

plaintiff had not proved that, when the fire was started by the defendants' locomotive, that locomotive was in the control of and being used by them.

I reserved my decision upon the defendants' motion, and stated that I would leave the first question to the jury and would ask the jury to assess the damages.

Counsel for the defendants then called witnesses, viz., McDonell, who used and drove the engine, and the superintendent of the defendant company. The evidence given by these witnesses was material, and the case must be decided upon the whole evidence and upon the law applicable thereto. So I submitted the following questions, which the jury answered:—

(1) Was the fire which occasioned the damage to the plaintiff started by the railway locomotive of the defendants? A. Yes.

(2) Was the witness McDonell the foreman of the defendants, in the absence of the superintendent of the defendants, on the day and at the time when the fire started? A. Yes.

(3) Was the witness McDonell, who was using and driving the engine at the time the fire started, if you find that the fire was started by that locomotive, acting for the defendants and within the scope of McDonell's authority? A. Yes.

And they assessed the damages at \$665.25.

I am of opinion that there was evidence to warrant these findings. The witness would not say that he did not carry mail matter of the defendants to the station of the Grand Trunk Railway at the time when the wife of the witness went with him. The locomotive engine was the property of the defendants and in use by them. It was in control of the witness McDonell, using it for the defendants, even if at the time the wife took that opportunity of going with her husband to the station on her business.

The statute aims at making the owner of a locomotive liable if in its use it starts a fire. McDonell was accustomed to drive the engine; he was in command at the time of the starting of the fire in question; the locomotive was being run on the tracks of the defendants' railway.

Even apart from the Ontario Railway Act, this is a case of the defendants starting a fire upon their own land, and allowing it to spread to the land of the plaintiff; so that, in my opinion, the defendants are liable; also, upon the findings the plaintiff is entitled to judgment.

There will be judgment for the plaintiff for \$665.25 with costs on the High Court scale and with no set-off of costs.