Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Canada Central Railway Company v. *McLaren*, *from the Court of Appeal of Ontario; delivered* 12*th July* 1884.

Present:

LORD WATSON.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THE Appellants are the proprietors of a railway which passes through the village of Carlton Place, in the province of Ontario, situated on the north bank of the River Mississippi. The Respondent is a timber merchant, and in the course of his business he brings large quantities of wood, in rafts, to Carlton Place, which are there converted into sawn lumber, and, when thoroughly dried, are sent to market along the Appellants' railway. For many years prior to the origin of the present litigation, the Respondent had, with the leave of the Appellants, been in use to pile his sawn lumber on the Appellants' land, with a view to its being conveniently loaded or "shipped" in railway cars, for conveyance to market. The piles, which were stacked on both sides of the line, were 17 or 18 feet in height, from a foot to a foot and a half apart, and the face of each pile was not more than six feet distant from the nearest rail used for the Appellants' ordinary traffic.

On the 27th May 1879 a fire broke out in one of the piles on the east side of the Appellants' main line, and, spreading rapidly, destroyed a

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great quantity of lumber and plant belonging to the Respondent. On the 3rd October 1879 the Respondent instituted an action against the Appellants, for recovery of the damages thus sustained by him, upon the allegation that the fire had been caused by the escape of sparks, or burning matter, from one of the Appellants' locomotives, in consequence either of its having been negligently and unskilfully managed, or of its having been insufficiently and improperly constructed.

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

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

At the close of the trial the presiding Judge put 15 questions to the jury. Of these it is only necessary to notice the following, with the answers returned :—

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

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

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

" *Answer.* From the smoke-stack.

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

" *Answer.* Imperfection of the stack.

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

" *Answer.* Cone too close to the netting.

" *Fifth.* Was the bonnet rim fitted to the bed ?

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

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

" *Answer.* Yes.

" *Eleventh.* Were the Defendants (Appellants), in your opinion, guilty of negligence in using such a mesh ?

" *Answer.* No.

" *Twelfth.* Was the Plaintiff (Respondent) guilty of contributary negligence in piling

his lumber so near the track, or by allowing sawdust to remain on it, or by not having sufficient appliances to extinguish fire. If the Plaintiff (Respondent) was guilty of negligence, could the Defendants (Appellants), by the use of ordinary care and diligence, have prevented the injury?

"*Answer.* Not as to piling lumber, or as to sawdust, but somewhat so as to appliances. We think that Defendants (Appellants) could have prevented the fire, and that the Plaintiff (Respondent) is entitled to a verdict."

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

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

On the 10th March 1882 the order *nisi* was discharged, with costs, by the unanimous decision of the Common Pleas Division of the High Court of Justice of Ontario, the bench consisting of Chief Justice Wilson, Mr. Justice Galt, and Mr. Justice Osler, before whom the case had been tried. The cause was then carried, by the present Appellant, to the Court of Appeal for Ontario. The learned Judges composing that court were equally divided; Chief Justices Spragge and Hagarty being of opinion that the decision of the Court of Common Pleas was right, whilst Justices Burton and Patterson were in favour of allowing the appeal. In these circumstances, the appeal was, on the 6th October 1883, dismissed with costs.

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

Their Lordships entertain no doubt that, taking the findings of the jury as they stand, the facts thereby found necessarily lead to judgement in favour of the Respondent. Shortly stated, the substance of these findings is: that the destruction of the Respondent's piles of lumber was caused by fire escaping from the smoke-stack of a locomotive engine belonging to the Appellants; that the escape of the fire was owing to the defective construction of the smoke-stack, its defects consisting in the cone being placed too close to the netting, and in the bonnet rim not being so well fitted to its bed as it ought to have been: and that, by the use of ordinary care and dili-

gence, the Appellants could have prevented the fire. Assuming the facts to be as thus found, their Lordships are unable to understand on what ground the Appellants can be relieved of responsibility for damage directly occasioned by their using a defectively constructed locomotive, —damage which would not have occurred but for their failure to exercise ordinary care and diligence.

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

The Appellants' next contention was that the findings ought to be set aside, and judgement entered for them, in respect there was no evidence to go to the jury in support of the Respondent's allegations, and of the findings of the jury, to the effect that the fire which ignited the lumber came from the Appellants' locomotive, or that the

Appellants negligently used an imperfectly constructed locomotive. It is sufficient to say that the argument for the Appellants upon another branch of the case, which involved an examination of the statements made by the leading witnesses, satisfied their Lordships that there was evidence upon both these points well fitted for the consideration of the jury, and that the presiding Judge would have committed a grave error if he had given effect to the motion made by the Appellants' Counsel in the course of the trial, and directed a nonsuit.

It may be proper to advert here to a proposition which was submitted, though not very strongly pressed, by the Appellants' Counsel. It is thus stated in the order *nisi*, as a ground for setting aside the findings, and entering judgement for the Appellants,—"that the Plaintiff (Respondent), by "piling his lumber in the Defendants' (Appellants') "property, took upon himself the risk of the "same being consumed by fire from such loco-"motives as the Defendants (Appellants) used." These words are deficient in legal precision. They might very well signify that the Respondent took upon himself the risk of fire which might be attendant upon the careful management of such locomotives as the Respondents generally use; and in that sense the proposition which they involve would hardly be disputed by the Respondent, but it would not assist the Appellants' case. Accordingly a much wider meaning was attributed to the words in the course of the argument, which really came to this,—that the Respondent must be held to have assumed all risks of fire arising from negligence on the part of the Appellants' servants, and from the disrepair or defective construction of their engines. When thus explained, the proposition appears to be so opposed to reason and authority that their Lordships do

not think it necessary to take any farther notice of it.

In the next place, it was maintained for the Appellant, that the answers of the jury to the first, second, third, fourth, and tenth questions were against evidence; and that the finding in answer to the question numbered the *fifth* ought to be set aside, not only because it was against evidence, but also in respect that the question was irregularly submitted to the jury. The alleged irregularity consisted in this, that the presiding Judge, after receiving replies to the other questions, and after the Respondent's Counsel had moved for judgement, put that additional question to the jury, before they were discharged, with the view of explaining the answer which they had already given to the fourth question. It appears to their Lordships that, in so doing, the presiding Judge acted within his powers, and with perfect propriety. It was the duty of the learned Judge to prevent miscarriage, and to take care that the material issues of fact raised by the evidence should be exhausted; and in the event of any answer given by the jury being incomplete, or requiring explanation, it was his duty, as well as his right, to put a farther question or questions, with the view of ascertaining what the jury did intend to find as their verdict.

Upon the question whether the findings complained of in the order *nisi* are against evidence, their Lordships, after hearing Counsel for the Appellants, are not prepared to differ from the judgements of the Courts below. It is for the Appellants to show that an honest and intelligent jury could not reasonably derive from the evidence the conclusions which the jury who tried this case have embodied in their findings. That, in the present case, implies a very heavy *onus*. Seeing that there must, some time or

another, be an end of litigation, Courts are naturally reluctant to allow a third trial by jury except upon clear and strong grounds; and in this case the verdict of the jury has been sustained by the concurrent opinions of no less than five of the seven learned Judges who heard and decided the case in the Courts below, one of the five being the Judge who presided at the trial.

Apart from these considerations, which are of great importance in determining whether a new trial ought to be allowed, their Lordships have formed the opinion for themselves, that there is evidence sufficient to sustain the material findings of the jury. The Appellants' Counsel scarcely ventured to dispute that the evidence was sufficient to warrant the finding that the fire which caused the mischief came from the smoke-stack of the locomotive engine No. 5. Then it seems to be sufficiently established by the evidence that,—if the lower edge of the cone be one or two inches above the level of the bed on which the rim of the bonnet rests, and if at the same time there be an aperture between the bed and the rim, caused either by the rim not being evenly fitted to the bed, or by the rim not being tightly fastened down,—it is not only possible, but probable, that the exhaust steam from the cylinders will be deflected by the cone, and rush through that aperture, carrying with it sparks or live embers of a larger size, and therefore more likely to cause a conflagration, than those which escape through the mesh of the bonnet. It is proved beyond doubt that, on the 27th May 1879, the cone of the locomotive No. 5 was so constructed that its lower edge was two inches above the level of the bed upon which the bonnet rim was rested. Accordingly, in the course of the Appellants' argument upon this point, the real and the only question came to be, whether there was evidence to show that, on the 27th May 1879,

the connections between the bonnet rim of No. 5 engine and its bed were so defective as to admit of fire escaping through some space between them. In the opinion of their Lordships there is evidence from which the jury might fairly draw the conclusion that fire did escape in that way, and did ignite the Respondent's lumber. Their Lordships do not, however, consider it necessary to enter into a detailed explanation of their reasons for holding that opinion, it being quite sufficient for the disposal of this part of the case that the Appellants have utterly failed to satisfy their Lordships either that the Judge should have withheld the case from the jury for lack of evidence, or that the findings were either perverse or unreasonable.

There still remain for consideration the objections taken by the Appellants to the admission of evidence for the Respondent, and in particular to the admission in evidence of the entry made by Burns, the driver of No. 5 engine, in the report book kept at the Defendants' workshops at Brockville, on the 30th May 1879, three days after the fire. The entry admittedly related to engine No. 5, and it contains *inter alia* this sentence: "Botom rim of bonnet in stack wants making tite." It appears to their Lordships that an entry in these terms, applicable to the locomotive which was alleged to have caused the fire, could not, in the circumstances of this case, be regarded as immaterial evidence; and, in that view, the question whether it was wrongly admitted becomes of importance. The Appellants objected to its admissibility on these grounds: (1) that evidence of the state of the engine on the 30th May could not be competently admitted as tending to show what was its condition on the 27th May; (2) that Burns could not on the 30th May bind the Company by any admission, direct or indirect, as to the condition of the

engine on the 27th May; and (3) that the entry was objectionable, because it went to contradict statements made by Burns, as a witness, with regard to the state of the engine on the 30th May, and that it was not tendered or admitted in terms of section 27 of the Revised Statutes of Ontario, cap. 62. As to the first of these objections, their Lordships are of opinion that it was competent for the Respondent to give evidence as to the condition of the engine on the 30th May, as throwing light upon any structural defects arising from imperfect design, or from disrepair, which might have existed on the 27th May, it being open to the Appellants to prove that any defects appearing at the later of these dates were due to intermediate causes. Their Lordships are also of opinion that the entry was not tendered or received as an admission by the Company in regard to the condition of the smoke-stack on the 27th May.

What the Respondent was endeavouring to prove, when the entry was put in evidence, was the condition of the smoke-stack of locomotive No. 5 at the time when it was taken into the Appellants' workshops for repair, on the 30th May. It had been proved that it was the duty of Burns to take his engine to the workshop for repairs, and that it was his duty to enter in a book, kept there for the purpose, the repairs needed, for the information and guidance of the workmen. Had he given verbal instructions to the workmen, it would have been clearly competent to ask him what these instructions were. He was the agent of the Appellants in giving such instructions, which were part of the *res gestæ* of the 30th May, and the Appellants could not have objected to his telling the jury what instructions he did give, on the ground that these were inconsistent with something which he had already deponed to. There is no difference in principle between asking the

witness to state the verbal instructions which he gave, and putting his written instructions in his hand and asking him to read them. Such an entry as that in question, when it is so put in evidence, cannot be regarded as a mere statement or narrative of fact; it was an instruction given, an act done, by Burns, in the ordinary course of his employment as an engine-driver of the Appellant Company. Their Lordships are accordingly of opinion that the entry was legitimately used as evidence at the trial, and they concur in the observations which were made upon this point by Chief Justice Hagarty in the Court of Appeal.

The only objection remaining to be noticed is that which was taken by the Appellants to the admission of evidence that the locomotive No. 5 was in use to throw fire. The argument addressed to their Lordships, in support of this objection, really went to the value, and not to the admissibility, of the evidence; and their Lordships have no hesitation in holding that the objection is not well founded. The admissibility of evidence depends upon its character, and not upon its weight; and their Lordships cannot doubt that evidence tending to show that engine No. 5 habitually threw more fire than the other locomotives used on the Appellants' railway might be legitimately taken into account by the jury in considering whether it was defective in construction.

Their Lordships will, therefore, humbly advise Her Majesty that this Appeal ought to be dismissed. The Appellants must bear the costs of the Appeal.