1914
March 12.

IN THE MATTER of the Petition of Right of

J. GODFROY BROCHU,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Government Railway—Injury to the person—Trespasser—Liability.

B., in going towards a station of the Intercolonial Railway, instead of using a safe public way or road thereto, entered, contrary to the provisions of section 78 of *The Government Railways Act*, upon the track of the railway drawing behind him a small sled containing two valises. It was dusk at the time, but there was light enough for him to see, as he did, a train approaching him. This train consisted of a locomotive and tender with a snow plough attached. B. instead of getting out of the way as soon as he saw the train, attempted to pick up one of the valises that had fallen from the sled, an act which rendered it too late for him to escape being struck by the train. Upon the trial of his petition of right for damages it appeared that the suppliant had at the time an unreduced fracture of the right leg which impeded his movements. On the other hand, the fact that the place where the accident happened being a "thicky peopled district" within the meaning of section 34 of the said Act, was not established beyond question; nor was it shown conclusively that the track there was not properly fenced. The engine-driver had complied with all statutory requirements as to whistle and bell and his train was running at a rate of about twelve to fifteen miles an hour. He did not see B. on the track until he was some fifteen feet from him, and the emergency brakes were at once applied

Held, that inasmuch as B. was a trespasser on the track, the only duty cast upon the engine-driver was to abstain from wilfully injuring B. while so trespassing, and further that inasmuch as the engine-driver had applied the emergency brakes as soon as he saw B. on the track he had done all he could to avoid the accident, and there was no negligence attributable to him.

PETITION OF RIGHT for damages for personal injuries alleged to have been sustained on the Intercolonial Railway in the Province of Quebec.

The facts are stated in the reasons for judgment.

March 5 and 6, 1914.

1914

BROCHU v. THE KING.

Reasons for Judgment

The case was heard before the Honourable Mr. Justice Audette at Quebec.

M. O'Bready, E. Baillargeon and D. Panneton, for the suppliant, contended that as the suppliant was injured upon the track of the railway owing to the negligence of an engine-driver, the Crown was liable. The suppliant was using the right of way and track with the implied sanction of the railway authorities; it was a customary way of approaching the station. The Crown ought not to invite people to use the tracks and then injure them by carelessness. There would have been no accident if the engine-driver had used reasonable care.

L. Moraud, for the respondent, relied on the facts to show that the suppliant was simply a trespasser. There was no duty towards the suppliant on the part of the railway employees except not to wilfully injure him. The engine-driver did all that he was required to do under the statute and regulations, and he did not see the suppliant until too late to avoid an accident.

AUDETTE, J., now (March 12, 1914) delivered judgment.

The suppliant brought his petition of right to recover the sum of $24,482.50 for alleged damages sustained by him, while walking on or along the track of the railway at Chaudière Curve, P.Q., when he was struck by a locomotive and snow plough of the Intercolonial railway travelling reversely. The railroad at the place of the accident, is operated under a joint traffic agreement between the Grand Trunk Railway and the Intercolonial Railway; the said agreement having been duly ratified by the Act, 62 and 63 Vict. Ch. 5. (1).

(1) Grand Trunk Ry. v. Huard, and Grand Trunk Ry. v. Goudie, 36 S.C.R. 655; and also the King v. Lefrancois, II Ex. C.R. 252, 40 S.C.R.. 431).

1914
BROCHU
v.
THE KING.
Reasons for Judgment.

The accident happened on the 22nd day of January, 1912, and the petition of right was filed in this Court on the 10th day of February, 1913. On the face of the pleadings the action would therefore appear to be prescribed under the provisions of Art. 2262 of the Civil Code for the Province of Quebec. However, it is established by the evidence that the petition of right was, in compliance with sec. 4 of *The Petition of Right Act* (R.S.C. 1906, ch. 142) duly left with the Secretary of State of Canada, on the 30th day of December, 1912, and following the decision of *Conrod* v. *The King*, (1) and *Vinet* v. *The King*, (2), it is found that the leaving of the petition of right with the Secretary of State did interrupt prescription within the meaning of Art. 2224, C.C.P.Q.—and that the case may now be approached upon its merits.

The facts giving rise to the case are as follows:—On the 22nd January, 1912, the weather being fine, between half-past five and six o'clock in the evening, the suppliant started from his house for the railway station with two valises on a small sleigh which he was drawing himself. He travelled from the point marked "A", on diagram Exhibit "A" herein, which is his residence, came to point "B", thence to "C", where he took to the track, and finally to point "H", where he was struck by a locomotive and snow-plough. He was on his way to the station and says he took the road that accommodated him, the one he liked. It will be seen that the road to the station provided by the railway is the one marked by the letters D, E and F. on the said diagram, Exhibit "A". Had he wished to go to the station by the regular road he would would have had to travel from A to B, when he would have crossed the tracks, and then to the gate or

(1) 14 Ex. C.R. 472. (2) Audette's Practice, 2nd Ed. 183.

entrance to the station road, at point D, and travelling to E and F, arriving at the back of the station. A great deal of evidence is adduced pro and con as to the maintenance of this road to the station. Some say it is not shovelled, that the traffic of the horses and sleighs alone keeps it open and in maintenance. However, it is established that the mail is daily carried through that road, that it is the only one through which all the sleighs go for freight every day. The suppliant testifies he cannot say in what state the road was on the day of the accident, because he never thought of it; but that it could not be blocked because all those who have freight travel through it. However, one of the witnesses says he travelled four times a day through that road in 1912, and that it was in good condition, but that in a big storm, like every other road submitted to winter climatic changes, some snow gathered at a certain spot, but not enough to impede traffic.

For the purposes of this case, it is found that the regular road to the station was on the day of the accident, especially in the afternoon after a full day's traffic, in a fair state of maintenance and could have been used by the suppliant if he had cared to.

It may be further stated to acquaint one with all the facts of the case that in winter most of the pedestrians going to the station, make use of the track, as the suppliant did; and as during the summer, on St. John Street at the point B on Exhibit "A", cattle-guards are placed between the northern and southern fences of the crossing, most of the foot travellers or pedestrians arrived at point B, cross over the tracks, take the station road at point D, thence walk down to the southern rail of the siding and walk along the same to the station. The object of the foot travellers seems

1914

BROCHU
v.
THE KING.

Reasons for Judgment.

to have been a distinct manifestation of their inability to resist the temptation of using a short cut.

Now, on the day of the accident, the suppliant was walking either on the main track or between the two tracks, between the points marked C and H on the said diagram. He testifies he cannot say whether he was on the main line or between the two tracks; however, he says further on in his evidence that "he did not have time to place himself aside, the train was coming upon him". At the time of the accident there were cars on the siding from H to the west. As he was then walking upon the railway bed, one of the two valises, the smaller one, slipped out of his sleigh (en m'en allant, en passant sur la ligne) while on his way, in passing upon the line. He saw the train coming before bending down to pick up his valise,—the train appeared to him to be just far enough to give time to get out. It was not then "dark, dark", as he says, and the locomotive was large enough to be seen by him at a distance.

The suppliant, however, had not time to pick up the valise which had fallen. He moved to the side (me suis mis de coté), but he was not quick enough to avoid being struck. He was first struck on the elbow which had the effect of turning him round, then he fell to the ground and was struck by the plough, the injury resulting in his two legs being broken.

At the time of the accident the suppliant had an old unreduced fracture of the right leg, which made that limb defective, resulting in a certain impediment in his movements, all of which went to increase his risk and danger in the circumstances. This of course called for the exercise of a greater degree of care than would be required of a man sound of limb who might attempt to do what the suppliant was rash enough to do in this case.

1914

BROCHU v. THE KING.

Reasons for Judgment.

The suppliant was struck by an Intercolonial railway train composed of a locomotive, tender, and a snow plough, the wings of the plough being closed at the time of the accident. The train was backing from east to west, with the regulation light on the back of the tender. The bell was ringing. At the eastern crossings marked M and N on the diagram, the engine whistled. Then a long whistle was given for the station semaphore. Afterwards the engine blew two long and two short blasts, which is a signal for a public highway crossing; then about 600 feet east of the western crossing (St. John St.) the engineer blew an extra alarm on account of his home being right opposite the station. Up to a short distance east of the station, the train was travelling between 12 and 15 miles an hour, more or less. When he arrived at the station he reduced his speed to 6 to 8 miles to pass the station, having closed his engine at the eastern semaphore. He had no business to stop at the station, and having gone about a car length west of the station, he reopened steam to continue west, which measure, he said, had he not taken, his engine would have stopped. He started again going at a rate of 12 to 15 miles an hour. The engineer was sitting in the window of his engine facing west, when about half way between the station and the crossing (St. John St.) he saw, about 15 feet ahead, a dark object, something falling from the main track to the south side, when he at once applied his emergency brakes.

Sections 34 and 35 of *The Government Railways Act* read as follows:—

"34. No locomotive or railway engine shall pass in "or through any thickly peopled portion of any city, "town or village at a speed greater than six miles per "hour, unless the track is properly fenced."

1914

BROCHU v. THE KING.

Reasons for Judgment.

"35. Whenever any train of cars is moving re-
"versely in any city, town, or village, the locomotive
"being in the rear, a person shall be stationed on the
"last car in the train, who shall warn persons stand-
"ing on or crossing the track of the railway, of the
"approach of such train."

The *locus in quo* is not a city, town or village as provided by section 34, but only a rural municipality, and it is very questionable under the evidence whether the place in question is what might be called "a thickly peopled district". And there is no evidence to show conclusively that the road on each side of the track was not properly fenced. True, there is evidence that there was no fence to the left of the entrance D, on the southern side of the siding; but the siding is within railway property, and access to the cars at that place is possibly given to vehicles for the purposes of loading and unloading. The railway property would therefore appear from the evidence to have been properly fenced.

Be that as it may, the suppliant being a trespasser was on the track at his own risk and the railway company was undoubtedly under no other duty than that of not wilfully injuring him. The engineer applied the emergency brakes as soon as he became aware of any danger, thus fulfilling his duty, as expounded in the case of *Canadian Pacific Ry.* v. *Hinrich.* (1)

If section 35 is invoked by the suppliant, the obvious answer is that the accident did not occur at the crossing, and if the train started going at about 12 to 15 miles an hour, one car length after leaving the station, and that the engineer saw the suppliant about 15 feet ahead of where he was struck and that he then applied his brakes, he must have passed at a very low speed at the crossing.

(1) 48 S.C.R. 557.

Then section 78 of *The Government Railways Act* which was moreover posted up in the railway station at Chaudière, reads as follows:

"78. Every person not connected with the Department or employed by the Minister, who walks "along the track of the railway, except where the "same is laid across or along a highway, shall for "every such offence, incur a penalty not exceeding "twenty dollars."

From the perusal of this section it will obviously appear that the suppliant, at the time of the accident was a trespasser. Can he recover under the circumstances of this case? What is the Common Law, and the Roman Law upon the subject?

Bramwell, B., in delivering the judgment of the Court in *Degg* v. *Midland Ry. Co.*, (1) pithily expresses the rule of the common law in the following words: "It seems to us there can "be no action except in "respect of a duty infringed, and that no man by "*his wrongful act* can impose a duty."

And the same learned judge says in *Holmes v. North Eastern Ry. Co.* (2):

"If the plaintiff had gone where he did by the mere "license of the defendants, he would have gone there "subject to all the risks attending his going."

To place the suppliant even in the position of a mere licensee would be giving him a better position than he is entitled to under the evidence.

The rule of Roman Law was to the same effect. In the Institutes 4, 3, 5, there is the following explanation of liability for bodily injury under the Lex Aquilia: "If a pruner, by breaking down a branch from a "tree kills your slave as he passes, then if this is done "near a public road or one used by the neighbours,

(1) (1857) 1 H. & N. at page 782. (2) (1869) L.R. 4 Exch. *at p.* 257.

1914

BROCHU v. THE KING.

Reasons for Judgment.

"and he did not first shout out so that an accident "might be avoided (ut casus evitari possit), he is "chargeable with negligence. But if he did first "shout out and the slave did not care to take heed, "the pruner is free from blame (extra culpam est). "And so, too, if he happened to be cutting at a place "quite off the road or in the middle of a field, *although* "*he did not first shout out, because there no outsider* "had any right to go." (Quia in eo loco nulli extra-"neo jus fuerat versandi.) (1).

The following excerpt is taken from *Sington's Law of Negligence*, pp: 216, 217:—

"A trespasser who is an adult, cannot, as a general "rule, recover damages. If, however, the defendant "has done an inhuman or an unlawful act, such as "setting a spring gun, then, although the trespasser "be by his own act the immediate cause of the injury "he sustains, he can maintain an action. The view of "the law seems to be that no duty is owed to a tres-"passer; but there is a duty owed to all the world not "to do something unlawful, or inhumanly cruel. "When, however, it is said that no duty is owed to a "trespasser, this only means that there is no such "duty towards him to prevent consequential injury "happening, as would be owed to one who is not a "trespasser. It does not mean that you have no duties "to him at all, merely because he is a trespasser; and "therefore if you go out of your way to inflict injury "upon him deliberately you would be liable."

"In the cases where a plaintiff has succeeded not-"withstanding that he was a trespasser, circum-"stances were present which made the trespass im-"material."

(1) *Hunter's Roman Law*, 4th Ed. 246; *de Couder*, 2. p. 322.

The suppliant has been a resident at Chaudière since 1904. He knew the locality well; he knew that when travelling on the railway track where cars were continuously passing up and down, he was taking a great risk, and that he should have been more careful. (1)

He saw the engine coming,—had he at once moved out of its way, there would have been no accident. He kept fumbling at his satchel which had slipped from his sleigh, losing thereby precious time,—and then his invalided leg must to some extent have impeded him and made his movements much slower.

The proximate and the determining cause of the accident was the conduct of the suppliant in walking on or along the track in direct violation of section 78 of *The Government Railways Act*. In a case of that kind, when the claimant is responsible for the determining cause of the accident, the doctrine of *faute commune*, as known in the Province of Quebec, does not apply.

Where the suppliant, as in the present case, is a trespasser, the duty of the railway rests merely upon grounds of general humanity and respect for the rights of others, and the engine-driver far from being wantonly or carelessly an aggressor towards Brochu, did all in his power to save him, but without avail. (1) The general rule is that a man trespasses at his own risk. (2)

In the result it must be found that the railway is relieved *quoad* the suppliant, who was injured while trespassing on the track, of all the above mentioned statutory duties. Brochu travelled along the track at his own risk. The only duty cast upon the railway

(1) Beven on Negligence 3rd Ed. 430, 925.
(2) *Grand Trunk* v. *Barnett*, (1911) A.C. 370; *Grand Trunk* v. *Anderson*, 28 S.C.R. 541.

1914

BROCHU v. THE KING.

Reasons for Judgment.

was to abstain from wilfully injuring him while he so trespassed.

The Court is therefore of opinion that judgment should be entered for the respondent, and that the suppliant is not entitled to any portion of the relief sought by his petition of right.

Judgment accordingly.

Solicitor for suppliant: *O'Bready* and *Panneton.*

Solicitor for respondent: *E. L. Newcombe.*