railway property; and following *Sénésac* v. *The Central Vermont* (1), *The Geo. Matthews Co.* v. *Bouchard* (2) and other cases, we are of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *John Bell.*

Solicitor for the respondents: *M. K. Cowan.*

(1) 26 Can. S. C. R. 641. (2) 28 Can. S. C. R. 580.