the experiments made, and what are the opinions and experience of those who have used spark-arresters on boats; consider the situation and surroundings of the steamer at the time when it is alleged the fire was set; whether a spark-arrester would have operated efficiently to prevent the escape of sparks; whether its use would have in any degree endangered the safety of the boat itself; you will consider what appliances the boat had for controlling or regulating the escape of sparks; to what extent, if at all, the outside exhaust diminishes, and the inside exhaust increases, the quantity of sparks produced, and their escape through the chimney; and in the light of all the circumstances, you will say whether there was any duty imposed on the defendant to have a spark-arrester on this steamer at the time of the fire complained of occurred. *Kellogg* v. *Milwaukee & St. P. Ry. Co.* 5 Dill. 543.

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Upon this general question of negligence I need only add, in substantially the language of Mr. Justice MILLER, in the case of *Kellogg* v. *Milwaukee & St. P. Ry. Co., supra*, that with the elements of transportation used in commercial transactions, and with the great bulk of material transported to and from different parts of the country, the use of steam-power has become not only necessary, but indispensable to the interests of the whole country, and you may properly consider how far the interests of the public require those using this great power to be restricted, and how far the good of the people require those making use of it to adopt means of safety and protection. Steam and fire are dangerous elements, but they must be used. The defendant and its employes had a right to employ the steamer Oconto in navigating the waters of Fox river, but they were required to exercise such care and prudence as I have before stated to you; and the question is, was there anything in the circumstances and situation at the time in question to put those exercising control over the boat, on their guard? Did they exercise due care and prudence, such as an ordinarily-prudent person would have exercised? This is the gist of your inquiry.

If your conclusion shall be that the planing-mill fire *was set* by sparks from the steamer, but that it was not the result of any negligence on the part of the defendant or those in charge of the boat, then the plaintiff cannot recover, and the case would necessarily stop at that point. But if you find that the fire originated from sparks from the Oconto, and that it was caused by negligence on the part of

the defendant or those having control of the boat at the time, as claimed by the plaintiffs, then the next question to be considered by you is, was the burning of the Crandall house so connected with the burning of the planing-mill as to make the defendant responsible for the loss of the house? In other words, the inquiry at this point is, what was the proximate cause of the burning of the Crandall building? and this is a question for the jury, to be determined as a fact in view of the circumstances of fact attending it. *Milwaukee, etc., Ry. Co.* v. *Kellogg*, 94 U. S. 474. It is shown by the evidence, and not disputed that between the planing-mill and the Crandall building were other structures, which happened to be situated in and near to the path of the fire, some of which were burned and others of which were saved. There is testimony in the case tending to show that burning brands and cinders were carried through the air by force of the wind, from building to building, and that thus they were destroyed. Now, it is claimed by the plaintiffs that the burning of the Crandall house was the result of the continued effect of the sparks from the boat, without the aid of other causes not reasonably to be expected; that it was the result naturally and reasonably to be expected, and naturally following from the burning of the planing-mill, and therefore that the alleged negligence of the defendant was the proximate cause of the plaintiff's loss. This is controverted by the defendant. The rule by which you are to be guided in determining this question of proximate cause is not a difficult one. If any difficulty exists in this case with reference to the rule, it arises in applying it to the facts.

Before stating the principle by which you must be controlled in considering this question, I ought, in this connection, to pass upon another question, concerning which several instructions are asked by the defendant. It is claimed that the owner of the planing-mill was guilty of negligence in leaving combustible material, such as shavings and sawdust, on the planing-mill dock; and it is contended that if in consequence of the presence of this inflammable material, negligently left on the dock, the fire was started at that place by sparks from the boat, such negligence of the owner of the planing-mill will itself defeat a recovery, even though the defendant was negligent. I do not think that is so. In other words, I am of the opinion that the alleged negligence of the owner of the planing-mill does not of itself relieve the defendant from liability for *its* negligence if it *was* negligent. And this I hold upon the authority of cases in which it has been decided that where an injury is the result of two concurring causes, the party responsible for one of these causes is not exempt from liability be-

cause the person who is responsible for the other cause may be equally culpable.

Now, gentlemen, in order to reach the conclusion that the alleged negligence of the defendant was the proximate cause of the burning of the Crandall house, you should be satisfied that the burning of that house was the natural and probable consequence of the defendant's negligent act,—if it was negligent,—and that it ought to have been foreseen in the light of the attending circumstances. You will consider whether the burning of the planing-mill was occasioned by sparks from the steamer; if it was, then was the burning of the Crandall house a result naturally and reasonably to be expected from the burning of the planing-mill under the circumstances then existing, and was it the result of the continued influence or effect of sparks from the boat, without the aid of other causes not reasonably to be expected? And the circumstances to be considered in determining whether or not the burning of the Crandall house was a result naturally following from, and naturally and reasonably to be expected from the burning of the planing-mill, are, among others, the strength and course of the wind at the time, the material of which the planing-mill and dock and the buildings between the planing-mill and the Crandall house were composed, the distance between the planing-mill and the Crandall house, the distances between the different buildings that were situated in the path of the fire, the state of existing facilities on shore for arresting the fire, and any and all other circumstances and facts bearing upon the question as developed by the evidence. In determining whether the burning of the Crandall house was or was not a consequence of the burning of the planing-mill, naturally and reasonably to be expected, you will consider it in the light of all the circumstances as they existed just before the fire. The question is not, you will notice, what the captain of the boat did in fact expect or anticipate. The question is, what would any reasonable person in the then-existing circumstances have naturally and reasonably expected to be the result of the burning of the planing-mill? It is true, as I am requested to instruct you, that no person is responsible for *every* consequence, however remote, of his wrongful acts, but only for such as in the circumstances naturally follow and may naturally and reasonably be expected to be the result of his acts.

One of the tests by which to determine whether the burning of the Crandall house was the result of the continued effect of the sparks from the boat—if such sparks caused the fire at the planing-mill—is to ascertain whether there was any intervening cause between the

burning of the planing-mill and the fire at the Crandall house, which could not have been reasonably anticipated, and which produced the injury. Was there any such in this case—that is a cause not connected with the original negligence—if there was negligence—and not reasonably to be expected, and but for which the Crandall house would not have burned? If there was, then of course the burning of that house should be attributed to that cause, and the defendant would not, in that event, be answerable for the consequences. As for example, if, after the ignition of the fire at the planing-mill, the direction of the wind changed and its violence increased so that burning brands or cinders were carried to the Crandall house, and if that house would have been safe if the wind had not changed and its force had not increased, and if such change in the wind could not reasonably have been expected when the fire at the planing-mill began, then and in that case the burning of the Crandall house might fairly be attributed to a new and independent cause, for which the defendant would not be responsible. But though you should find that there was no new and independent cause to which the burning of the Crandall house was attributable, it is still necessary for you to say whether the destruction of that house was a result naturally and reasonably to be expected and naturally following from the burning of the planing-mill.

So, I may conclude what I have to say on this branch of the case by repeating that if you find that the planing-mill fire was caused by sparks from the steamer, which escaped because of the negligence of the defendant or those in charge of the boat, and if the burning of the Crandall house was a result naturally and reasonably to be expected from the burning of the planing-mill under the circumstances, and was the result of the continued effect of the sparks from the steamer without the aid of other causes not reasonably to have been expected, then you will be justified in concluding that the alleged negligence of the defendant was the proximate cause of the burning of the Crandall house. But if you find that the destruction of that house was not an event naturally and reasonably to be expected from the burning of the planing-mill, or was not the continued effect of the sparks from the boat without the aid of other causes not reasonably to have been expected, then the loss of the house should not be charged to the alleged original fault.

Yet another question remains to be submitted to you: It is claimed on the part of the defendant that after the fire broke out, Kimball, the occupant of the Crandall house, did not, as it is contended it was

his duty to do, remain at home where he could look after and protect the house against the danger of fire, and did not make proper exertions to check or prevent the burning of the house—in short, that he was negligent in that respect, and that in consequence of such negligence the loss occurred. Here again the rule of ordinary or reasonable care applies. It was the duty of the occupant of the house to exercise such care over it, and to make such exertions to protect it against threatened destruction by fire as a reasonably cautious and prudent man would be expected to exercise in the same circumstances; and if he neglected to use such care, and if the want of it contributed proximately to the loss of the house, then the plaintiffs cannot recover. In determining whether Mr. Kimball exercised ordinary care and diligence in the particulars mentioned, you will consider all the circumstances as they existed at the time: the location of the house, the direction of the wind, the course of the fire, the extent to which the house was threatened, whether the danger was or was not imminent, the time when the house burned, and the efforts made to save it, and you will say whether there was any want of such care and prudence on the part of the occupant of the house as a reasonably-cautious man would have exercised if placed in the circumstances that surrounded Mr. Kimball at the time. If there was fault on his part you will notice that to prevent a recovery it must appear to have been negligence that proximately contributed to the loss of the house, and this will suggest the inquiry, could the burning of the house have been prevented by the exercise of proper care by Kimball, if such care was not exercised? Was the building burned because of the want of such efforts on his part to prevent the burning, as a reasonably-prudent man would have made in the same circumstances? These are legitimate matters of inquiry in this connection.

Now, gentlemen, as a summary of what has been said, if you find from the evidence that the fire which destroyed the planingmill was caused by sparks from the steamer Oconto, and that this occurred through or by reason of the negligence of the defendant or those in charge of the boat at the time, and that the burning of the planing-mill was the proximate cause of the burning of the Crandall house, and that the occupant of the house was not guilty of negligence which proximately contributed to its loss, then the plaintiff is entitled to recover. If, on the other hand, you find that the fire at the planing-mill was not set by sparks from the steamer, or that even though it was so set, it did not occur through or by reason of the negligence of the defendant or those in charge of the boat, or if you find that the

burning of the planing-mill was not the proximate cause of the burning of the Crandall house, or that Kimball, the occupant of the house, was guilty of negligence that contributed proximately to its loss, then your verdict will be for the defendant.

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It is admitted that the value of the Crandall building at the time it was burned was $5,846.81, and if you should find for the plaintiffs your verdict should be for that sum, with interest thereon at 7 per cent. from the twenty-sixth day of August, 1881, which was the time when this action was commenced.

WITHERS *v.* BURKETT and another.*

(*Circuit Court, E. D. Texas.* January, 1883.)

TRESPASS ON REAL ESTATE.

By the common law, and by the statute law of the state of Texas, neither a devisee of real estate nor the universal legatee of the testator can bring or maintain an action for damages for a trespass committed on said real estate during the life of the testator.

Texas Code, arts. 3128, 4858, 1201.

On Demurrer.

Chilton & Chilton, for plaintiffs.

Herndon & Crain, for defendants.

PARDEE, J. This case has been heard upon a demurrer to action brought by devisee of land and residuary legatee for damages committed during life of testator. The devisee claims by virtue of assignment from residuary legatee, who joins *pro forma* in the suit for the use of assignee. By the common law such action survives to neither heirs nor executors and administrators. 2 Wat. Tresp. § 980. The common law is the general rule of decision in this state. Texas Code, art. 3128. The law of the state does not authorize the devise of a claim for damages for trespass to real estate. See article 4858, Texas Code. But such action is saved to the executor or administrator. Article 1201, Texas Code.

It follows that neither of the parties now before the court as plaintiffs have authority to bring the action, and the demurrer should be sustained.

MORRILL, J., concurs.

*Reported by Joseph P. Hornor, Esq., of the New Orleans bar.