

and noisy dog so near a highway as to be likely to frighten horses on it by his barking." This judgment was affirmed on appeal.

In the case under consideration by me, the engine house and waterworks were admitted to be constructed under a by-law of the municipality, and the defendants contend that the use of the steam whistle is essential to the efficient management of the works. It was not contended, however, that the use of the whistle was expressly authorized by the by-law, it having been added after the works were finished and tested, and some difficulty experienced, in the bursting of the pipes, caused, as it is said, by the enforced contact of the water with the air in the pipes on the higher ground.

If the whistle, then, be a thing likely to do mischief the defendants assume the common law liability in bringing it on their property, and "are bound to keep it there at their peril, and are answerable for all the damage which is the natural consequence of its escape," according to the rule in *Fletcher v. Rylands*. That noise and steam are likely to do mischief many decided cases attest. I need only refer to two—*Manchester R.W. Co. v. Fullarton*, 14 C.B.N.S. 54, and *Stott and Wife v. G.T.R. Co.*, 24 C.P. 347.

This whistle was described as one of unusual sound, between that of a steamboat and a railway whistle. One of the witnesses said that he remembered but once before to have heard a whistle like it, on a steamboat. Several of the witnesses described it as "more of a bass than a treble."

Situate, as it is, so near and in full view of the highway, with its escaping steam and unusual sound, it is well designed, in my opinion, to frighten horses passing along the highway. It is needless to add here that it is no justification for the use of a dangerous thing for defendants to say that it is essential to the efficiency of their waterworks. (See remarks of PROUDFOOT, J., in *Hilliard v. Thurston*, *supra*, at p. 516.)

The railway cases cited on the argument, and that class which, for distinction, we may call obstruction to highway cases, belong to a different class from *Fletcher v. Rylands*, though nearly related thereto, and I have therefore endeavoured to avoid, as far as possible, a reference to them, in this portion of my judgment. *Wilkins v. Day* and *Brown v. Eastern Mid. R.W. Co.* both belong to the obstructions to highway class.

The question of contributory negligence alone remains to be considered.

The defendants say that if plaintiff's servant had been holding a tight rein and giving special attention to the horse as he should, when driving along this portion of the road, on which there was a mill and the engine house, etc., he could have prevented the accident, and the driver himself would not undertake to say what might have been the result if he had been holding a tight rein at the time the whistle blew. And some evidence was given to the effect that the driver, immediately after the accident, made remarks to the effect that if he had been paying more attention to the horse and less to his pipe the horse would not have got away from him.

It is quite in accordance with the frailty of human nature, and, perhaps, especially among horsemen, that the driver should endeavour to uphold his reputation as a skilful horseman by offering some such excuse for the horse's escape from him; but in his evidence, whilst he would not deny that he might