

discharge or receipt of any kind was given by the pursuer to Lord Ailesbury, which confirms this view.

“It is also unnecessary to deal with the question as to the effect by the law of England of a receiving-order having been made and a receiver appointed in connection with Lord Ailesbury’s affairs, as to which a good deal of evidence was given on both sides by counsel learned in the law of England. I must say that I have some difficulty in seeing how the receiver could have made use of the cheque if it had been handed to him. He could only sue in the name of Lord Ailesbury and Lord Ailesbury could not have recovered on that cheque.

“But as I have said, it is unnecessary to consider that question. The pursuer has been shown not to be a holder in due course, and therefore the defender must be assoilzied.”

Counsel for the Pursuer—A. J. Young—Watt. Agents—Winchester & Nicolson, S.S.C.

Counsel for the Defenders—Sol. Gen. Asher, Q.C.—Dickson—Salvesen. Agents—Webster, Will, & Ritchie, S.S.C.

## HOUSE OF LORDS.

Saturday, January 21, 1893.

(Before the Lord Chancellor (Herschell), and Lord Watson, Lord Ashbourne, Lord Macnaghten, and Lord Field.)

THE PORT-GLASGOW AND NEWARK  
SAILCLOTH COMPANY, LIMITED  
v. THE CALEDONIAN RAILWAY  
COMPANY.

(*Ante*, vol. xxix., p. 577, and 19 R. 608.)

*Reparation—Railway—Fire Caused by Spark from Engine—Damages—Negligence—Onus of Proof.*

The owners of a flax store situated near a railway, which had been set on fire by a spark from a passing engine, sued the railway company for damages, alleging that they had omitted to take proper precautions against the emission of sparks in not fitting the engine with a contrivance known as the “spark-arrester.” The evidence showed that the engine in question was of a new type, to which the “spark-arrester” was inapplicable, and that it was fitted with the best known means for preventing the emission of sparks available in engines of that class. It was not proved that the risk of communicating fire had been sensibly increased by the new method of construction.

*Held (aff. the decision of the First Division)* that the pursuers had failed to prove that the absence of the spark-arrester made the engine defective, or that the defenders were negligent in

using such an engine, and accordingly that the defenders fell to be assoilzied.

This case is reported *ante*, vol. xxix., p. 577, and 19 R. 608.

The pursuers appealed.

At delivering judgment—

LORD CHANCELLOR—My Lords, this is an appeal from an interlocutor of the Inner House recalling an interlocutor of the Lord Ordinary, by which he found the defenders, the Caledonian Company, in blame in respect of a fire which had occurred on the pursuers’ premises owing to flax stored there being ignited.

My Lords, at the trial it was in contest whether or not this flax had become ignited by means of a spark from one of the defenders’ engines. That question was determined against the defenders by the Lord Ordinary, and the Court above saw no reason to differ from that conclusion. It must therefore be taken, for the purpose of discussing this matter in your Lordships’ House, that the injury and damage to the pursuers was the result of a spark from one of the defenders’ engines. It is now well settled-law that in order to establish a case of liability against a railway company under such circumstances it is essential for the pursuers to establish negligence. The railway company having the statutory power of running along the line with locomotive engines which in the course of their running are apt to discharge sparks, no liability rests upon the company merely because of sparks emitted by an engine having set fire to adjoining property. But the defenders, although possessing this statutory power, are undoubtedly bound to exercise it reasonably and properly, and the test whether they exercise this power reasonably and properly appears to me to be this—They are aware that locomotive engines running along the line are apt to emit sparks. Knowing this, they are bound to use the best practicable means, according to the then state of knowledge, to avoid the emission of sparks which may be dangerous to adjoining property, and if they, knowing that the engines are liable thus to discharge sparks, do not adopt that reasonable precaution, they are guilty of negligence, and cannot defend themselves by relying upon their statutory power. About the law, as I have thus expressed it, I do not think there is any controversy between the parties to this litigation. It was conceded by the learned counsel for the appellants that the law was that which I have submitted to your Lordships. The question therefore resolves itself into one of fact. Have the pursuers, upon whom, in my opinion, the *onus* lay, and always must lie where liability can only be shown by the establishment of negligence on the part of the defenders, made out a case of negligence?

My Lords, at the time when the action was tried the pursuers did not know for certain which of the engines of the defenders’ company had caused the damage, assuming it to be certain that it was caused

by one of them, inasmuch as three engines had passed along the line within a short time, different from one another, and it might have been occasioned by either one or other of them. However, it appears now to be established with certainty that it was engine No. 85, a spark from which caused the disaster. This engine was one of the modern type adopted in the year 1888. Prior to 1882 the engines of the Caledonian Railway Company were all of them fitted with what is known as a spark-arrester—that is to say, a grid was inserted in a particular position in the engine for the purpose of preventing embers that were likely otherwise to find their way by means of the draught out of the chimney, from so being discharged.

Now in 1882 the Caledonian Railway Company ceased introducing in the construction of their engines these spark-arresters. But I need not dwell upon that, inasmuch as the accident which occurred did not result from sparks discharged from one of these engines of the older type without the spark-arrester, but from sparks discharged by the modern type of engine introduced in the year 1888. This type of engine, using what is known as the vortex blast, never has been constructed with a spark-arrester; and the case on behalf of the defenders is this, that for the purpose of preventing the emission of sparks it is a more efficient engine and of a better construction than the older type of engine, even with the spark-arrester. That is undoubtedly a matter upon which there was some controversy at the trial before the Lord Ordinary. The Inner House came to the conclusion that the defenders had established (certainly that the pursuers had not established the contrary) that the modern type of engine without the spark-arrester was an engine better adapted for diminishing the risk of fire to the property of adjoining owners than the older type with the spark-arrester, and I am unable to advise your Lordships to differ from that conclusion. The modern engine differed in several particulars from the older engine. It was alleged that in the older type of engine the lower tubes got very soon blocked up in the course of the journey, which necessitated a greater draught through the upper tubes in order to maintain the engine in a state of efficiency, and that consequently this increased draught, which was caused by an increased blast, tended to drive the embers which passed through the upper tubes out into the air; so that although the spark-arrester operated no doubt to some extent to prevent embers from finding their way out, which would have found their way out if there had been no spark-arrester, yet, upon the whole, the fact that this increased draught was necessitated in the course of the working of the upper tubes, tended to a considerable increase in the amount of sparks. In the later type of engine, owing to the mode in which the blast was effected, and the products of combustion were carried up, the draught was said to be more equally diffused, so that although in a sense the

blast and the draught were greater, yet they were not greater in the whole of the tubes than they would have been in the upper tubes before when the lower tubes became blocked, the consequence being that as the lower tubes never did get blocked in the modern type of engine, the combustion was said to be more complete, and it was alleged that fewer embers were likely to leave the combustion chamber, and (this is a very important circumstance) that the fire was likely to be less disturbed.

Now, these distinctions between the two types of engines were pointed out very forcibly by the practical witnesses called on behalf of the defenders, who alleged (especially Mr Drummond on this point) that they had observed, in point of fact, that the fire was less disturbed with this new type of engine than it had been in the working of the older type. My Lords, if that is clearly established, it is a point of cardinal importance; because everybody must admit that the more the tendency to disturb the fire, the more the tendency of the embers to pass out through the tubes; and the less the tendency to disturb the fire the less will be the tendency of the embers so to pass out.

I need not detain your Lordships by going through the whole of the evidence; but first of all it seems to me that it is impossible to say that the Court below were wrong in coming to the conclusion that the modern type of engine, even without the spark-arrester, was as well or better adapted for preventing the emission of sparks than the older type with the spark-arrester. And, my Lords, this is by no means an unimportant fact, that the evidence was that there were not more complaints, but rather less, of fires caused by the use of the engine without the spark-arrester than there had been with the spark-arrester. There was certainly no evidence that the fires were more frequent. Further than that, one of the pursuers' own witnesses—one of their scientific witnesses—Mr Armstrong, stated that besides these two engines, Nos. 82 and 85, which were referred to at the trial, he had "seen an engine with the vortex-blast in actual operation on the London and South-Western Railway." He says, "I found there was no excess of sparks." Then he mentions that "the cinders were rising towards the sides of the box, and there was a hollow just below the inner blast of the tube." That is an important admission as the result of his observation; he did not find any excess of sparks.

I need not detain your Lordships by going further into the evidence which was dealt with in the Court below, but I content myself with saying that I am quite unable to find it established that this new type of engine, illustrated by No. 85, was more dangerous as regards the emission of sparks than the older type. Indeed, upon the whole, the weight of the evidence seems to me to be the other way, and to tend to the conclusion that it was likely to be less dangerous.

My Lords, the pursuers say, however,

that that is not enough, that even assuming that this modern type of engine without the spark-arrester was not worse or was even better than the old type with the spark-arrester, the defenders were bound to use this modern type with the spark-arrester added, so as to increase still further the security of the adjoining owners of property. Now, upon the question whether the introduction of this spark-arrester was practicable in this new type of engine without destroying some of the advantages, even as regards the protection from sparks, secured by the new type of engine, the evidence is in conflict. No doubt there is evidence on the part of the pursuers that the spark-arrester would diminish the risk without injurious consequences to the engine. There is evidence the other way on the part of the defenders. The experiment has never been tried. It is said that it ought to be taken as against the defenders that the theoretical evidence of the pursuers establishes their case, inasmuch as the experiment might have been tried, whereas it has not been tried. My Lords, I do not think it would be reasonable to say that a case has been made out to impose liability upon the defenders in that way. The pursuers themselves might have sought an experiment of that description—they might have applied to the defenders to permit an experiment of that description. If they had so applied, and the defenders had refused to permit the experiment, no doubt it would have been a very important matter for consideration in coming to a conclusion upon the evidence on the one side and on the other. I can quite understand why it was not done. The truth is that when this case was launched it was not, as I have pointed out, known whether the engine to be attacked was one of the old type, as is alleged, with the spark-arrester out of repair, or one of the new type, and that may account for the fact that no such experiment was made. But, my Lords, it seems to me impossible to say, upon that conflict of testimony to which I have called attention, that the defenders were negligent because they did not combine with the new type of engine, such as I have described, the spark-arrester. It cannot be said that because they did not do that they failed to use the best practicable means, according to the then state of knowledge, to avoid a dangerous emission of sparks. Upon the whole, therefore, my Lords, on that part of the case I do not see my way to suggest that your Lordships should reverse the judgment of the Court below.

The pursuers, however, say—and say truly—that even although the particular kind of engine employed may have been of the best known description, yet if it were worked negligently by the engine-driver, and sparks were consequently emitted, the defenders would be none the less liable. They place their reliance as regards this part of the case upon the evidence given on behalf of the defenders. There can be no doubt that Mr Drummond and

Mr Adams, who were called on their behalf, did state their opinion very strongly that an engine of this type was so admirably constructed for preventing sparks issuing from the chimney of a size that could possibly do any mischief, that if sparks did issue from the chimney which did mischief, it must be because there was something wrong in the method of dealing with the engine. Now, my Lords, of course evidence of that description must be accepted with some hesitation. It is not an uncommon experience to find that those who are seeking to show (because the *onus* is upon them of showing it) that they have used the best practicable means of preventing the emission of sparks, are very much inclined to believe that not only will the engine which they have designed and employed emit the fewest sparks possible, but that they have been so successful in achieving the end which they have desired, that sparks will not be emitted at all. In the case of *Fremantle v. The London and North-Western Railway Company*, the same description of evidence was given by those of the engineers who were called on behalf of the railway company. And when it is remembered that one of these witnesses was the inventor of this new type of engine, the sanguine estimate which an inventor makes of the merits of his invention can hardly be accepted as positive evidence of the particular state of facts. Therefore, my Lords, I do not think it would be possible to treat the statement made by Mr Drummond and Mr Adams as conclusive, that if sparks did issue, and such sparks did set fire to the flax, the engine must have been negligently driven. No doubt it is evidence in that direction, and evidence to be weighed and considered in connection with the rest of the evidence in the case.

But, my Lords, what I fail to find is any evidence on the part of the pursuers indicating exactly what is the negligence which they attribute to the engine-driver, and why they suggest that he should, at the particular time and place, have been guilty of this negligence. When we consider the evidence given by the engine-driver himself, who was an experienced engine-driver, we find him stating that he drove the engine in the ordinary way, and that there was no reason at the time and place why he should have driven it in any but the ordinary fashion, and I do not find that in cross-examination a single suggestion was made to him as to whether he did not do this, that, or the other, and so cause more sparks to be emitted than need have been. Surely, if there was negligence, it was the negligence of the witness Brown, and when he was cross-examined, if the case was to be rested upon his negligence, it would have been only reasonable and natural that there should have been put to him a suggestion of the particular negligence which he was supposed to have committed which was to render the defenders liable. Nothing of the kind is to be found, and I am very much impressed with this consideration, that an engine-driver, or anyone else who

is continuously and regularly performing any description of work, is so apt to get into a routine method of performing his work that the probabilities are very strong that he did drive his engine or perform his work in the ordinary and regular fashion unless one can see some reason why on the particular occasion it was likely that he should have departed from it. Now, I cannot see any such reason suggested here. Why should he have been negligent at this time and place? No suggestion has been put before your Lordships. No suggestion has been made to the witness.

Under these circumstances, looking at the evidence altogether, I cannot think that this house would be justified in reversing the interlocutor appealed from and directing judgment for the pursuers on the ground that they have established that although the engine was not in itself so constructed as to make its use negligent, the particular use of it by the engine-driver on the occasion in question rendered the defenders liable.

For these reasons I think the interlocutor should be affirmed, and I move your Lordships accordingly.

**LORD WATSON**—My Lords, the law in this case is not doubtful. The only controversy between the parties relates to matters of fact. I shall not refer to the evidence at all, because I derive from it precisely the same inferences which have already been so clearly expressed by the Lord Chancellor. I therefore agree in thinking that the judgment of the First Division ought to be affirmed, and I have only to add that I concur in the reasons assigned for it by the Lord President and by Lord M'Laren.

**LORD ASHBOURNE**—My Lords, I also concur in the conclusion at which your Lordships have been asked to arrive by my noble and learned friend on the woolsack.

It has not been suggested in the course of the argument that there is any absolute duty upon the part of the railway company to prevent the emission of sparks. It is conceded that without negligence and without liability there may be an emission of sparks, and that therefore there may be damage resulting from that emission of sparks, and under those circumstances the case which is made on the part of the pursuers is, that notwithstanding that necessary admission, the railway company ought to be held liable, if evidence can be pointed to showing, first, that the engine was not duly worked on the occasion in question; or secondly, that the defenders had not used an engine with the best known and practicable means of obviating danger, having regard to the state of knowledge at the date of construction.

Now, I at once put aside the first ground relied upon by the pursuers. It is given up. It is not suggested that the coal used was not perfectly proper for the purposes of the journey. Nor is it suggested that there was anything wrong in the way in which the engine was worked—that is to say, no definite indication is given as to

any point in which the engine itself was not rightly worked and was defective, having regard to its construction; and it is not suggested that the driver was not careful, and experienced, and sober. Therefore, I take it, concurring entirely with the conclusion of the Court in Scotland, that the engine No. 85 on the particular occasion was neither better nor worse than others of its class, and that practically the whole argument of the pursuers must turn upon the second ground. Accordingly, the main weight of Mr Ure's very able argument, and Sir Richard Webster's argument, has turned upon the second contention, namely, that the engine was not constructed in the best way, and with the best practicable means of obviating danger, an allegation which again turned upon the contention that the absence of the spark-arrester or grid made it defective, and that is the point upon which they ask your Lordships to arrive at the conclusion that the judgment below was erroneous and should be reversed.

Now, my Lords, it is obvious that no absolute standard can be laid down to which companies are bound to conform. They have to conform to the general principle which I have stated, and which has been stated so clearly by my noble and learned friend on the woolsack. But the position and history as we now have it before us, as regards the construction of engines, is very instructive. It appears that spark-arresters or grids were used formerly much more extensively than they are used now. It must also be conceded in favour of the pursuers that their use has not gone out—some companies use them still. That, however, is to be taken in connection with the fact that the vast preponderance of modern engines are made with other appliances, and it is strongly urged that these new appliances are not less efficacious than the old. My Lords, we have been reminded of the fact, and it has been stated in the course of the argument by my noble and learned friend, Lord Watson, that many thousands of new engines are made without these grids or spark-arresters. Therefore I think it must be taken upon the figures, that for some of the very greatest companies in England and Scotland, a great many thousands of modern engines are made on exactly the same lines as the engine No. 85, which is the engine that caused the damage in the present case. Now, I see no evidence upon which we can rely, that more sparks are emitted under the new system than under the old, and I do not think that railway companies can be said to be under any disability to prevent them from improving the efficiency of their engines, if they keep within the lines which will prevent an increase of danger to the public. I agree with Lord M'Laren, who in the course of his well-considered judgment said—"The Legislature, by authorising the use of steam-power, without limitation as to the power of the engines or the speed of locomotion, has impliedly indemnified the company against the consequences of the

use of such engines, provided they are of the best construction, and that the proper safeguards are used for minimising the risk of fire-damage."

Having regard to all the circumstances of the case, and the arguments which we have heard, I have myself arrived at a conclusion, as far as I am concerned, without any doubt in favour of the decision of the Court below, and I think that it should be affirmed.

LORD MACNAGHTEN and LORD FIELD concurred.

The Lords affirmed the interlocutor appealed from, and dismissed the appeal with costs.

Counsel for the Appellants—Sir R. Webster, Q.C.—Ure. Agents—Thomas Cooper & Company, for W. B. Rainnie, S.S.C.

Counsel for the Respondents—Lord Advocate Balfour, Q.C.—Finlay, Q.C.—Graham Murray, Q.C. Agents—Grahames, Currey, & Spens, for Hope, Mann, & Kirk, W.S.

Monday, March 20.

(Before the Lord Chancellor (Herschell), and Lords Watson, Ashbourne, Macnaghten, and Field.)

ORR v. MITCHELL AND OTHERS  
(MOIR'S TRUSTEES).

(Ante, vol. xxix., p. 543, and 19 R. 700.)

Property—Disposition—Conveyance of "Lands" without Reservation—Construction—Superior and Vassal.

The Duke of Argyle holding the *plenum dominium* of the estate of Castle Campbell of the Crown, in 1796 feued Hillfoot, part of the estate, to Drysdale, reserving coal and coalheughs. In 1726 Moir acquired Drysdale's feu. In 1808 the Duke conveyed the estate remaining in him to Tait, who in 1811 obtained a Crown charter of resignation and confirmation. Tait's estates were sequestrated in 1828, and in 1837 his trustee, on the narrative that he had exposed for sale "the superiority and feu-duty of the lands of Hillfoot," and that Moir had been preferred to the purchase, disposed to Moir "all and whole the toun and lands of Hillfoot . . . all as at present possessed" by Moir. The warrandice clause excepted the feu-rights or infefments granted by the disponent's predecessors; there was an assignation of the Crown charter of 1811 with its unexecuted precept of sasine. Moir was infeft on the precept. In 1860 Tait's trustee disposed to Orr the lands of Castle Campbell with a description which included the lands of Hillfoot and the "coals and coalheughs," and in 1890 Orr raised an action against

Moir's trustees to have it declared that he possessed the coal in Hillfoot in virtue of the conveyance of 1860. The defenders relied on the conveyance of 1837.

Held (rev. the judgment of the Whole Court) that the pursuer was entitled to the declarator sought, on the ground that the deed of 1837 conveyed the superiority of the lands alone, and did not include the coal.

This case is reported ante, vol. xxix., p. 543, 19 R. 700.

The pursuer appealed.

At delivering judgment—

LORD WATSON—My Lords, this appeal depends upon the construction of the dispositive clause of a deed of conveyance, dated 28th July 1837, executed in implement of a contract of sale by the trustee on the sequestrated estates of Crawford Tait, in favour of John M'Arthur Moir of Hillfoot, the respondents' author. In that clause the principal subject conveyed is described as "all and whole the toun and lands of Hillfoot, with mosses, muirs, and all and singular pertinents used and wont pertaining and belonging thereto, all as at present possessed by the said John M'Arthur Moir and his tenants." Two other subjects, Lochyfaulds and the Bog, are by the same clause disposed in similar terms, with this difference only, that they are described as having been formerly possessed by persons who do not appear to have been proprietors.

It is not matter of dispute that at the date of the conveyance in question the *dominium utile* of Hillfoot, Lochyfaulds, and the Bog was vested in John M'Arthur Moir with the exception of the coal, which was reserved by the Duke of Argyle, then owner of the barony of Campbell, when he feued out these lands to a predecessor of Mr Moir's in the beginning of last century. The superiority of the lands and the reserved estate of coal continued to form part of the barony which was acquired from the Argyle family by Crawford Tait and passed to the trustee in his sequestration.

In the year 1860 the lands and barony of Campbell were purchased from the trustee by the late Sir Andrew Orr, and are now feudally vested in the appellant as his testamentary disponent. This action has been brought by the appellant in order to have it found and declared that he has the sole and exclusive right to the coal in the respondents' lands of Hillfoot, Lochyfaulds, and the Bog; and they resist decree on the ground that the coal reserved in the original feu-rights was conveyed to John M'Arthur Moir by the disposition of the 28th July 1837. If that defence cannot be established it was conceded in argument that the appellant must prevail.

Shortly stated, the case which was maintained by the respondents in the Courts below and at the bar of the House was this—that the dispositive clause of the deed of 1837 conveys the lands to their author