IN THE MATTER of the Petition of Right of
NAPOLEON LOISELLE.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1920
Sept. 23rd.
Reasons for Judgment.

Railways—Responsibility—Damage to one using property without permission of company—Licensee—Negligence.

S had three carloads of potatoes near the freight-shed at Mont-Joli, which by agreement with railway company he was to keep heated.

To reach this car, S. could take a good travelled road or could take a short cut through the busy railway yard. The latter was used by the public, but without the permission of the railway company. S. on the 16th November, 1917, at 8.15 p.m. elected to take this short cut to his car. The night was dark and having missed his way, he fell into a viaduct and was injured.

Held, that the proximate and direct cause of the accident was want of prudence on the part of the suppliant in venturing on a dark night, through a busy railway yard to his car, instead of using a good travelled road, free from any such dangers, as he was confronted with in using the tracks.

2. Where a licensee, for his own benefit, is upon the premises of a railway, without objection from it, such railway company cannot be said to be under the legal duty to guard such licensee against the obvious risks and dangers attending his crossing or walking through a railway yard at night. He must under such circumstances, take care of himself in using the premises as he finds them at the time he made his contract for transportation, and is not entitled to be protected from obvious conditions upon the property in their ordinary state.

PETITION of Right to recover from the Crown damages alleged to have been suffered by reason of an accident in a railway yard of the Intercolonial Railway Company.

THE case was tried at Rivière du Loup on the 9th of July, 1920.

Adolphe Stein and *Dominique Lévesque*, counsel for suppliant.

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Mr. Bérubé, counsel for respondent.

The facts of the case are stated in the reasons for judgment.

AUDETTE, J., now (this 23rd September, 1920) delivered judgment.

The suppliant, by his Petition of Right, seeks to recover $4,660.10, damages for personal injuries caused by the negligence of the Intercolonial Railway's servants.

The accident in question occurred on the 16th November, 1917, and the Petition of Right was filed in Court only on the 20th January, 1919. While on its face the claim would therefore appear to be prescribed, the evidence established the Petition of Right had been lodged with the Secretary of State, pursuant to sec. 4, of the Petition of Right Act, on the 14th November, 1918, and it must be found that such compliance with the statute interrupted prescription.

The suppliant, having purchased three cars of potatoes, entered into agreement with the Intercolonial Railway Company, as appears by the Bill of Lading and the way-bill, filed herein as Exhibit No. 13, to transport the same to destination upon his undertaking to place a wooden lining inside the car, heat the same, and supply the fuel therefor,—the question of frost being thereby at his own risk and peril.

The cars of potatoes in question were placed at Mont-Joli, near the freight shed, at the place indicated on the plan, Exhibit No. 2, as "chars de patates."

At 4 o'clock on the afternoon of the day of the accident, the suppliant had gone and heated his cars,

and, as he says, that fire could last only about four hours,—at 8.15 p.m., of the same day, the 16th November, he started to attend to his fire again.

He went to the station, at the office marked "B" on the plan, with the object of advising the employees he wished to leave that night, and to have his cars weighed, and he was informed the employees were in the yard.

It was then he started from point "B," on his errand to heat his cars, and followed the dotted line shown on the plan and marked "trajet parcouru par Loiselle." He states it was then difficult to cross opposite the station towards his cars, as there was shunting going on. The Mont-Joli yard is at a Divisional point of the Intercolonial Railway and it is also the terminus of the Gulf & Terminal Railway running down to Metis and Matane. There are two shunting engines in that yard to attend to the considerable shunting necessarily involved in such a locality.

Loiselle, after leaving point "B," followed the dotted line above mentioned, and being carried beyond his bearings, reached point "A" and fell at that point into the viaduct from a height of 12 feet, 7 inches, upon the grating of a drain and was injured. He now claims for the bodily injury resulting from such accident. Can he recover under such circumstances? Was the suppliant justified in crossing the railway yard to go to his cars, instead of taking the road leading to them? What were his rights?

In answering this question let us follow the modern tendency of the courts and view the facts of the case in the light of the first principles of the law of negligence rather than to seek to establish an analogy between the facts of this case and those obtained in

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decided cases. Negligence is want of care in the circumstances, and every case must be determined upon its own set of facts. An observation upon this point of Lord Finlay, in the case of *Craig* v. *Glasgow Corporation* (1), is quite instructive. His Lordship was then dealing with a case of injury to the person arising out of alleged negligence on the part of the driver of a tram-car. He says:—"The use of cases was for the proposition of law they contained, and it was of no use to compare the principal facts of one case with the principal facts of another for the purpose of endeavouring to ascertain the conclusion to be arrived at in the second case."

In determining the question of liability in all such cases as the one before the court, it is necessary to examine the conduct of both parties in the circumstances, and note the bearing that the acts of each had upon the resultant injury. Want of care must be posited as the cause of the injury. Then whose incuria was the proximate or active cause of the accident. Liability is established where it is shown that the party injured had some legal right to be on the locus of the accident and did not know of a peril to his safety that was known to the defendant, but in respect of which he took no care to warn the plaintiff.

Holmes J. in the case of *Commonwealth* v. *Pierce* (2) says: "So far as civil liability is concerned, at least, it is very clear that what we have called the external standard would be applied, and that, if a man's conduct is such as would be reckless in a man of ordinary prudence, it is reckless in him. Unless he can bring himself within some broadly defined exception to general rules, the law deliberately leaves his idiosyn-

(1) 1919, 35 T.L.R. 214 at p. 216. (2) 138 Mass. 165, at p. 176.

crasies out of account, and peremptorily assumes that he has as much capacity to judge and to foresee consequences as a man of ordinary prudence would have in the same situation. In the language of Tindal, C.J., "Instead, therefore, of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe." *Vaughan* v. *Menlove* (1).

To succeed in the present instance, the suppliant must bring the circumstances of his case within the ambit of sec. 20 of the Exchequer Court Act. There must be, 1st, a public work; 2nd, there must be negligence of an employee or servant of the Crown while acting within the scope of his duties or employment, and 3rd, the accident must be the result of such negligence.

Coming back to the course pursued by the suppliant on the night of the accident, it must be noted that there is a road indicated on the plan at the back of the station, joining when travelling west, the King's highway which runs north under the viaduct in question. Then both to the northeast and southeast of the letter "N," on the plan, there are good travelled roads leading from the King's highway, to the freight shed and therefrom to the cars of potatoes in question.

Leaving the station, the suppliant could and should have gone to his cars in that way, or on leaving his hotel, which was to the west of letter "x" he just had to walk east almost straight down to the freight

(1) 3 Bing N.C. 468, 475; S.C. 4 Scott, 244.

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shed. However, he says he was unfamiliar with Mont Joli, and did not know of the roads; but, that is no excuse for running through a busy railway yard or any dangerous locality in Mont Joli. He could easily have enquired and been told.

He had gone across the yard in the afternoon, without interference or objection from the railway company. The most favourable construction of the suppliant's complaint is that he was in the railway yard, or at the place in question, in pursuance of a usage by the public, which usage was permitted passively by the railway company. It does not go further than this. The suppliant was not passing over the tracks at a crossing or on a road which had been adopted or recognized by the railway company; but was simply making use of this "short cut" from one place to another, which is said to have been used by many persons for convenience. Such user of the tracks or "short cut" is unquestionably dangerous and regarded as an intrusion upon the legal rights of the railway who maintain their railway yard solely for the purpose of operating the railway. It is not easy to see how such a user of the railway yard by the public could be wholly prevented without force, which would be attended with difficulties that might not be overcome without the imposition of unnecessary burdens upon the railway company. Conceding, however, that the suppliant had the tacit and passive permission, resting upon usage, to walk through the railway yard and that in the circumstance he might be termed a licensee, his presence there was not especially invited and was of no advantage to the railway company.

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Where a licensee, for his own benefit, is upon the premises of a railway, without objection from it, such railway company cannot be said to be under the legal duty to guard such licensee against the obvious risks and dangers attending his crossing or walking through a railway yard at night, to get to his cars at the freight shed, when his business can be looked to by following the safe roads made and provided by the company to reach the freight shed or the siding adjoining thereto. In other words, the licensee must under such circumstances take care of himself in using the premises as he finds them at the time he made his contract for transportation, and is not entitled to be protected from existing conditions upon the property in their ordinary state (1).

The suppliant might have the right to complain of a wilful act of the railway company in running him down or of traps and pitfalls, which would be an allurement to unexpected dangers. There is no natural or possible relation between the injury and the fact that there was no cattle fence at the viaduct or that the latter was not lighted, as requested by the municipality, for its traffic. That is *nihil ad rem.* Had he not crossed the railway yard, had he not lost his way,there would have been no accident. As the station-master at Mont-Joli testified, "we do not give permission to pass over the tracks, but we do not prevent any one from doing so." The suppliant had no right to be where he was at the time of the accident, and in no case, can this passive leave to go across without objection, referable to the obliging act of the Crown, be said to give rise to a legal right of action. A wrongful act cannot impose a duty. There

(1) *Sullivan* v. *Waters*, 14 Ir. C.L. 460, (1903) 58, L.R.A. 77. (*cited*)

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is no act of negligence on behalf of any officer or servant of the Crown, which caused the injury. The proximate and direct cause of the accident is the obvious *incuria*, want of elementary prudence for the suppliant to venture on a dark night through a busy railway yard, and to wander and grope his way therein to his cars which were accessible through a good travelled road, free from any such dangers.

A man gifted with ordinary prudence would not, at night, have ventured through that yard. He should have reached his destination by the ordinary road, and not choose to go through the yard. *Volenti non fit injuria.* As between himself and the railway company, he has obviously shown greater *incuria* and the railway can only be liable for cases of negligence.

The accident being obviously the result of the suppliant's *incuria* and imprudence, he is adjudged not entitled to any portion of the relief sought by his Petition of Right.

Judgment accordingly.

Solicitor for suppliant: *Adolphe Stein.*

Solicitor for respondent: *Léo Bérubé.*