ORIGINAL CIVIL.

Before Mr. Justice Beaman.

HIRJI KHETSEY & COMPANY, PLAINTIFFS, *v.* THE BOMBAY BARODA AND CENTRAL INDIA RAILWAY COMPANY, DEFENDANTS.* 1914. *March 7.*

Indian Contract Act (IX of 1872), sections 151 and 152—Liability of Railway Companies for loss, damage or destruction of goods entrusted to them for carriage—Evidence necessary to exonerate Railway Company when the true cause of the loss, etc., cannot be ascertained—Provision of appliances to put out fires.

H. sued the B. B. & C. I. Railway Company for the value of certain bales of cotton entrusted to the railway company for carriage and accidentally burnt while being so carried.

Held, that the railway company, merely by getting the Court to believe that the wagon on which the goods entrusted to it had been loaded had been so loaded with ordinary care, had not done all that was needed to absolve itself, but that in the absence of a definite known cause the railway company had to satisfy the Court that in the management of its engines, and in the whole course of drawing the wagon to the place where it caught fire, the railway company observed in all respects the same degree of care and prudence which an ordinary man conveying his own valuable goods might have been expected to take under the same circumstances.

When anyone has entrusted goods to a railway company for carriage, and those goods are lost, damaged or destroyed while in the possession and under the control of the railway company, the fact of the loss, damage or destruction is enough to cast upon the company the burden of proving that that loss was not due to any negligence on its part. The standard of negligence is given in sections 151 and 152 of the Indian Contract Act but no general rule universally applicable can be laid down as a rule of law defining the amount and quality of the proof in every case which will discharge the railway company's onus.

Lakhichand Ramchand v. *G. I. P. Railway Company*[1] is an authority for the proposition that a decree ought not to be given against a railway company sued as bailee for loss, damage or destruction of goods bailed to it, the moment it admits that it is unable to assign the *vera causa* of the loss. The company as bailee is primarily liable for the loss, but it may exonerate itself in

* O. C. J. Suit No. 963 of 1912.

[1] (1911) 37 Bom. 1.

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two ways. It may, while ignorant of the cause of the fire, show, if it can, that that cause could not possibly be attributable to itself, that in other words it was altogether external and beyond the railway company's control. Second, the bailee, while ignorant of the *vera causa*, might point to the fact that he had taken such precautions against risk, had dealt with the goods entrusted to him with such care, that whatever the cause might be and although attributable to his own act, yet it must be presumed to have been of such an uncommon, or of such an unpreventable, kind that he ought not to be held responsible for it. But such a defence could only be logically (if ever logically) established by the virtual exclusion of all causes of an ordinary kind attributable to the bailee or his servants or machinery.

THE plaintiffs in this suit were a firm of cotton merchants carrying on business at Bombay and having a branch office at Ujjain. On the 15th of April 1912, the plaintiffs' branch at Ujjain entrusted to the defendants at their station at Ujjain 2 lots of cotton of 135 and 100 bales respectively to be delivered to the plaintiffs in Bombay, and the defendants gave receipts in respect of each of these lots. The plaintiffs presented these receipts at Bombay to the defendants and paid the freight payable in respect of the lots, but the defendants failed to give delivery of 122 bales out of the lot of 135 bales and of 51 bales out of the lot of 100 bales. In fact the bales of which delivery was not given had been destroyed by fire while in the custody of the defendants, the circumstances of such destruction being fully set out in the judgment of the learned Judge.

The plaintiffs on failing to receive the balance of the bales above mentioned sued the defendants to recover the value thereof. In their written statement the defendants stated that the bales had been destroyed while in transit on the defendants' railway, that the defendants had been unable to discover the cause of the fire, but that the fire and the destruction of the bales had not been due to the negligence of the defendants or their servants or to any cause for which the defendants were responsible and claimed that in their carriage

and custody of the bales the defendants had acted throughout with all the care and taken all the precautions incumbent on them as bailees.

Inverarity, with *Raikes* and *Captain*, for the plaintiffs.

Contends that the railway has got to show what the cause of the fire was.

Relies on *Hurlstone* v. *London Electric Railway Company*[1].

Deals with the method of loading the bales: alleges improper management of the engine.

Refers to *Piggot* v. *The Eastern Counties Railway Company*[2]; *Fremantle* v. *The London & N. Western Railway Co.*[3].

Contends that there is no evidence as to rules being given to the driver.

Relies on *Gibson* v. *The South-Eastern Railway Company*[4]; *The Rivers Steam Navigation Company* v. *Choutmull Doogar*[5].

Binning, with him *Strangman* (Advocate General) and *Jardine*, for the defendants.

BEAMAN, J.:—The material facts about which there is little, if any, dispute are that the defendant-company received from the plaintiffs 186 bales of full pressed cotton for conveyance from Ujjain to Colaba. The goods were to be carried at railway risk. They appear to have been loaded on a bogie open truck forty-five feet long by nine feet wide, inside measurements, between the 14th and 16th April at Ujjain. During that time, though there is no specific evidence on the point, it may be taken

(1) (1913) 29 T. L. R. 514.
(2) (1846) 3 C. B. 229.
(3) (1861) 10 C. B. (N. S.) 89.
(4) (1858) 1 F. & F. 23.
(5) (1898) 26 Cal. 398.

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for granted that a considerable number of trains passed. Three lines converge on Ujjain, the defendant-company's lines, the Great Indian Peninsula Railway and the Rajputana-Malwa Railway. But the general control of the station is in the hands of the defendant-company. The wagon No. 13024 duly loaded with these 186 bales was finally despatched from Ujjain between 5 and 6 P.M. of the 16th April, being the 42nd wagon on the 62 up train, which consisted of 59 wagons and the guard's van. The contention of the defendant-company is that the wagon was properly and carefully loaded at Ujjain, that none of the coolies employed in loading it smoked in its vicinity, that there were notices prohibiting smoking, in English and Vernacular, that the wagon itself was examined and found not to be in any way defective, that the load was properly sheeted with three fire and water and rot proof sheets, the measurements of which are twenty-five by seventeen and a half, and that the sheeting was rapped and sealed and that all these precautions were verified more than once by the clerk in charge of that business at Ujjain. The train started, and, like nearly every other train running that night on this section of the line, was considerably behind time. The traffic was greatly congested, and there was great lack of water between Bangrode and Rutlam. At a station called Nagda the 62 up was stopped and a down mixed brought up alongside it. The engine of that train must have been close to the 62 up, though the evidence in this case is that it was at some distance from wagon No. 13024. That engine went to water, that is to say must, before the trains parted, have passed some part of 62 up at least three times, and at very close range. No fire was, however, detected, and the 62 up proceeded to Bangrode which it reached between 11 and 12 P.M. on the 16th. Here, owing to the congestion of the traffic, it received

orders from Rutlam, not to proceed. The engine was needed to carry off the traffic which had accumulated in Rutlam; and the Bangrode station officials were ordered to stable this great train, consisting of 59 loaded wagons, at Bangrode. We may assume that if the wagons were loaded with merchandise averaging even only a quarter of the value of that packed in wagon No. 13024 the total value of this load would have been very considerable. I mention this in connection with one of many arguments which may have to be noticed later, namely, that it would be unreasonable to expect the defendant-company to maintain any fire-quenching apparatus at a small inconsiderable station like Bangrode, the average daily takings of which were from rupees five to ten a day. Bangrode is a small station, but it is clear that it is used as a supplementary stabling station to Rutlam, when the accommodation of the latter is exhausted, and therefore may, at any time, be required to shelter goods of great value. On receipt of these orders the 62 up was broken into two parts, one part consisting of fifteen wagons being stabled in the dead end siding, the other consisting of the remainder of the train being stabled in the refuge siding. The shunting operations occupied from one-half to three quarters of an hour, and during that time no signs of fire were noticed. It will be noted that as soon as the first fifteen wagons had been subtracted from the train, the engine, if it had completed the shunting from the rear, would have been the guard's van and seventeen wagons off the burnt truck, and if from the other end 27 wagons off it. In neither case would it have been within a distance which, in the opinion of the heads of the defendant-railway, is dangerous. But presumably in the course of the shunting it must have passed the burnt wagon more than once, at fairly close range. When the whole 62 up was thus stabled at Bangrode

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the engine drew off and waited on the main line at some distance, say roughly 100 yards, from the burnt wagon, with steam up, waiting for permission to proceed to Rutlam. It appears to have stood so, for about an hour and a half in all before it got line-clear and went off with the engine-driver and guard. That was about 1-30 on the morning of the 17th. The actual hours and minutes are of no importance and I am only giving the times approximately. The Deputy Station Master was on duty during the night and superintended the shunting, but neither he nor anyone else detected any fire. Considering where the engine stood, and how long it stood there, and considering that the driver, fireman and guard at any rate were probably awake, it is in the highest degree improbable that the fire which subsequently broke out and consumed all these bales but thirteen could have made much headway at that time, or been visible from without the wagon. The 63 down train from Rutlam reached Bangrode about two hours late, say at 3-30 A.M., on the 17th; and the driver of that train saw smoke rising from wagon No. 13024 at a distance of about quarter of a mile from the station. It was a dark night, no moon, and I doubt whether it is possible to see smoke in such circumstances, unless it is slightly incandescent, and shows a certain amount of glare or light as well as mere smoke. But the engine-driver declares that he did not see any flame or light, only smoke. There is a conflict of evidence, (and a great deal too much has been made of it) whether the fire was first seen by the pointsman sent to prepare the points for the incoming 63 down or by the driver of that train, and who first reported it to the Deputy Station Master. In my opinion it makes not the slightest difference who first saw and who first reported the fact that the wagon was on fire, for it is common ground, and that is all that is important, that the fire was first seen and

reported when this 63 down was entering Bangrode at about 3-30 A.M. The engine of the 63 down was at once utilized to isolate the burning wagon, while all available hands were summoned to help in putting out the fire. Unfortunately the only fire-quenching appliances available at Bangrode were six hand-buckets and a watering can. There is a well with a rope, but the water was very low and it is obvious that little could be done with such means to cope with such a fire as had now developed in this wagon-load of cotton. While the wagon was being isolated it appears that three or four men got on the top and managed to dislodge 25 or 26 bales, with their hands and crowbars. Some of these were already on fire. But as the flames rose, the men could no longer stay on the wagon, and these attempts at salvage had to be abandoned. But if it be true that these men were able not only to mount the wagon but actually to work on it for some time (and something of the kind must certainly have been done) it follows that the fire could not at that time have seized the whole length of the wagon and probably was confined, as alleged by the defendant-company's witnesses on the point, to the centre portion. There is some ambiguity on this point, the witnesses, or some of them, probably meaning by "the middle" of the wagon not the middle portion of the surface, but the centre of the load. The latter statement could hardly be correct if the company's other evidence as to the complete and effective sheeting of the wagon be true. For it would then have been impossible to see into the centre of the wagon at all, and no fire would have been visible until the flames had burst through the sheeting. Nor is it probable that this would first have occurred at the side, although, I suppose, it is possible that it might have done. On the question of sheeting the defendant-company contends that this

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wagon was sheeted with three sheets, while the plaintiffs' case is that it was only sheeted with two. The third sheet is not traceable. The sheeting record book of Ujjain has disappeared. In fact it does not appear to have been kept during the first half of April as the local staff was overworked and unable to fill in all the required records. The evidence, so far as Ujjain is concerned, upon this point is purely general. None of the witnesses can pretend to have any definite recollection of this particular wagon, or how it was loaded, or sheeted or sealed. All that that part of the evidence amounts to is that the usual practice is to load, sheet and seal in a particular way, and that no wagon loaded, as this wagon was, would have been allowed to proceed had it not been so loaded, sheeted and sealed. That is of course merely begging the question, and all such evidence appears to me to be quite valueless and negligible. But at Bangrode we have the evidence of the staff to the effect that the wagon had three sheets on it, of which the middle sheet was totally consumed, not a rag or vestige of it remaining. Considering that neither of the other two were much burnt that appears to me almost incredible. Of course there are different ways of spreading three sheets of these dimensions over a wagon forty-five by nine, and loaded to a height of say five feet. But Mr. Pechey's evidence suggested that the third sheet would be used under the other two, and there is other evidence in the case to the same effect, namely, that underneath sheets are first put over the goods and then sheets over these again. Now if that had been the method of loading here, I mean if the third sheet had been put over the central twenty-five feet of the wagon, dropping down say four feet over each side, and then the other two sheets had been placed over it so as to overlap say ten feet on either side leaving a drop for each of five feet over each end of

the wagon (and that seems the natural way to employ three sheets of these dimensions upon a load placed in a wagon of the dimensions of No. 13024), then it is obvious that that central sheet could not possibly have been so utterly destroyed without doing a very great deal more damage to the overlapping sheets on either side, than the evidence shows was done to them. And I see nothing inconsistent with Mr. Pechey's ideas of efficient sheeting in supposing that two sheets would have fulfilled all the requirements of such efficient sheeting. Two sheets twenty-five feet long by seventeen and a half would of course have covered the wagon from end to end with a drop of two and a half feet at each end and about four feet over the sides, thus leaving three feet of cotton bales exposed at each end and about one foot at the sides. Mr. Pechey says that he is not much concerned with the sides of such loads, as the chief care of the Company is to protect the surface. But recollecting the manner in which engines come close alongside goods wagons, as one train passes another at a station, I confess I do not see why there is greater risk of conflagration on the surface than at the sides from sparks. But as I shall show later I do not think that this point is really important enough to deserve a twentieth part of the time and labour that has been spent over it during the trial. The fire having been discovered at 3-30 A.M. it appears that the Deputy Station Master at once awoke the Station Master of Bangrode, and, as I have said, everything that could be done was done to extinguish the fire. Somewhere between four and five a telephone message was sent to Rutlam for help, and this was received by the Station Master himself who happened to have come on to the station premises a good deal before his usual hours of duty. The Bangrode staff wanted more water; but Rutlam had no water to spare. There is a water train

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of eighteen tanks which runs, sometimes once, sometimes twice, a day out of Rutlam to a small watering station called Ghatla, just half way between Rutlam and Bangrode, that is to say, three miles from either, and brings back its tanks filled to supply the water needs of Rutlam. Rutlam is an engine changing station, and of course if its water supply runs out, traffic is at a standstill. I cannot in this sketch of the facts go into all the considerations pro and con which weighed with the Rutlam authorities, or have been suggested in argument as being such as ought to have weighed with them, on the subject of sending the water train, immediately the telephone message was received, to Ghatla to fill and go straight on to Bangrode. Had this been done, had it been feasible, and the staff at Rutlam are unanimous in saying that in all the circumstances it was not feasible, the water train might have got to Bangrode by about 6-30 A.M. And as far as I can see having got there it would have been quite useless. An immense amount of time has been spent by the plaintiffs over this point of the water train probably as a consequence of the result of *Lakhichand's case*[1]. But the short answer to all this argument is that supposing there had been no difficulties in the way of despatching the water train, and supposing it had been despatched and ranged-up alongside (or as near as it could then get) to the burning wagon, what would have been the use? By 6-30 the flames must have been at their height: probably no one could have got within fifteen feet of the wagon (vide Storrer's evidence as to the state of affairs when he reached Bangrode, say a couple of hours later) and with tanks and tanks of water available no impression, as far as I can see, could have been made on the fire by tossing buckets of water at it from a distance of fifteen feet. What was needed, what

[1] (1911) 37 Bom. 1.

alone would have been serviceable, was not only water in abundance but a hose and pressure pump as well, and there was no available hose or pressure pump at Rutlam, or at any place nearer than Godhra, 115 miles away. I may have to discuss this part of the case in a little more detail later, though I have long ago felt convinced that it really has little or no materiality if it can even be said to be relevant. For the present it is enough to say that the Station Master of Rutlam did not send the water train but ordered the Bangrode Station Master to take the drinking water tank off the up train which would reach Bangrode about 10 or 11 A.M. In the meantime the Kotah special had proceeded from Rutlam and found the wagon blazing at Bangrode. That would have been between 6 and 7 A.M. The engine-driver gave all the water he could spare from his tender, but this was useless, so he took his train on. Then followed the 17 down mixed, with Mr. Storrer on it. No mention appears to have been made of the fire at Bangrode to anyone on either of these trains, except the guard of the latter, who says (in opposition to all the rest of the evidence on this point) that it was common knowledge at Rutlam before his train left. When the 17 down got to Bangrode between 8 and 9 A.M. the engine was taken as close as it could get to the burning wagon and steam was blown upon it, seemingly more to enable the mixed train to get by than with any hope of putting out the fire. Then the 17 down went on its way leaving the wagon burning as hard as ever. In the meantime two telegrams appear to have been sent from Bangrode, one the formal "to all concerned" and the other, sent later, a special telegram to the Station Master at Rutlam for more water. The "all concerned telegram" certainly suggests that the fire had done its work completely and that there was no hope of saving anything. But

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the other telegram asks for more water, and this appears to have reached the Station Master shortly after 8 A.M. He thought the best thing to be done, indeed the only thing to be done in the circumstances, was to order the Station Master at Bangrode to arrest the drinking water tank which would shortly come to his station; and this was duly done about 10 or 11 A.M. But when its whole contents had, like the spare water of three previous engine tenders, been thrown at the wagon out of the six hand buckets and watering can, naturally without the least effect, the staff at Bangrode gave the fire up as hopeless, and left the wagon to burn itself out. This it did in about two days from the commencement of the fire. Of the 26 bales which had been flung from the top of the wagon when the fire was first discovered 13 appear to have been saved; the remaining 13 which were left lying about already on fire were burnt and utterly destroyed. As to that the position of the Company might be different had its liability to be determined solely with reference to the manner in which it discharged its obligations not only in the way of taking precautions against risks, but in dealing with the situation when in spite of those precautions the risks had actually occurred. For it is hard to see how, had any attention been paid to these smouldering bales lying on the ground, a few buckets of water thrown over them at once would not have finally put them out, and saved them, subject of course to whatever damage they might have suffered before being dislodged from the wagon top.

Those being in outline the principal facts, what are the legal rights and liabilities of the parties? I do not see that sections 72 and 76 of Act IX of 1890 put a railway company sued in respect of goods entrusted to it for carriage in a better position than a common carrier under the old Carriers Act. Nor do I think it necessary

to go minutely into any change which the Act of 1890 may have made in the liability of railway companies, when sued as bailees, as compared with their liabilities before the passing of that Act. For, as it stands, the law appears to be clear. When anyone has entrusted goods to a railway company for carriage, and those goods are lost, damaged or destroyed while in the possession and under the control of the railway, the fact of the loss, damage or destruction is enough to cast upon the company the burden of proving that that loss was not due to any negligence on its part. The standard of negligence is given in sections 151 and 152 of the Contract Act but no general rule universally applicable can, I think, be laid down as a rule of law defining the amount and quality of the proof in every case which will discharge the railway company's onus. It cannot be a rule of law, though speaking generally, I think it is a very sound rule of right reason, subject to all proper exceptions in special cases, that where the fact of loss, damage or destruction is proved, and the railway company cannot prove the cause of this loss, etc., it cannot logically prove that it is not in law itself responsible for that unascertained cause. While on the one hand it is fair argument to say that a bailee who has goods in his sole possession and under his sole control and loses or allows them to be damaged or destroyed must show, first, how the loss or damage was occasioned before he can be heard to say that it is not due to his own negligence, it is going too far in the other direction to maintain that it is a universal rule of law in such cases that where the bailee is unable to assign the true cause of the loss or destruction he must in every case be liable for the value of the goods to the bailor. In every case it is open to the bailee to satisfy the Court, if he can, that although he does not know how the goods came to be lost, damaged or destroyed, it certainly was

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not owing to any want of ordinary care on his part. And this was actually done in the recent case of *Lakhichand Ramchand* v. *G. I. P. Railway Company*[1]. There the defendant-company could assign no cause for the fire, but the trial Court was satisfied that whatever the cause might have been it was not due to the negligence of the defendant-company, and in this view the Court of appeal concurred. The defendant-company in this case has from the first relied, in my opinion, much too confidently on *Lakhichand's case*[1] as establishing a rule of law that a defendant-company sued, as this defendant-company is sued, may exonerate itself by proof of general care, in dealing with large quantities of similar goods, and proving that that amount of care is usually sufficient to prevent loss, damage or destruction. On the other hand the case is certainly an authority for the proposition that a decree ought not to be given against a railway company sued as bailee for loss, damage or destruction of goods bailed to it, the moment it admits that it is unable to assign the *vera causa* of the loss. Now what is the actual position at the outset of the case? The defendant-company has received goods to be carried at its own risk. Instead of delivering them, it allows them while in its sole possession and under its sole control to be burnt. Two main questions then arise—(1) Has the defendant-company proved that it took as much care of the goods from the time they came into its possession to the time when they caught fire as an ordinary person would have taken of goods of the like quality and quantity of his own? (2) When the goods were found to be on fire did the defendant-company take as much care of them, that is to say, did it exert itself as strenuously having regard to the means at its disposal

[1] (1911) 37 Bom. 1.

and all the circumstances to put the fire out and save the goods as an ordinary person might have been expected to do if the goods had been his own? It will be noted at once that the second question is totally distinct from the first, and, in regard to the proof, has to be dealt with on a different line of reasoning altogether. The defendant-company might succeed, as in fact, it did succeed in *Lakhichand's case*[1], in exonerating itself so far as the origin of the fire was in question, and yet fail as it did in that case to exonerate itself when the question was of the duty it owed its bailor after the fire had been discovered. And that distinction is also of some importance with reference to Batchelor, J.'s criticism of the judgment of the Privy Council in *The Rivers Steam Navigation Company* v. *Choutmull Doogar*[2]. With respect I am unable to agree wholly either with the line of reasoning or the conclusion reached by Batchelor J. in that part of his judgment. Presently I will explain more in detail why. Now in this case the defendant-company comes into Court and professes a total ignorance of how the fire was caused. In effect its case is this. We always take care, as much care as any ordinary owner would himself take, of goods committed to our care for carriage. This is proved by the fact that while we carry enormous quantities of cotton, just as this cotton was carried, in open wagons, we rarely let it get on fire. Tables have been put in for three years to show that the company has lost very little cotton in transport by fire. Therefore, it is contended, we must be exonerated in respect of this particular fire. Now I may at once say that that appears to me an entirely fallacious piece of reasoning. Doubtless a very similar course was taken by the defendant-company in *Lakhichand's case*[1], and

[1] (1911) 37 Bom. 1.

[2] (1898) 26 Cal. 398 ; L. R. 26 I. A. 1.

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it proved successful. And the whole defence in this case has been modelled upon the defence in *Lakhichand's case*[1]. But it can never follow as a matter of law that what satisfied a Judge in one case with special reference to the facts of that case must always satisfy every other Judge in dealing with cases in which the problem may be in many respects different, the facts either more simple or more complicated and the grounds of inference therefore always liable to change. As to the defendant-company's liability for what happened after the fire was discovered, that must always be relatively simple and easy to determine compared with the first question, namely, was the defendant-company, in the absence of any known cause, liable for the origin of the fire? And it is clear that if that question be answered in the affirmative the second question would lose all practical importance. Now let me explain in a word or two why, I think, the very simple reasoning upon which the defendant-company mainly relies, professing to borrow it bodily from *Lakhichand's case*[1], is fallacious. Assuming that the defendant-company has carried, say, 6,00,000 bales of full pressed cotton, in all respects like the full pressed cotton which was burnt in wagon No. 13024, and carried them safely, with no greater percentage of loss than, say, 250 bales out of 6,00,000, how is that an answer to the fact that these particular 186 bales were set on fire while being carried by the defendant-company? Surely it is rather worse than no answer. For again assuming that exactly the same precautions were taken with these bales as with all other bales, and that in the vast majority of cases the bales reach their destination safely, does it not follow of necessity that since in fact these bales were burnt, the company must have exposed them to some extraordinary danger? Upon the defendant-company's reasoning it is certain

[1] (1911) 37 Bom. 1.

that one of two things must have happened, assuming that their propositions be true. Either the ordinary precautions were *not* adopted in loading these bales, or they were exposed to extraordinary danger. In either case if the act was the company's—a point I will develop in a moment—it appears to me to follow that on the facts thus stated and admitted, to go no further, there is a clear case of negligence made out. I cannot myself see how evidence, that as a rule bales are carefully loaded and in consequence reach their destination safely, can really have any relevance in the defendant's favour, although, no doubt, once believed, that kind of proof would acquire a distinct cogency against the defendant-company as making it certain or almost certain (in the absence of any known or even suggested cause external to the company and its servants and machinery) that these particular bales were *not* treated with that degree of ordinary caution all along the route which has ensured the safe delivery of so many thousand other bales. I have read a great many cases, to which I have been referred, and carefully analyzed their contents, and I have very little doubt about what is the law in cases of this kind. The company as bailee is primarily liable for the loss but it may exonerate itself in two ways. It may, while ignorant of the cause of the fire, show, if it can, that that cause could not possibly be attributable to itself, that in other words it was altogether external and beyond the company's control. I should always feel that there was a logical difficulty in accepting such a demonstration in a case like that with which I am dealing. But in cases of loss, it might very well be that the bailee might show that he had taken all reasonable care of the goods and yet that some person unknown had stolen them, and so they had disappeared. Here in a sense the cause of the loss is unascertainable and yet the bailee might

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exonerate himself. But that could only be by satisfying the Court that the cause of the loss was external to himself, and beyond his control. The commonest case perhaps would be spontaneous combustion if that ever really happens.

But that again is not truly a case of an unknown cause, for once assigned and believed it is a complete and efficient cause and explanation. But the unknown felonious acts of others (which according to high authority ought never to be assumed), again narrowing the ground of this particular species of defence, or acts of others in no sense felonious but merely careless and guessed at as a cause, almost exhaust the category of unassigned causation external to the defendant-company itself which would be likely to be acceptable in a Court as a sufficient possibility, and, when consistent with the proof of ordinary care, probability, to exonerate the bailee. Second, the bailee while ignorant of the *vera causa* might point to the fact that he had taken such precautions against risk, had dealt with the goods entrusted to him with such care, that whatever the cause might be and although attributable to his own act, yet it must be presumed to have been of such an uncommon, or of such an unpreventable, kind that he ought not to be held responsible for it. But such a defence could, I apprehend, only be logically (if ever logically) established by the virtual exclusion of all causes of an ordinary kind attributable to the bailee or his servants or machinery.

But I should think that it would be extremely hard for a defendant to make good such a defence, although, no doubt, it has been done. Those cases must, I think, be very rare in which a bailee, having the sole custody and control of the goods and losing or destroying them without himself knowing the cause, would be able to satisfy a Court that whatever the cause was it *must*

have been attributable either to some agency external to his own and beyond his control or to some thing so unusual and unpreventable that he could not in reason have been expected to guard against it. And that in effect is the law laid down, as I understand it, in *The Rivers Steam Navigation Company* v. *Choutmull Doogar*[1]. Lord Morris is very careful throughout his judgment to insist upon the need of such evidence as he examined on this point showing that the fire was caused by something or somebody external to the defendant-company and beyond its control. His reasoning on that part of the case, which should not be confused with his reasoning upon the second part, namely, whether apart from the origin of the fire the company was liable for negligence in not having detected it sooner, may, I think, fairly be thus summarized. The defendant-company had these goods in their exclusive possession and control. They allowed them to get on fire, and can assign no cause whatever external to themselves and their agents, nor can lay any solid foundation for the inference that the *vera causa* of the fire might have to be sought there, (his Lordship's examination of the evidence does not seem to me to have gone beyond this upon that part of the case) therefore they are liable. In other words, having regard to the natural course of events and the admitted facts, the fire must have been caused by some act or neglect of the defendant-company, since it undoubtedly *was* caused, since a fire is not an ordinary event to be set down as an usual incident of transport, and since no one else, so far as the evidence on that point goes, could reasonably be held to have caused it, the defendants and no one else are answerable for the fire, and were the cause of it. This does of course go very near laying down as a rule of law that where the bailee who has

[1] (1898) 26 Cal. 398 ; L. R. 26 I. A. 1.

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the complete and sole control of the goods bailed, loses or destroys them, and cannot prove the cause, the legal inference is irresistible that the cause is attributable to him and that, looking to the result, it must have been due to negligence. For fires are not caused except by negligence, though what the degree of that negligence may be would often depend upon all the facts being known, the true cause ascertainable. It would, I apprehend, have been no answer to the plaintiff's case in *Choutmull Doogur* v. *The Rivers Steam Navigation Company*[1], in the opinion of the Privy Council, had the defendant-company proved that it had carried thousands of loads of jute under similar conditions without losing a drum by fire.

From this brief analysis I deduce the following general principle, that where a bailee cannot assign the cause of loss he may always give evidence to prove, if he can, that although unknown, the cause *must* have been external to himself and beyond his control. Failing that, to exonerate himself he would have to prove that, while unknown and in all probability attributable to himself, the cause was of such a nature that he could not have foreseen and prevented it by taking all reasonable care and precautions. Thus, of course, it will always be open to a bailee defendant to give evidence, although he has no hope of discovering the cause of the loss, to prove that it was beyond his control, and that he is not answerable for it. While such evidence would always be relevant and needs to be examined, should it fail of its purpose, the mere fact that it was relevant and examined would not materially detract from the ordinary presumption of right reason, that a man, who has had the sole custody of goods and has destroyed them without knowing how, is himself responsible for the destruction. Such, I understand,

[1] (1897) 24 Cal. 786.

was the view of Palles C. B. in *Flannery* v. *Waterford and Limerick Railway Co.*[1], a judgment in which the nice points arising in all cases of the kind are treated with a subtlety and thoroughness that, I think, is rarely to be found in the judgments of the English Courts. Such too, I think, was the opinion of Erle C. J. in *Scott* v. *The Uxbridge and Rickmansworth Railway Company*[2] and the same doctrine was expressed in a sentence by Scrutton J. in a very recent case, *Hurlstone* v. *London Electric Railway Company*[3].

What is the evidence in this case? An immense amount has been accumulated, (but I may say at the outset that in my opinion at least 90 per cent. of it will never be relied on, or even looked at again,) during the much too protracted trial. I repeatedly protested but both sides appeared to be equally desirous of heaping up evidence, apparently with the idea of making the case appear to be much more difficult and complicated than in my opinion it really is. A common reply was that days were spent over a similar point before Mr. Justice Robertson or Mr. Justice Heaton; and it looks as though the bar had accepted a standard pattern (and I think a very bad standard pattern) for all cases of the kind. But where both sides are rich, and money appears to be no object, then naturally neither side likes to yield to the other in a plausible desire to lay every possible fact, material or immaterial, before the Court. Proof, if any were needed of the almost ridiculous superfœtation of evidence in this case, is given by the simple fact, that in their final addresses Counsel on both sides hardly referred to the evidence at all. Mr. Binning for the defendant-company occupied about an hour and a half dealing almost entirely

(1) (1877) Ir. R. 11 C. L. 30. (2) (1866) 35 L. J. C. P. 293.
(3) (1913) 29 T. L. R. 514.

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with generalities, with an occasional digression of which the object was to defend one of his witnesses from what he thought unjustifiably severe strictures, while Mr. Inverarity took perhaps an hour longer, but devoted almost all that time to a discussion of the law and English cases illustrating his main points.

The evidence, such as it is, breaks up naturally into three main divisions: (1) the evidence of the Ujjain witnesses intended to prove that all proper care was taken of the goods while loading, and that when loaded they were sheeted in the ordinary way, roped and sealed. That nothing was wrong with the wagon itself, and that therefore up to that point the defendant-company could not possibly be held guilty of any negligence; (2) the evidence relating to the journey between Ujjain and Bangrode; (3) the evidence relating to Bangrode, which again has to be sub-divided into evidence relating to what happened before, and after the fire was discovered. The latter evidence includes all the Rutlam witnesses and the drivers, firemen, guards, etc., as well as the passenger, Storrer, on the train which left Rutlam and reached Bangrode after the fire had been discovered. This evidence also includes the train, which brought the water tank of which use was finally made, from Nagda.

Now a very little thought will show that most of this evidence must be valueless. Indeed, in spite of the length at which witnesses were examined and cross-examined, hardly a single fact which can help the Court is really disputed. Thus, for example, it is of course useful to know what trains passed the 62 up on its way between Ujjain and Bangrode, and how long the foreman was in close proximity with any or all the latter. But such facts could have been elicited without dispute in five minutes from any of the defendant-company's responsible servants. On the other hand the evidence is *not*

explicit as to what trains passed the wagon, or at what distance, while it was being loaded at Ujjain. And I shall presently have to point out that the want of this information might tell seriously (though as the facts stand I do not think it does) against the defendant-company. Before I demonstrate, as I hope to do conclusively in a little while, that I have not exaggerated the worthlessness of most of the evidence, I will point out that the origin of the fire admits of only three practical possibilities: (1) that it was caused while the wagon was being loaded or after being loaded was waiting despatch at Ujjain; (2) on the journey between Ujjain and Bangrode; (3) at Bangrode between the time of its arrival there at about 11-44 P.M. and 3-30 A.M. It is only the first of these three possibilities which offers the defendant-company any chance of satisfying the Court that the origin of the fire was not due to any act of theirs. For after the train with this wagon, making part of it, started for Bangrode, it cannot be contended that if the fire was caused by any act at all, and not due to spontaneous combustion, that act was not the act of the defendant-company or some of its servants. My opening analysis of the true content of the main propositions upon which this doctrine depends, as well as of the true content of that doctrine applied to any particular case, brings out clearly, I hope, the great importance of this factor in the reasoning. For if the act cannot possibly have been an act external to the defendant-company, that is to say, if it is not humanly speaking possible, that anyone but the defendant-company itself caused the fire, then the further fact that the defendant-company is not in a position to show what the act was, who did it, or under what conditions it was done, virtually deprives all general evidence of ordinary care taken in this, as in innumerable other cases of like goods in quality and quantity, of all probative, or at any rate logical, value. The furthest such evidence could go in such circum-

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stances would be to open a possibility of the origin of the fire having been due to some cause so extraordinary and unusual (the intentional felonious acts of any person being now entirely excluded since such are never to be presumed) that although in a sense the defendant's own act, the defendant could not be charged with liability in respect of it. Virtually the only real exception to this rule, I think, would be a true case of spontaneous combustion, a cause which is as truly external to the defendant-company as though the wagon had been set on fire by a passing engine belonging to some other company, or by a flash of lightning. But in this case the defence of spontaneous combustion was explicitly abandoned before the trial. At the close of the case Mr. Binning urged that while this was so the defendant-company never meant to say that the fire may not after all have been a case of spontaneous combustion; all that the defendant-company meant was that they were not in a position to prove this, and did not mean to try. But, I think, after the correspondence which passed on the point, it would be wrong for the Court to entertain that cause as even a possibility. For the plaintiff had expressed his intention of calling expert evidence to convince the Court that these bales could not have caught fire of themselves, had that defence been directly or even indirectly persisted in. I must, therefore, deal with the evidence on the assumption that whatever the cause of the fire really was, it was not spontaneous combustion. And I may add that I do not believe that full pressed bales of cotton ever would ignite in that way. I do not know whether a single case has ever been scientifically proved, by which I mean that every other possible and ordinary cause, such as smoking in the vicinity, sparks, etc., has been rigorously excluded. There may be many cases, both on railway lines and in godowns, where large quantities of cotton have been burnt and no cause has been discoverable. Some of these

may have been attributed to spontaneous combustion. But had all the facts been known, as they never are in such cases, a simpler and more natural cause would probably have been discovered. For it must be admitted that the consensus of scientific opinion while favouring the bare possibility is strongly against the probability of the occurrence of spontaneous combustion in pressed cotton. If such a cause is always to be regarded as extremely remote and unlikely, although just possible, it is hardly necessary to seek for it among half a dozen quite ordinary, probable, and natural causes. Here, for instance, the burnt bales have been exposed over and over again to contact with passing sparks, and even if we exclude chance kindling from careless smoking while the bales were being loaded there are enough probable, not to say possible, causes of a very ordinary kind, to render it unreasonable to go out of our way (as some members of the defendant railway staff appear to have done in the early correspondence) to ascribe the fire to such a very exceptional and questionable cause as spontaneous combustion.

It has never been suggested, I think, in this case that the cause of the fire may have been due to the friction of the iron hoops round the bales. This was put forward and, I believe, seriously considered in the former case. But standing alone it can hardly be regarded even as a possible cause. I am pretty positive myself that, without some added factor, some defect in the wagon bringing some of its parts while in motion in contact and violent contact with these hoops, no amount of ordinary friction in transport could suffice to generate a fire. Were that really so it must be a matter of averagely frequent recurrence, and having regard to the millions of pressed bales of cotton which are annually carried over hundreds and hundreds of miles of railway without a single case of this kind ever having been proved to

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occur, I think I may safely disregard this conjectural cause. I have laboured these two points more than I should otherwise have been disposed to do, because, the whole of my reasoning must ultimately depend upon a logical process of exclusion. I have to exclude all possible causes external to the defendant-company before I bring the problem into a narrowed focus, within which the application of what I conceive to be not only the governing principles of law, but of right reasoning, can be easily and clearly applied. I will now turn back to the Ujjain evidence which was quite unnecessarily voluminous. I think it is entirely negligible for this main reason, that in the admitted facts, I do not believe that the fire did or could have originated at Ujjain. It will be observed that from the first, and in some parts of the oral evidence at the trial, the defendant-company attempted to show that the fire when first seen was in the middle, meaning the heart of the wagon. Of course, if that were so, its cause could not have been external ignition in transit, either at Nagda or at Bangrode. Some of the lowest or lower tiers of bales must have been set on fire at Ujjain while the wagon was being loaded, and the others being heaped upon them, and the whole load sheeted down, the fire must have slowly smouldered from 14th April when the wagon appears to have come in from Rutlam—or I should perhaps rather say from the moment it began to be loaded in Ujjain, up to 3-30 A. M. on the 17th when the flames were seen at Bangrode. Now books of authority certainly do say that cotton may smoulder almost indefinitely, once ignition has thus been partially started, and it is not absolutely impossible that sparks of some sort may have fallen upon and lodged among the lower or middle tiers of bales while the wagon was being loaded at Ujjain. But I should think that ordinarily, if such a thing happened, the almost immediate superimposition of other bales would have

a very strong tendency to crush out a merely smouldering spark on the surface of the bale below. And although if the smouldering cotton were stationary, it may be that the process of ignition is sometimes extremely slow, this must be less likely to be the case where smouldering cotton is being dragged through the open air at a fairly high rate of speed. Although sheeted, a wagon like this would admittedly have had a foot or so of the lower part of the load exposed to the air, and if the origin of the fire had been as suggested by the defendant-company, something which happened at Ujjain (I mean something beyond their own control) beginning in the lowest or lower and middle tiers, then it appears to me hardly possible that the fire should have remained unnoticed, merely smouldering from, say, the 15th April to the early morning of the 17th. The fanning wind made by the moving train would have been just about the level where the fire is, on this theory, originating, and surely long before the train had completed its journey to Bangrode, the smouldering centres would have broken out into flame. That is one reason, though it may not be deemed conclusive, for dismissing the whole Ujjain evidence. For, if the fire did not originate in Ujjain, it appears to me perfectly useless and bad reasoning to pile up evidence of careful loading at that place. However careful the loading, it was not careful enough. Either it was *not* careful, or the wagon was later exposed to heightened and unnecessary risk. Else there had been no fire. That I should have thought self-evident. And in this connection I will pause upon Mr. Binning's concluding presentation of his case. That learned Counsel was evidently as alive as I am to the rather absurdly disproportionate amount of evidence he had laid before the Court, for no better reason that I can see than that this had been done before in other Courts, and was the approved way of conducting a railway company's defence. For he

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virtually gave the go-by to the whole of his evidence resting his case on a syllogism and a very bad syllogism. He said in effect that the sum of the whole matter was this, the kernel lying in certain statistical statements put in by Mr. Pechey. The defendant-company carries enormous numbers of bales every year. We have shown by these tables that relatively very few get burnt. Therefore it follows inevitably that we take ordinary and reasonable care of all goods that are entrusted to us for carriage. The staring fallacy lies in the conclusion and the use of the word "all." The true syllogism is this. We carry innumerable bales every year loaded with ordinary care and upon an uniform principle. None of these bales get burnt. These (and a few rare cases to be found in our tables are of the same nature) did get burnt. Therefore it is clear that either our ordinary usual precautions were *not* taken with these bales, or that something very unusual happened which rendered precautions, ordinarily sufficient, insufficient in the case of these bales. Now what was that? Here the defendant-company is silent, merely saying that we do not know, we have not the slightest idea. But whatever it was it was not our fault.

But another and more cogent reason for disregarding the whole Ujjain evidence is that upon examination it turns out that none of the witnesses who give it really has or possibly could have definite recollection of this particular wagon. All they can say (the superior officers from such records as are kept) is that wagons are always loaded and sheeted and sealed in a particular way, and that as there is nothing on record to show that there was any defect in the construction of this wagon, or anything wrong in the way it was loaded, and as it was allowed to start on the evening of the 16th April, it must have been, etc., etc. Vinayak Vaman for

instance says that he examined the wagon three quarters of an hour before it left, but here he can only be speaking of his general practice, just as he is when he says that had bales been projecting he would not have allowed the wagon to go. Every one acquainted with the ways of station staffs up-country will easily rate such evidence at its true value. We have a photograph put in by the defendant-company of an ideally sheeted wagon, which makes it appear as though the whole load were completely swathed in sheeting, and then we have half a dozen photos put in by the plaintiff of wagons belonging to the defendant-company in which the load appears to be bulging out and is certainly considerably exposed. Except as showing that the perfect ideal of loading offered to the Court by the defendant-company is, to say no more, sometimes departed from, I do not attach much value to these pictures. Nor do they seem to be necessary, for two main reasons. One is the evidence of Mr. Pechey which makes it quite clear that not much concern is shown in loading wagons for the lower part of the side of the load. This must in almost every case of a fully loaded open truck, if Mr. Pechey is right, be exposed. And the next and far more decisive reason is that the evidence of two chemical analysers in this case proves conclusively that these very sheets, which are intended to protect the cotton against fire, are themselves rather more inflammable than cotton itself. If they afford any additional protection against ordinary sparkage at all, it must be rather on account of their surface than texture. Very likely a passing spark would have less chance of finding a dangerous resting place upon the surface of one of these sheets, than upon the centre of an uncovered set of pressed bales. But not much more can be said in favour of the sheets as a protection against fire. If they are at all loose and wrinkled on the top of the bales, thus, forming ridges, as in Captain Higham's experiment, it appears

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that they would offer a comfortable and secure lodgment to a dangerous spark, and would be almost certain if then set in motion to break out into flame. They appear to be saturated with a fatty substance, the main object of their manufacture being apparently to make them water, and not fire, proof. This wagon was in process of being loaded at Ujjain from the 15th to the evening of the 16th when it was sent off on 62 up train to Bangrode. All the coolies available have been called and unanimously declare not only that they never smoke themselves, but that they don't know what *bidis* and *hukkas* are, and that some of them have never even heard of smoking or seen anyone doing it even in the town of Ujjain. This is simply absurd and indicates the true value of most of the Ujjain evidence. But taking it to be true, it excludes one very simple cause of the fire, assuming that the fire could have been caused at all at Ujjain and yet remained undiscovered till 3-30 A.M. at Bangrode. As far as Ujjain is concerned then we should be limited in our search for a cause to some spark thrown on the bales in process of loading by a passing engine, not belonging to or under the control of the defendant-company, but there is no evidence of anything of the kind, and although engines belonging to other companies do pass through Ujjain, the general control of the traffic and loading there is in the hands of the defendant-company, and it is just as much their business to see that nothing uncommonly dangerous in the management of engines, which they permit to pass, is done, as it would be were they dealing with their own engines. Now as to the sheeting of the wagon. The Ujjain staff cannot produce their sheeting record. Apparently they were all so overworked at that time, that they were unable to write up records, which in the ordinary course they were bound to keep. And this, I may observe, is worth considering in connection with the evidence of such

witnesses as Jamnadas and Vinayak Vaman. In such circumstances it is easy to understand that they might have relaxed some of their ordinary precautions and the rigour of their rules of inspection. But at any rate we have no evidence worth the name of how many sheets actually were placed over this particular load of 186 bales. The first report, made by a responsible officer of the company as the result of personal enquiries at Bangrode after the fire, suggests that the staff there were of opinion that only two sheets had been used. Much evidence in this case has been led to prove that three and not two sheets were used. I do not think the point very material for reasons which have already been given. But it appears to me more probable that only two sheets were used, than that the third should have been utterly consumed leaving not a trace behind while the remaining two were but very slightly burnt. This is barely possible, if the fire, when first discovered, was confined to the middle of the truck, which for the purposes of this conjecture may be taken to have been covered by the third sheet. For then the first thing the local staff would have done would have been to pull off the remaining two sheets, while the fire may have got such a hold on the third as to render any attempt to save it useless. Its inflammable composition would also have contributed to its speedy and total destruction. The length of the wagon is 45 feet, and as I pointed out in an earlier part of this judgment, if three sheets were used in the manner suggested by Mr. Pechey, the central sheet would have been overlapped by the two end sheets to, say, the extent of ten feet or so, leaving a space in the middle through which the flames may first have broken. But the point appears to me to be of absolutely no importance, and the extent to which it has been laboured is of a piece with the rather senseless determination to accumulate evidence, rather than first

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reason, out the content of the problem to be solved, which has characterized the conduct of the parties on both sides. For it is perfectly obvious that three sheets would not necessarily afford complete protection, where two failed to do so, although, (unless the ignition of the sheets themselves was the true cause of the fire in which case no number would have increased the security of the load but would rather have heightened the risk) using three would have left rather less of the load exposed than would have been exposed had only two been used. According to Mr. Pechey's idea two sheets would have been quite adequate covering for such a load as this; the whole of the top of the load would have been covered, only about a foot of the lower sides, and two or three feet of the ends of the load would have been exposed. But the fact remains that whether two or three or thirty sheets were used the load caught fire, and there is nothing to show that increasing the number of sheets, under certain conditions of danger, would have increased the degree of protection.

Let it then be supposed for the rest of the argument that wagon No. 13024 left Ujjain loaded with 186 bales sheeted with either two or three sheets (in my opinion it makes not the slightest difference) duly roped and sealed, wagon in good running order, load so far safe and unignited. Will this state of preliminary facts exonerate the defendant-company? They appear to have thought that it would. In my opinion it does not. They have still to account for the manner in which notwithstanding all these ordinary precautions having been taken, a most unusual thing happened, namely, how the wagon came to be on fire at 3·30 the next morning. Their reply would probably be we have shown that in loading and despatching the goods we took as much ordinary care as a prudent man would have taken of those goods had they been his own. We are therefore freed of all liability

under sections 151 and 152 of the Contract Act. That is a view which I cannot adopt. It appears to me to violate not only well settled law, but all canons of reasoning. Before the defendant-company can be exonerated they have yet to satisfy the Court that, while the goods were in transit and under their exclusive control, they took every proper precaution, not only in the packing of the goods, but in the management of their numerous, dangerous and unruly machines happening to come into close proximity with the goods, to have rendered any mishap of this kind impossible but for the intervention of some wholly novel and unpreventable factor, which they could not with reason have been called upon to anticipate and guard against. And on this point the defendant-company is utterly silent. Absolutely no evidence has been given of the manner in which they manage their engines, when these have to pass close to loads of valuable merchandise. If they could have proved that they have adopted every means known to science to neutralize the recurrent risk of sparkage; if they had proved that none of their engines were ever allowed to pass, particularly at night, close by loaded wagons containing highly inflammable goods without shutting off steam, and that after every such quite ordinary risk had been run, inspection was taken of the wagon which had been exposed to the danger—and all these appear to be quite ordinary precautions which any man would naturally take to protect his own very valuable property—then the defendant-company might fairly have said to the Court, we have now proved that we did everything in reason to take care of these goods, and we have no idea how in spite of having taken all those precautions, the fire occurred. The answer (not to that appeal which would then be perfectly legitimate, but to the supposed need of ever making it) would be that in such circumstances,

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it is almost impossible that any fire should occur or that the defendant-company would be called upon to account for it.

Before I deal with the question of sparkage which, in my opinion, is the most important in the case, if indeed not the only important one, I will say a few words upon another point upon which an entirely disproportionate amount of time and quantity of evidence has been wasted, I mean the manner in which wagons of this kind are loaded. The defendant-company stoutly maintain that fully pressed bales loaded in open trucks are always laid end to end within the truck, and then tier on tier till the full tonnage of the wagon is reached. The plaintiff on the other hand contends that it is a common practice for the defendant-company to load these bales in a very peculiar way. The length of a fully pressed bale is 4·1 and the interior width of one of these wagons is 9 feet. Thus laid end to end on the floor there would be a space of eight inches between. The plaintiff, however, contends that the bales are commonly made to project anything from six inches to a foot over the rail of the truck. This rail is six inches high. Thus, if the plaintiff be right, the bottom tier of bales would be lying at an angle of about six inches in thirty-six. This would leave space between for placing a third row of bales upright. The width is 1·8. There is of course absolutely no evidence to show that wagon No. 13024 was loaded in this singular manner, but Mr. Inverarity relies on his pictures to show that in some wagons fully pressed bales do appear to be projecting slightly. Mr. Pechey appeared to doubt whether in one instance at any rate the bales were fully pressed, and if they were not but the common *dokdas* of unpressed cotton no inference could be drawn from the appearance of such a load to exceptional methods of loading fully pressed bales.

Apart from Mr. Inverarity's pictures, which are not very convincing, I should certainly have thought that the method of loading he suggests is so inconvenient and purposeless that no sensible loaders would ever have recourse to it. Every tier would be tilted down to the centre and the whole load would, I should think, be so unstable as to be likely to fall while in transport. But Mr. Inverarity appears to think that the notion is to wedge the two outside tiers by the central row of upright bales so as to fix them more firmly than if they were merely left lying on the floor eight inches apart. I do not think in the first place that the plaintiff's point is of any importance. It is true that if the ends of a lot of uncovered bales were projecting with an upward tilt, say six inches beyond the wagon, and uncovered, they would be much nearer a passing spark and might offer it a more comfortable resting place. But the absurdity of the argument lies in this that there is absolutely no evidence to prove that this method of loading is universal (and I should think every probability points the other way) or that the particular wagon was loaded in this way. It is going much too far afield to ask the Court first to hold that out of four or five thousand wagons one or two are loaded in this way on the strength of one or two photographs taken of wagons at rest in the Colaba Station (and for all we know partially unloaded or prepared for unloading) and two at rest in Broach and Surat respectively, and then to conclude that this wagon must have been loaded in that way and so exposed to an increased risk. Had it been so then the evidence pointing to the fire, when first seen, being in the centre of the wagon, would be made more credible. All I can say is that there is no evidence whatever that would warrant me in holding that this wagon was loaded in such a singular manner. I am inclined to agree with Mr. Pechey that no one but a fool would think of so

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loading an open truck. It is not as though by doing so more goods could be got into the wagon. Loaded in the ordinary manner the full tonnage of the wagon could be easily exhausted without the load being in excess of the prescribed height. But it cannot be denied that the plaintiff's photographs have this degree of value, supposing that they are not explainable or qualifiable on other grounds, that when the defendant-company with its picture of a completely sheeted wagon asserts, we invariably load every wagon in this manner, the pictures show that there are exceptional cases in which the defendant-company does not. But I do not understand Mr. Pechey to contend that there are *not* exceptional cases. There always must be over a great railway system in this country manned, as far as loading operations go at all sorts of out of the way places, by ignorant, careless and idle natives. But where goods catch fire, the case every time must be exceptional and some exceptional feature must have been introduced. Else we should have the proposition, all goods loaded with ordinary care, according to our usual loading practices, and carried in the ordinary way, get burnt, which is absurd. Where they *do* get burnt these questions arise. What was the exceptional feature which brought about the exceptional result? Was it some act of the defendant-company? And, if so, was it some act which they ought not to have done in the exercise of ordinary care and prudence? Whether the exceptional feature, the cause of the fire, lay in the loading of the wagon or in the manner in which the defendant-company managed the traffic, through which that wagon had to pass, matters nothing. It is here, I think, that the defendant-company, perhaps misled by the G. I. P. Railway Company's rather easy success in *Lakhichand's case*[1], have been lulled into a false security. They appear to have thought throughout the trial, that if they could get the Court to believe that this

wagon was loaded with ordinary care, they had done all that was needed to absolve themselves. In my opinion it is not so. They are still, in the absence of a definite known cause, to satisfy the Court, that in the management of their engines, in the whole course of drawing this truck from Ujjain to the place (wherever that was) where it caught fire, they observed in all respects the same degree of care and prudence which an ordinary man, conveying his own valuable goods, might have been expected to take under the same conditions.

Then how does the evidence stand about this? It is certain that the 62 up was passed at Nagda by another of the defendant-company's train, the engine of which went to water, that is to say, must have twice passed part at least of the train on which the burnt wagon was, in performing that operation, and once in ordinarily crossing it, that is three times in all. The engine must have started to water, and it is at starting that sparks are likely to be emitted more freely, just as they are under any other condition of strain, as for instance going uphill. It is pretty clear from parts of the defendant-company's own correspondence that some suspicion attached to this incident, and that it was at once seen to have been a possible—not to say a probable—cause of the fire. The only thing to be said against it is, that the fire was not discovered till some four or five hours later; and if a spark from this engine had set the truck on fire by lodging on the sheeting, then as the train moved from Nagda to Bangrode, it is pretty certain that the wind would have fanned the fire into a blaze and that it could not have escaped detection during the later shunting operations at Bangrode, which occupied about 45 minutes. But it is at least possible that the spark (if it was a spark here which set the wagon on fire) lodged in the lower tiers of the uncovered bales, and worked its way smouldering

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inwards, till later on it set the whole wagon on fire. However that may be, here is an obvious, a natural and possible cause. And, if it were the true cause, could it be said that the defendant-company had taken all reasonable care of the goods in train 62 up, although they allowed this engine to pass and re-pass close to the loaded wagon? I doubt it. I am sure that any private owner who had been so situated would at least have taken some precautions to minimise the risk of the engine throwing out sparks, and that he would probably also have been on the watch to see, that no spark in spite of such precautions had actually lit on and was likely to set fire to his goods. If the fire had not been caused by the time this train left Nagda, then by a process of exhaustion we reach the conclusion that it must have been caused either by sparks from its own engine on the way to Bangrode after leaving Nagda, or by sparks from its own engine while engaged in shunting it at Bangrode, or afterwards when the whole train having been stabled, the engine stood for an hour and a half on the main line with steam up waiting for line clear to Rutlam. It is unlikely that any spark from the engine of train 62 up could have set a wagon so far back on the train as this one was, on fire, while the train was actually running. Such evidence as there is on the point, not very convincing evidence at best, points to the extreme improbability, verging on actual impossibility of a spark travelling the length of 42 wagons. The danger line used to be put at ten wagon lengths, but has been reduced in Mr. Pechey's time to seven wagon lengths from the engine. Wagons loaded with inflammable goods are not under the present running rules allowed nearer to the engine than this. But from the very fact that there is a rule on the subject it is clear that the controlling authorities of the defendant-company do recognize a real danger from sparks. Nor

can there be any serious doubt or controversy but that that danger is real and substantial.

But if any such rule is needed for running trains it is clear that some similar rules ought to be enforced to regulate shunting and the management of engines passing close to loaded trains. No such rules appear to exist. It is idle to protect goods against this very special risk by insisting upon their being drawn at a greater distance than say 150 feet from the engine if any number of other engines may pass and re-pass them at a distance of less than ten feet.

I have been referred to some English decisions upon the liability of a railway company for damage caused to adjacent properties, etc., by sparks from their engines. The case decided by Tyndall C. J. in 1846 shows that much the same question, I am now considering, was raised there and that the railway company relied on much the same defence. But most of these cases differ from the present case, in being actions brought by persons between whom and the defendant-railway company no privity of contract existed. And perhaps the defendant-company here would seek to distinguish even what principles can be got out of those cases by pointing to the words of sections 151 and 152 of the Contract Act and saying that that was the utmost the railway company had to prove in any case in which it was charged with loss, damage or destruction of goods as a bailee by a consignor. I think, however, these cases are not without value as showing the views consistently maintained by many eminent English Judges where it was merely a question of negligence or no negligence. True, these may have been actions on the case, and not, as here, founded in contract, but I cannot see what fair distinction can be drawn, between the principles upon which, in the former class of cases, there was said to be a case to go to the jury for the plaintiff, and cases like this, in which again, all that

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is to be decided is, whether in the whole ordering and management of the goods entrusted to them including in this, of course, the whole ordering and management of any other part of their machinery or running gear, from which any reasonable danger might be apprehended, the defendant-company had or had not exercised ordinary care and prudence. It might be argued that while in most, if not all, of those cases the Judges appear to have insisted with some rigour on the railway companies, taking the utmost possible care to prevent their engines causing any injury to the property of other people, all that our law requires is, that as between the railway company and their clients the railway company is only bound to take ordinary care. I confess I see no reason in principle why a company should be under a greater obligation towards those with whom it has entered into no contract than towards those with whom it has. And as I understand the terms of sections 151 and 152 of the Contract Act they would not exclude from the reasoning by which the final conclusion is to be reached just those considerations on which so many English Judges have repeatedly laid stress in determining whether a case was proper or not to be left to the Jury. I can hardly doubt that in the admitted facts here there is a case which in England would most certainly have been left to a Jury, nor do I entertain much doubt as to what the Jury's verdict would have been. The defendant-company has not offered any evidence to show that its servants have orders to handle their engines with special care when passing stationary loaded wagons, particularly at night. And yet surely it is no extraordinary measure of precaution if their engines ever throw out sparks and glowing cinders at all. This they admittedly do. It is plain, I think, that whatever danger is reasonably to be anticipated from such a cause is greatly increased at night, when, as a rule, there are

long intervals during which probably no supervision is exercised at all, and at any rate the same degree of vigilance is hardly to be expected as during the day time. A fire kindled in day time might be easily and early detected by a hundred casual eyes; but during the small hours of the morning, unless the relatively few officers of the company on duty are wide awake and on the alert, it might go undetected until it had got such a hold as to be beyond all local means available to check it. And this is exactly what did occur in this case. For, however the fire originated, it is certain that it was not found out till it had made such headway that the staff at Bangrode found it impossible to cope with.

Some evidence was offered to show that the type of engine used to draw the 62 up is fitted with an internal arrangement—a brick arch and baffle plates—to reduce the quantity and size of sparks admitted to the funnel. But no one on behalf of the defendant-company can seriously contend that these, as well as all the rest of its engines, do not occasionally emit dangerous sparks and glowing embers. The defendant-company has adopted no spark arrester, although we are told that the G. I. P. uses one on all its engines. It is true that no spark arresters yet invented are, in the opinion of such experts as have been examined in this case, thoroughly satisfactory. But the fact that they are used on the G. I. P. and at least two Scotch lines of railway, suggests that such as they are they are better than nothing. But the real point lies, I think, not so much in the extent to which precautions of that kind are carried, for in no event it is contended that they are always efficient, but rather in the degree of caution shown by the defendant-company in the management of its engines, it being admitted and universally known that they do constitute a danger to inflammable goods when close to them, while passing and re-passing trains so loaded. And

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this appears to me in the admitted facts of this case to be the vulnerable point in the defence.

In the case to which I referred in an earlier part of this judgment, *Flannery* v. *Waterford and Limerick Railway Co.*[1], although that was an action for damages in respect of an injury caused to a passenger in which, of course, the onus would be largely on him, Palles C. B. laid it down that the accident must have been caused in one of three ways: (1) through some defect in the line; (2) through some defect in the carriage which ran off the line; (3) through some mismanagement of the engine and train while running. And it appears to me that *mutatis mutandis* that must always be very near the true principle to be applied in such a case as that with which I am dealing. The injury, if caused by an act of the Company at all (and I think I have shown that it must have been), must have been caused by some carelessness in loading the goods, or after they were loaded by some careless act of the Company's servants, either individually, or in the management of the rolling stock, and all that passed it while the train was *en route*, or being shunted. And as nobody knows what that act was, it seems to me that the defendant-company is placed, to say the least of it, in a very difficult, if not hopeless, position. But this case is not so difficult as some might be, because we have here admitted acts of the defendant-company, any one of which might have caused, and probably did cause, the fire, and those acts all appear to me to be of a kind which is not within the contemplation or meaning of sections 151 and 152 of the Contract Act. So far then as the origin of the fire has to be determined and the degree of negligence on that account for which the defendant-company is fairly liable determined, I think,

[1] (1877) Ir. R. 11 C. L. 30.

it is clear that the defendant-company by some act of its own caused the fire, and in the admitted facts the only reasonable conclusion is that that act was not such as an ordinary man would have done had the goods been in his own and under his complete control. In other words, in my opinion, the defendant-company is plainly responsible for the fire.

That being my conclusion on the first and most important point in the case, it is less necessary than it otherwise might have been to examine in detail another mass of evidence relating to the steps taken by the defendant-company's servants at Bangrode and Rutlam to quench the fire after it had been discovered. Here again the shaping of the case has plainly been influenced by the result of *Lakhichand's case*[1]. But it is surely rather unreasonable to insist that because in that case it was found that the defendant-company was negligent and therefore to that extent liable, because it did not take very simple, easy, effective steps to put out the fire, that here the defendant-company must likewise be held liable because they did not do all sorts of extreme, impracticable things which having been done, as far as the evidence goes, the destruction now complained of could not have been averted. Briefly, the plaintiff complains that the fire was discovered at 3-30 A. M. but no message was sent to Rutlam for help till an hour or so had elapsed, and then the Rutlam authorities took no immediate steps to send water to Bangrode. Further, that it amounts to negligence on the part of the defendant-company not to have maintained at Rutlam an abundant supply of water together with fire extinguishing apparatus, and in a less degree that they did not do the same at Bangrode. The latter point is a question of law and does not turn on any evidence at all. For the facts are admitted. There was not enough water at

[1] (1911) 37 Bom. 1.

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Rutlam to supply the needs of that station, and there was no apparatus kept there for putting out fires on a large scale. It certainly seems surprising, considering the large amount of merchandise which must be constantly lying at Rutlam, considering too that it is an engine-changing station, and therefore in need of a large supply of water, that the two wells on which it depends locally are allowed to become practically useless, and that while depending for its engine-water upon a water-train which runs sometimes once, sometimes twice a day to the little roadside watering station of Ghatla, three miles from Rutlam, it possesses no fire extinguishing apparatus at all. So that should a fire occur in the sidings there, involving loss to perhaps lacs worth of goods, the station authorities say that they would not be in a position to put such a fire out. Apparently the nearest station at which any proper fire extinguishing apparatus is to be had is Godhra, rather more than 115 miles from Bangrode. Of course it was out of the question to obtain that in time to be of any service in the present case of fire. But as I say all that depends upon admitted facts, and the point to which much evidence and argument has been addressed is simply this, whether when the Rutlam officials learnt of the fire between 4 and 5 A. M. they ought not at once to have sent the water tank train to fill up at Ghatla and go on to Bangrode? The railway staff have assigned a great many reasons why in existing circumstances this could not possibly have been done. All these reasons may be reduced to one, that doing what the plaintiff suggests would have so congested the traffic, already blocked and much behind time, that it could not reasonably be expected that the company would have faced all that inconvenience and loss for the sake of saving a single wagon load of the plaintiff's goods. If that were all that there is to be said on the point, I think it would be a

perfectly fair answer that the defendant-company then ought to pay the plaintiff the value of his goods. If to suit their own convenience and in their own interest, they did not adopt means which they might have adopted to save the plaintiff's goods, then it might be urged that they preferred their own interests to those of their bailor. But I think the real answer is much simpler. Mr. Storrer's evidence is emphatic. He declares that had the water tanks arrived all full, in the absence of force pumps and hoses, no good could have been done. The burning wagon might have been surrounded by water tanks and yet if there were no other means of utilising the water than throwing it out of hand buckets at the burning wagon, from a distance of fifteen feet, it would have been as impossible as before to get the fire under.

Once the fire had got hold of all the bales, this is probably true. For notwithstanding a fairly liberal supply of water from two engines, and finally the tank of drinking water which was detached from the up train at about 10 A. M., it is clear that the staff at Bangrode could not make the slightest impression on the fire. Now, had the Station Master at Rutlam used the utmost diligence, it is impossible, I think, that he could have sent the water train with all its tanks filled so as to reach Bangrode before 6-30 in the morning. And considering the accounts we have of the fire at 3-30 and the fact that it steadily increased in fury, and at no time was held in check, it may be concluded that by 6-30 it would have been entirely beyond the control of water, however abundant, which could only be pitched at it out of buckets from a considerable distance. Mr. Storrer says that when he reached Bangrode, say, at 8-30, the fire was raging so that he would not have cared to go within fifteen feet of it. He did, as a fact, get much nearer,

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but that because he was protected by the cab of the engine.

That being so, I think the whole of the evidence, about the water train and the question whether it might and ought to have been sent straight to Bangrode after filling up at Ghatla like most of the rest of the evidence in the case, may be entirely neglected. If, had the water train been sent, it could have given no effective help, then there was no use in sending it.

But it may be doubted whether the want of water and fire-quenching appliances at a station like Rutlam is not in itself evidence of negligence. Subsidiary to this is the consideration whether the local staff of Bangrode ought not, had they exercised proper care and vigilance, to have seen the fire long before 3-30. Once the shunting was over, say by 12-15, there can be little doubt that the station night staff took no further interest in the stabled train, and in all human probability they all went to sleep till the arrival of the 63 down at 3-30 woke them up. By that time the fire had broken out and was blazing fiercely. I think that the staff at Bangrode were right to isolate the wagon at once, and to try to get as many bales off it as possible while this was being done, but I should hesitate to say, did I think anything turned upon it, that they were equally right in not having at once applied for help to Rutlam instead of allowing a valuable hour to pass. But as there was no help available at Rutlam the point becomes immaterial.

I hope that I have not treated this part of the case too cavalierly. But let the evidence be handled how you will, the result must always be the same. It was physically possible to have despatched the water train, so that it might have reached Bangrode with all its tanks full between 6 and 7 A. M. But doing so would

have caused very serious and widespread dislocation of the traffic, and would, as far as I can judge, have done no good. Nothing really turns on the laboriously accumulated details concerning the actual hours at which down trains were to leave, and in fact did leave, Rutlam. Nor can I see that anything is gained from a consideration of so much of the evidence as may be related to hypothetical conditions. If both wells at Rutlam had been kept full to the brim, the station itself might not have needed the water brought in by the water train that morning at about 8-20. But the despatch of the water train would still have blocked the section and thrown the already congested traffic into worse confusion. It may be thought strange that when Bantleman, the Station Master of Rutlam, learnt of the fire and received a call for help at, say, 5 A. M. he did not at once go to Parr who appears to have had the disposition of the water train and confer with him about what had best be done. Parr was of course asleep at the time, and the evidence is that the water train could not have been made up for despatch without his concurrence and orders. But Bantleman evidently never thought of it. Indeed he did nothing except authorise the Bangrode staff to stop the up train which but for delays should have been at Bangrode a good deal earlier than it was, and take off the drinking tank to use in putting out the fire. Bantleman did not even mention the fire to Mr. Storrer who was leaving Rutlam between 8 and 9 A. M. for Bangrode.

But the explanation is that in all the circumstances of the case Bantleman judged that nothing effective could be done at Rutlam and so took what appeared to him to be the best course, leaving the section between Rutlam and Bangrode clear for scheduled trains in ordinary course (though all much behind time) and trusting to the arrival of the drinking water tank on the up train being in time to give the needed aid.

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In all the circumstances, both at Bangrode and Rutlam, I do not think that the staff of either station is to blame. The Bangrode men all appear to have worked hard and loyally with the limited means at their disposal. And the most that can be said against Rutlam is that it ought to have had, what it had not, an efficient fire-quenching apparatus, and an abundant supply of water. The consideration must always be a grave one, in regard to a station of such importance as Rutlam, and it will doubtless engage the attention of the defendant-company. It is one thing to say that a railway company cannot in reason be expected to sink all possible profits in the upkeep of efficient fire brigades and apparatus at every station, however insignificant, along the whole system, and quite another to say that they are under no obligation to provide such precautionary agency at great stations where goods must constantly accumulate and be exposed to the risk of fire. Had this fire occurred at Rutlam and lacs of rupees worth of damage been done, it may be doubted whether a Court would have listened favourably to a plea that the fire could not have been extinguished because the company does not maintain any staff to work, or apparatus to be worked, to put out fires. And indirectly of course the line of attack may be extended, as it has been in this case, the length of contending that had there been all that there ought to have been at Rutlam, effective use might have been made of it to extinguish the fire at Bangrode. But on that ground alone I should not have thought myself justified in holding the defendant-company liable. If they were not liable for the origin of the fire then I do not think they would be liable at all. As to what was done at Bangrode by the local staff a good deal of time was spent over the purely hypothetical question whether, had there been a force pump in the well,

water in sufficient quantity to cope with the fire when first detected might not have been available. The fact is that the water in the well was very low, and that there was no force pump. I think it is going too far in cases of this kind to put forward all sorts of hypothetical conditions under which loss might have been averted or minimized, and then charge the defendant-company for what loss was sustained, because those conditions did not exist. The trend of sparkage cases in England certainly encourages such attacks, but I think they ought to be kept within due bounds, in view of practicalities governing the management of great systems of railway in this country. Moreover, unless there had been pressure pumps and fire hoses as well as a force pump in the well, very little more could have been done to put out the fire than was done by the Bangrode staff. It is true that so long as men were able to be on the top of the wagon, and this was possible for some time after the fire was discovered, they might have dealt with it much more effectively had the supply of water at their command been much more copious than it was. Bringing buckets of water from a well at considerable distance, two at a time, to throw at the fire was of course utterly futile. And doubtless no more could have been done in the condition of the well, while much more might have been done had there been a force pump in it. On the other hand, it is unreasonable to expect the defendant-company to set up force pumps in every well at every road side station along the line and maintain them on the mere chance that some day a fire may occur there. Nor do I attach any importance to the want of any chemical preparations for extinguishing fires. I am not in a position to say whether, had there been chemical fire extinguishers, the fire might have been got under. I was referred to the late Aisgill disaster, and told that

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chemical fire extinguishers were used there with good results, but there is no evidence on record to prove this. Nor does the defendant-company use chemical fire extinguishers anywhere on its whole system. Having regard to the extreme proportional rarity of fires while goods are being transported by the defendant-company, I think that they are quite justified in contending that they are under no liability to incur a heavy, perhaps a ruinous, expense, to guard against these uncommon contingencies. But that only applies, of course, to the part of the case with which I am dealing. I cannot too often repeat that so far from being an answer on the first part of the case, the rarity or otherwise of fires affecting goods of this quality carried under ordinary conditions, rather points to the conclusion I have reached against the company. If fires were of constant daily occurrence then the method of transport would have to be reorganised; if they are of very rare occurrence, when they do occur they prove positively that something very unusual has happened. If the defendant-company say that engines passing and repassing wagons full of pressed bales of cotton properly loaded and sheeted very seldom set them on fire, it must be because those engines do not as a rule emit dangerous sparks, or the conformation of the sheeting is such as seldom to afford lodgment to dangerous sparks when thrown upon it. None the less if one fire has been caused in that way it becomes clear that here is a real source of danger, easily preventable by taking very ordinary precautions, and the defendant-company is, in my opinion, bound to see that every reasonable precaution is invariably taken. In all the voluminous, and for the most part utterly useless, evidence got together in this case there is not a word, I believe, to show that the defendant-company either anticipate any danger from this cause or have issued orders of any

kind to gaurd against it. It may be a rare but it is a recurrent cause, a continuing danger to which no private owner of valuable goods would subject them if he could guard against it. To go no further than the very recent records of this Court, this is the third case I recollect within a very few years in which goods carried by a railway company have been destroyed by fire. In *Lakhichand's case*[1] the Court held that the company was not responsible for the origin of the fire which was left for ever unexplained. In the other case, which was not properly a case of goods being carried, but of grass lying at a station, the Courts found that the defendant-company was liable, as the fire was due to sparks thrown out by a passing engine. Now, if sparks thrown out by a passing engine can ignite grass lying on a platform or in a station yard, or plantations or bean stocks (as in two well known English cases) beside the line of railway, it is clear or ought to be clear that they may also ignite goods in wagons which are being drawn along the line. It is merely a question of distance, and the degree of protection afforded the goods by the method in which they are loaded and being carried. The distance where the danger lies in a passing engine can never be nearly as great as in the cases I have mentioned, and I have already shown that while sheeting the goods may afford some slight protection, may make it much less likely that a flying spark should find a comfortable and dangerous resting place, this alone is not sufficient to absolve the company from taking every precaution in the management of its engines, in addition. If it could be shown that the sheets put upon the wagons were completely fire-proof (in fact they are highly inflammable) then the defendant-company might reasonably say that having so covered the goods they were entitled to ignore any risk

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from flying sparks thrown out by passing engines. The facts, however, do not warrant any such position. The sheets are as likely to catch fire as the cotton, if a spark falls upon them and is not immediately blown off or extinguished; sparks are constantly being emitted within range of these sheeted wagons, and occasionally they do light and dwell on and ignite the sheeting. Even in the case of a covered wagon, as in *Lakhichand's case*[1], in all human probability the fire was caused, as conjectured by Batchelor J. by a spark from the engine falling through the narrow aperture in the roof of the carriage, and considering that, if I remember right, it was actually next the engine, I think that the defendant-company were, to say the least, unusually fortunate in having been able to convince the trial Judge and the learned Judges of Appeal, that the fire was due to no negligence on their part and that they had taken all the care which the law required them to take of the goods entrusted to them. This case is on an altogether different footing of fact and is much more difficult, because of the length of time and the distance covered and the incidents which happened between the commencement of the loading of the wagon at Ujjain, and the fire being discovered at Bangrode. I must not be thought to be calling in question in any way the authority of the decision of the Appeal Court in *Lakhichand's case*[1]. I have indeed adopted the only rule approaching to a general rule of law laid down by their Lordships in that case, namely, that where the defendant-company admits that it is not aware of the cause of the loss, damage, or destruction, it is not on that mere pleading to be held answerable. But further than that I cannot go and I do not see that I am bound to go by a single word in the judgment of the learned Chief Justice in that case. I am still to consider on the

[1] (1911) 37 Bom. 1.

evidence (if there be any relevant and material evidence) and the admitted facts whether the company has absolved itself within the meaning of section 72 of the Railways Act and sections 151 and 152 of the Contract Act. That must always be a question of fact in each case depending upon the facts of that and no other case, and here, in my opinion, the company has entirely failed to absolve itself of the responsibiliy cast upon it. I think it necessary to add these remarks because at the conclusion of his final address Mr. Binning said that whatever be my own view he apprehended that I should feel myself bound by the decision of the Court of Appeal. I certainly do. I have not consciously in the whole of this judgment gone a step beyond all that I can discover in the learned Chief Justice's judgment which could fairly be called a ruling of law binding on all the original Courts. I have permitted myself to comment on Batchelor J.'s criticism of the judgment of the Privy Council in *The Rivers Steam Navigation Company* v. *Choutmull Doogar*[1] because it seemed to me absolutely essential that I should do so if I was to make myself clearly understood. For, I am as strongly of opinion as ever that that tudgment, being of the highest authority and therefore binding upon all our Indian Courts, lays down a perfectly correct and easily intelligible principle not of law but of proof, which is quite a different thing. And I believe that my method of dealing with this case, while it leaves the rule laid down by Scott C. J. untouched, is strictly in accordance with what was done by their Lordships of the Privy Council in the case of *The Rivers Steam Navigation Company* v. *Choutmull Doogar*[1].

I trust that I have now made good what I have said more than once in the course of this judgment, that at least ninety per cent. of the evidence is utterly

[1] (1898) 26 Cal. 398 : L. R. 26 I. A. 1.

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useless. It will be seen that, if I am right, every fact which needs to be considered, and forms part of the legitimate reasoning up to the main conclusion, is virtually admitted. And the same can be said with almost equal correctness of the second part of the case, which I have dealt with as shortly as I possibly could, in view of my first finding. It has, I am afraid, become a tradition of the bar founded on the far away dictum of some eminent Counsel, that the right way to conduct a case of any importance is to heap up all the bricks you possibly can within the limits stretched to their uttermost of the laws of evidence, on the off chance of making use of some of them in constructing the edifice of the final argument. Continuing that metaphor I may say the whole field and surrounding country, upon which have been built the tiny edifices of Counsel's final arguments to me, have been made a mass of useless bricks and debris. In my opinion that is not the best, but the worst way of conducting a case. I believe that had careful preparatory reasoning and reflection on both sides, with a full knowledge of what the evidence which they could call really was, been given to this case, before plunging into it, with an eye to the standard pattern I have previously mentioned, all the evidence that was necessary or ever likely to be referred to again could very easily have been laid before the Court in two or at most three days. But as both parties appeared as bent upon taking the somewhat tedious and profitless course that was taken, and no doubt the case will be carried to the Privy Council, I will say no more on that point. Perhaps I am wrong and the learned Counsel may prove to be right, but it will be seen that in this judgment, just as in the concluding addresses of Counsel on both sides to me, very little use indeed has been made, or (from my point of view) ever could pro-

fitably have been made, of a very great deal of the evidence, oral or documentary, which now forms the bulky record.

I find then that the railway company is liable for the origin of the fire and the entire resulting loss. I find that the defendant-company has entirely failed to show that in dealing with these goods it exercised all the care that an ordinary man would have exercised, had the goods been his own, and the whole machinery of transport under his own control. And I find that the defendant-company is not liable in respect of negligence or carelessness in dealing with the fire after it was discovered.

Attorneys for the plaintiffs: Messrs. *Captain and Vaidya.*

Attorneys for the defendants: Messrs. *Crawford, Brown & Co.*

Suit decreed.

H. S. C.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

KASHINATH PARSHARAM GADGIL AND OTHERS (ORIGINAL PETITIONERS), APPELLANTS, *v.* GOURAVABAI AND ANOTHER (ORIGINAL OPPONENTS), RESPONDENTS.*

1914. *June* 29, *October* 3.

Joint Hindu family—Ancestral property—Will—Probate—Payment of full probate duty.

In a case where there was admittedly a joint Hindu family consisting of a father and a minor son, the father made a will in effect bequeathing the whole property to his minor son. It was not disputed that the property covered by the will was joint family property. The executors contended that the deceased testator had no beneficial interest in any part of the property devised, and therefore they were exempted from the payment of any probate duty :—

* First Appeal No. 177 of 1913.