

necessarily smaller, and there is therefore less danger of fire, as they are more likely to be extinct when they reach the ground. The advocates of the straight stack shew that it is so constructed that the live cinders are more burnt up, beaten down, and deadened than is possible in the diamond, before they reach the point of escape, and that those that do escape, though they may be in one respect larger than those emitted by the diamond, are ejected from the stack by force of the exhaust, directly upwards to a great height, and thus are more likely to die before they fall.

The trial Judge told the jury that if they came to the conclusion upon the evidence, that as regards prevention of danger from fire, one stack was as good as the other, or if they thought this was a question upon which practical or scientific people, with a knowledge of the subject, might honestly differ, defendants were entitled to succeed. If they believed that the real reason for substituting the straight stack for the diamond was that there was less danger of fire from it, that might alter the case.

If there was a substantial difference, a substantial lessening of the danger, it was defendants' duty to have adopted the better method, and then the question would be whether they had acted reasonably in making the change, or had they delayed too long a time in doing so.

All the circumstances which could bear in favour of defendants were very fully pointed out, and if the jury had found a verdict the other way it would have been impossible to say that they were wrong. They might well, as it seems to me, have adopted the view that one engine had no practical advantage over the other, on the point in question.

On the other hand, I am clearly of opinion that the trial Judge could not properly have withdrawn the case from the jury. There was evidence of practical men that the straight stack was the better stack of the two for preventing the emission of sparks likely to be dangerous to property adjoining the line of way, and that this was one of the reasons, if not the main reason, why it had been substituted for the other. Defendants' witnesses, while admitting the superiority of the straight stack to the diamond, in the matter of cleanliness, and perhaps economy, would not concede that safety was one of the elements which influenced its general adoption by railway companies, asserting that as a spark arrester the diamond was quite as efficient as the straight. These two questions of fact, viz., whether the straight was inferior in point of safety to the diamond, and whether that was the reason or one of the reasons which had induced the companies to substitute it for the latter, were for the jury to decide, upon the opposing testimony, and if plaintiff's contention prevailed with them,