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IN THE

Supreme Court of Appeals of Virginia

AT WYTHEVILLE

June Term, 1928

LOUISVILLE & NASHVILLE RAILROAD COMPANY
Plaintiff

vs.

J. J. SALTZER
Defendant

CIRCUIT COURT OF WISE COUNTY
VIRGINIA

REPLY BRIEF FOR COUNSEL FOR PLAINTIFF IN ERROR

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MORTON & PARKER,
R. T. IRVINE,
For Plaintiff in Error.

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FIRST: Opposing counsel in their brief make much of the alleged "upper channel change." We do not dispute with them that there was such a change. We have agreed in this record that there was, but we do think that they take this alleged change more seriously than they should and out of all proportion to its proved importance.

The truth is that it does not seem to have been discovered by the defendant in error until after the bringing of this suit. This "upper channel change" was not mentioned in the pleadings anywhere, not even in the declara-

tion. The plaintiff in the lower court, and his counsel, appeared ignorant of its existence. We again call the court's attention to this fact (see Record, pages 16-19). The declaration purports to give a short history of the railroad line in controversy, and states that it passed through a certain tract of land in Wise County, a short distance below the mouth of Callahan Creek, known as the J. J. Kelly, Sr., tract of land. It then describes the two and one-fourth acres of land which the plaintiff owned inside of said Kelly tract, which tract contained 1,470.74 acres of land. There is no mention in the declaration of this so-called "upper channel change." If the plaintiff and his counsel knew there was such a channel change, they ignored it until in the midst of the proof in the case. The record shows that Mr. H. E. Fox, their first witness, who was apparently intended as their chief witness, states (page 22) that in his opinion the damage to Saltzer's land was done by the lower channel change and was not caused by the upper channel change for which the plaintiff contended. Mr. Saltzer himself, in his evidence (page 22), did not claim that the damage to the land was done by the so-called upper channel change. He didn't seem, even at that late date, to know or to think that it had been so done. Mr. B. H. Crizer, a witness for the plaintiff, Saltzer, who had been a building and road contractor in Appalachia since 1908, apparently took the same view as Saltzer took. He did not mention any upper change in his evidence, but states that from the time he came to Appalachia there had been a gradual and continuous washing of the Saltzer property during periods of high water, but does not mention in that connection any "upper change," which seemed to have possessed opposing counsel about the end of the case.

The three witnesses named were the only witnesses used by the plaintiff below, except the witness John W. Guntner. He testified (page 23) that the Saltzer land was a part of the old Kelly tract. The year 1915 the then owners of that tract brought suit against the L. & N. Railroad Company for damages on account of washing their property and recovered one thousand dollars damage thereon. In his opinion, part of this damage would

have occurred in any event, but a part thereof was caused by the lower channel change made by the L. & N. Company. The map which is in evidence in this case, and was likewise in evidence in the trial court, shows that the Saltzer land was taken out of this Kelly tract and from about the center thereof, and in the immediate neighborhood of the land which was washed on or prior to 1915, and about which the said suit at that time was brought. It does not appear that in connection with that suit there was such a thing as an "upper channel change," or that it was brought forward in that connection. He did state that the damage complained of in the present suit was caused by the upper channel change, but he was not an engineer and, so far as appears from the record, he had none of the qualifications which enabled him to give an expert opinion such as he undertook to give. The real experts were Mr. Fox, for the plaintiff, and Mr. George K. McCormick, for the defendant below, who was a highly competent and experienced engineer, who states that he was in the employ of the L. & N. Company at the time the channel changes in Powells River were made, in 1889 or 1890; that he had known the land at this point and the former channels of Powells River before any change therein had been made, and stated that he had made a survey of the land on the south side of Powells River, which had been washed away in this territory up to that time, including Saltzer's land. He states that the "upper channel change" complained of by the plaintiff could not have caused any of the damage to the plaintiff's property; that in his opinion every year since the channel changes had been made parts of the Saltzer land, as well as parts of other land in the Kelly tract, had been washed away, and that such washing and damage had been continuous from the date of his measuring to the time of the bringing of this action (see Record, page 25).

In this connection we again call the court's attention to the point we made in our petition for the writ of error in this case, which states that "From the time of the making of said changes in the bed, channel and course of said river up to and including the day of the institu-

tion of this suit, wholly failed and neglected to so provide and confine the waters of said river, by reason whereof the waters of said stream remained unconfined on the eastern side of said bed and channel, and the waters thereof from henceforth continuously and negligently were allowed and permitted by the said defendant to flow out upon and into a very valuable portion of the tract first above described, and particularly upon and into that portion of said tract, which was conveyed to plaintiff as aforesaid, which caused the said land to fall in and be washed away."

This quotation from plaintiff's declaration is an admission of what the defendant below claimed about this damage, that it was done by reason of a permanent change in the channel of the Powells River, and that it had been going on steadily since the said change had been made, which was in 1891. It had been, therefore, for many years (approximately thirty) subject to limitations, and could not properly be classed as being a temporary change and subject to the law governing such changes, as the judge of the lower court instructed (page 27).

SECOND: The verdict of the jury was legally impossible in this case. We, at first, thought that this case would fall in the class of cases typified by the Southern Railroad Company versus Watts, 134 Va. 503, but fuller consideration for the last-named case leads us to conclude that we were mistaken, and that it falls in a different class, of which there are a number of cases in Virginia, in which the statute of limitations begins to run upon the completion of a permanent structure, and that any suit must be brought within five years from that time. All of the facts in this case go to show this, beginning, as we have shown, with the declaration itself. Mr. Fox states, "The soil was sandy and gravelly and easily washed; parts of the larger boundary of land out of which the Saltzer land had been carved had been washed away and damaged subsequent to the making of the channel changes by the defendant, and that, in his opinion, this damage was done by the lower channel change, if, indeed,

it would not have been done if no change had been made in the river."

Mr. Saltzer states that Powells River never damaged his property but one time, and that was in the high water or flood of January and February, 1918, but that during previous high waters a part of his land was always inundated. He does not deny that some of it at all such times was not washed away. It is needless to admit this, however, when the physical fact is known that a river is running by such property and that the soil of the river is sandy and gravelly and easily washed.

Mr. Saltzer's chief witness, Mr. Guntner, says the same thing about the soil and states that in previous times of high water part of Saltzer's land was inundated. He gives his opinion that no appreciable or material damage had been done thereto, but that the character, quality and quantity of the land had seemed to him to remain about the same during all that period up until the high waters of January and February, 1918. Mr. B. H. Crizer stated that after the time the river change was made there was a gradual and continued washing of the Saltzer property during periods of high water; that he based this statement on the nature of the soil, which he said was sandy and gravelly and easily washed, and that from the time he came to Appalachia, about the year 1908, there had been a gradual and continuous washing of the Saltzer property during periods of high water, and he further stated that even since the flood dirt that he had put back on the property had washed away. These witnesses were all for the plaintiff below. The witness, McCormick, for the defendant, who had known this property from before the time of the channel changes, states (page 25) that, in his opinion, every year since the channel changes had been made part of the Saltzer land had been washed away and parts of other land in the Kelly tract also from which the Saltzer lands were carved; that such wasting and damage had been continuous from the date of his measuring to the time of the bringing of this action, and that much of said damage had been done more than five years prior to the bringing of this suit. In addition to this evidence, as to none of which was there

any contradiction, the natural facts showed the truth of the statements quoted, to wit: that as stated in the plaintiff's declaration, washes began where this channel change had been made and continued regularly until the time this suit was brought. We submit that such facts make the channel change a permanent and not a temporary change. This fact is emphasized by the fact that in or about 1915 the L. & N. Company was sued by the then owners of this property, to wit, the Wise Realty Corporation, for washes to this same land and recovered a thousand dollars therefor. This fact appears in this record, and it alone should have caused the jury to bring in a verdict in favor of the defendant.

On the other hand, it is somewhat difficult to understand clearly what the court did instruct the jury in its oral instruction, as set forth in the Record (page 27). Evidently the jury interpreted this as instructing them that this case was one of a temporary structure or channel. Instruction should have been clear that it was a permanent structure and that the five-year statute of limitations clearly applied.

We are twitted by opposing counsel in their brief that we did not object to the instruction at the time it was given. Perhaps we did not, and should have done so, but we afterwards, in our motion to set aside the jury's verdict, gave the court ample opportunity to correct its mistake, and it should have done so, but did not. We submit, however, that a mistake of this nature, even if made, was fully cured by the statute of Jeofails, Code sections 6331-6334. We submit further that the plaintiff brought his suit on one supposed cause of action, but declared on another and different one. Moreover, he declared on a so-called upper channel change. When the record shows that whatever mischief may have been done to his land was done, not by such a channel change, but by a totally different one, for these reasons also the verdict of the jury should have been set aside.

This court knows and will take judicial notice of the fact that often in the hurry and hustle of a circuit court trial, particularly where the attorneys waive written in-

structions by the court and in a hurry substitute oral instructions, mistakes and omissions occur, which should be cured by appeal or by the statute of Jeofails.

In addition to the foregoing, it is pertinent to remind this court that if suit were brought against the L. & N. Company by the Wise Realty Company prior to the year 1915 for washing and for the washing of his land, and that this was the same land which Saltzer afterward bought, then the suit was, or should have been, for permanent damages and the verdict included those damages for which Saltzer is now sueing, which is not allowed in law.

THIRD: The present suit is concluded by statute of limitations, regardless of whether the court takes the view that this is a permanent change in the channel of Powells River or only a temporary one.

This suit was brought, as shown by the record, on the 29th day of January, 1923. The facts are stated by Mr. John W. Guntner (page 23) of record. He states that the flood or high waters began on January 27, 1918; that the three railroads running into Appalachia, to wit, the Southern, the Interstate, and the Louisville and Nashville, ran no trains on January 27 and none thereafter until February 3, both inclusive. No suit is begun until process therein issues. In this case the process was issued on Monday, January 29, 1923. A memo was made on Saturday, January 27, for process in the usual way, but none was issued until the following Monday, that is, January 29, which was more than five years after the beginning of this flood, which Mr. Saltzer testified started his trouble. While this may be a narrow miss, yet it is a good miss. Under the old saw that "A miss is as good as a mile," all the evidence of this case, including that of Mr. Saltzer, is to this same effect. There is no contradiction about it, and although it may miss the five-year statutory period only two days, yet this is as good in law as two years, and should be the end of this case.

In our view of this case, we do not think it necessary to prolong its discussion, as we are confident that the court will be obliged to reverse the case for the many and serious defects which we have pointed out, and we, therefore, submit it to this court in confidence of the result.

LOUISVILLE & NASHVILLE
RAILROAD COMPANY,
By MORTON & PARKER,
P. T. IRVINE,
Attorneys.