

The defendant admitted the burning of the property of the plaintiff, but said that the fire was set out in the usual course of husbandry and without carelessness or negligence on his part, and if it escaped and did the damage complained of, it was through no negligence of his. He further alleged that the by-law had no application to this case; that the plaintiff was not the owner or occupier of adjoining property within its meaning, and was not, therefore, entitled to notice. He also alleged that the plaintiff was guilty of contributory negligence in not saving his property, after knowledge and notification that it was in danger.

*J. B. Clarke, Q.C., for the plaintiff. Du Vernet, for defendant.*

MORSON, J.J.—On the evidence I have come to the conclusion that the defendant knew of the plaintiff's property being on the highway opposite his property, that the fire set out by him was set out in the early part of June in the ordinary course of husbandry; that no fire was set out by him in the month of July; that he reasonably and honestly thought the fire had been extinguished in June by the rain and by burning out, and that he was not aware of any fire or smoke upon his premises until the 30th July, the day on which the north pile was destroyed. It is quite clear, however, that in this he must have been mistaken, for there seems no reason to doubt that the fire had been smouldering from the time when defendant thought it was out up to the 30th July, when it broke out again, but not to the knowledge of the defendant. I do not find any negligence on his part in not knowing of the smouldering, under the circumstances. That on the 30th July in consequence of a very high wind suddenly arising it blazed up, and as a result the plaintiff's north pile was destroyed. About a week later the south pile was also destroyed, and during all that week the fire was burning to the knowledge of the defendant, who took no steps, so far as his evidence shows, to control it or put it out, and who was aware that the south pile had not been removed out of danger. The plaintiff had knowledge that the fire was raging, as he termed it, all that week and that he, having his harvest to attend to, which he deemed the most important, took no steps to remove the south pile which was destroyed; that the defendant did not give the notice required by the by-law before setting the fire out. The plaintiff does not allege there was any negligence in setting out the fire, which he admits was quite proper in the ordinary course of husbandry in the month of June. He does not show any particular act of negligence down to the 30th July. He only alleges that fire was set out on the 13th July and that smoke was seen rising during the months of July and August. This in itself, apart from the by-law, in my opinion is not evidence of negligence. He does not state that the fire was not under control nor that there was any danger in it, nor that it must have been smouldering. It might be, however, that the setting out of fire on the 13th July, a month which was very dry, is some evidence of negligence, but the defendant has answered this by showing to my satisfaction that he did not set out any fire on that date.