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March 15.

IN THE MATTER OF THE PETITION OF RIGHT OF ALEXIS BRILLANT, farmer, of the Parish of St. Bruno, as well personally as in his quality of Tutor to his minor son, Alcide Brillant..... SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Negligence—Government Railway—Crossing—Omission by railway employees to comply with requirements of section 37 of The Government Railways Act—Faute Commune.

B., the suppliant, in the afternoon of a clear winter day, was driving a horse attached to a double sleigh along a road crossed by the Intercolonial railway. He was followed by his son, aged eleven, who was driving a horse attached to a small single sleigh. The view of the track on the northeastern side until arriving within 25 feet of it was obstructed by wood-piles. After passing the wood-piles B. looked to the southwest to see if any train was coming down, but did not look in the opposite direction i.e., from which a train was coming. When he was in the act of crossing the track he heard the alarm signal of a train coming upon him from the northeast at about thirty to forty feet away; then, but not before, the engine-driver sounded an alarm signal. B. by urging his horse was just able to clear the train, but the boy was unable to stop his horse and sleigh with the result that the train struck them, killing the horse, smashing the sleigh and severely injuring the suppliant's son. The train hands had omitted to sound the whistle and ring the bell on the approach to the crossing as provided by section 37 of *The Government Railways Act.*

Held, that the Proximate or determining cause of the accident was the negligent omission of the railway employees to comply with the provisions of the said section; but inasmuch as the conduct of B. in not looking both ways before entering upon the track while not contributing to the proximate or determining cause of the accident, yet amounted to negligence, it was a case justifying the application of the doctrine of *faute commune* under the law of Quebec.

2. That upon the facts the suppliant was entitled to recover against the Crown under section 20 of *The Exchequer Court Act*, such damages as might be fixed comformably to the above mentioned doctrine having regard to the nature and extent of the negligence of the respective parties.

3. The doctrine of *faute commune* does not obtain under the law of Quebec where the claimant contributes to the proximate or determining cause of the accident.

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PETITION OF RIGHT for damages for injury to the person and loss of property alleged to have been caused by the negligence of servants of the Crown on a public work of Canada.

The facts appear in the reasons for judgment.

The case was heard at Fraserville on the 2nd and 3rd of February, 1914.

W. A. Potvin and *J. Langlois* for the suppliant.

L. Berubé for the respondent.

AUDETTE, J., now (March 25, 1914) delivered judgment.

The suppliant brought his petition of right, in the above dual capacity, to recover the sum of $1,346.90 as damages resulting from an accident on the Intercolonial railway.

On the 13th February, 1912, between half past three and four o'clock in the afternoon, the suppliant and his son, left the Chapleau shop, marked A on the diagram filed as Exhibit "A" herein, and travelled southerly along Central Road on their way home to St. Bruno, which is about six miles south of the crossing of the railway. It was a fine day and there was nothing abnormal in the state of the atmosphere. The father was driving in a double sleigh, with two bags of oats in it; and the son, in his eleventh year at the time, was following close behind sitting on a barrel of pork in a sleigh with side-sticks (une traine à batons). On their way to the crossing, opposite the *chemin de commodité* shewn on plan Exhibit No. 2,—there is a line of vision eastward, but it is not established how far and at what given place a train travelling west could be seen, and the evidence on this point is unsatisfactory and unreliable.

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For about 264 feet north of the crossing there are piles of deals and pulpwood on the Government land which obstruct the view eastward and northeasterly. On their way to the crossing the suppliant and his son say they looked to the northeast; but they could neither see any train or hear any noise indicating the approach of a train, either from the bell or the whistle or otherwise. On arriving at the end of the pulpwood piled on the western side of the Government property, at about 25 feet from the crossing, opposite the western end of the station, the suppliant says he looked towards the southwest to see if any train was coming down, and when he arrived at the track, a train came upon him from the east at about 30 to 40 feet, and the engineer then blew two blasts or the alarm signal. The suppliant touched his horse with his rein and cleared the track; but unfortunately his boy and rig were struck by the train and thrown upon the ground. The boy said he tried to stop his horse, but he could not. The animal at the time of the accident sprang up and followed the rig ahead. The accident resulted in the killing of the boy's horse, smashing of the harness and sleigh, and the boy was picked up unconscious all covered with blood.

He was taken to Dr. Deschêne's house, and it was found he had a compound fracture of the left arm,—the bones were protruding through the flesh and skin, his skull broken in at the eyebrow, ecchymosis at the hip where an abscess afterwards formed. Dr. Caron attended him to the end of March following. He examined him again some time in August or September and found a fistula on the arm brought on from pieces of bones acting as extraneous bodies. The boy was further examined by Dr. Caron at the time of the trial, and the doctor found two fistulas on the arm and

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two other saturated sores; and he offers as his opinion and belief that the boy will probably be cured, but that it will take time, and that he will not have the same capacity in the broken arm as he would otherwise have.

It is found that the crossing in question, which is a level crossing, is on the outskirts of the village of St. Paschal, is one which on the day of the accident was made dangerous by the piles of deals and pulpwood on the Government land. The buildings and the wood piles made it impossible, under the weight of the evidence, for any one travelling on Central Road, as the suppliant did, to get a view of the track until arrived at about 25 feet from the same. The crossing although properly fenced (1) had become a dangerous one, under the circumstances. Section 37 of *The Government Railway Act* (R.S.C. ch. 36) reads as follows:

"37. The bell shall be rung or the whistle sounded " at the distance of at least eighty rods from every " place where the railway crosses any highway, and " shall be kept ringing or be sounded, at short intervals, " until the engine has crossed such highway."

From the perusal of the above section it will be seen that any one travelling on this Central Road has the right to expect, from an approaching train, the ringing of the bell and the sounding of the whistle. This should be expected at every place where the railway crosses any highway, and much more so where the crossing has been made more dangerous by the obstruction of the view in piling wood at the approach to the crossing.

Was the bell rung and the whistle sounded at 80 rods, or 1,320 feet from the crossing, and was the bell kept ringing, or the whistle sounding, at short intervals,

(1) Parent v. The King, 13 Ex. C.R. 104.

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until the engine crossed the Central Road, at the time of the accident? The question must, under the evidence, be answered in the negative. (1)

Eight witnesses,—Brillant, Senior, Langelier, Labrie, Leclerc, Lagacé, the baggageman at St. Paschal, Duval, Brillant, fils, and Lavoie the stationmaster at St. Paschal, testify they did not hear the train either whistling or ringing the bell. Duval is more specific and was in a position to be more observant also. He was driving down the Central Road, sitting on his load of wood and saw the train coming from quite a distance. He stopped his rig at about 50 feet south of the track (the southern approaches were not obstructed) to let the train pass and followed it up with his eyes, and testifies positively that the train did not whistle until it gave those alarm blasts at 30 to 40 feet from the place of the accident.

Against this overwhelming evidence we have the testimony of Engineer Rouleau, who had one month's experience as engineer, and who says he blew his whistle at four places on reaching St. Paschal. One of these places is indicated by him at a whistle post which never existed. This same witness says Brillant was at about 50 feet from the crossing when the train was at two hundred feet from the same when he blew the alarm blasts. If that was the case, travelling at eighteen to twenty miles an hour, the engine would have been at the crossing before the rigs. The stoker, Dumas, says the train blew and rang and he says so because it was their duty to do so. However, the brakesman, Levesque, who was on the engine at the time, says he does not remember that the bell rang when they passed St. Paschal—the stoker was taking a rest, he was sitting on his bench, He adds that the

(1) Connell v. the Queen, 5 Ex. C.R. 74.

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alarm signal was given at about one *arpent* from the crossing.

It is unnecessary to review the evidence any further. The only question remaining to be answered is, what was the determining, the approximate cause of the accident. The answer to this must necessarily be that it was the want of blowing the whistle and ringing the bell as required by section 37 above cited. Indeed, as was said, in the case of the *Grand Trunk* v. *McAlpine* (1): "Where a statutory duty is imposed upon a railway company, in the nature of a duty to take precautions for the safety of a person lawfully crossing its line, they will be responsible in damages to such a person who is injured by their negligent omission to discharge, or secure the discharge of, that duty properly; but the injury must be caused by the negligence of the company or its servants."

Had the engine whistled and the bell rang, the suppliant would have heard it and would not have ventured upon the track at all before the passing of the train. That is the natural inference. *Res ipsa loquitur*.

Now, did the suppliant approach the crossing with ordinary care and diligence on his own part? The warning the suppliant had a right to expect from the train was only such as ought to be apprehended by a person possessed of ordinary faculties in a reasonably sound, active, and alert condition, and the time given to avoid the danger should be such as would be reasonably sufficient (2).

The suppliant had been listening and looking to the northeast all along while travelling from quite a

(1) (1913) A.C. at p. 846.

(2) *Grand Trunk Ry. Co.* v. *McAlpine* (1913) A.C. 838; *Griffith* v. *Grand Trunk Ry. Co.* 45 S.C.R. 380; *Pedlar v. Canadian Northern Ry. Co.* 20 Man. L.R. 265; *Vallee* v. *Grand Trunk Ry. Co.* 1 O.L.R. 224; *Sims* v. *Grand Trunk Ry. Co.*, 10 O.L.R. 330.

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distance north of the track, but of course had not been able to see the track quite a distance north of the same. There was a space of 25 feet from the end of the wood-pile and the track. He was sitting on his bob-sleigh,—the length of his horse and rig would allow very little space for him to see before he got to the track; and, having looked to the northeast as above mentioned, when he got to the track he looked to the southwest, when the alarm signal brought his attention to the train coming upon him. However, he did not look both ways on approaching the track as he should have done (1).

True, as stated in the *McAlpine Case* (p. 845) "there is no rule of law in England as that if a person "about to cross a line or lines of railway looks both "ways on the approaching track, he need not look "again just before crossing it. Neither is it true "that according to the law of England a plaintiff "who is guilty of negligence cannot recover damages. "On the contrary a plaintiff whose negligence has "directly contributed to the accident, that is, that "his action formed a material part of the cause of it, "can recover, provided it is shown that the defendant "could by the exercise of ordinary care and caution "on his part have avoided the consequence of the "plaintiff's negligence."

The question of contributory negligence is a question of fact to be decided in each case on the evidence in the special case. The doctrine of *faute commune,* as it obtains in the Province of Quebec is somewhat different. Indeed, when there is *faute commune,* and where the suppliant did not contribute in the determining and proximate the cause of the accident, the amount of the damages are fixed having regard to the nature and

(1) *Beckett* v. *Grand Trunk Ry. Co.* 1 Cam. S.C. Cas 228; *Royle* v. *C.N.R.* 3 Can. Ry. C. 4.

extent of the negligence of both parties respectively (1).

Under the circumstances of the present case, this court cannot dispel from its mind that the suppliant Alexis Brillant should have been more careful and diligent in approaching and taking the track. Indeed, he knew that the *locus in quo* had become quite dangerous by the obstruction of the eastern view by the wood-piles, and notwithstanding that fact, he ventured upon the track looking but one way and with his back turned the other way. Should it not be expected from a person of ordinary care and prudence to look both ways before venturing upon the track? The greater the danger, the greater should be the care and prudence. By taking the track in the manner mentioned he contributed to some extent to the accident and made himself guilty of such negligence as would justify the application of the doctrine of *faute commune*, and thereby reduce the quantum of damages (2).

In the result it must be found that if the railway employees had complied with the statutory duties, as embodied in said section 37, the accident would not have happened; that the present case comes within the provisions of section 20 of *The Exchequer Court Act*, and that the injury complained of occurred on a public work and resulted from the negligence of the officers or servants of the Crown while acting within the scope of their duties or employment.

Therefore there will be judgment in favour of the suppliant for the sum of eight hundred dollars, apportioned in the following manner, namely, three hundred dollars for Alexis Brillant, the father, and five hundred dollars, free and clear of all charges for Alcide Brillant, the son. The whole with costs.

Judgment accordingly.

Solicitors for the suppliant: *Potvin & Langlois.*

Solicitor for the respondant: *L. Berubé.*

(1) *Nichols Chemical Co.* v. *Lefebvre*, 42 S.C.R. 404.
(2) *Beckett*, v. *Grand Trunk Ry Co.* Cam. S.C. Cas, 228.