

such as of promissory notes to which I have referred, and there seems no good reason why it should bar an action founded upon a claim such as the present.

The case is not to be likened to the case of a joint covenant in which one of the covenantors is also a covenantee, as in . . . *Ellis v. Kerr*, [1910] 1 Ch. 529. . . .

Nor, with great respect, do I think the case can be likened to the case of a partner injured through the negligence of a servant of the partnership while actually engaged by the partner to render him a service which it was the servant's duty to render to him, and which he had a right to require the servant to render him at the time. . . . The firm was dealing with the plaintiff in the same way and on the same terms as its other customers. The plaintiff's loss arose in the course of the business, and not in the course of any service that he was individually receiving because he was a member of the firm. And there is no authority for saying that for such a loss he should not be recouped by the firm, just as others would be.

The negligent acts of the firm's servant in such a case ought not to be so attributed to the plaintiff as to preclude him from saying to the firm that the loss resulting to him was the outcome of its servant's negligence, and that it should make good the consequences.

Probably this is only another manner of enforcing contribution; but, if so, there seems to be reasonable objection to it on that ground.

Why should the fact that the loss is the loss of the plaintiff's own property place him in any different or worse position? He is out of pocket to the same extent as if he had paid it or made it good to a third person. His position ought not to be any worse than if that was what he had been obliged to do.

If, therefore, the case were to be determined upon the findings of the jury as they now stand, I would, with respect, be of the opinion that the judgment ought not to be disturbed.

But, having regard to the evidence in support of the allegation that the fire arose from or was caused by the engine, and the more than hesitation expressed by the jury in regard to their finding in the affirmative upon the second question, and to what then took place with regard to it, I would be in favour of a new trial.

The second question was the crucial question upon which, as the learned trial Judge told the jury, the whole case turned—if they answered it in the negative, they need not proceed further. It was as follows: "Were the barn and goods of the plaintiff