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THE CANADA SOUTHERN RAIL- } APPELLANTS ;
 WAY COMPANY..... }

* Jan. 21.

* June 23.

AND

MARTHA PHELPS.....RESPONDENT.

ON APPEAL FROM THE QUEEN'S BENCH DIVISION OF THE
 HIGH COURT OF JUSTICE FOR ONTARIO.

*Negligence—Damages—Fire communicated from premises of Com-
 pany—14 Geo. 3 ch. 78 sec. 86 not applicable in cases of neglig-
 ence.*

In an action brought by P. against the appellants company for negligence on the part of the company in causing the destruction of P's. house and outbuildings by fire from one of their locomotives, it was proved that the freight shed of the company was first ignited by sparks from one of the company's engines passing the Chippewa station, and the fire extended to P's. premises. The following questions *inter alia*, were submitted to the jury, and the following answers given:—

- Q. Was the fire occasioned by sparks from the locomotive? A. Yes.
- Q. If so, was it caused by any want of care on the part of the company or its servants, which, under the circumstances, ought to have been exercised? A. Yes.
- Q. If so, state in what respect you think greater care ought to have been exercised? A. As it was a special train and on Sundays, when employees were not on duty, there should have been an extra hand on duty.
- Q. Was the smoke stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being the best kind, or because it was out of order? A. Out of order.

And P. obtained a verdict for \$800.

On motion to set aside the verdict, the Queen's Bench Division unanimously sustained the verdict.

On appeal to the Supreme Court, *Held*, affirming the judgment of the court below, Henry J. dissenting,—

- 1. That the questions were proper questions to put to the jury, and that there was sufficient evidence of negligence on the part of the appellants' servants to sustain the finding.

* PRESENT—Sir W. J. Ritchie C.J., and Strong, Fournier, Henry and Gwynne JJ.

2. If a railway company are guilty of default in the discharge of the duty of running their locomotives in a proper and reasonable manner, they are responsible for all damage which is the natural consequence of such default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with and consuming the property of third persons, or is caused to the property of such third persons by a fire communicating thereto from the property of the railway company themselves, which had been ignited by fire escaping from the engine coming directly in contact therewith.
3. The statute 14 Geo. 3 ch. 78 sec. 86, which is an extension of 6 Anne ch. 31 secs. 6 and 7 is in force in the Province of Ontario as part of the law of England introduced by the Constitutional Act 31 Geo. 3 ch. 31, but has no application to protect a party from legal liability as a consequence of negligence.

APPEAL, by consent of parties, under the 27th section of the Supreme and Exchequer Court Act, brought directly to the Supreme Court from a judgment of the Queen's Bench Division of the High Court of Justice for Ontario discharging an order *nisi* asking that a non-suit should be entered or judgment for the defendants, or for a new trial upon grounds set forth in the order *nisi*.

The action was brought by the plaintiff in the Queen's Bench Division of the High Court of Justice for Ontario to recover damages for the loss of her buildings in the village of Chippewa, which were destroyed by fire on the 24th of July, 1881.

The plaintiff's statement of claim alleged that her buildings caught fire from a conflagration which was negligently allowed to spread from the defendant's buildings, namely, a freight house, owing to carelessness and negligence on the part of the defendants, and that these buildings of the defendants had been set fire to owing to the carelessness and negligence of the defendants, from a train passing over the railway of the defendants.

The fire spread and consumed a number of buildings in the village of Chippewa for the loss of which a

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number of actions were brought, in which it was agreed that the liability of the defendants should be determined by the result of this action.

The cause was tried before Mr. Justice Patterson and he put the following questions to the jury, which were answered as appears below :—

Q.—Was the fire occasioned by sparks from the locomotive? A—Yes.

Q.—If so, was it caused by any want of care on the part of the company or its servants, which, under the circumstances, ought to have been exercised? A—Yes.

Q.—If so, state in what respect you think greater care ought to have been exercised? A—As it was a special train and on Sunday, when employees were not on duty, there should have been an extra hand on duty.

Q.—Was the smoke-stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being of the best kind, or because it was out of order? A—Out of order.

Q.—Was there anything in the working of the engine which, under the circumstances, was improper, and what was it? A—In our opinion should not have put on such a heavy pressure of steam, passing the freight house and other buildings, owing to the dry weather at that time.

Q.—Was the state of the freight house such as, under the circumstances, and with reasonable regard to safety from passing trains, ought to have been permitted? A—No.

Verdict for plaintiff, \$800,00.

The order *nisi* asking that a nonsuit should be entered, or judgment for the defendants or for a new trial was on the following grounds :—

1. That there was no evidence given by the plaintiff, of legal evidence of negligence by the defendants upon any of the grounds of negligence relied upon by the plaintiff in support of the alleged liability of the defendants in this action.

2. That any damages shown, were too remote and not caused by any such negligence of the defendants, as they are in law liable for.

3. That by virtue of the Act 14, George III., ch. 78, sec. 86, the defendants are exempted from any liability to this action or

4. For a new trial upon the ground that the finding of the jury on the several questions submitted to them by the learned Judge, is contrary to law and evidence, and for the misdirection of the learned Judge in holding that there was legal evidence to support the same, and also to the weight of evidence at the said trial.

The evidence as to the carelessness and negligence of the defendants while running a special train passing their freight shed at Chippewa station, is reviewed in the judgment of Sir W. J. Ritchie C.J. hereinafter given.

H. Cameron Q.C. and *Kingsmill* for the appellants contended: 1st. That the defendants are exempted from liability by Act 14 Geo. 3 ch. 78 sec. 86, and cited in addition to cases reviewed in the judgments of the court *Richards v. Easto* (1); *Dean v. McCarty* (2); *McCallum v. G. T. R.* (3).

And 2nd. That defendants are not liable for loss caused to a building or property detached and removed at such a distance as the plaintiff's from the defendant's property, on which latter a fire accidentally originated which spread without negligence on the part of the defendants to the plaintiff's property.

(1) 15 M. & W. 251.

(2) 2 U. C. Q. B. 448.

(3) 31 U. C. C. P. 527.

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Ryan v. N. Y. Central Ry. Co. (1) is exactly in point. Also, *Pennsylvania R. R. Co. v. Kerr* (2).

3rd. There was no evidence given by the plaintiff of legal negligence.

Citing *inter alia Daniel v. Metropolitan R. R. Co.* (3); *Williams v. G. W. Ry. Co.* (4); *Hill v. O. S. & H. Ry. Co.* (5).

Belhune Q.C. for respondent, contended:

That the statute 14 Geo. III. ch. 78 sec. 86 did not apply.

That the appellants were liable in three ways:—

1st. That it was negligence to have had the freight shed in the state in which it was, owing to the dryness of the season and the close proximity of the track to the door, and that having negligently kindled fire in the freight house, the appellants were liable for its extension to the respondent's buildings.

2nd. That there was negligence in the construction of the screen of the smoke stack in question, because it was proved very clearly that a great shower of sparks came from the smoke stack and fell upon the platform, and that this could not have happened if the screen had been in proper order. The jury have found the screen was out of order, and the evidence of the witnesses amply sustains their finding.

3rd. That the locomotive was negligently managed in this, that there was great haste on the part of the engineer to get up speed rapidly, and that he worked the engine in such a way as to throw an unusual shower of sparks while passing the freight shed in question, which, owing to the dryness of the season and other matters, was gross negligence, and so the appellants are liable for the improper management by the engineer on the occasion in question.

(1) 35 N. Y. App. R. 210.

3 C. P. 594; s. c. L. R. 5 H. L. 56.

(2) 62 Penn. 353.

(4) L. R. 9 Ex. 161.

(3) L. R. 3 C. P. 222; s. c. L. R.

(5) 13 U. C. Q. B. 503.

The cases relied on by counsel are reviewed in the judgments of the court.

Sir W. J. RITCHIE C.J.—The following questions *inter alia* were put to the jury:—

Was the fire occasioned by sparks from defendant's locomotive? To which the jury answered. Yes. Then if so was it caused by any want of care on the part of the company or its servants, which under the circumstances ought to have been exercised? The jury answer. Yes. And being asked to state in what respect greater care ought to have been exercised, the jury say that as it was a special train on Sunday when employees were not on duty there should have been an extra hand on duty.

Then come crucial questions:—Was the smoke-stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being of the best kind or because it was out of order? To which the jury answer. Out of order.

If there was evidence to support the first and last findings, viz:—That the fire was caused by the defendant's locomotive and that the apparatus of the smoke-stack for arresting sparks was out of order, the case against the defendants would be established.

I think the irresistible inference from the evidence clearly establishes that the fire in the shed was caused by sparks from the defendants' locomotive. There was nothing whatever to shake the evidence of the boys, present on the passing of the train; on the contrary all the surrounding circumstances confirm what they said, and the jury evidently believed their testimony, and no reasonable hypothesis has been suggested that the fire in the shed could have been ignited in any other way.

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If then the testimony of the boys is to be accepted as true, there was evidence from which negligence might be inferred proper to submit to the jury.

There was no motion for a non suit, which indicates that defendants assumed there was such evidence in plaintiff's case, but whatever question there may be as to that, the evidence drawn from the defendants' witnesses supplied any deficiency there may have been in the plaintiff's case.

Mr. Domville—recalled, says :

Q. This is established as the actual screen on the locomotive on the day in question ; will you look at it and say what that screen represents in reference to your knowledge of the screens of locomotives used on the Great Western Road ? A. Well, it is a fair ordinary screen ; I would not consider it a first class one. I would think a screen with several holes in it like that, I would have darned it. I have seen better screens and I have seen a great deal worse. Of course it might have got worn after removing it ; the cross wire.

Q. In regard to the general character of the screen, how would it compare in its mesh and general arrangement with the screens used by the Great Western ? A. It would compare favourably with the screens we have been in the habit of using.

Q. Are there any other screens which would be different from this screen in coal burning locomotives ? A. No. The wood burning screen is smaller. I would not have been afraid to run that screen on a train for a short time longer, even in its present state. I would not have condemned the screen for the state it is in now. Without darning, I mean, I would have run that another week rather than stop an engine, and then I would have taken the first opportunity of repairing it.

Q. Assuming that this screen was removed it was still worth repairing ? A. Yes. There is quite enough substance in it which when repaired would answer it still. This would last at least another month, or perhaps five or six weeks.

Q. In connection with your duties, is there any particular reason why the actual condition of a screen like this should be examined into from time to time ? A. We cannot afford to throw away screens, and we exercise due caution in having them darned from time to time. It is greater economy to repair them from time to time than to let them get in such a state that they are beyond repair. You might get a big hole in one side.

Q. A stitch in time saves nine ? A. Yes, that would be the case with this.

Q. They are expensive? A. Yes, that would cost about four dollars to put on an engine. It makes a considerable difference in the expense of running trains.

Q. And what is the ordinary duration of a screen like this? A. From two and a half to three months; and it depends on the material, whether it is really good or not, and as to whether the manufacturer has given you *bona fide* steel, or put some iron in. What we look for is steel. We pay steel price for it.

Cross-examined: Q. I suppose in very dry weather, when everything is ready to go off like tinder, you would probably be more careful about the meshes of the smoke stacks than in winter? A. We always are, and for that reason our practice to tell the *orman* to be careful in examining them. Especially in dry weather.

Q. I see some holes down there; that would emit a pretty large spark? A. Yes. A spark getting through that might set fire to a building in a very short time. Our cones for coal burning engines are as near as possible like that one on plan 4. Ours might possibly have a little more lip. The more lip you have to a cone the less likelihood there is of a spark being driven against the wire. If the whole force came against the wire, it would soon wear the netting through.

Q. Supposing the cone became displaced so that there was more action on this wire, it would be very much more likely to get through? A. Yes.

Q. Suppose you found a shower of sparks coming in such a manner that a bare-footed boy had to dance about to get away from them, would not that indicate there was an imperfect mesh? A. If the man had been firing with very small coal, and put it on in a hurry, he might get a shower of sparks like that.

Q. That shower would be dangerous if it fell on combustible material? A. No doubt. There would be a chance of a blow up if such sparks fell where there had been coal oil.

Q. Of course a driver in going past a freight house in a village ought to be more careful than in the open country? A. Well, I think a man might use a little caution in passing through stations and places like that.

Q. It would be a very hazardous thing to fire up with small coal in passing by such a place as this in question? A. I do not think a man should do it.

Q. Can you conceive a shower of sparks coming through a perfect mesh from any other cause than by firing in that way—throwing in small coal? A. Oh, a man might do it by throwing his engine over, and putting on steam in a hurry, and so lift the coal; it is quite possible he might do that. Or if an engine starting away with a train should slip a good deal it might throw such sparks.

Q. To do that would be dangerous in the proximity of a station?

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A. Well, that cannot be avoided sometimes in starting. He might do that while he was running, but I do not think any man would go to do that. If he did do that it would be very dangerous.

Q. So that the sparks could come from the defective netting and also from the defective netting and bad management, as well from one as from the other? A. Yes.

Q. Do you think you would undertake to run that covering the way it is now in a dry time? A. Yes, I think I would.

Q. You do not think you would be in great danger of burning the country up? A. There would be more danger than with a perfect netting, of course.

Charles K. Domville, sworn :

Q. What is your profession? A. Locomotive engineer.

Q. In what position are you now? A. I am locomotive superintendent of the Great Western Division of the Grand Trunk Railway, and I have been for the last six and a half years locomotive superintendent of the Great Western Railway.

Q. Have you had experience prior to that, practical experience upon railways? A. Yes, I have had charge of the locomotive department of railways since 1851.

Q. Are you acquainted with the mode of construction of locomotive engines used upon Canadian railways? A. I am.

(PLAN PRODUCED, WHICH WAS AFTERWARDS MARKED AS EXHIBIT 4.)

Q. Perhaps you can give me some of the chief particulars; I have got here what is supposed to be a sort of section of the smoke-stack on the locomotive; what are the chief requisites of a smoke-stack in connection especially with the ordinary and usual means which are used to prevent the emission of sparks through the firing up of locomotives? A. The principal things are as shown upon the drawing, the netting across the top and the cone in the centre. This netting is made of fine wire mesh; it is made of different sizes. There is very little difference in them, some people use larger wire than others, and the opening in some is less than others. That inverted cone is for the purpose of the sparks striking against it and returning them into the smoke-box, and it destroys them to such an extent that when sparks are emitted out, the fire is out of them, and they are very little when they do come out. The first result of the firing up is to drive the chief stream under that cone. That cone is so constructed that it carries the whole body with it at first; the whole of the sparks strike that at once. They strike the covering of the cone; there are an immense number of sparks get stuck in the netting and are returned into the smoke-box. The chief volume of sparks are arrested in their escape by the cone and then thrown back and fall into the smoke-box.

Q. And reach that in a much smaller condition that they were?

A. Yes, very much smaller, the cone breaks the force of the volume which is emitted.

Q. And also breaks the different sparks into smaller portions? A. Yes, it has that effect. And then they are thrown back into the smoke-box, a great many of them rest there.

Q. What proportion rests there and are not carried off with the smoke? A. Sometimes there is a very large proportion there; it all depends upon the working of the engine. Those are cleaned out at the end of the journey below.

Q. Everything which is capable of passing through the screen goes off there in smoke, the small particles? A. Very small particles.

James H. Rushton, foreman of the boiler making at St. Thomas :

Q. What experience have you had in the making of these screens?

A. About 12 years.

Q. Suppose you were perfectly satisfied that a shower of sparks, such as described by these little boys, you would think from that that there must be something wrong with the netting? A. If I saw them myself, I would.

Q. What would you think was wrong with the netting? A. I would think there were some holes in the netting. I should think there was not any netting there at all.

Q. Do you think the managing of the engine could have anything to do with that? A. It might.

Q. Do you think a man could get the fire so shaken up as to send out a shower of sparks like that, either by stirring up his fire or putting on steam? A. Oh, it might throw out a little more.

Q. That would be very dangerous in passing a station where everything was dry? A. Yes.

Q. And you think it would be dangerous to run with a netting that would throw out a shower of sparks as described by these boys? A. I should think so.

Q. You could have a netting to prevent sparks coming out such as described by these boys? A. Yes, if there was any netting at all I do not think sparks such as described by them could come out. If the holes were twice as big as they are now they would not even then get out in such a shower as the boys have described.

Wm. A. Short, master mechanic of the C. Southern railway :

Q. Suppose you found a shower of sparks coming out on the platform, burning boys' feet and going down their backs, and leaving black marks on the platform, would you think that extraordinary, or is that a usual thing? A. I have seen it. Some platforms have small charred marks on them. It might have been from defective netting in some other place.

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Q. If the netting was perfect you would not expect to find these indications on the platform? A. No. I was here when the boys gave their testimony.

Q. If what they said was true, it would indicate that there was something wrong in the netting? A. I did not hardly take so much stock in what the boys said this morning.

Ritchie C.J. Q. Just assume that what the boys said was true; would you not infer from that that there was something faulty in the netting? A. I cannot say; I have answered you correctly every thing you have asked me.

Q. If you were on another railway what would you think if you saw what these boys did? A. When an engine is passing I never saw any red-hot sparks yet.

Q. Assume that you found the same quantity described by these boys as coming out of the pipe and dropping down, would you not infer from that that there was something faulty in the netting? A. I do not know; it is hardly a fair question I think.

Q. Could what the boys said be true if the netting was perfect? A. No sir, it could not be true.

Q. Of course it follows that if the boys' stories were true the netting could not be perfect? A. If the netting was perfect you could not get such a shower as that.

David Wright, locomotive foreman at Victoria :

Q. If you found a shower of sparks as described by these witnesses this morning would you not think there was something wrong with the netting? A. Most decidedly.

Q. Suppose the cone got a little put to one side? A. It would have a tendency to throw cinders on the opposite side. It would give more space on one side for sparks to go through.

Patterson Hall, engineer in charge of the locomotive :

Q. Is it part of your duty to examine the netting? A. Yes. I would not swear to a day or two when I examined it.

Do you remember whether the coal was ever thrown back so as to burn you while you were on the tender? A. I never felt anything of that sort.

Q. That would not be possible? A. Well, I suppose it would be.

Q. Do you think, with a good netting like this, that the fire would ever get through? A. I do not know. I never have been burned that way.

Q. If a shower of sparks came as to burn the boys' feet, what would you think? A. I would think there was fire?

Q. Would you think the netting was all right? A. Yes; well, I do not know.

Q. If fire enough came to burn their feet in that way, would you think the netting was all right? A. No, I would not.

Q. You would think it was all wrong? A. Yes.

The mass of sparks of the character of those described by the witnesses was, as proved by defendant's skilled witnesses, evidence that defendants had not adopted every precaution that science or practical experience would suggest to prevent injury, in other words, the screen was both insufficient, defective or not in proper working order or properly placed on the stack; that had the screen been in proper working order, no such quantity of sparks could have been emitted. The evidence of Short, master mechanic of the Canada Southern Railway, Domville, a locomotive engineer, Rushton, foreman of the boiler works, Wright locomotive foreman and Patterson Hall the engineer in charge on the occasion, all concur in the opinion that if there was such a shower of sparks as described by the boys, the netting could not have been perfect and there must have been something wrong with it.

If the fire in the freight shed was caused by the negligence of the defendants, they would be clearly liable for damages occasioned by the fire extending to plaintiff's building.

The appeal must therefore be dismissed with costs.

STRONG J.—The evidence of negligence was amply sufficient to warrant the judge who presided at the trial in leaving the case to the jury. The large shower of sparks which are proved to have been emitted from the smoke stack of the engine and the evidence as to the condition of the iron netting made the case a proper one for the consideration of the jury. It was argued however that the statute 14 Geo. 3. ch. 78, sec. 86 applied and exonerated the appellants from all liability, inasmuch as the fire was accidental and began on the appellants own property. That enactment is as follows :—

No action, suit or process shall be had, maintained or presented

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against any person in whose house, chamber, stable, barn or other building, or on whose estate, any fire shall accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby, any law, usage or custom to the contrary notwithstanding.

This provision which is an extension of 6 Anne, c. 31, sections 6 and 7, is, I have no doubt, in force in the Province of Ontario as part of the law of England, introduced by the Constitutional Act, 31 G. 3, ch. 31, but I am clear that it has no application whatever to protect a party from legal liability as a consequence of negligence. At common law a person who brings or originates on his land any dangerous element, such as fire or an accumulation of water, or any other thing which if it should escape may damage his neighbour, does so at his peril, negligence being in such cases entirely immaterial. This is shown by the case of *Fletcher v. Rylands* (1), where persons who formed on their own land a large reservoir of water were held liable on this express ground for damage done to their neighbour by the escape of the water, though no negligence was proved; and *Jones v. Festiniog Railway Co.* (2) proceeded upon the same principle, it being held that a company who had power to maintain and run a railway to be worked with horse power, no authority being given by statute to run steam engines, were liable at their peril and irrespective of negligence for damage caused by a locomotive which they had made use of. Subsequently in the case of *Nichols v. Marsland* (3) the same principle was recognised, though an exception to it was also admitted in that case upon the facts there established of the escape of the water having been caused by *vis major*. The rule of the common law there held applicable to water would, but for the statute before referred to, be equally applicable to fire, and every per-

(1) L. R. 3 Q. B. 733.

(2) L. R. 3 H. L. 330.

(3) 2 Ex. D. 1.

son who might light a fire in his house for ordinary domestic purposes would but for that enactment be bound at his peril to keep it safely, and liable to his neighbour for any damage which it might cause him though no negligence could be imputed. It was only to mitigate this rule of law that the statute was passed, and it was not intended thereby to alter the law of liability for negligence. Two cases both of high authority establish this very distinctly; *Filliter v. Phippard*, (1); and *Lord Canterbury v. Attorney General* (2). In the first of these cases the plaintiff on proving negligence was held entitled to recover damages against the defendant on whose land the fire accidentally began, and in the second Lord Lyndhurst rejected the argument that the suppliant in a petition of right was disentitled to recover, because the damage caused to him by a fire beginning on the property of the Crown was shown to have been caused by accident, it being also shown that the fire arose from the negligence of the servants of the crown. In the fifth edition of Addison on Torts the learned editor, Mr. Justice Cave, recognizes these cases as having settled the law as to the effect of the statute, and I have found no authority and heard no argument which leads me to doubt for a moment that this is a sound conclusion.

In some of the United States, the qualification in the case of fire of the principle of liability before stated, which has been introduced by the statute in England seems to have been considered by the courts as applying at common law. The decisions which have adopted this common law relaxation of the general doctrine seem to rest it on the necessity which every one is under to keep and use fire, thus rendering it unreasonable as regards that element to enforce the strict duties which apply to other noxious things; and

(1) 11 Q. B. 347.

(2) 1 Phi. 328.

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this view, by which the case of fire is treated as exceptional at common law, and irrespective of the statute, has also prevailed in the Province of Ontario as is established by the cases of *Dean v. McCarty* (1) and *Gillson v. North Grey Ry. Co.* (2).

It is sufficient, however, here to say, without pursuing the subject further, that neither the statute of George the III, nor the decisions introducing the restriction to the common law rule, in any way relieve persons from liability for their own negligence or from responsibility for the negligence of their servants.

It was further argued that the damage proved by the plaintiff was too remote, inasmuch as the fire was not communicated directly to the plaintiff's house but spread from the defendants' property to the houses of third persons from whence it reached the plaintiff's house. There are certainly American authorities sustaining the appellants' contention on this head, but no English case has been cited which would warrant such a proposition and the American cases are far from uniform. The courts which deny the liability in such a case seem to have been influenced by a regard to the serious consequences and enormous liability which a responsibility in damages under such circumstances might involve rather than on any sound principle of law. It seems to me that the well known case of *Scott v. Shepherd* (3), though the facts are not the same, is in principle directly in point and fully establishes the liability. The subject is discussed in the work of a very able contemporaneous American writer, Mr. Justice Cooley, in his treatise on Torts (4) and although we may not be permitted to cite his work as authority, yet I think a careful consideration of his reasoning will convince any one that the facts in question can have no influence on

(1) 2 U. C. Q. B. 448.

(3) 2 W. Black p. 892; 1 Smith

(2) 35 U. C. Q. B. 475.

L. C. p. 466.

(4) P. 77.

the question of liability and that the American cases which determine the opposite have no foundation in legal principle.

The case was fairly left to the jury, and the appellants have nothing to complain of either on the ground of the verdict being against the weight of evidence or as regards the amount of damages.

The appeal should be dismissed with costs.

FOURNIER J. concurred that the appeal should be dismissed with costs.

HENRY J.—In dealing with the circumstances of this case I may premise that the statute 14 Geo. 3, ch. 78, sec. 78, has, in my opinion, no bearing upon the present case; and I consider it therefore unprofitable and unnecessary to discuss the several, contradictory decisions given, and views expounded, in respect to it in England. I do not consider that it has any application to cases where damage has been done by fire produced by railway engines when passing through the country. The principles of law applicable to such cases have been so well ascertained and settled by the numerous decisions to be found in the reports in England, in the United States and in this country, that it is unnecessary to debate what has been so fully determined, and that in such a way, as to the leading principles, that they can hardly be misunderstood.

The acknowledged principle is that a railway company chartered by the legislature has the right to use its locomotive engines over its lines propelled by steam generated in the usual way; even although the use of the fire by which the motive power is produced is dangerous from its tendency to set fire to objects near to where the engines run; rapid combustion of the fuel is necessary to the production of the necessary motive power and that necessitates a strong draught in

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the smoke-stack or chimney. That strong draught carries with it partly consumed fuel, in a burning state, calculated to set fire to objects upon which it falls. To prevent such results means were found necessary, and have been adopted and applied for preventing, as far as possible, the sparks of burning fuel from being carried by the draft outside of the smokestack; and the principle established as applicable to the owners of railways and their liability in cases of damage by fire is, that if they were the ordinary and well known means for such prevention they are not answerable for any resulting damages. The points, then, necessary to be established in such cases are first, that the damage was caused by fire proceeding from the engine; and secondly, that the company was guilty of negligence either in not using the proper preventive appliances or in some other way in the management or working of the engine by which the damage was caused; and in some cases the question of contributory negligence on the part of the plaintiff.

The jury have found in this case, I will not say improperly, that the fire to the station house of the appellants was caused by sparks from the engine, nor, as it was I think a question of contradictory evidence, can their finding as to the question of negligence arising from the alleged defective state of the hood in the smokestack be set aside; but whether the appellants are answerable under the circumstances in this case is a question in my mind of no small difficulty. The fire did not spread to the house of the respondent, and it must have been ignited by sparks or burning wood having been carried by the wind across a part of the railway station and a street, a distance of over 100 feet. Railway companies have been held answerable for the ordinary consequences of the spread of the fire from their station houses or grounds, but can it be

held that they would be answerable for damages resulting from the course that the wind held at the time the damage was caused? If answerable when the sparks should be carried 100 feet they would be equally answerable if they were carried half a mile, or any other greater or less distance, and set fire to and damaged property. If the principle is sound in its application to the one case, it is equally applicable to another, and where should the line be drawn? Railway companies may fairly be held to be bound to know the state of the immediate surrounding territory, and if a quantity of inflammable and combustible matter is on or contiguous to the line of railway, forming the means for ignition and spreading, they may be held bound to know it, and the natural consequences of a fire set to that matter, and to guard against it by the ordinary precautionary means; but I don't think they can be held answerable for an injury that is not the natural or consequential result. Suppose the case of an engine passing through a city, town or village, and sparks, negligently permitted to escape from the smoke stack, passing over several squares and buildings set fire to and burn a house beyond, would the owners of the engine be answerable for the damages resulting solely from the direction of the wind and other independent causes at the time? and if through and by means of frequent changes of wind, whole squares were burnt by the spreading of the fire from the house first set fire to, would the owners of the engine be answerable to the owners of all the houses situated on those squares? If answerable for the first house burnt, what would limit the liability to that one? A difficulty has arisen and has not yet been satisfactorily resolved as to the limit of responsibility where a fire spreads by the ignition of combustible matter along its track, but if the liability of the owners of the engine in the present case

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is adjudged, the difficulty will be immeasurably increased; and railway companies may be held answerable for the burning of half a city, town or village. In the case of buildings or other insurable property, it is unnecessary so to decide, as insurance is presumed to cover the bulk of such property, and the owners only taxed for the indemnity they obtain. It is, therefore, not so necessary by legal decision to seek other indemnities for them. I don't feel justified or willing to establish a principle having such important consequences and results. In the case of *Ryan v. The New York Central Ry. Co.* (1) the Court of Appeal of that State decided that, although negligence was proved, the company was not liable in a case wherein the fire commenced in burning some wood in one of the company's sheds, which was also destroyed, and from there by the force of a strong wind the fire was carried to, and consumed, the plaintiffs property, which was distant about 130 feet from the shed. The court holding that the plaintiff had no cause of action against the company, on the ground that the damage to the plaintiff was not the necessary or natural consequence, ordinarily to be anticipated from the negligence committed. That the plaintiff's injury was the remote and not proximate result of the fire in the shed, and too remote to give a cause of action.

In a subsequent case, however, *Webb v. The Rome Watertown & Ogdensburg Ry. Co.* (2), the same court, composed partly of other judges, held that where coals were negligently dropped from the company's engine, which set fire to a tie, from which the fire spread to an accumulation of weeds, grass and rubbish lying on the road, and from those spread to a fence, and into plaintiff's woodland, and burnt and destroyed his trees, the plaintiff was entitled to recover.

(1) 35 N. Y. Rep. 210.

(2) 49 N. Y. Rep. 420.

It will be observed that the latter case is plainly distinguishable from the other and from this one. In that case, through the negligence of the company, the means for the spreading of the fire on their own property existed, by which the fire spread to their fence, and thence into the land of the plaintiff. The spreading of the fire from the tie was therefore from a cause for which the company was held answerable. In this case it is not shown, that through the negligence of the appellants, the means for the spreading of the fire from the station-house to that of the respondent existed. In fact the opposite is shown; for there was no combustible matter shown to have existed by which the fire could spread to the barn and house of the respondent—there was an open space of over one hundred feet, formed by an angle of what is marked on the plan in evidence “First Cross Street,” and nothing by which the fire could spread, and, therefore, no negligence could be imputed as to the spreading of the fire. In the case of *Ryan v. The New York Central Railway Company* (1) before referred to, the decision of the court was pronounced in an able judgment pronounced by Hunt J. on the question of proximate and remote damages, and illustrates his views by a supposed case which, with others, he puts. He says:—

So if an engineer upon a steamboat or locomotive, in passing the house of A, so carelessly manage its machinery that the coals and sparks from its fires fall upon and consume the house of A, the railway company or the steamboat proprietors are liable to pay the value of the property thus destroyed. Thus far the law is settled, and the principle is apparent. If, however, the fire communicates from the house of A to that of B, and that is destroyed, is the negligent party liable for his loss? And if it spreads thence to the house of C, and thence to the house of D, and thence consecutively through the other houses, until it reaches and consumes the house of Z, is the party liable to pay the damages sustained by these twenty-four sufferers? The Counsel for the plaintiff does not distinctly claim this, and I think it would not be seriously insisted

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that the sufferers could recover in such a case. Where, then, is the principle upon which A. recovers, and Z fails? Again he says: Without deciding upon the importance of this distinction, I prefer to place my opinion upon the ground that in one case, to wit, the destruction of the building upon which the sparks were thrown, by the negligent act of the party sought to be charged, the result was to have been anticipated the moment the fire was communicated to the building, that its destruction was the ordinary and natural result of its being fired. In the second, third or twenty-fourth case as supposed, the destruction of the building is not a natural and expected result of the first firing. That a building upon which sparks and cinders fall should be destroyed, or seriously injured, must be expected; but that a fire should spread, and other buildings be consumed, is not a necessary or an usual result. That it is possible, and that it is not unfrequent, cannot be denied. The result, however, depends, not upon an necessity of a further communication of the fire, but upon a concurrence of accidental circumstances. Such as the degree of heat, the state of the atmosphere, the condition and materials of the adjoining structures, and the direction of the wind. These are accidental and varying circumstances. The party has no control over them, and is not responsible for their effects.

My opinion, therefore, is, that this action cannot be sustained for the reason, that the damages incurred are not the immediate, but the remote, result of the negligence of the defendants. The immediate result was the destruction of their own wood and sheds; beyond that, it was remote.

In the case of *Pennsylvania Railroad Co. v. Kerr* (1) in the Supreme Court of Pennsylvania the judgment of the court was delivered by Chief Justice Thomson. It was in an action to recover damages for the burning of goods in a tavern, leased by the plaintiff, and which was ignited and consumed, with its contents, by fire communicated from a building set on fire, by sparks from the defendants engine. He says:—

It has always been a matter of difficulty to determine judicially, the precise point at which pecuniary accountability, for the consequences of wrongful or injurious acts, is to cease. No rule has been sufficiently defined and general as to control in all cases. Yet there is a principle applicable to most cases of injury, which amounts to a limitation. It is embodied in the common law maxim, *causa proxima non remota spectatur*—the immediate, and not the remote cause, is to be considered.

He then refers to an illustration of the rule to be found in *Parsons on Contracts* (1) and refers to notes in the same volume at p. 180. He again says:—

It is certain that in almost every considerable disaster, the result of human agency and dereliction of duty, a train of consequences generally ensue and so ramify, as more or less, to affect the whole community. Indemnity cannot reach all these results, although parties suffer who are innocent of blame. This is one of the vicissitudes of organized society. Every one in it takes the risk of these vicissitudes.

Again:—

It is an occurrence undoubtedly frequent, that, by the careless use of matches, houses are set on fire. One adjoining is fired by the first, a third is by the second, and so on, it might be, for the length of a square or more. It is not in our experience that the first owner is liable to answer for all these consequences, and there is a good reason for it. The second and third houses in the case supposed were not burned by the direct action of the match; and who knows how many agencies might have contributed to produce the result.

The question which gives force to the objection that the second or third result of the first cause is remote, is put by *Parsons*, vol. 2, 180, "did the cause alleged produce its effects without another cause intervening, or was it made to operate only through, or by means of, this intervening cause?" There might possibly be cases in which the cause of disaster, although seemingly removed from the original cause, are still incapable of distinct separation from it, and the rule suggested might be inapplicable.

He cites *Lowrie J.* in *Morrison v. Davis & Co.* (2) in support of his views, who, in giving judgment in that case says:—

There are often very small faults, which are the occasion of the most serious and distressing consequences. Thus a momentary act of carelessness set fire to a little straw and that set fire to a house, and by an extraordinary concurrence of very dry weather and high winds, with this little fault, one third of a city (Pittsburgh) was destroyed. Would it be right that this small act of carelessness should be charged with the whole value of the property consumed?

Bigelow, in his list of overruled cases (3) puts down the judgment in *Ryan v. New York Central Railway Company* (4), as "denied" in *Kellogg v. Chicago &*

(1) 3 vol. p. 198.

(2) 8 Harris 171.

(3) P. 437.

(4) 35 N. Y. 210.

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N. R. Co. (3). I have examined the latter case and find that although impliedly perhaps but not expressly the principle of remoteness is denied; and as I read the judgment of the majority of the court—there having been a decision of two to one—it is hardly even impliedly denied. The circumstances in the two cases were somewhat different. In the case of *Kellogg v. the Chicago Co.* the fire was caused by sparks from the engine which fell on dry grass on the defendant's grounds alongside of the track, and by means of combustible matter was carried to and consumed the plaintiff's stacks of hay, sheds and stables. It was therefore one continuous burning and in that respect different from the circumstances in the other case, and Chief Justice Dixon, who gave the majority judgment, appears to have decided it upon the fact that the fire was uninterrupted throughout, and he so treats it. He says:—

If when the cinder escapes through the air, the effect which it produces upon the first combustible substance against which it strikes is proximate, the effect must continue to be proximate as to everything which the fire consumes in its direct course.

The distinction drawn by the dissenting judge (Paine) between the result of a fire spreading, as it did in that case, and that of the effect of burning sparks carried by the wind a distance from the building first ignited to another which is consumed is applicable to this case. He says:—

It seems to me, that where it is negligently kindled, the destruction of whatever is in such a situation as to burn, by the mere force of the conflagration, without other intervening cause is the direct and proximate consequence of the negligence. * * * But, where such a fire is kindled, and by reason of some other intervening cause, it is carried or driven to objects which it would not otherwise have reached, the destruction of such objects would fairly seem to be a remote consequence of the negligence. * * * Thus if a person should negligently set fire to a building in which powder was stored, and the explosion of the powder should throw fragments of the

burning building to other buildings that would not otherwise have been reached and set them on fire; or, if an unusual gale of wind, should carry such fragments to a distance with the same result, the damage for the loss of such other buildings might justly be said to be remote.

When however the year after the judgment in that case was given, an application for a rehearing was made, in the judgment thereon given.

The law, as laid down in the *Ryan* and *Kerr* cases, was denied, and I will not go so far as to say, that the liability must necessarily in all cases be confined to the first object destroyed.

There have been and no doubt, there will be, cases where the destruction of a second building by fire communicated from the first, may be found to be the natural and consequential result—where the two are connected by combustible materials, forming part of the one or the other, so that under almost any circumstances the destruction of one must result in the destruction of the other, there can be little doubt that for the destruction of the second through the burning of the first, the party guilty of the negligent burning of the first should be held answerable for the loss of the second, the burning of which was the direct and natural result of the burning of the first. Such, however, is not the present case. If the wind at the time had been from an opposite or even slightly different quarter, the respondent's house would not have been burnt. The burning of it was, therefore, not alone the usual or natural result. The burning of the respondent's house was not necessarily, and would not have been in ordinary circumstances, the cause of the damage. It may be admitted that if the appellants' building had not been set fire to, the damage to the respondent's would not have been occasioned; but it must be also admitted that, but for the particular direction and force of the wind at the

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time, the damage would not have been done. Is, then, a party who negligently causes the destruction of his own or his neighbor's house answerable for, not an immediate or ordinary result, but one arising from a cause over which he had no control? If a fire thus caused is in the near vicinity of houses in every direction around it, which would be in no danger unless with the presence of a strong wind, is the party answerable for any one or more of them that the wind happens to carry sparks to? His liability in such a case would not arise from the natural effect of the original cause but from a *vis major*, which he would have no part in producing, and would he be answerable for the effect of the wind, at one time carrying the sparks to the house of A, and by a change of direction should subsequently carry other sparks from the first building on fire, in an opposite direction to the house of B? Could it be reasonably said that in both cases the damage was the natural and consequential result, and if not in both how could it be said that it was so in either? And is it not the proper conclusion that both were attributable to the fortuitous direction and operation of the wind?

In *Pennsylvania Railroad Co. v. Hope* (1) Chief Justice Agnew delivered the unanimous judgment of the court. It was a case of negligently leaving combustible materials on the railway ground, which ignited; and from which the fire spread to, and consumed the plaintiff's property. He says the question of the proximity of the result of a fire by which the plaintiff's property is destroyed is solely for the jury aided by proper instruction from the presiding judge. He canvasses the judgment in the case of the *Railroad Company v. Kerr* and sustains the law laid down in it, but distinguishes the two cases. He says:—

(1) 80 Penn. R. 373.

As the case was placed before the mind of Chief Justice Thomson, there is no reason to doubt the correctness of his conclusion.

Again :—

From the very issue of the thing, the natural probability of a consequence, which ought to have been seen, is a matter of fact to be determined upon the evidence. Every case must depend upon its own circumstances.

Referring to *Railway Co. v. Kerr and Kellogg v. Chicago & N. W. Railway Co.* (1), he says :—

That in the former the point was : that the burnings were distinct and separate, a series of events succeeding one another, while in that before him, there was but one burning. One continuous conflagration from the time the fire was set on the railroad, till the plaintiff's property was destroyed.

He, therefore, unreservedly approves of both judgments—the one deciding, that in the case of the distinct and separate burnings, the damages were remote ; but in the case of the one continuous burning they were proximate.

I have referred to all the English cases and decisions that I could find likely to throw light on the difficulty presented in this case, but I could not find any decision upon the application of the rule of law applicable to a case like the present. Cases are reported, where the damages were occasioned by the setting fire to combustible materials found to have been negligently left on the railway grounds, by sparks from an engine and, the *spreading* of the fire therefrom, by one continuous conflagration to the properties consumed of the parties claiming damages ; but there is no case that I can find where the distinction was drawn, between such cases and one in which damage was occasioned by sparks carried a distance by the wind, and doing damage. As far as I can discover, no case has been determined in England in which it has been decided that damage done, as in this case, was proximate or remote. Whether such damages are the natural, and

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ordinarily, to be expected, result is a question I believe not yet deliberately decided in England; and, as each case should be decided by its own circumstances, it becomes a question for a jury to resolve in each case. There are no doubt cases where a party may be answerable for such damages but they are not the usual ones. Several cases have been tried in the United States, where it was shown that one continuous fire, spreading from sparks from engines, by means of combustible matter on, and alongside of, the railways, consumed property, wherein the railway companies were held answerable. As to cases like the present, the decisions are not uniform and some of them were decided on the liability imposed by statutes, but, as far as I am capable of judging, the weight of authority favors the classing of the damages in such cases as remote.

It is necessary, however, according to the course adopted generally in England and in the courts in the United States, to submit to a jury, the question whether, under the circumstances in evidence, the burning complained of was the natural and ordinary result of the imputed negligence. My own opinion is, that, under the circumstances in this case, there was not a sufficient liability established by the evidence, to justify such a submission; and, still less, for the presiding judge, to withdraw the matter from the jury, as was done, as it appears to me, in this case.

In *Pennsylvania Railroad Co. v. Hope* (1) in 1876 it was expressly held by the Supreme Court of that State that such an issue was for the jury. The head note is as follows:—

Sparks from defendant's engine fired a railroad tie, from which rubbish, left by the defendant on their road, was fired, communicated with plaintiff's fence next to the road, and spread over two fields, burned another fence, and standing timber 600 feet distant from the

(1) 80 Penn. 373.

road.

Held; that the proximity of the cause was for the jury.

2nd. In such case, the jury must determine whether the facts constitute a continuous succession of events, so linked as to be a natural whole, or whether the chain is so broken as to become independent, and the final result cannot be said to be the natural and probable consequence of the negligence of the defendants.

3rd. The rule for determining what a proximate cause is, that the injury must be the natural and probable consequence of the negligence, and that it might and ought to have been foreseen under the circumstances.

4 *Pennsylvania Railroad Company v. Kerr* (1) distinguished.

The learned judge who presided at the trial put the following questions to the jury, which were answered as follows (2):—

It will thus be seen that the questions and answers just quoted have reference only to the origin of the fire in the freight house of the appellants; and not, in the least degree, referring to the catching on fire of the respondents barn or house. The charge of the learned judge is not reported, and we are unable to judge how he charged in reference to the latter question, if he did so at all. I should judge from the nature of the questions and answers, that the question as to the natural and ordinary result was not in any way submitted. It is in my opinion a clear case of *non-direction* upon the vital issue to properly determine the case. Had it been a general verdict, without questions and answers, we might possibly assume—but that would perhaps be going too far—that all the necessary issues under the pleadings had been submitted to, and found by, the jury; but such was not the course adopted. The findings of the jury on the questions put to them, are alone insufficient upon which to found a judgment. They only refer to the setting fire to, and destruction of, the appellants property, but in no way refer to that of the respondent.

(1) 12 P. F. Smith 353.

(2) *Ubi supra* p. 134.

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In my opinion the appellants, as a question of law are not answerable to the respondent for the damage she complains of, but if I am wrong in that position, the liability should be ascertained by a jury, on issues properly submitted.

I think the verdict should be set aside and a judgment of non-suit entered or, under any circumstances, a new trial granted—with costs.

GWYNNE J.—I concur in the opinion that this appeal must be dismissed, but it is unnecessary, in my opinion to decide in this case whether it is an established legal proposition that a fire originating in negligence can never be a fire “beginning accidentally” within the meaning of 14 Geo. 3 c. 78 sec. 86; it is worthy of remark, however, that the observations of Lord Denman in support of this proposition, criticising the opinion to the contrary of Sir William Blackstone as expressed in his commentaries, and the observations of Lord Lyndhurst in Lord Canterbury’s case (1), were unnecessary to the decision in *Filliter v. Phippard*, (2) and are therefore open to the same objections as, in the opinion of Lord Denman, were the observations of Lord Lyndhurst in Lord Canterbury’s case. The judgment of *Filliter v. Phippard* is, by Lord Denman himself, rested upon the ground that a fire which was knowingly and intentionally lighted by the defendant could never be said to be a fire beginning accidentally within the meaning of the statute. Neither that case, therefore, nor that of *Vaughan v. Menlove*, (3) therein referred to, can, I think, as I have endeavoured to point out in *Jeffrey v. The Toronto, Grey & Bruce Ry. Co.* (4), be said to establish such a proposition; against it must be taken the opinion of Sir William Blackstone and the

(1) 1 Ph. 306.

(2) 11 Q. B. 347.

(3) 3 Bing N. C. 468.

(4) 24 U. C. C. P. 276.

express decision of the learned judge Sir John B. Robinson C. J. in *Gaston v. Wald* (1) and the fact mentioned by Lord Lyndhurst in Lord Canterbury's case, that although cases of damage from the burning of houses by negligence have frequently occurred since the statute, no instance had ever occurred to his knowledge, nor can be found in the books, of an action having been brought to recover compensation for this species of injury, nor is there any trace of any such proceeding.

The fact that no trace can be found in the English courts of such an action having ever been brought is to my mind strong evidence that the proposition that a fire originating in negligence *can never be a fire beginning accidentally* within the meaning of the statute, is at variance with the general impression of the English mind professional and lay, and in the absence of any such action the rule of Lyttleton referred to in *the Attorney General v. Vernon* (2) may well apply, namely — "*what never was never ought to be.*" When the point does directly arise it will be time enough to consider the foundation upon which the proposition can be, if it can be, supported, and to decide between the opinion of Sir Wm. Blackstone with the dictum of Lord Lyndhurst, though it was unnecessary to the decision of the case before him, supported by the considered judgment of Sir John B. Robinson C.J. on the one side, and the dictum of Lord Denman, which was also unnecessary to the decision of *Filliter v. Phippard*, on the other.

The statute of Geo. 3 referred to has however no application whatever, in my opinion, in actions like the present against railway companies for compensation for injury, alleged to have been occasioned to the plaintiff by negligence upon the part of the defendants and

(1) 9 U. C. Q. B. 586.

(2) 1 Vernon 385.

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their servants, in the use by them of the dangerous element which they are by law authorised to use, but this non-application of the statute is not because a fire originating in negligence cannot be an accidental one within the meaning of the statute. The principle upon which the liability of railway companies in such cases rests, is, in my opinion, this; by the common law, apart from any statute, where a person for his own private purposes brings upon his premises an engine of an extremely dangerous and unruly character, such as a locomotive engine worked by the dangerous element of fire, which, if it should escape from the fire box, in which for the working of the engine it is contained, is calculated to do much mischief, he must keep that fire confined, so as to prevent its doing mischief at his peril: and if he does not do so he will be responsible for all damage which is the natural consequence of, and directly resulting from, its escape, unless he can excuse himself by showing either that the escape was owing to the plaintiff's fault, or was the consequence of a *vis major*, or the act of God; this I take to be the principle established by the House of Lords in *Rylands v. Fletcher* (1). But the legislature having authorised the use of locomotive steam engines as a motive power, and having authorized the carrying the dangerous element of fire along the railways for impelling the locomotives, the common law is qualified, but conditionally only upon the persons, authorized so to use the fire using it in a proper and reasonable manner (such proper and reasonable manner being estimated relatively to the dangerous nature of the element and the combustible nature of the materials with which it is brought into proximity), and using all the appliances known to science, and taking all reasonable precautions to prevent the fire escaping and

(1) L. R. 3 H. L. 330.

to prevent also combustible material upon their property becoming ignited by fire from the engine coming in contact therewith, and so extending into the property of a neighboring proprietor;—in fact conditional upon their adopting all such known appliances and precautions as may reasonably be required to prevent damage to the property of third persons near which the Railway passes, and if they are guilty of any default in the discharge of this duty they are responsible for all damage which is the natural consequence of such default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with and consuming the property of such third persons, or is caused to the property of such third persons by fire communicated thereto from property of the railway company themselves which had been ignited by fire escaping from the engine coming directly in contact therewith (1).

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We are of opinion (says Bramwell B. when delivering the judgment of the Court of Exchequer in *Vaughan v. Taff Vale Ry. Co.*) (2), that the statute (3) does not apply where the fire originates in the use of a dangerous instrument knowingly used by the owners or the land in which the fire breaks out.

And in that case in the Court of Exchequer Chamber (4) (while reversing the judgment of the Court of Exchequer upon the ground that as it was found as a fact that the defendants were guilty of no negligence no action lay), Cockburn C. J. states the principle upon which these actions rest thus:—

Although it may be true that if a person keeps an animal of known dangerous propensities or a dangerous instrument he will be respon-

(1) *Pigott v. Eastern Counties Ry. Co.*, 3 H. & N. 743; and in *Smith v. L. & S. W. Ry. Co.*, L. R. 5 C. P. 98; and in the Exchequer Chamber, 5 H. & N. 679; *Fremantle v. L. & N. W. Ry. Co.*, 10 C. B. N. S. 90; *Jones v. Festiniog Ry. Co.*, L. R. 3 Q. B. 14. (2) 3 H. & N. 752. (3) 14 Geo. 3 c 78 (4) 5 H. & N. 688.

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sible to those who are thereby injured, independently of negligence in the mode of dealing with the animal or using the instrument, yet when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it is authorized and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence that if damage results from the use of such thing independently of negligence the party using it is not responsible.

And Blackburn J. says:—

Rex. v. Pease has settled that when the legislature has sanctioned the use of locomotive engines, there is no liability for injury caused by using them, so long as every precaution is taken consistent with their use.

The principle of liability then being, that unless every precaution is taken to prevent injury occurring from the fire in the locomotive engine, the party neglecting to take such precaution cannot claim the protection of the statute which authorizes the use of the engine, but is subject to the same liability as he would have been liable to at common law, apart from the statute, for such reason, the statute 14 Geo. 3rd ch. 78 has no application. This it will be observed, also, is the same point as is decided by the judgment in *Filliter v. Phippard* (1).

In these actions, therefore, against railway companies for compensation for damage occasioned by fire proceeding from their engines in the use of them as sanctioned by law the enquiry always is:—Have they complied with the condition subject to which alone the use of the fire, in the manner in which it is used by them, is authorized, and by compliance with which they can alone relieve themselves from liability? Have they used the destructive element under their control with that degree of care which was reasonably requisite, in view of the danger to be apprehended of inflicting injury and which the circumstances in each case called for? Negligence, as said by Willes J. in

(1) *Ubi supra.*

Vaughan v. Taff Vale Railway Co. (1), is the absence of care according to the circumstances. In this case the evidence clearly proved, and indeed upon this point there was no dispute, that the property of the plaintiff was set fire to by fire directly communicated to it proceeding from a freight shed of the defendants which was on fire and which was situate just across a street in the village of Chippewa, which separated the property of the defendants from that of the plaintiff, and there was abundant evidence to go to the jury upon the question, whether in point of fact this freight shed was or not set fire to, by sparks issuing from an engine of the defendants which had passed there immediately before the breaking out of the fire in the shed. The defendants' contention at the trial was that the smoke-stack of the particular engine had attached to it a perfect netting or screen to prevent sparks escaping. But there was evidence of the strongest character that a shower of sparks did in fact escape from the smoke stack precisely as the engine passed the shed, and fell on the platform all around about and upon and against the freight shed, and the witnesses of the defendant admitted that if this evidence was true the netting could not have been perfect, what they plainly intended to convey thereby being that, in their opinion, it was not true. The evidence upon this point however, if believed, was quite sufficient to justify the jury in finding, and they did believe it to be true, and accordingly found as a fact, that the freight shed was set fire to by sparks escaping from the smoke stack, and that those sparks escaped by reason of the apparatus for arresting sparks having been out of order; they also found that having regard to the dryness of the season the engine was taken past the freight shed, which was quite close to

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the track, under too heavy pressure of steam, such heavy pressure having the tendency to cause sparks to escape, and that the state in which the freight shed was (there having been evidence that its floor was saturated with oil and that the building itself, which was of wood, was very dry and inflammable) was not such a condition as having regard to its proximity to passing trains should have been permitted. That there was evidence to go to the jury upon all of these points, and which, if believed (and of its truth they were the sole judges), was sufficient to support these findings, cannot, I think, be doubted; it is therefore unnecessary to consider whether their finding that "as it was a special train and on Sunday when "employees were not on duty, there should have been "an extra hand on duty," if it stood alone, would be a sufficient finding of negligence to support a verdict in favor of the plaintiff.

The learned counsel for the appellants strongly contended that as the plaintiff's buildings were ignited, not by sparks proceeding directly from the engine and falling on the buildings of the plaintiff, but by fire proceeding from the freight shed, the damage so done to the plaintiff's property was too remote to justify a verdict against the defendants. In support of this contention he relied upon a case of *Ryan v. New York Central Ry. Co.* (1), decided in the Court of Appeals of New York in 1866, which certainly does appear to lay down very distinctly such a proposition. In that case the New York Central Railroad Company, by the negligent manner of conducting an engine, or by the defective condition of the engine, set fire to a quantity of wood in one of their own sheds; the fire consumed the wood shed and spread to, and consumed, the house of the plaintiff situate about 180 feet

(1) 35 N. Y. Rep. 210.

distant from the shed, and the court held that the plaintiff had no cause of action against the railroad company, on the ground that the plaintiff's injury was not the necessary or natural consequence of, nor the result ordinarily to be anticipated from, the negligence committed, that the plaintiff's injury was the remote and not the proximate result of the fire in the wood shed, and too remote to give a cause of action. In *Webb v. The Rome Watertown & Ogdensburg Ry. Co.* (1), however, the same court differently constituted in 1872, citing and relying upon *Vaughan v. Taff Vale Ry. Co.* (2) and *Smith v. London & S. W. Ry. Co.* (3),* held that where coals were negligently dropped from an engine of the defendants which set fire to a tie, from which the fire was communicated to an accumulation of weeds, grass and rubbish, which lay on the side of the track, and thence spread to the fence and into plaintiff's woodland burning and destroying his trees, the plaintiff was entitled to recover. In the report of *Smith v. London & S. W. Ry. Co.* in the Common Pleas, there is something in the language of Brett J., who dissented from the majority of the court, which upon a cursory view appears also to give countenance to the appellants' contention. He says there (4):—

I take the rule of law in these cases to be that which is laid down by Alderson B. in *Blyth v. Birmingham Waterworks Co.* (5), "negligence is the omission to do something which a reasonable man" "guided upon those considerations which ordinarily regulate the" "conduct of human affairs would do, or doing something which a" "prudent and reasonable man would not do."

And again at p. 103:—

I quite agree that the defendants ought to have anticipated that sparks might be emitted from their engines, notwithstanding they are of the best construction and were worked without negligence, and that they might reasonably have anticipated that the rummage and hedge trimmings allowed to accumulate might be thereby set on

(1) 49 N. Y. R. 420.

(3) L. R. 5 C. P. 98.

(2) 5 H. & N. 688.

(4) L. R. 5 C. P. at p. 102.

(5) 11 Ex. at p. 784.

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fire. But I am of opinion that no reasonable man could have foreseen that the fire would consume the hedge and pass across the stubble field and so go to the plaintiff's cottage at the distance of 200 yards from the railway, crossing a road on its passage. It seems to me that no duty was cast upon the defendants in relation to the plaintiff's property, because it was not shown that the property was of such a nature and so situate that the defendants ought to have known that by permitting the rummage and hedge trimmings to remain on the banks of the railway they placed it in undue peril.

And again :—

I am of opinion as matter of fact that no reasonable man could suppose—or at least eight out of ten would fail to suppose—that if by any means the rummage and hedge trimmings on the side of the railway were set on fire, the fire would extend to a stubble field adjoining and so proceed to a cottage at the distance before mentioned.

And he concludes thus :—

I think that the defendants cannot reasonably be held responsible for not having contemplated such an extraordinary combination of circumstances or such a result. For these reasons I am of opinion that there was no such evidence of negligence on their part as could properly be left to a jury.

Now, it is to be observed that these remarks of the learned judge as to the remoteness of the damage, and as to its not being reasonably (within the contemplation of a prudent and careful man,) such a natural consequence of the rummage and hedge trimmings being left where they were, as to make the leaving of them such negligence, as standing alone in the absence of any evidence whatever of negligence in the mode in which the fire was used and its escape guarded against, should render the defendants liable, are made by the learned judge to justify the conclusion at which he had arrived that no evidence of negligence proper to be left to a jury was produced. His remarks are not at all addressed to the consideration, whether : if there was evidence that the fire in the rummage and hedge trimmings had been occasioned by a negligent use of the fire carried in the locomotive, and by its being permitted to escape by reason of some negligent defect in the engine, or its

screen, or of some other negligence in the conduct of the engine, the fact of the fire having been communicated to the plaintiff's property through the medium of the fire spreading from the rummage and hedge trimmings along the ground through the stubble field to the plaintiff's house and not by sparks emanating from the engine directly striking the plaintiff's house and setting fire to it, would make the injury to the plaintiff in such case to be too remote to constitute a cause of action. This distinction is plainly pointed out in the case when in the Exchequer Chamber (1) where Channell B. says :

I quite agree that where there is no direct evidence of negligence the question what a reasonable man might foresee is of importance in considering, the question whether there is evidence for the jury of negligence or not, but if it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences whether he could have foreseen them or not.

And Blackburn J. who entertained doubts similar to those which had been entertained by Brett J. says :—

I also agree that what the defendants might reasonably anticipate is, as my Brother Channell has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence.

And after stating the grounds of his doubts of their being sufficient evidence of negligence in that case, he says :—

I do not say that there is not much in what is said with respect to the trimmings being the cause of the injury and not the state of the hedge, but I doubt on this point and therefore doubt if there was evidence of negligence. If the negligence was once established it would be no answer that it did much more damage than was expected.

Now, in the case before us, there was, as I have already said, abundant evidence which, if believed, justifies the finding of the jury that the fire in the shed was occasioned by sparks emanating from the smokestack by reason of the apparatus for arresting sparks being out of order, and that the engine should

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not have been taken past the freight house in that dry season under such a heavy pressure of steam, and as it appears that the plaintiff's buildings were ignited and consumed by sparks conveyed from the burning freight shed, I am of opinion that the injury sustained by plaintiff is a damage naturally consequential upon and resulting from the defendants' negligence found by the jury, and for which the defendants are in law responsible.

I express no opinion upon the point as it does not arise upon this record: whether damage sustained by another person whose buildings may have been destroyed by fire proceeding from the plaintiff's burning buildings, or from an intermediate building of a third person, whose building had been ignited by fire, proceeding from the plaintiff's building, being carried by the wind to the property of the plaintiff would or not be too remote to constitute a good cause of action against the defendants? Whether or not in such case the negligence of the defendants could be said to be *causa causans* of such damage? It may be that there must be some point where, in a fire so spreading from house to house, the liability of the defendants ceases even though their negligence be the cause of the occurring of the first fire. In the case of a fire so spreading it may be that in the case of a building far removed from that in which the fire first broke out becoming ignited by fire, proceeding from an intermediate building, there may be some circumstances to be taken into consideration as constituting the *causa causans* of the damage, which would distinguish that case from that of the fire, as in the case before us, proceeding directly from the defendants' shed but such a point does not arise upon this record. It is stated it is true, in the appellants factum that a number of actions have been brought against the defendants and that it

has been agreed that the defendants liability in those actions shall be determined by the result of this present one. This circumstance however cannot authorize us to import into the consideration and determination of this case any facts not actually appearing in evidence in the case. It may be that the facts in the other cases are identical with those appearing in this case. It may be that in some of the other actions the facts are in some particulars different. How this may be we know not. To all cases similar in their facts to the present our judgment will of course, under the agreement referred to, naturally apply, and if the agreement affects cases, the facts of which may be materially different from those appearing in the present case, that is a matter over which we have no control and with which we cannot interfere.

Upon the facts, as they appear in the present case, I am of opinion that the damage of which the plaintiff complains is damage naturally consequential upon and resulting from the negligence of the defendants as found by the jury, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Crooks, Kingsmill & Catanach.*

Solicitors for respondent: *Rykert & Ingersoll.*

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