1884

*Feb'y. 26.

*June 23.

THE NEW BRUNSWICK RAILWAY COMPANY (DEFENDANTS) } APPELLANTS;

AND

ISSACHER N. ROBINSON (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Railway Company—Sparks from engine—Proper care to prevent emission of—Use of wood or coal for fuel—Contributory negligence.

R. owned a barn situated about two hundred feet from the New Brunswick Railway Company's line, and such barn was destroyed by fire, caused, as was alleged, by sparks from the defendants' engine. An action was brought to recover damages for the loss of said barn and its contents. On the trial it appeared that the fuel used by the company over this line was wood, and evidence was given to the effect that coal was less apt to throw out sparks. It also appeared that at the place where the fire occurred there was a heavy up-grade, necessitating a full head of steam, and therefore increasing the danger to surrounding property. The jury found that the defendants did not use reasonable care in running the engine, but in what the want of such care consisted did not appear by their finding.

Held, reversing the judgment of the court below, that the company were under no obligation to use coal for fuel and the use of wood was not in itself evidence of negligence; that the finding of the jury on the question of negligence was not satisfactory, and that therefore there should be a new trial.

APPEAL from the Supreme Court of New Brunswick, refusing to set aside a verdict for the plaintiff and order a new trial.

The facts of the case sufficiently appear in the judgments of the court.

Weldon Q.C., for appellants.

---

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

1884

NEW BRUNSWICK R. CO. v. ROBINSON.

As to the right to use wood in locomotives. See *Rex.* v. *Pease* (1); *Falconer* v. *C. & N. A. R. R.* (2); *Toledo R. R. Co.* v. *Corn* (3); *Spaulding* v. *The Chicago & N. W. R. R. Co.* (4); *Collins* v *N. Y. Central & Hundson R. R. Co.* (5). Ordinary and regular care was taken and proper appliances used. *Ball* v. *G. T. R. Co.* (6); *Jeffery* v. *Toronto & Grey & Bruce R. R. Co.* (7); *Freemantle* v. *London & N. W. R. R.* (8).

Gregory, for respondent, relied on *Dumnioch* v. *London & North Staffordshire Ry. Co.* (9); *Vaughan* v. *Taff Vale Ry. Co.* (10); 1 Redfield on Railways (11).

Sir J. W. RITCHIE C. J.—No doubt plaintiff has the right to use his barn as he pleases, but knowing that the Legislature has permitted the running of locomotives on the railway passing his barn, if he chooses to place in his barn combustible materials, and to leave it in such a condition that such combustible materials are exposed to sparks from the engine, though provided with all the usual and requisite appliances for preventing the escape of sparks, and the prevention of accidents, and an accidental spark should ignite such combustible material and cause the destruction of the barn and its contents, the owner must submit to the risk, as a consequence of the Legislature having permitted the use of a dangerous agent; and the question is: Have the defendants used all reasonable precautions and appliances to prevent accidents? It cannot be supposed that the best appliances will absolutely avoid all danger from the emission of sparks; and therefore it behooves parties, through whose premises the railway runs, to

(1) 4 B. & Ad. 30.
(2) 1 Pugs. (N.B.) 179.
(3) 71 Ill. 493.
(4) 33 Wisc. 582.
(5) 5 Hun 499.
(6) 16 U. C. C. P. 22.
(7) 23 U. C. C. P. 553.
(8) 2 F. & F. 340.
(9) 4 F. & F. 1058.
(10) 5 H. & N. 679.
(11) 5 Ed. p. 475.

1884

NEW BRUNSWICK R. Co. v. ROBINSON.

Ritchie C.J.

understand the risk to which the sanction of the Legislature, in the public and general interest of the country, to the running of locomotives, has subjected them. And, if they choose to leave their property unnecessarily exposed, as in this case, it is their own imprudence, and they must bear the loss.

I think the fair result of the evidence is, that the fire took place from a spark from the locomotive getting into the hay and igniting it; and if the hay had not been left in the exposed condition it was, the fire would not, in all human probability, have taken place.

There was, in my opinion, evidence most proper for the consideration of the jury, as to whether the plaintiff was not guilty of great negligence in placing such a combustible article as hay in a barn so near the railway, with such openings as exposed such combustible material to fire from sparks from passing locomotives.

I think the correct rule was laid down in *Collins* v. *N. Y. Cen. & Hudson R. R. Co.* (1), "that one whose property is exposed to risk or injury from or by reason of its location, as where it is situated in a position of constant exposure to fire on the side of a railroad, must use such care as prudence would dictate in view of the unavoidable perils to which it is subject."

The Legislature, then, having allowed the company to run a locomotive on this railway, if parties place combustible materials in such near contiguity to the railway that there is reasonable grounds for believing that they are liable to become ignited from sparks from the locomotive, even though all proper appliances for preventing sparks and all precautions and care are taken, the parties will be liable for contributory negligence if they omit reasonable care on their part to protect their property. Thus, if the plaintiff's barn, when the railway came into operation was, or while locomotives were

(1) 12 S. C. Rep. N. Y. 502.

1884

NEW BRUNSWICK R. Co. v. ROBINSON.

RITCHIE C.J.

running is, open, so that under such circumstances sparks would be liable to enter and ignite combustible materials such as hay or straw housed therein, the plaintiff would, in my opinion, be guilty of contributory negligence if he placed such combustible materials in such a barn without having taken the care and precaution of closing the openings through which sparks might enter and lodge in the hay, there being, in my opinion, reciprocal duties as well on those who have combustible material near to the railway as on the railway company to use reasonable care and precaution.

In *Radley et al* v. *London & North Western Railway Co.* (1), Lord Penzance says:

> The plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.
>
> But there is another proposition equally well established, and it is a qualification upon the first, namely, that although the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.
>
> This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies* v. *Mann* (2), supported in that of *Tuff* v. *Warman* (3), and other cases, and has been universally applied in cases of this character without question.

There is nothing whatever in the judge's charge relative to contributory negligence, though a question is left to the jury on this point. This last question, as appears by the judge's notes, was submitted at Mr. Gregory's request and prepared by him.

I think there was non-direction (tantamount to misdirection) in not pointing out to the jury the duty of plaintiff, and what would constitute contributory negligence, and stating distinctly to the jury the law in reference thereto. I think the charge defective also, in

(1) 1 App. Cas. 754. (2) 10 M. & W. 546.
(3) 5 C. B. N. S. 573.

1884

NEW BRUNSWICK R. Co. v. ROBINSON.

Ritchie C.J.

reference to the fuel used.

The Act which allows the use of locomotive engines, necessarily allows the use of such fuel for propelling them as is ordinarily used in the place where the locomotive is run, and if there is a difference as to the emission of sparks in the use of different descriptions of fuel, and there are different recognized precautions in use suitable to each description of fuel, and the precaution applicable to the particular fuel used is adopted, the railway company cannot be held liable for the consequences of a spark escaping and causing damage, no actual negligence being shown on their part. The legislature has sanctioned and authorized the use of dangerous engines, subject to the party using them taking all reasonable precautions. The railway company must use and carry fire along the railway for propelling their engines, and the statute has not limited the company to the description of fuel to be used. If then the company use a well known and ordinary description of fuel, and take all reasonable and known precautions consistent with the use of such fuel, and in spite of such precautions, sparks escape, the company cannot be held liable for the consequences, because they did not use another well known and ordinary description of fuel taking the usual precautions applicable to the use of such fuel. The use of wood cannot be said to be an illegitimate use of the locomotive; if not, and damage results from its use independently of negligence, the party using it cannot be held responsible. In other words, by using wood instead of coal the effect of the legislative authority to run the locomotive is not removed, and they are not left to their liabilities at common law, viz., that of using a highly dangerous machine at the peril of the consequences if it causes injury to others.

In the Supreme Court of New Brunswick *per* Ritchie

1884

NEW BRUNSWICK R. Co. v. ROBINSON.

Ritchie C.J.

C.J., in *Falconer* v. *The E. & N. A. Railway Co.* (1):—
"The fact that an accident has occurred is not of itself
"evidence of negligence, because its occurrence is
"quite consistent with due care having been taken. The
"plaintiff is not entitled to have his case left to the jury
"unless he gives some affirmative evidence of negligence.
"*Hammock* v. *White* (2). In *Daniel* v. *The Metropolitan*
"*Railway Company* (3), Willes, J., says, that to entitle a
"plaintiff to recover in an action for negligence, he must
"establish in evidence circumstances from which it may
"fairly be inferred that there is reasonable probability
"that the injury resulted from the want of some precau-
"tion to which the defendant might and ought to have
"resorted."

See Wharton on Negligence (4); *Sheldon* v. *The Hudson R. R. R. Co.* (5); *Collins* v. *N. Y. C. & H. R. R. R. Co.* (6).

The use of coal has not been adopted by reason of its being a safer article of fuel, the use of wood or coal has been determined with reference to economy and convenience. When railways were first established in New Brunswick wood was universally used by locomotives as being the cheapest and most economical fuel. In localities where wood became scarce and dear, and coal more easily obtainable, coal was substituted, so with steamboats in the bay of Fundy and harbor of St. John, coal is universally used; on steamboats plying on the river St. John, wood is generally, if not universally used, and so with reference to fuel in ordinary use in the city of St. John and its neighborhood. The period is not very remote when wood was the fuel in general use, now coal is the article of fuel ordinarily used. In the part of New Brunswick through which this railroad runs (with the exception of the city of Fredericton and

(1) 1 Pugs. (N.B.) Rep. 183.
(2) 11 C. B. N. S. 588.
(3) 3 L. R. C. P. 216.
(4) Pp. 869, 870, 872.
(5) 29 Barb. 227.
(6) 5 Hun. 503.

1884

NEW BRUNSWICK R. CO. v. ROBINSON.

Ritchie C.J.

its immediate vicinity,) wood ever has been and is the general ordinary fuel of the country.

June is by no means a month in New Brunswick characterized by excessive drouth.

Railroad companies having used all proper care to guard against accident, if injuries occur, they are *damnum absque injuria*.

The appeal should, in my opinion, be allowed with costs.

STRONG J.—Although a motion for a non-suit was made at the trial and over-ruled, leave to move to enter a non-suit was not reserved. Two of the objections to the directions of learned judge specified in the notice of motion are as follows, viz: 1. That there was misdirection in not instructing the jury that there was no evidence that the barns of the plaintiff caught fire from the locomotives of the defendant. 2. That if there was any evidence that they did so catch fire, then the learned judge should have told the jury that there was no evidence to submit to them as to negligence on the part of the defendants in the running of their train or locomotive on the day in question, and therefore the defendants were not liable for the loss. The only evidence to show that the fire was caused by sparks from the defendants' locomotive was that on the day on which the fire occurred a train passed along the railway, and a short time afterwards the respondent's barns, situated about 200 feet from the line of railway, were discovered to be on fire. In the absence of authority I should have doubted if this was sufficient to make a case for the consideration of the jury upon the question of the origin of the fire. I should have thought it not sufficient to prove that the fire might have originated from the sparks thrown out of the locomotive, but that the plaintiff was bound to prove something further to connect the fire with the passage of the engine. In *Free-*

1884

NEW BRUNSWICK R. Co. v. ROBINSON.

Strong J.

mantle v. *N. W. Ry. Co.* (1) such evidence was, however, held sufficient to make a *primâ facie* case for the consideration of the jury. But from this case I should have thought the plaintiff was bound at least to have given some evidence to show there was no other probable cause to which the fire might have been ascribed; but, assuming there was evidence for the jury, and that they were warranted in their finding as to the origin of the fire, I am of opinion that the plaintiff was bound to go further and give some evidence of negligence, such as the omission to use all proper and reasonable means to arrest the sparks by means of known contrivances for that purpose, and that in the absence of all proof of negligence the onus was not cast upon the defendant of proving that they had adopted and used such precautions; in other words, that it was for the plaintiff to make out his case in the first instance by proving negligence in such a case as the present, as in all other cases of action for negligence. The only evidence of negligence given by the plaintiff was that so strongly relied on by the learned counsel for the respondent at this bar, that the defendants were guilty of actionable negligence in having used wood instead of coal for fuel. It was shown that the locomotive was one adapted for the use of wood. So that the question is just reduced to this: Is a railway company guilty of negligence in burning wood instead of coal in a country in which wood is a kind of fuel in common use? I cannot agree that this is any evidence of negligence. If it were, a railway company would be bound to consume coals as fuel when procurable, though involving a much greater outlay than the use of wood—a proposition so unreasonable as to be wholly untenable. If the fuel used was of an unusual or dangerous kind, then there would be no doubt *primâ*

(1) 10 C. B. (N.S.) 80.

1884

NEW BRUNSWICK R. CO. v. ROBINSON.

Strong J.

facie grounds for imputing want of care, but when it is of a kind in common use for railway purposes, as in the present case, numerous American authorities show that railway companies are justified in using it.

I am not able to concur in the view that contributory negligence on the part of the plaintiff was shown by the fact that he maintained his barns in a dangerous proximity to the railway. I apprehend that a land-owner has a right to make any use of his land he pleases, and is entitled to be protected in that use against injury from the culpable negligence of others. Upon this point I refer to *Fero* v. *Buffalo, &c., Ry. Co.* (1); *Grand Trunk Ry.* v. *Richardson* (2).

I am of opinion that a rule for a new trial without costs should have been granted, and that this appeal must consequently be allowed with costs.

FOURNIER J. concurred.

HENRY J.—This is an action to recover damages alleged to have been sustained by the setting fire to and burning of the respondent's sheds, barns and buildings by means of sparks of fire which issued from a locomotive railway engine of the appellants while passing the premises of the respondent, and it is charged that the same was caused by the negligence and unskilful working of the railway, and the locomotive used thereon and the negligent and unskilful management of the appellants and their servants of the locomotive engine, and the fire and burning matter therein contained; and it was alleged that the locomotive engine was so insufficiently constructed that sparks from the fire therein and portions of the burning matter escaped from the locomotive engine and set on fire and burnt the sheds, barns and buildings, together with certain hay, farming utensils, plant, tools and goods of the respondent. The appellants

(1) 22 N. Y. 209. (2) 91 U. S. 454-473.

1884

NEW BRUNSWICK R. Co. v. ROBINSON.

Henry J.

pleaded that they were not guilty. The appellants, by their charter, were authorized to contract for and eqnip and operate certain lines of railway, including the one in question.

The jury having found that the respondent's barns were burned by means of sparks from the appellants' engine, I do not consider it necessary to question the correctness of their finding. The law is fully settled that where legislative sanction is given to the use of locomotive engines, there is no liability for any injury caused by their use if every known means are adopted to prevent the escape of fire from them and necessary precaution is taken consistent with their ordinary use. As a reasonable result of the evidence the court below did not find, and I think properly, that there was want of any of the necessary precautions on the part of the appellants, and that every means in their power had not been used to prevent the escape of sparks from their engine, but founded their judgment solely on the fact that during the very dry weather at the time the fuel used was wood, and that coal should have been used as not so dangerous or likely to set fire to property on the line. In one of the questions submitted to the jury: "Did the defendants use reasonable care and caution in the material used for fires on the day in question?" They answered: "No, they did not, considering the surroundings, the state of the weather, the season of the year, the state of the country along the line, the dryness of the material and its then liability to ignite flame from sparks." To another question: "What is the ordinary material used in the country—that is wood or coal?" They answered: "If for domestic purposes wood, locomotives wood and coal." In answer to the question: "Was the fire caused by the negligence of the defendants?" They answered: "Yes," but did not point out wherein the

1884

NEW BRUNSWICK R. CO. v. ROBINSON.

Henry J.

negligence consisted. In answer to another question: "Supposing the jury arrived at the conclusion that fire was caused by sparks from the engine, and that sparks caused the damage, do the jury find that though wood was used, if reasonable care was used, the fire might and likely would not have occurred?" They answered: "Yes." And to the question: "Supposing wood was the proper fuel, was the running of the engine conducted with reasonable care?" They answered: "No." Notwithstanding all these questions and answers, it does not appear to me that the findings amount to negligence, for which the appellants would be answerable. The want of reasonable care suggested in the last two questions is in no way definite. It might mean want of care in running with an engine not properly constructed to prevent the emitting of fire or sparks, or it might be the want of care in the use of the engine. I think the court below was right in not founding their judgment upon such vague findings, particularly under the evidence. The judgment is founded on the proposition that if fuel of wood is more likely to do injury than fuel of coal, a railway company must be held to use the former at the peril and risk of paying damages for all injuries occasioned thereby which would not have had happened had coal fuel been used. There are many objections to such a ruling, and one, a practical one, which would be the difficulty of determining the question. It is known that what are called hoods are used near the top of every locomotive smoke-stack to prevent egression of lighted sparks, and if those used where wood is the fuel were placed on smoke-stacks for coal they would clog up and the draft would be practically destroyed; and if those intended for coal were used with fuel of wood, the sparks would not be restrained. I take it that if the proper hood is used for coal or wood, as the case

1884

NEW BRUNSWICK R. Co. v. ROBINSON.

Henry J.

may be, and still an injury is done by the emission of sparks, the company is not answerable. The use of wood for fuel in railway engines is not unlawful, but greater precautions are necessary in regard to the sparks. Being lawful if properly used it may be so used at all times with impunity, and the only obligation imposed by law is to use the proper and well-known precautionary measures and means. There is no evidence that such were not used and employed in this case. To entitle the plaintiff to recover, in an action such as the present, he must prove negligence by showing the proper preventive means were not used on the occasion. In this case he has not done so, and it would be a wrong and and dangerous course to leave the rights of parties to be dealt with and decided upon by the speculative decision of a jury on the probable results of the use of wood instead of coal—I cannot find any precedent for such a submission, and I can discover no principle to sustain it. The law governing cases of this kind, is founded on the immunity awarded to those using locomotive engines on railways, and they have the right at all times, and at all seasons of the year, and in every state of the railway surroundings to use wood for fuel, and they cannot be charged as for negligence for doing what the law permits. The jury found that for locomotives wood as well as coal was the ordinary fuel. I take it a railway company can legally use either at its option, and with the proper precautionary means and appliances can legally use the one as well as the other, and with the same immunity from the consequences of damages done to the property of others.

I think the judgment appealed from should be reversed and a new trial granted with costs.

GWYNNE J.—This is an action brought by the plaintiff against the New Brunswick Railway Company as

1884

NEW BRUNSWICK R. CO. v. ROBINSON.

Gwynne J.

defendants, to recover compensation for a barn and contents, alleged to have burned by sparks of fire permitted to escape from an engine of the defendants through the negligence, as was said, of the defendants and of their servants. The negligence charged in the declaration, as it was when amended at the trial, is thus stated:—

> Yet the defendants and their servants not regarding their duty, so negligently and unskilfully built, used and worked the said railway, and the locomotive used thereon, and managed the said locomotive, and the fire and burning matter therein contained, and the said locomotive engine was so insufficiently constructed, that sparks from the said fire and portions of the said burning matter escaped and flew from the said locomotive engine, to and upon the sheds, barns and buildings of the plaintiff, whereby the same, with their contents, were burned, and destroyed to the plaintiff, damages of $250.

At the trial the plaintiff tendered evidence for the purpose of establishing that wood (which was the fuel burned in the engine from which the sparks which set fire to the plaintiff's building were said to have proceeded) emitted more sparks than coal. Evidence of this nature was objected to as inadmissible, but was received, and the case as the evidence proceeded was chiefly rested upon the contention that the defendants should for this reason have used coal instead of wood, and that the use of wood under the circumstances was, therefore, such negligence as rendered the defendants liable in this action. The defendants produced evidence to establish that the engine was quite new and was furnished with the best apparatus to arrest the escape of sparks therein and in use in wood burning engines, which this engine was. This evidence was not much questioned, the case for the plaintiff having been rested upon the use of wood instead of coal, and the fact that when passing the plaintiff's place a great pressure of steam was used, the consequence of such

1884

NEW BRUNSWICK R. CO. v. ROBINSON.

GWYNNE J.

increased pressure being to cause more sparks to be emitted than happens under a light head of steam. This latter point was met by the defendants showing that the grade there was steep and an ascending grade to draw the train up which a greater pressure of steam was necessary. There were several objections taken by the defendants' counsel to the evidence offered by the plaintiff, and which was received by the learned judge who tried the case, for the purpose of establishing (as there was no direct evidence upon the point) that the fire which burned the plaintiff's building proceeded from the engine which had passed along the railway close to the plaintiff's barn immediately before the fire broke out, but all that evidence was, I think, clearly admissible. It was also objected by the defendants' counsel that the learned judge wrongly rejected evidence offered by him to show that the plaintiff's property destroyed by the fire had been insured in an insurance office, and that he had been paid for his loss by the insurers, but that evidence was, I think, rightly rejected. The defendants' counsel also desired to put questions to the witnesses under examination for the purpose of obtaining evidence that wood was the fuel in ordinary use upon railways in New Brunswick. This evidence was rejected, but, in my opinion, was admissible and proper to be taken into consideration by the jury upon the question whether the use of wood on the engine in question without more, and in the absence of all other negligence, was, in the opinion of the jury, such negligence as should make them responsible in this action, and more especially was it material upon one of the questions submitted by the learned judge to the jury, namely, "What is the ordinary material used in the country, that is, wood or coal?" The learned judge, in submitting the case to the jury, told them that the plaintiff

1884

NEW BRUNSWICK R. Co. v. ROBINSON.

GWYNNE J.

was not entitled to recover unless the damage of which he complained was caused by the negligence of the defendants, and that the plaintiff must establish this negligence to the satisfaction of the jury. He told them further that the defendants had a right to run their railway, but that they must use all proper appliances, care and diligence in working their trains, so as not to do damage to the people through whose property their line passes. This care, he said, extended as well to the construction of all the machinery as to the fuel used. He told them that the mere fact of sparks from the engine igniting the plaintiff's property, does not fix liability on the defendants to pay damages; that there must be negligence on the part of the defendants, and that it was incumbent on the plaintiff to establish this negligence, and that if not proved to their satisfaction the defendants were entitled to succeed. With this charge, as far as it goes, it must, I think, be admitted that the defendants have no just ground of complaint, but it fails to draw the attention of the jury to the points upon which the plaintiff relied as establishing, and upon which the jury were to say whether, in their opinion, under all the circumstances bearing upon the point he had established, that the defendants were guilty of, and, if any, of what, negligence to justify the jury in rendering a verdict against them in this action. The learned judge, however, together with the above charge, submitted certain questions to the jury, and among them the following:—

1. Did the defendants use reasonable care and caution in the material used for fires on the day in question?

2. Did the defendants use reasonable care and caution in the material used for firing purposes?

3. What is the ordinary material used in the country, that is, wood or coal?

4. Could the defendant have reasonably procured coal

instead of wood at the time?

5. Was the fire caused by the negligence of the defendants?

6. Would the use of coal have materially reduced the risk of fire?

7. Supposing the jury arrive at the conclusion that the fire was caused by sparks from the engine, and that the issue of sparks caused the damage, do the jury find that though wood was used, if reasonable care was used, the fire might not, and likely would not, have occurred?

8. Supposing wood was the proper fuel, was the running of the engine that day conducted with reasonable care?

The two first of the above questions which appear to be one and the same, are, as it seems to me, susceptible of two constructions, and which was intended does not very clearly appear, namely,—whether the use of wood, as the material to create the motive power, constituted in itself without more a want of reasonable care and caution, or whether there was a want of reasonable care and caution in the manner in which the wood was used upon the particular engine in question. If this latter was what was intended it would have raised a question, material no doubt, but one which was scarcely suggested at the trial, namely, whether the engine was or not supplied with all proper appliances and contrivances for arresting the escape of sparks, and upon that point the jury should have been asked directly whether the defendants had been guilty of any, and, if any, of what negligence in that particular. If the former was what was intended, then, I think, the question should have been accompanied with some direction explanatory of the circumstances which would make the use of wood as the material for creating the motive power to constitute, if it would constitute, want of reasonable care and caution.

1884

NEW BRUNSWICK R. CO. v. ROBINSON.

Gwynne J.

To these questions the jury answer in, as it appears to me, a very vague and unsatisfactory manner, not pointing at all to what they considered to be that want of reasonable care and caution which they find to have existed. In the question, as expressed in the first of the above formulas they answer: "No, they did not, considering the surroundings, the state of the weather, the season of the year, the state of the country along the line, the dryness of the material and its then liability to ignite flame from sparks." And to the question as put in the second of the above formulas they simply answer "No;" but what it was that in the opinion of the jury the defendants neglected to do, which they ought to have done, or did which they ought not to have done, which in the view of the above circumstances detailed in their answer they considered to constitute the want of due care, there is no suggestion whatever, so as enable the court to judge whether there was any evidence to support such finding, or to justify a verdict against the defendants, a point of great importance, especially as it appears to me in this description of action, in which the known tendency of juries is so great to render verdicts against railway companies under the influence of sympathy with the plaintiff, instead of in accordance with the facts established in evidence.

To the third of the above questions they replied: "If for domestic purposes wood—for locomotives wood and coal;" thereby establishing that wood is a material ordinarily in use in New Brunswick for creating motive power in locomotive engines.

To the 4th and 6th of the above questions they answer "yes."

Now, although coal could have been procured by the defendants, as found by the jury in answer to the 4th of the above questions, and although the use of coal

1884

NEW BRUNSWICK R. Co. v. ROBINSON.

Gwynne J.

might have materially reduced the risk of fire, it by no means follows as a conclusion of law, that the use of wood upon a railway, which for its entire length passes, as was said in the evidence, through a wooded country, where wood is procurable at every station, and which the jury by their answer to the third of the above questions, have found to be a fuel in ordinary use upon locomotives in New Brunswick, is in itself (even though the best appliances known to science and to practical experience to arrest sparks are used, and the utmost care in managing the engine is taken) such negligence as entitles the plaintiff to recover in this action. Whether the defendants were or not guilty of negligence, is a matter of fact to be expressly found by the jury, and what is the particular act or default, which in the opinion of the jury constitutes negligence in each case, should be clearly found and not be left in doubt, for what the jury might rely upon as constituting negligence, the law might pronounce not to be. In cases of this nature, therefore, there should be no doubt as to the acts or defaults which the jury in each case rely upon as constituting the negligence which subjects the defendants to liability. In the present case the answers of the jury leave in the utmost doubt what it is that they rely upon as constituting the negligence of which the defendants are guilty. If they meant that the mere use of wood instead of coal without more, constituted the negligence relied upon, the effect of that finding would be to pronounce it to be illegal for the defendants to use wood-burning engines at all, unless at the risk of insuring all persons against damage by fire escaping from such engines, even though the best possible appliances should be used and the utmost care should be taken to prevent the escape of sparks, and this is a proposition which cannot, I think, receive any countenance

1884

NEW BRUNSWICK R. Co. v. ROBINSON.

Gwynne J.

in a wooded country described as New Brunswick is to be throughout the entire length of the railway. But the jury do not say, as matter of fact, that this is the negligence of which they find the defendants to be guilty, and that they did not mean to find it to be so would appear from their answer to the 7th of the above questions, in which, by answering the question simply in the affirmative, they, in effect, say, in the words of the question, that though wood was used, if reasonable care was used, the fire might, and likely would, not have occurred. Now, what the want of care here referred to is, is not suggested; all that is said is that if something, not stated what, had been done, or it may mean that if something, not stated what, had not been neglected to be done, it is likely, but not clear, that the fire might not have occurred. The jury do not find any defect in the appliances used to arrest sparks; during the trial that point was scarcely questioned by the plaintiff; they do not find any want of care in the management of the engine to which they find that the fire was attributable. So likewise in their answer to the 8th question, while by answering "no" to the question as put to them they in effect find that even supposing wood to have been proper fuel, still that the running of the engine that day was not conducted with reasonable care, but what want of care they find to have existed and whether it consisted of omission or commission there is not the slightest suggestion. Such answers, finding nothing definitely and leaving in the greatest uncertainty what the jury intended to find to have been done by the defendants which ought not to have been done, or to have been omitted to be done which ought to have been done, are, in my opinion, altogether too loose, vague and uncertain to support a verdict against the defendants. As then the jury has not found that

1884

NEW BRUNSWICK R. Co. v. ROBINSON.

Gwynne, J.

there was or whether there was or not any defect in the construction of the engine used upon the occasion of the fire occurring as a wood burning engine, nor any want of proper appliances to arrest the escape of sparks, or any defect in the appliances which were used for that purpose which could and should have been avoided, and as, in my opinion, the mere fact that more sparks are liable to escape from wood than from coal does not make the use of wood as a motive power negligence subjecting the defendants to liability, and as there is so much doubt appearing upon the answers of the jury to the questions put to them, as to what they intended to find to have been done or omitted to be done by the defendants, which constituted negligence subjecting them to liability to the plaintiff, I think the case should be remitted to another jury, who should be required to state what is the particular negligence, if any, of which they shall find the defendants to have been guilty; and that the appeal should be allowed with costs, and a new trial.

Appeal allowed with costs.

Solicitors for appellants: *Weldon, McLean & Devlin.*

Solicitor for respondent: *John C. Winslow.*