

Eng. Rep.]

CANADA CENTRAL RAILWAY CO. V. PETER McLAREN.

[Privy Coun.]

*Eleventh.* Were the defendants (appellants), in your opinion, guilty of negligence in using such a mesh?

*Answer.* No.

*Twelfth.* Was the plaintiff (respondent) guilty of contributory negligence in piling his lumber so near the track, or by allowing sawdust to remain on it, or by not having sufficient appliances to extinguish fire. If the plaintiff (respondent) was guilty of negligence, could the defendants (appellants), by the use of ordinary care and diligence, have prevented the injury?

*Answer.* Not as to piling lumber, or as to sawdust, but somewhat so as to appliances. We think that defendants (appellants) could have prevented the fire, and that the plaintiff (respondent) is entitled to a verdict.

Questions 6, 7, 8 and 9 related to the management of the smoke-stack and ash-pan, and the possibility of the fire being caused by the ash-pan; and these, for obvious reasons, were not answered by the jury. Questions 13, 14 and 15 related solely to the amount of damages; and the answers to these are not impeached by the appellants.

Upon the foregoing findings Mr. Justice Osler directed judgment to be entered for the respondent for 100,000 dollars, the sum at which damages were assessed by the jury, with costs. The appellants, on the 14th February, 1882, obtained an order *nisi* to set aside that judgment and to enter judgment for themselves, or to allow a new trial, on these grounds:—(1) that the findings in question did not warrant a judgment in favour of the respondent, and that judgment ought to be entered for the appellants; (2) that there was no evidence to go to the jury in support of the main findings, or, at all events, that the evidence was altogether insufficient to support them; and (3) that certain evidence adduced for the respondent had been wrongly admitted, whilst evidence tendered by the appellants had been unduly rejected.

On the 10th March, 1883, the order *nisi* was discharged, with costs, by the unanimous decision of the Common Pleas Division of the High Court of Justice of Ontario, the bench consisting of Chief Justice Wilson, Mr. Justice Galt and Mr. Justice Osler, before whom the case had been tried. The cause was then carried, by the present appellants, to the Court of Appeal for Ontario. The learned Judges composing that Court were equally divided; Chief Justices Spragge and Hagarty being of opinion that the decision of the Court of Common Pleas was right, whilst Justices Burton and Patterson were in favour of allowing the appeal. In these circumstances, the appeal was, on the 6th October, 1883, dismissed with costs.

The present appeal has been taken against the judgments of the Court of Common Pleas and of the Court of Appeal of Ontario, discharging the order *nisi* obtained by the appellants on the 13th February, 1882; and all the points raised by the order *nisi* were fully argued by the appellants' Counsel, with the single exception of the alleged undue rejection, by the presiding Judge, of evidence tendered at the trial on behalf of the appellants.

Their Lordships entertain no doubt that, taking the findings of the jury as they stand, the facts thereby found necessarily lead to judgment in favour of the respondent. Shortly stated, the substance of these findings is: that the destruction of the respondent's piles of lumber was caused by fire escaping from the smoke-stack of a locomotive engine belonging to the appellants; that the escape of the fire was owing to the defective construction of the smoke-stack, its defects consisting in the cone being placed too close to the netting, and in the bonnet rim not being so well fitted to its bed as it ought to have been; and that, by the use of ordinary care and diligence, the appellants could have prevented the fire. Assuming the facts to be as thus found, their Lordships are unable to understand on what ground the appellants can be relieved of responsibility for damages directly occasioned by their using a defectively constructed locomotive—damages which would not have occurred but for their failure to exercise ordinary care and diligence.

Upon this part of the case their Lordships listened to a great deal of argument and minute verbal criticism of the findings of the jury, which had really very little bearing upon the question before them. In impeaching the judgment based upon these findings the appellants cannot travel beyond the reasons assigned by them in the order *nisi*; and the only ground there stated for setting aside the judgment of Mr. Justice Osler, and entering judgment for the appellants, is that "it is not found as a fact that the fire came from the defendants' (appellants') locomotives, but is at most only a matter of conjecture." Their Lordships can understand an argument to the effect that the jury must have based their findings as to the source of the fire on conjecture, but the proposition, as stated, has obviously no foundation in fact. The jury in response to the question, "How did the fire occur?" said, "We think the fire occurred from sparks cast by the locomotive." And in response to the further questions, "Did it (*i.e.*, the fire) come from the smoke-stack or the ash-pan?" affirmed, in express terms, that it came "from the smoke-stack."

The appellants' next contention was that the