ADDIE L. HIGGINS AND CHAN SING (PLAINTIFFS) ..... } APPELLANTS;

AND

COMOX LOGGING AND RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT.

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*Feb. 4.
*Mar. 8.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA

*Negligence—Fire—Logging operations—Steel cable snapping and striking another, the friction causing sparks, starting fire—Damage to property—Method of operation—Dry season—Pure accident.*

Defendant was carrying on logging operations, using the "Lidgerwood system" for lifting the logs and carrying them through the air to its railway siding. A steel cable snapped, and a broken end coiled

(1) (1868) L.R. 3 H.L. 330. (2) (1880) 5 Q.B.D. 602.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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around a steel guy line, the friction causing sparks which ignited the bark of a tree, starting a fire. Defendant had all the appliances required by law for fighting fires, and its men did all they could to extinguish the flames, but the fire spread and damaged plaintiffs' property. Plaintiffs claimed damages.

*Held,* plaintiffs could not recover; as to the complaint that defendant should have used a "tree jack" in its system of operations, it could not be said, on the evidence, that defendant's method of operation was defective; and, although the season was drier than usual, it could not be said that operating at all at the time was *per se* negligence; the fire was a pure accident (*Municipality of Port Coquitlam* v. *Wilson,* [1923] S.C.R. 235, referred to).

Judgment of the Court of Appeal of British Columbia (37 B.C. Rep. 525) affirmed.

APPEAL by the plaintiffs from the judgment of the Court of Appeal of British Columbia (1) reversing the judgment of Morrison J. who held the plaintiffs entitled to recover against the defendants for damages to their property through a fire which started from sparks caused by the friction of a broken end of a steel cable striking another steel cable, in the course of defendant's logging operations. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

*E. Lafleur K.C.* and *F. Higgins K.C.* for the appellant.

*R. S. Robertson K.C.* for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—This appeal raises the question whether the respondent is liable for the damage caused by a fire which started in the place where it was carrying on its logging operations and spread to the property of the appellant Higgins, which was leased to the appellant Chan Sing. The learned trial judge found the respondent liable, and appointed a referee to assess the damages. This referee made his report, in accordance with which judgment issued awarding $1,132.50 to the appellant Higgins and $394 to the appellant Chan Sing. From this judgment an appeal was taken by the respondent. The appellants also cross-appealed against the assessment of their damages, alleging

(1) 37 B.C. Rep. 525; [1926] 3 W.W.R. 417.

that the referee, before making his report, had improperly visited the property in the absence of the parties and of their counsel. The main appeal was allowed by the Court of Appeal, Macdonald C.J.A., and McPhillips J.A. dissenting. The dissenting judges would also have maintained the cross-appeal of the appellants. The latter now appeal to this court, asking that the decision of the appellate court be set aside and that their cross-appeal be allowed. In the view I take of the question at issue, it will not be necessary to deal with the cross-appeal.

The material facts of the case may be briefly stated.

In the summer of 1925, the respondent was carrying on logging operations in the Comox District, Vancouver Island, using what is known as the Lidgerwood system for lifting the logs and carrying them through the air to its railway siding. In this system, there is what is called the sky line, a steel cable connecting at a height of about 75 feet two trees, one known as the head spar tree, near the siding, and the other, the tail spar tree, which was at a distance of 1,100 feet from the former. Suspended to the air line there was a movable appliance called the bicycle, from which another cable hung, on to which the logs were hooked in order to be carried down the line to the siding and there loaded on the respondent's cars.

The sky line was a new steel cable, one inch and a half in diameter, in use only for about three weeks. It was daily inspected, and usually would not be used more than a few hours on the same trees. Where it reached the tail spar tree it was looped or wrapped around the tree, and held in place by spikes, and it then continued towards the ground a distance of 175 to 200 feet, where it was firmly anchored to a tree stump. The tail spar tree was also protected as far as possible from oscillation by two steel guy lines on either side of the descending portion of the sky line.

The summer of 1925 was drier than usual. On August 8, the day the fire started, the degree of humidity was 47, but we are without information as to the temperature. About half-past nine in the forenoon, what I have called the descending portion of the sky line suddenly snapped about 20 feet from the tail spar tree, and one of the broken ends of the steel cable coiled around one of the guy lines,

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the friction causing sparks which ignited the bark of a tree, and pieces of the burning bark fell from the tree and set fire to some cedar brush. The respondent had all the appliances required by the forestry laws of the province for fighting fires, but although its men immediately set to work to extinguish the flames and did all they could, the fire spread and eventually reached the appellant's property some miles distant and caused the damage for which this action was brought.

The sole point with which we are concerned is whether the respondent is liable towards the appellants for the damages which they claim. The legal principles governing liability in such a case were fully explained in the decision of this court in *The Municipality of Port Coquitlam* v. *Wilson* (1), where all the relevant authorities were referred to. If, applying these principles to the case under consideration, it can be said that the fire in question "accidentally began," no liability was incurred by the respondent.

It was contended by the appellants at the trial that the respondent should have used what is called a tree jack on the tail spar tree through which the sky line would have passed. The evidence however was contradictory as to the usefulness of such an appliance, the respondent's experts stating that, unless it were possible to find a tail stump or anchor directly in line with the spar trees, the cable would scrape against the shell of the jack and would be cut. In their opinion, looping or wrapping the air line cable around the tail spar tree is the only practicable method of operation. The respondent had tree jacks but after trying them had discontinued their use.

The learned trial judge purposely did not deal with the respective merits of these two methods, being in doubt whether he was in position to say that one was better than the other. On the other hand, the dissenting judges in the Court of Appeal considered that the method of wrapping the steel air line around the tail spar tree instead of using a tree jack was a defective method, and that the defect was calculated to break the cable and start the fire.

After having carefully read all the testimony, I am, with great respect, unable on the evidence to say that the re-

(1) [1923] S.C.R. 235.

spondent's method of operation was defective. The reason given by practical loggers for discarding the tree jack—the difficulty of finding a tail stump or anchor directly in line with the spar trees—seems plausible. There is no evidence that at the place here in question there was available a convenient tail stump or anchor in line with the spar trees, and I am not in position to find, against the opinion of the majority of the learned judges of the Court of Appeal, and in the absence of a finding by the learned trial judge, that the respondent was negligent in not using the tree jack in this instance.

I have therefore only to consider whether the respondent was guilty of negligence importing liability for the sole reason that it carried on its operations in a season drier than usual, when, if by such an accident as occurred a fire was ignited, it might spread and cause damage. In the opinion of the learned trial judge, there was a breach of the duty of the respondent to take due care in the circumstances "by operating at that time of the year with an appliance of that sort."

So far as the experience of the practical loggers called at the trial went, they had never heard of a fire caused by the snapping of a steel cable and its coming in contact with another cable. It is true that it is a well known fact that sparks are caused by the striking of one piece of steel against another or against a stone. But no one had ever heard of a fire being occasioned by the snapping of the sky line of a logging machine such as that used by the respondent. I may refer to the evidence given by one of the appellants' witnesses, whose testimony impressed the learned trial judge, Allen Brady. He is asked in cross-examination:—

Q. Now did you ever see this kind of accident happen before?
A. I never seen anything like that happen before, not like that.

So far therefore as this unfortunate occurrence might have been anticipated by a practical logger, the testimony is entirely in favour of the respondent.

As Mr. Justice Galliher observes:

Lumbering is one of the chief industries of British Columbia, and the felling and logging of timber is one of the elements of that industry. This operation is necessarily of a more or less dangerous character, and that danger is accentuated at certain seasons of the year by conditions of

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humidity, in various stages, such as partly prevailed at the time in question here.

But the legislature has not seen fit to establish a close season for such operations. The regulations made under the forestry laws of the province require logging concerns to have on hand certain appliances for fighting fires, and these requirements were complied with by the respondent, as Major Cowan, District Forester of Vancouver Island District, testifies. He says that the fire fighting equipment of the respondent was always more than up to the general standard. It is stated that the respondent received warnings from the forestry authorities, but these warnings, which were not filed at the trial, appear to have been merely a request to be careful, and the respondent was careful.

In my opinion, it is impossible to say that operating at all at the time was *per se* negligence. I am therefore impelled to the conclusion that liability was not incurred by the respondent solely by carrying on its operations under the circumstances that prevailed. I think the fire was a pure accident.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

Solicitor for the appellants: *Frank Higgins.*

Solicitors for the respondent: *Farris, Farris, Stulz & Sloan.*