IN THE MATTER of the Petition of Right of

SARAH ANN CHARLTON.....SUPPLIANT; 1912 June 10.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Negligence—Government Railway—Injury to passenger—The Exchequer Court Act, R. S. 1906, c. 140, sec. 20—9-10 Edw. VII, c. 19—Weight of evidence.

The acts of negligence contemplated by sec. 20 of *The Exchequer Court Act*, as amended by 9-10 Edw. VII, c. 19, are such as constitute the proximate or decisive cause of any accident in respect of which relief by way of damages is sought against the Crown.

2. *Held*, following *Lefeunteum* v. *Beaudoin* (28 S. C. R. 89), that in estimating the value of evidence a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed.

PETITION OF RIGHT for damages alleged to have arisen out of the negligence of the Crown servants on the Intercolonial Railway of Canada.

The facts are stated in the reasons for judgment.

May 22nd, 1912.

The case was heard at St. John, N.B.

L. A. Currey, K.C., and *E. T. C. Knowles*, for the suppliant; *E. H. McAlpine, K.C.*, for the defendant.

Mr. Currey contended that there was negligence established against the servants of the Crown, first, because while they advertised that the train would stop at Fernhill Cemetry Crossing, they had no proper accommodation there for the alighting of passengers; secondly, because they issued a ticket to the suppliant for a station beyond the place where they undertook

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to stop; thirdly, because they did not announce the arrival of the train at the crossing, nor give the suppliant an opportunity of alighting there; and, fourthly, because the confusion brought about by this state of affairs caused the suppliant to attempt to alight when she did. He cited *Ryan* v. *The King*, (1), *Robson* v. *Northeastern Ry. Co.* (2), *Keith* v. *Ottawa & New York Ry. Co.* (3).

Mr. *Knowles* followed for the suppliant.

Mr. *McAlpine* contended that the proximate cause of the accident was the negligent act of the suppliant in placing herself on the step of the car from which she was thrown by the motion of the train. Had she not been there she would not have been injured.

AUDETTE, J. now (June 10th, 1912) delivered judgment.

This is a petition of right brought by the suppliant to recover the sum of $10,000 for bodily injury, alleged to have been sustained by her through the negligence of the officers and servants of the Crown, by being violently thrown from the steps of the platform of a car, while travelling on a train of the Intercolonial Railway, a public work of Canada.

The Crown, by its pleas, denies the facts as alleged in the said petition of right and says, *inter alia*, that if the suppliant suffered any bodily injuries, they were caused by her negligent and improper conduct.

The suppliant, who is at present a widow of 61 years of age, acting on a "reading" notice (as distinguished from a "displaying" notice as mentioned by witness Jordan) which appeared in the local papers, to the effect that on Saturdays, suburban trains

(1) 11 Ex. C. R. 267. (2) L. R. 2 Q. B. D. 5.
(3) 2 Can. Ry. Cas. 26.

leaving St. John at 1.15 would stop at Fernhill Cemetery, and that returning trains would also stop *at the crossing*, proposed to a Miss Mabel Babington, then 15 years of age, to take her to Fernhill Cemetery. Her invitation being accepted they both started, on the 13th August, 1910, and went to the union station where Miss Babington, applying to the ticket office, asked the agent for two tickets to Fernhill Cemetery, and having paid for the same was given two tickets which, sometime after the accident were discovered by them to read from St. John to Coldbrook. Fernhill Cemetery is a mile and a half, and Coldbrook three miles, from St. John.

The Intercolonial Railway has not and does not issue tickets to Fernhill Cemetery. The ticket agent, F. E. Hannington, says there is no station at Fernhill Cemetery, it is only a crossing and the suburban trains stop there only on Saturdays for the convenience of and to oblige passengers. He further contends that when a purchaser asks for a ticket to Fernhill Cemetery he gives him a ticket to Coldbrook, telling him to ask the conductor to stop at Cemetery Crossing. On that point the suppliant says that the person selling the tickets at the station made no remarks, while Miss Babington says she asked him if the train stopped at Fernhill Cemetery, and the agent said yes, but did not say anything about asking or letting the conductor know.

After purchasing their tickets they both boarded the train leaving at 13.15 o'clock Miss Babington says they did not get on the rear car, there were three or four cars behind them. It was an excursion, the train was crowded, and two young men gave them their seat, while they (the young men) sat on the arm of the seat. They did not see the conductor on

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the train. No one came to take up their tickets, and they did not hear the conductor or brakesmen announcing Fernhill Cemetery, their destination.

On this question of announcing Cemetery Crossing on the train, the evidence is somewhat conflicting. Mrs. Worden says she did not notice any official announcing it. Mrs. Kelley says she does not remember if the officials did announce; and Mrs. Corbet says none of the officials announced. Brakesman Berryman says that when they left St. John, at the request of the conductor, he started collecting tickets at the rear of the train, and when they arrived at Cemetery Crossing he had got as far as half the second car from the rear, and that he had announced Cemetery Crossing in these two cars. Brakesman Cobham on leaving St. John stayed in the head car, near the engine, until they reached the switch, 1¼ miles from St. John. On arriving there he opened the switch, left the train pass, closed the switch and boarded the train at the far end of the last car and walked back to the front announcing Cemetery Crossing in al the cars.

Taking the rule of evidence to be that affirmative evidence must prevail over negative evidence, it should be found that Cemetery Crossing was announced, although, in the view this court takes of the case, it does not matter here—the accident did not occur because Cemetery Crossing had not been announced—but indeed, because of the last act before the accident, the reckless position assumed by the suppliant on a moving train. Under the evidence of the crew, it must be found the station had been announced. Without casting upon them any discredit, one must realize it is the evidence of interested witnesses, whose interest is closely identified with

that of the Crown, in fact in a larger degree because they may think their employment at stake. However, in estimating the value of evidence one must not lose sight of the rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, *magis creditur duobus testibus affirmantibus quam mille negantibus*, because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed (*Lefeunteum* v. *Beaudoin*, (1).

However, while the suppliant and Miss Babington were sitting quietly in their seat, one of the young men said it was Fernhill Cemetery. The train had then come to a stop, says the suppliant, and they both (herself and Miss Babington) walked from about the centre of the car toward the rear to get off.

Before they reached the rear of the car, the train was moving—it had started. Miss Babington jumped off and the suppliant sat on the last step, and said to Miss Babington who was opposite her, she would not jump. Then Miss Babington jumped back on the train, on the step of the adjoining car. The suppliant was asked by the court, if she were then holding the railings, and she said she did not remember whether she did or not, but she said *she was sitting on the last step*. She contends the train then gave a jerk and she was thrown off. Miss Babington says the train stopped before the suppliant fell, but she must be in error. After her fall the train was stopped. Some of the officials came to her, and she was cared for and left in charge of Miss Babington.

She says she fell at the place where she would have alighted, and at that time the train was moving a

(1) 28 S. C. R. 89.

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little, just as fast as she would walk. She says she fell when Miss Babington was back on the train, on the step of the adjoining car.

There is no platform, no contrivance for alighting at Cemetery Crossing; and L. R. Ross, the terminal agent of the Intercolonial Railway at St. John, says that the space between the last step of the cars and the ground at that place is 18 inches—varying between 18 and 22 inches. On this question of convenience for alighting, we have the evidence of three lady passengers,—one of them a pretty old person and another a matured and rather heavy person. Mrs. Worden says she had no trouble *or bother* getting out. Mrs. Corbet says she had no difficulty in alighting or getting back on the train,—they stepped on the ground. Mrs. Kelly says she got off the train without trouble,—it was as flat as the floor and it was not a long step getting off.

With respect to the time the train stopped at Cemetery Crossing, we have profuse evidence. A. C. L. Tapley, a newspaper reporter, who was on board, says the train made an ordinary stop the first time when he saw some ladies getting off. Mrs. Worden says the train stopped long enough to get off, she had ample time to get off. Five of us got off,—five ladies. She had not risen from her seat before the train stopped and had ample time to get off. Mrs. Corbet says she had ample time to get off. Mrs. Kelly says the train stopped long enough for any person who had her mind made up to get off. There was lots of time, ample time to get off,—time enough to get off for any person who had her mind made up to get off. She had no trouble either going or coming, although she had never been there by train before.

Brakesman Berryman says the train stopped a reasonable time, long enough at that place. Everything was done in the usual way. George W. Speer, the engine driver, says the train stopped at Cemetery Crossing the usual time,—possibly a minute—suppose the train stopped one minute the first time, ample time for passengers to get off.

Brakesman Cobham says the train stopped long enough to allow passengers to get off, two or three minutes (he does not seem to have a good idea of time). He helped three passengers off the train. After all the passengers were off he asked Brakesman Berryman if all was well behind, and on the latter announcing all right he,—the conductor being inside collecting tickets,—gave the order to go ahead. Berryman corroborates him on that point, and adds that he did not see anyone appearing on the platform or any one coming off. The conductor says before leaving he had been asked to stop at Cemetery Crossing and had given the order to stop.

Now, how and when did the suppliant fall? The suppliant herself says she fell only after Miss Babington had jumped back on to the train,—when she was still sitting on the last step. Witness Tapley, the reporter, already referred to, says that while he was standing with another reporter on the front platform of his car, he looked over the side and saw the suppliant falling off. At that time the train was practically in motion,—it had stopped and started again, and the train was in motion before she fell. Asked if the suppliant had jumped, he says he thinks, he imagines she had fallen, he saw her come head foremost.

The engine-driver, a man of 21 years experience who gave his evidence in a most quiet and creditable manner, says he had no sooner started after receiving the

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signal to do so, when he looked back and saw a young girl on the bank—she jumped on the train, and *right off* after the suppliant fell, when he immediately applied the emergency brakes on account of what he had seen. When he applied the emergency brakes the train had gone on about half the length of a car, and one could walk as fast as the train was then going, The suppliant fell and came off all in a heap. Brakeman Berryman says the train was barely moving when the emergency brakes were applied.

The last and only question to be now answered is, what was the proximate, the determining, the decisive cause of the accident?

It is now beyond doubt and established by the evidence that the suppliant got on the platform of the car and took her seat on the last step thereof while the train was in motion, and that she fell when it was in motion, almost immediately as young Miss Babington jumped back on to the steps of the adjoining car, as above stated. Miss Babington must be mistaken and in error when she says the train gave a jerk and the suppliant fell, as the overwhelmning weight of the evidence is the other way. If there was a jerk when the train left, that must have happened much before Miss Babington jumped back and therefore before the suppliant fell. The emergency brakes were only applied after the accident, when the engine-driver saw the suppliant fall. There must have been a jerk when the emergency brakes were applied, but that was after the accident. How then did the accident happen, how can it be explained?

The suppliant had certainly taken a most dangerous position when she went down and sat on the very last step with her feet hanging over and not far from the ground—a most dangerous and reckless position;

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indeed—at the sight of which a witness in the case, Mrs. Kelly, was perfectly horrified, and she told her companions, "look at that woman, she might be killed",—she turned her head away and said she did not want to see her fall off. There was no justification, under the circumstances, to take the position the suppliant took. If by inadvertence she let her destination go by, she could either get off at the next station, or call the attention of the conductor and ask him to stop the train and take her back, if possible, to Cemetery Crossing—but not do what she did.

The ordinary cautious and prudent persons had no difficulty in getting off and contend they were given ample time to do so. Should the railway authorities provide for extremely incautious, reckless and imprudent people? Here is a passenger, the suppliant in this case, going through the feat of sitting down on the last step of a car with her feet hanging almost to the ground while the train is moving,—a feat an ordinary train man with experience would hesitate to attempt, and one no passenger with any common sense would dare try.

Under all the circumstances, as brought out from the evidence, it would appear to the court that when young Miss Babington jumped back on the train the suppliant must have endeavoured to right herself,—to get on her feet and in doing so necessarily and obviously did place a foot on her skirts on the step, and in making the effort to get up, lost her balance and fell, as described, all in a heap, head foremost.

The Court must therefore find that the proximate, decisive and preponderant cause of the accident was the fact of the suppliant, on a moving train, assuming the reckless position she did. Much stress has been laid by suppliant's counsel on the case of *Ryan* v. *The*

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King (1), but on perusal of the case, the Court arrives at the conclusion that it does not apply to the present case. The suppliant here did not alight from a moving train. She fell off. She so fell not in the act of endeavouring to alight, because she absolutely refused to attempt to alight under the circumstances. Ample time was given to the suppliant to alight as established by the evidence. The Cemetery Crossing through inadvertence was let go by, and an endeavour or rush to alight was made too late and abandoned.

Instructive comments on the question of proximate cause of an accident will be found at page 154 in "Schuster's German Civil Law, 1907, reading as follows:

"149. Under English law the plaintiff's contribu-
"tory default affects the defendant's liability in the
"case of claims for damage done by unlawful acts;
"under the rules of the present German law the liability
"created by a contract or other act-in-the-law is
"affected in the same way by the contributory default
"of the other party as the liability for an unlawful
"act. Under German as well as under English law,
"the proof of the plaintiff's own default is revelant
"only for the purpose of showing that the defendant's
"default was not the 'decisive' or 'preponderant'
"(vorwiegend) cause of the damaging event, but while
"under English law the fact that the defendant's
"default was not the decisive cause deprives the plain-
"tiff of his entire claim to compensation (except in
"cases coming under Admiralty law) German law leaves
"it to judicial discretion to determine whether the
"defendant's liability to make compensation is en-
"tirely destroyed or merely reduced by contributory
"default on the part of the plaintiff,—B. G. B. 254

(1) 11 Ex. C. R. 267.

"(The expression 'decisive', which is used by Sir F. "Pollock (See Law of Torts, 7th edition p. 455) is "clearer than the expression 'proximate' generally "used in the English authorities.)"

The suppliant, under the circumstances of this case, is barred from recovering under the Roman rule of law respecting contributory negligence, which says that *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.* The suppliant's counsel contended there was negligence on behalf of the Crown because of the following reasons:

1. Because after advertising excursion to Cemetery Crossing the Intercolonial Railway authorities did not issue tickets reading for that place.

2. Because the conductor did not take up all the tickets before making his stop at Cemetery Crossing, after it had been advertised and the ticket agent stating they would stop.

3. Failing to announce the stop to the passengers.

4. For not stopping the train long enough to allow the passengers to alight.

5. For not having any platform, step or other contrivance at the Crossing, after advertising the train would stop there.

With respect to the three first counts, the Court must find they had nothing to do with the proximate cause of the accident. With respect to the second count, under the evidence, it must be obviously found the train was announced, although again it had nothing to do with the determining cause of the accident. With respect to the fourth count the court must find under the evidence there was ample time to get off. And with respect to the fifth count, again it had nothing to do with the determining cause of the accident.

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The acts of negligence contemplated by sec. 20 of *The Exchequer Court Act*, as amended by 9-10 Ed. VII Ch., 19, are only such as would be the proximate, determining and decisive cause of the accident.

There will be judgment that the suppliant is not entitled to any portion of the relief sought by the petition of right.

Judgment accordingly.

Solicitor for suppliant: *E. T. Knowles.*

Solicitor for respondant: *E. H. McAlpine.*