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Jan. 20.

JAMES CONNELL..... .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Tort—Injury to the person on a railway—Undue rate of speed of train at crossing—Liability of Crown—50-51 Vict. c. 16 sec. 16 (c).

Where a train was approaching a level crossing over a public thoroughfare in a town and the conductor was aware that the watchman or flagman was not at his post at such crossing, it was held that the conductor was guilty of negligence in running his train at so great a rate of speed as to put it out of his control to prevent a collision with a vehicle which had attempted to pass over the crossing before the train was in sight.

2. Where such negligence occurs on a Government railway the Crown is liable therefor under 50-51 Vict. c. 16 sec. 16 (c).

PETITION OF RIGHT for damages arising out of an injury to the person on a Government railway.

The Intercolonial Railway, a public work of Canada, runs through New Glasgow, N. S., a town of some five thousand inhabitants. In its course through the town this railway intersects at right angles, and crosses on the level, George street, one of the principal thoroughfares of the town. At this level crossing the railway runs almost due north and south, while the street so crossed runs, approximately, east and west in a straight line for two or three hundred yards or more. The street was only forty-three feet in width at this place, and the railway buildings were situated so closely upon the boundaries of the railway and George street that any one approaching the crossing from any direction could not see a train approaching until he was within a few feet of the railway. In the case of persons approaching the crossing from the west, along George street, a train coming from the north could not

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be seen until they were upon the crossing itself, because on the northern side of George street and on the western boundary of the railway, about eighteen and one-half feet from its centre line, there was a high stone building which completely obscured the view along the track to the north. There was a watchman or flagman whose duty it was to stand at this crossing and warn persons about to pass over it of danger from approaching trains.

On the afternoon of the 8th of December, 1891, between four and five o'clock, the suppliant, with his son, was driving in an express wagon eastwardly along George street and approaching the crossing. Some little time before coming to the crossing the suppliant had heard the whistle of a locomotive. Noticing that the flagman was absent from his post, before entering upon the crossing he looked up and down the track, as far as he was able, to see if a train were approaching. He could see none, and heard no warning of any approaching. He then attempted to cross, and while upon the crossing the wagon was struck by a freight train, the suppliant and his son being thrown out upon the ground, and the former quite seriously injured. The fireman of the train (and he was corroborated in this by one of the brakesman) swore that he had rung his bell while the engine was appoaching the crossing; but the conductor, who was on the van at the time, admitted that he did not hear it, and several witnesses called by the suppliant said they heard no bell rung.

The evidence, as a whole, established that the train was then running at the rate of about six miles an hour.

The case was tried at Halifax, N.S., on the 4th day day of October, 1895.

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Argument of Counsel.

J. L. Jennison for the suppliant:

The crossing in this case is a level one, and the fences and buildings make it a crossing where it is difficult to get a good view of the track until you are on the rails in passing. It is in evidence that a flagman has been stationed there for many years, and of late they have put gates there. But at the time of the accident in question here no flagman was present, but the flagman swears it was his duty to be present all the time. The only point we have to consider is the question whether Connell used ordinary judgment or acted in a way that any person would ordinarily act under such circumstances, or, in other words, did he contribute to the accident himself? Take the evidence of the Crown. This train started for Antigonish and went over the crossing, and the semaphore was against it and they returned. We say that in returning they were guilty of negligence. There were two brakesmen and a conductor on the train, and it was on a down grade. It was a train nine or ten car lengths long, and yet, strange to say, the conductor did not hear the bell being rung! Suppose they had rung that bell? The bell is supposed to be a signal to people using the crossing. If the bell could not be heard by the witnesses who swear they did not hear it, it was not a signal even if they had rung it. Connell says he looked for the flagman and that there was no flagman there, and he supposed the coast was clear. Connell having seen the train go out, and knowing that there was no other train due to leave or come in just at that time, was absolved from a great exercise of vigilance on that account. (He cites *The North-eastern Railway Co.* v. *Wanless*) (1). Under section 36 R. S. C. c. 38 the evidence of negligence preponderates in our favour. There was no whistle sounded and no bell rung, or, if rung at all, not

(1) L.R. 7 H.L. 12

rung in such a way as to be heard by the people on and about this crossing. (He cites *Bligh's Orders in Council*) (1).

The evidence is that the flagman was not there at the time of the accident, nor was the conductor then doing his duty under these rules and the provisions of the statute. There really was no signal given. Connell's conduct in the matter was, we contend, that which any discreet man would adopt. The conductor says he shouted to him ; that might have been just the cause of the accident. If, as the conductor says, he saw the suppliant was going over all right, the discreet thing to do was not to shout at all.

W. B. A. Ritchie, for the Crown :

If your Lordship believes the conductor, it is clear that Connell was guilty of negligence and took the risk himself.

There is no doubt Connell heard the whistle, and he would know if they whistled at the semaphore that they were coming back. He hears the whistle, he is approaching the track, I submit that coming to a dangerous place it was his duty to look to see if a train was coming or not, but he went on without looking to see.

[PER CUR. :—That brings you down to the Pennsylvania rule that a man is bound to "stop, look and listen," that is not the rule here.]

There is nothing to the contrary in our law that a man must take some precautions to avoid accident in a case like this.

I submit that the railway authorities, the officers of the Crown, having complied with the regulations which are made—and there being no negligence that can be fixed upon them as such officers, the Crown is not liable for this accident.

(1) 1889 p. 968, rule 188 also p. 960, rule 126.

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The suppliant was fumbling with the reins, so the conductor says, and going this way, it is very possible that they might have made a blunder and pulled the horse up.

The train was only 200 or 300 yards from the semaphore, on a down grade, does not your Lordship think that he must have had it at a slow rate of speed? The conductor, finding that he had to back his train, takes the precaution of standing at the back of the train to give warning to persons approaching.

If the suppliant had been killed, could the conductor have been held criminally responsible for his death? That is the best test to fix liability on the Crown.

I maintain, on the whole evidence, that this is not a case falling within clause (c.) of section 16 of *The Exchequer Court Act.*

The following authorities were cited by counsel for the respondent:

Davy v. *London & South-western Rail Company* (1); *Wakelin* v. *London & South-western Rail Company* (2); *Newman* v. *London & South-western Rail Company* (3): *Curtin* v. *Great South Railway* (4); *Greenwood* v. *Philadelphia Rail Company* (5); *Johnston* v. *Northern Rail. Company* (6); *Casey* v. *Canada Pacific Railway Company* (7); *Jones* v. *Grand Trunk Railway Company* (8); *Weir* v. *Canada Pacific Railway Company* (9); *In Beckett* v. *The Grand Trunk Railway Company* (10); *Hollinger* v. *Canada Pacific Railway Company* (11).

(1) 12 Q. B. D. 70.
(2) 12 App. Cas. 41.
(3) 7 T. L. R. 138.
(4) 22 L. R. (Ir.) 219.
(5) 17 Atl. Rep. 188, and cases there cited.
(6) 34 U. C. Q. B. 432.
(7) 15 Ont. R. 574.
(8) 16 Ont. App. R. 37; 18 Can. S. C. R. 696.
(9) 16 Ont. App. R. 100.
(10) 8 Ont. Rep. 601; 13 Ont. App. 174.
(11) 21 Ont. Rep. 705; 20 Ont. App. 244.

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C. S. Harrington, Q. C., replied. The essential features of this case are as follows:

1. The crossing was a dangerous one, over which it was not safe for a train to pass without a flagman being there.

2. The conductor who was moving the train knew that the flagman, whose duty it was to be there, was not at the crossing, because he met him, spoke to him, and left him going away from the crossing towards the semaphore.

3. Whether the bell was sounded or not, it did not perform the function of a signal, because it was not heard by any one at the crossing. The suppliant and his son both say they were listening, and positively aver that no bell could be heard. Now, I do not put any greater stress on their not hearing the bell than is necessary; but I claim that they listened for the sound of the bell, and the statute requires that trains should ring a bell or blow a whistle. Now, I say that the circumstances under which this train was being moved required that they should have given a signal that could be heard. Well, then, the train was going down there without any signal, and it was coming to a crossing where there was no flagman, and no matter how many people that train would meet it must go six car lengths before it could be stopped, with the possibility of killing all these people. An accident did occur, and the cause of it is *res ipsa loquitur*.

There was no contributory negligence on the suppliant's part in trying to get over the track, or otherwise. I submit the suppliant did only what one's common sense would suggest in the absence of the flagman,—he thought the coast was clear. Both the suppliant and his son swear that the absence of the flagman created in their minds an impression of safety. Leaving out of the question as to how far the Crown is

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answerable by reason of not having a flagman there, the absence of a flagman was an indication to this man about to cross that the crossing was safe, and he took it to be so. He was not guilty of negligence in supposing no train was coming, for he saw the train go out, and there was no need for the train to come back so far as the evidence shows.

When the suppliant got a view of the track it was quite clear. He had a line of vision up the track at a point of 90 feet, and this train was not in sight, and he did all a reasonable man would be expected to do. There was every reason for him to be careful, because he had his life in his hand. He looked to the right and the left, the flagman was gone and he was justified under the circumstances to say: "the track is clear."

I ask your Lordship to assume from the evidence that when the suppliant got past that corner there was no train in sight. What the conductor suggests about the suppliant hesitating on the track is only in the way of compromise. I say that the suppliant did all that a reasonable man would do under the circumstances, and that even if he hesitated, as suggested, he would not be held liable for contributory negligence. I think the evidence clearly shows that when the suppliant saw the train he did the best he could to get out of the way, and that he did not must have been because the train was going at too high a rate of speed. A witness speaks of the train slipping along "quite quickly and noiselessly." I can hardly imagine a more dangerous condition of things.

The following authorities were cited by counsel for the suppliant:

North-eastern Railway Company v. *Wanless* (1); *Brady* v. *The Queen* (2); *Gilchrist* v. *The Queen* (3);

(1) L. R. 7 H. L. 12. (2) 2 Ex. C. R. 273.
(3) 2 Ex. C. R. 300.

Lavoie v. *The Queen* (1); *Filion* v. *The Queen* (2); *Leprohon* v. *The Queen* (3); *The Revised Statutes of Canada*, chapter 38, sections 36 and 29; Orders in Council, 1889, p. 960, rule 126; p. 961, rule 130; p. 968, rules 186-188.

THE JUDGE OF THE EXCHEQUER COURT now (January 20th, 1896) delivered judgment.

I think this case is within the statute (*The Exchequer Court Act*, 50 and 51 Vict., c. 16, sec. 16 (c); and that the injury complained of in the petition herein occurred upon a public work, and resulted from the negligence of an officer or servant of the Crown, while acting within the scope of his duties or employment. In particular, I think, that the conductor, knowing as he did, that the watchman or flagman was not at his post at the crossing at George or Bridge street, in backing the train into the station allowed it to approach and cross the street at too high a rate of speed, and without having the train sufficiently under command. I express no opinion one way or the other as to the other charges of negligence referred to in the petition and evidence in this case.

There will be judgment for the suppliant for four hundred dollars ($400.00) and costs.

Judgment accordingly.

Solicitor for suppliant: *J. L. Jennison.*

Solicitor for respondent: *R. L. Borden.*

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(1) 3 Ex. C. R. 96.
(2) 4 Ex. C. R. 134.
(3) 4 Ex. C. R. 100.