1915
Sept. 7.

IN THE MATTER OF THE PETITION OF RIGHT OF

FLORIDA CANTIN,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Railways—Yard—Injury to trackman—Shunting—Appliances—Signals—Look-out.

The Crown is not responsible for the death of a trackman run over by an engine carefully backing into a yard of the Intercolonial Railway, not occasioned by the negligence of any officer or servant of the Crown in or about the operation of the railway, within the meaning of sec. 20 (f) of the *Exchequer Court Act*, but brought about by the negligence of the deceased in having failed to keep an especially good look-out for train signals as required by the rules. Sec. 35 of the *Government Railway Act*, requiring the stationing of a person in the rear of a train moving reversely, and the rules governing the running of trains, do not apply to shunting engines in a railway yard. The fact that the engine attending to the shunting had no sloping tender and no foot-board and railing was immaterial under the circumstances.

PETITION OF RIGHT to recover for the death of an employee of the Intercolonial Railway.

Tried before the Honourable Mr. Justice Audette, at Quebec, June 14, 15, 16, 1915.

Thomas Vien, for suppliant.

E. Belleau, K.C., for respondent.

AUDETTE, J. (September 7, 1915) delivered judgment.

This is a petition of right whereby it is sought by the widow of Michel Morneau, to recover the sum

1915

CANTIN v. THE KING.

Reasons for Judgment.

of $10,000 as damages arising out of an accident resulting in the death of her husband while in the employ of the Intercolonial Railway.

The accident happened on June 11th, 1913, between about 8.40 and 8.45 a.m. Morneau was, at the date of the accident, yard-foreman of the Chaudière Yard, and his work consisted, in a general way, in repairing the tracks and looking after the yard. Having placed his men at cleaning the yard, he was seen shortly before the accident, when a ballast train was coming in the yard from the east, standing on that track, his hands in his pockets, with his face turned to the east, towards this incoming train and on the same track.

When this ballast train came in, engine No. 89, which on that day was doing the shunting in that part of the yard, in the place of the usual shunting pilot then under repairs, was uncoupled from a Montreal freight train, and in compliance with orders given by the proper officer, started backing, tender first, on the track adjoining the one upon which the ballast train was coming, with the object of taking the van in rear of the same. Engine 89 started backing slowly, as the engineer did not wish to get to the switch before the ballast train had cleared it. It thus travelled backward at the speed of 2 to 3 miles an hour, the engineer having started the automatic air bell before moving, and the bell was being rung during all the time it was moving. While in the act of so moving backward the engineer suddenly heard a cry, when he immediately put on his emergency brake and stopped his engine in about 20 feet.

By that time the engine had passed over Morneau, who died at 9.25 a.m. as the result of the accident.

In his endeavour to clear the ballast train he had obviously thrown himself under engine No. 89.

To succeed in an action like the present one, the suppliant must bring his case within the provisions of sub-section (f) of sec. 20 of the *Exchequer Court Act*, as amended by 9-10 Ed. VII. ch. 19, which reads as follows:

"Every claim against the Crown arising out of "any death or injury or loss to the person or to "property caused by the negligence of any officer "or servant of the Crown, while acting within the "scope of his duties or employment upon, in or about "the construction, maintenance or operation of the "Intercolonial Railway or the Prince Edward Island "Railway."

In other words, there must be, 1st, a public work; 2nd, an officer or servant of the Crown who has been guilty of negligence while acting within the scope of his duties or employment; and 3rd, the accident must result from such negligence.

The first requirement is duly found. The Intercolonial Railway is a public work of Canada.

The next question to consider is whether or not there has been such negligence on behalf of an officer or servant of the Crown as contemplated by the statute.

The accident happened on a fine day, in the early morning. The track where the accident happened is perfectly straight and there was no obstruction between Morneau and the engine at the time of the accident.

Two or three minutes before starting to back his engine No. 89, the engineer, Mountain, says he saw Morneau, who passed close by his engine. They

1915

CANTIN v. THE KING.

Reasons for Judgment.

spoke to each other, therefore he knew of the presence of engine 89 at the place in question.

No one saw the accident. It is surmised that when Morneau cleared the ballast train, instead of standing between the tracks where there was place, he came on the track upon which engine No. 89 was backing, and was struck, notwithstanding that the bell was ringing. It may be also that the bell of the ballast train was also ringing and that the latter drowned the sound of the bell of engine No. 89. The last words of Morneau seem indeed to confirm that view. Witness J. V. Lemieux, Morneau's clerk, asked him when he was still under the engine, how he had managed to meet with such an accident, and Morneau answered: "In trying to clear the ballast train, I got struck by the Pilot."

Under rule 37 of Exhibit No. 1 all trackmen are especially enjoined to keep a good lookout for signals. Morneau seemed to have overlooked or ignored the bell of engine No. 89, backing towards him, notwithstanding he knew engine No. 89 was there, having spoken to the engineer 2 or 3 minutes before.

The spirit of the rules for the guidance of foreman-of-track or trackmen under Rule 11 of Exhibit "G," and 37 of Exhibit No. 1, would seem to be that they should keep an especially good lookout for signals and *keep themselves out of the way at all times* of special or irregular trains.

If Morneau was killed in placing himself on the track upon which engine No. 89 was backing, he must alone be held responsible, and his death was due entirely to his own negligence. There was a space of 8 feet between the two tracks, and of 4½ to 5 feet between the two trains meeting one another, and 30 feet free on the other side of the ballast train. There

was no reason why he should not place himself between the two trains going as slowly as they were, or on the free space on the other side. And one of the employees, heard as a witness, said he often stood between two trains. There was no obstacle to prevent Morneau from seeing engine No. 89 coming,—no tree, no house, no fog, but a straight right-of-way, clear of everything, and fine weather. He probably had his back turned to engine No. 89. It was practically impossible for him not to hear the engine coming and the sound of its bell.

Mountain, the engineer on board of engine No. 89, was not guilty of any negligence. At the order of the proper officer he started to back—and all the shunting at that end of the yard was done by backing. He rang his bell,—he looked ahead from his window,—on the right, but could not see Morneau, who was at the left. He put on the emergency brakes on the first information of an accident. The fireman was busy at his fire when they started backing, and was subsequently engaged at the injector. He is supposed to help the engineer to look out, when he is not otherwise engaged in other duties, as provided by rule 181, of Exhibit No. 1.

As already stated, there was no eye-witness to the accident, and no doubt Morneau was on a track where he should not have been when engine No. 89 backed; but the action is based upon sub-sec. (f) of the statute above referred to, which is very similar to Art. 1054 of the Civil Code with respect to *quasi-délits*—and the *onus* is in such cases upon the suppliant to prove that the immediate and determining cause of the accident was occasioned by the negligence of the respondent's employees.

1915

CANTIN v. THE KING.

Reasons for Judgment.

A number of alleged grounds of negligence were mentioned by the suppliant's counsel which will now be considered and dealt with. It is contended that under sec. 35 of the *Government Railway Act,* a person should have been stationed in the rear of the tender. Clearly this section does not apply to a locomotive engaged in shunting in a railway-yard,—such obligation is limited to a train moving reversely in a city, town or village, but not to a railway-yard, even situated in a city, town or village,—and the place of the accident in this railway-yard is 12 to 15 acres from any public highway, and the public is not admitted in this railway-yard, which is exclusively limited to railway purposes and for railway employees. The same might be said with respect to rule 56 of the time-table in force at the time, Exhibit No. 2. This rule would appear to have been made in compliance with and to give effect to sec. 35 above referred to, and does not apply to shunting in a railway-yard; the time-tables and the rules attached thereto are in respect to running trains and not with respect to shunting in railway-yards. The same must be said with respect to rule 126 of Exhibit No. 1. That rule is under the heading of "Conductor" and there was no conductor in the present case. That rule applies to the conductor of a train, but not to the engineer in command of an engine doing shunting in a railway-yard,—its uses being limited to railway employees only. As witness Genois says, when we go out of the railway-yard, we place a man behind the train, but not in the yard.

Then it was contended that engine No. 89, which was attending to the shunting, in the Chaudiere

Yard, on the day of the accident, was not properly equipped in that it had not a sloping tender and a foot-board and rail at the back of the tender.

It is true that engine No. 818, the Pilot replaced by engine No. 89, to do the shunting on that day, had a sloping tender, allowing one to see better at the back when it is not loaded very high with coal. But that is not required by any regulation, and Pilot No. 816, which was also daily attending to the shunting in the Chaudiere Yard, had no such sloping tender, but a square one, as will be seen by reference to Exhibit No. 8. Moreover, the nature of the work did not require an engine of a special type under any statutory enactment or under any regulation. It was not necessary to have a foot-board and railing for the switchmen on the back of the tender of engine No. 89, taking into consideration the manner in which the shunting was done in that part of the yard. The switchmen also always use, as less dangerous, the foot-board in the opposite direction the engine is moving. Moreover, these foot-boards and hand bars are for the use of the switchmen and not for anybody else. Indeed, there was no more negligence in not having such appliance on the day of the accident, to be of some help to Morneau, than there would be in not having them on the ordinary passenger trains to prevent accident, or help in case of accident,—especially when in all likelihood he had his back turned to the engine when he was struck and that in such position it would have been easier for him to jump off the track than on the foot-board, taking into consideration that he was not accustomed to the use of such board and rails.

There was indeed no defectuosity in the engine and no negligence on behalf of any of the respond-

1915

CANTIN v. THE KING.

Reasons for Judgment.

ent's employees on the occasion in question and the action fails.

The decision of the Supreme Court of Canada, in the case of *Dominion Cartridge v. Cairns*,[1] cited by the respondent's counsel, would also find its application in the present case. In that case it was decided that where it appeared under the circumstances of the case, that the cause of the accident was either unknown or else it could fairly be presumed to have been caused by the negligence of the person injured, and whose personal representative brought the action, there cannot be any such fault imputed to the defendants as would render them liable in damages.

Where there is no fault, no *quasi-délit*—on behalf of any of the employees, the respondent cannot be held responsible for the accident. Familiarized as he was with a daily work in a somewhat dangerous locality, Morneau ignored all elementary diligence and prudence and became the victim of his own imprudence.

Having arrived at the present conclusion it becomes unnecessary to consider the question of insurance and the receipt given by the suppliant relieving the Crown of any responsibility respecting the accident.

There will be judgment in favour of the respondent, and the suppliant is declared not entitled to any portion of the relief sought by her petition of right.

Petition dismissed.

Solicitors for suppliant: *Francoeur & Vien.*

Solicitors for respondent: *Belleau, Belleau & Belleau.*

[1] 28 Can. S.C.R. 362.