

Privy Coun.]

CANADA CENTRAL RAILWAY CO. v. PETER McLAREN.

[Eng. Rep.]

REPORTS.

ENGLAND.

JUDICIAL COMMITTEE OF THE PRIVY
COUNCIL.*Considered.**R. v. Galah**(3 ajia).**U985 J O.**W. N. 616;**34 C. CANADA CENTRAL RAILWAY COMPANY**R. 196; (Appellants), v. PETER McLAREN**116 Can. (Respondent).**C. C. 34.**Negligence—Contributory negligence—Evidence.*

[July 12, 1884.]

This was an appeal from the Court of Appeal of Ontario, reported in 8 App. Rep. 564, and was heard before Lord Watson, Sir Barnes Peacock, Sir Robert P. Collier, Sir Richard Couch and Sir Arthur Hobhouse.

Bethune, Q.C., for appellant.

McCarthy, Q.C., for respondent.

The following is the judgment of the Court:—

The appellants are the proprietors of a railway which passes through the village of Carlton Place, in the Province of Ontario, situated on the north bank of the River Mississippi. The respondent is a timber merchant, and in the course of his business he brings large quantities of wood, in rafts, to Carlton Place, which are there converted into sawn lumber, and, when thoroughly dried, are sent to market along the appellants' railway. For many years prior to the origin of the present litigation, the respondent had, with the leave of the appellants, been in use to pile his sawn lumber on the appellants' land, with a view to its being conveniently loaded or "shipped" in railway cars, for conveyance to market. The piles, which were stacked on both sides of the line, were seventeen or eighteen feet in height, from a foot to a foot and a half apart, and the face of each pile was not more than six feet distant from the nearest rail used for the appellants' ordinary traffic.

On the 27th May, 1879, a fire broke out in one of the piles on the east side of the appellants' main line, and, spreading rapidly, destroyed a great quantity of lumber and plant belonging to the respondent. On the 3rd October, 1879, the respondent instituted an action against the appellants, for recovery of the damages thus sustained by him, upon the allegation that the fire had been caused by the escape of sparks, or burning matter, from one of the appellants' locomotives, in consequence either of its having been negligently and unskillfully managed, or of its having been insufficiently and improperly constructed.

The case was first tried before a special jury in January, 1880, when the jury brought in certain findings in the respondent's favour, which were subsequently set aside by the Court, as being against the weight of evidence.

The second trial took place in January, 1882, before Mr. Justice Osler and a special jury. The respondent's evidence was mainly directed to these points: (1) that the ash-pan of the appellants' locomotive engine No. 5, which admittedly passed the pile in which the fire began shortly before it was observed, was not properly constructed; (2) that the chimney or smoke-stack of the engine was defective in construction; and (3) that, owing to one or other of these defects, a live ember escaped, which ignited the pile in question, and so caused the destruction of the respondent's property. The appellants adduced evidence to meet the case set up by the respondent, and also to prove that the respondent had been guilty of contributory fault, inasmuch as he had suffered sawdust or similar inflammable material to adhere to the piles of lumber, and had failed in other respects to take sufficient precautions against fire.

At the close of the trial the presiding Judge put fifteen questions to the jury. Of these it is only necessary to notice the following, with the answers returned:—

First. How did the fire occur; from sparks or cinders cast out by the locomotive, or from some other cause?

Answer. We think the fire occurred from sparks cast by the locomotive.

Second. If you find that the fire was caused by fire cast out by the locomotive, did it come from the smoke-stack or the ash-pan?

Answer. From the smoke-stack.

Third. If you find that it came from the smoke-stack, was it from any imperfection in the construction of the stack, or from the way in which it was managed by those in charge of the train?

Answer. Imperfection of the stack.

Fourth. If you find that it was from any imperfection in the construction, state what the imperfection was; was the netting too large, the open or unfastened bonnet improper, or was the cone too close to the netting?

Answer. Cone too close to the netting.

Fifth. Was the bonnet rim fitted to the bed?

Answer. We think not so completely as it should have been.

Tenth. Would there be more substantial danger of fire from the bonnet provided with the mesh of the size of that used by the defendants (appellants), than from that used by the Northern Railway, which appears to be the smallest in use?

Answer. Yes.