THE GRAND TRUNK RAILWAY CO. OF CANADA (DEFENDANTS)..... } APPELLANTS;

AND

MARY ROSETTA ROSENBERGER, *et al.*, (PLAINTIFFS)..... } RESPONDENTS.

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*Jan. 22.

*March 8.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway—Failure to sound whistle—Accident from horse taking fright—C. S. C. cap. 66, sec. 104—Finding of Jury—Evidence.

Held,—Affirming the judgment of the Court of Appeal for *Ontario*, that Consolidated Statutes of *Canada*, ch. 66, s. 104, must be construed as enuring to the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage in their person or their property from the neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle, as they are directed to do by said statute, whether such damage arises from actual collision, or as in this case by a horse being brought over near the crossing and taking fright at the appearance or noise of the train.

The jury in answer to the question, "If the plaintiffs had known that the train was coming would they have stopped their horse further from the railway than they did?" said "Yes."

Held,—Though this question was indefinite, the answers to the question as a whole, viewed in connection with the judges charge and the evidence, warranted the verdict.

APPEAL from the Court of Appeal for *Ontario* (1), affirming the decision of the Common Pleas Division of the High Court of Justice (2) discharging an order *nisi* to set aside the judgment entered for the plaintiffs, and the finding of the jury upon which said judgment was based, and to enter a judgment for the defendants, or for a new trial.

* PRESENT.—Sir W. J. Ritchie, Knight, C.J., and Strong, Fournier, Henry and Gwynne, JJ.

(1) 8 Ont. App. R. 482. (2) 32 U. C. C. P. 349.

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The action was commenced by the respondents against the appellants on the 16th September, 1881, for injuries which they had severally sustained by being thrown out of a buggy on a highway in *Berlin*, near a crossing of the appellants' railway on the previous 9th of June.

The cause was first tried before Mr. Justice *Galt* and a jury, when, on answers to questions submitted to the jury, the judge entered a verdict and judgment for the respondents against the appellants.

This verdict was set aside by the Common Pleas Division, and a new trial was ordered, and leave was given to the respondents to amend their statement of claim, the court being of opinion that the original statement of claim did not shew a good cause of action.

The statement of claim was then amended, so as to state the facts upon which the respondents relied to maintain their action, in the words following—

"Paragraph 2. On the evening of the 9th day of June, 1881, the plaintiffs were lawfully proceeding from the said town of *Berlin* to the town of *Waterloo*, in a carriage drawn by one horse, and upon and by the way of the highway leading from the said town of *Berlin* to the said town of *Waterloo*.

"Paragraph 3. In order to reach the said town of *Waterloo* it was necessary for the plaintiffs to cross the defendants' railway, in the said town of *Berlin*, where the said railway crosses the said highway on a level with the said highway.

"Paragraph 4. The plaintiffs proceeded upon the said highway to within a very short distance of the said railway, where it crosses the said highway, when a train upon the said railway in charge of the defendants' servants came along the said railway and proceeded to cross the said highway without giving the warning or signal of the approach of the said train, as required by the statute in that behalf, and when the said train had

gone partly across the said highway the whistle upon the engine attached to the said train was then for the first time sounded, and the horse which the plaintiffs were driving took fright at the very close, unexpected and sudden appearance of the said train, became unmanageable, and upset the said carriage, and the plaintiffs were violently thrown to the ground, and the said carriage was broken, and the said horse ran away, although during all the time aforesaid the plaintiffs drove the said horse with reasonable care and skill.

"Paragraph 4*a*. While the plaintiffs were proceeding upon said highway in the said carriage as aforesaid, and before the said carriage was upset as aforesaid, the said train (preceded by a locomotive engine attached thereto and forming part thereof) was being rapidly driven along and over the said railway in charge of the said defendant's servants, and thereupon it became and was the duty of the defendants to ring the bell, or to sound the whistle, which were upon the said engine, at least eighty rods from the place where the said railway crosses the said highway, and to keep the said bell ringing, or the said whistle sounding, at short intervals until the said engine had crossed the said highway, to warn persons travelling along the said highway of the approach of the said train, but the said servants of the defendants did not, nor did any other person, ring the the said bell or sound the said whistle when approaching the said crossing, either at, or within, the said distance of eighty rods from the said point of intersection or crossing, but wholly neglected so to do, by reason whereof the plaintiffs were not warned of the said approach of the said train.

"Paragraph 5. No warning or signal of the approach of the said train towards the said highway on the occasion aforesaid was given as required by law. No bell

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was rung, nor whistle sounded upon the said engine until the same was partly across the said highway, when the said horse immediately took fright and became unmanageable, through no fault of the plaintiffs, and entirely in consequence of the said negligence and carelessness of the said servants of the defendants.

"Paragraph 5*a*. Because no warning of the said train was given by whistling or ringing the bell as hereinbefore mentioned, the plaintiffs had reason to suppose that no train was then approaching the said railway crossing, and therefore being ignorant of their danger, and being unable to see or hear any approaching train, and believing that no train was coming, the plaintiffs drove with due care as aforesaid much nearer and closer to the said railway crossing than the plaintiffs would have gone on the occasion aforesaid if they had been warned by whistle or bell of the approach of the said train as required by law, and immediately thereupon, when the plaintiffs had proceeded to within a very short distance of the said railway, as mentioned in the fourth paragraph hereof, the said train came suddenly upon the said highway, and the said horse took fright at the said train, so that the said horse became unmanageable and upset the said carriage, and the plaintiffs then received the injuries hereinafter mentioned, and it was by reason of such neglect to ring the said bell or sound the said whistle as aforesaid that the plaintiffs sustained the damages hereinafter mentioned.

The appellants pleaded not guilty by statute.

The cause was tried a second time before Mr. Justice *Patterson* and a jury.

The learned Judge after reading s. 104 of the Consolidated Statutes of *Canada*, ch. 66, put the following questions to the jury:

First, has it been proved to your satisfaction that that

duty was not performed? to which the jury answered yes.

Second—If you find the signal was given, but not so far as eighty rods from the highway, would it have been heard by the plaintiffs if they had been careful and listened so they could have avoided the accident? To which the jury answered yes, but said that they do not mean that the bell was rung.

Third—Was it a prudent thing for the plaintiffs to have driven the horse they did where the railway was to be crossed? To which the jury answered yes.

Fourth—Did the plaintiffs use such care as a reasonably cautious person would under the circumstances have used on approaching the railway? To which the jury answered yes.

The fifth question was not answered and is not material.

Sixth—If the plaintiffs had known the train was coming would they have stopped the horse further from the railway? To which the jury answered yes.

The jury then assessed the damages of the respondents—*Mary Rosetta*, at $600, and of *Lydia Ann*, $500.

Upon these answers the learned judge entered a verdict for the respondents.

On the 18th May, 1882, the Common Pleas Division granted an order *nisi* to show cause why the judgment rendered for the plaintiffs, and the findings or verdict of jury upon which the said judgment was based, should not be set aside, and a judgment entered for the defendants, on the ground that the plaintiffs could not maintain an action, as the defendants did not owe any duty to sound the bell or blow the whistle, so far as the plaintiffs were concerned, and on the ground that it was not established that the injury to the plaintiffs complained of was caused by the omission of the defendants to give the signal referred to, and on the ground

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that the omission to give the signal was not the proximate cause of the injury, or why the said findings should not be set aside and a new trial had between the parties, on the ground that the findings were against law and evidence, and the weight of evidence.

After arguments the order *nisi* was discharged, Justices *Galt and Osler* being of opinion that the action was maintainable, and that they could and ought to supply a finding of a matter of fact which the jury had not found. The Chief Justice dissented, holding that the action was not maintainable. The appellants then appealed to the Court of Appeal, and a majority of the judges of that Court affirmed the judgment of the Common Pleas Division. Mr. Justice *Burton* dissented, agreeing with the opinion of Chief Justice *Wilson*.

The present appeal was from the judgment of the Court of Appeal.

The evidence at the trial, besides the statements of the two respondents, consisted of persons in the neighborhood of the crossing, who stated that they did not hear the signals given, and some of them that if they had been given they would have heard them, while others gave evidence to show that either one or both signals were given. The two respondents, who were driving a buggy, said that they did not hear the signals or hear even the noise of the approaching train till they saw it.

Mr. *James Bethune*, Q. C., for appellants:

The appellants submit that except for the statement of claim numbered 5*a*. the appellants could have demurred. See observation of *Osler*, J. (1).

If the action will lie at all it certainly was necessary for the respondents to prove to the satisfaction of the jury, and to get them to find, that the injury to the

(1) 32 U. C. C. P. 364 & 365.

respondents happened by reason of the appellants' neglect to give the signals in question.

The majority of the judges of both the courts below have in effect tried that part of the case as jurors, and have supplied a finding which the real jury did not find, and might not have found if the matter had been submitted to them.

The respondents rely on marginal rule 321 of the Judicature Act, as enabling the Court to try that issue.

I submit that this could not in such a case as this be done, or even if the court possessed the power it ought not to have been so exercised in this instance.

The respondents required to have the issues of fact tried by a jury. Then attention was called to the importance of the issue as to whether the injury happened by reason of the defendants' neglect to give the signals. See observation of *Osler*, J. (1), in the report already referred to. The respondents chose to rest their case on the findings of the jury in answer to the questions submitted, and declined to ask the judge to submit a question as to the causation of the injury, and ought not now to be allowed to raise any question of the kind, but certainly if it is to be raised it must be tried by the tribunal of the respondents' own choice.

The appellants submit that marginal rule 321, already referred to, does not apply to a case of this kind, but if it does, the appellants contend that the divisional court had not, and this court has not, all the materials before it necessary to enable it finally to determine the question of whether the injury was caused by reason of the neglect to give the signals in question.

In cases of this kind no court who has not seen the witnesses can determine a question of this kind now under consideration.

That the accident happened because the signals were

(1) P. 364.

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not given is not the necessary result of the findings of the jury.

The 6th question is the important one in connection with the matter now being discussed. That question is "if the plaintiffs had known the train was coming would they have stopped the horse further from the railway?" The appellants ask how much further? and do not see where the evidence is upon which the exact place can be fixed. It is not a finding that they would have stopped a quarter of a mile away. The finding is so vague as to be quite useless to enable the the court to determine anything.

Then I also submit that an action will not lie for a breach of the statute, even if everything else assumed in favor of the respondents, because the damages are too remote.

Moreover the respondents were guilty of such contributory negligence in attempting to drive the horse across the railway track as should disentitle them to recover, and the appellants did not owe the respondents, in the circumstances which happened, any duty to give the signals. [The learned counsel also relied on the judgments of the Chief Justice of the Common Pleas (1) and the cases therein cited, and the judgment of Mr. Justice *Burton* in the Court of Appeal (2).]

Mr. *Bowlby*, Q. C., for respondents:

The finding of the jury in answer to the 6th question sufficiently shows that the respondents' damages were sustained by reason of the appellants' neglect to give the requisite statutory signals by whistle or bell, when that finding is read in connection with the evidence and the Judge's charge, which must always be done with the findings of Juries given in answer to questions.

It is enacted by "The Ontario Judicature Act, 1881,"

(1) 32 U. C. C. P. 349. (2) 8 Ont. App. R. 482.

rule 321, statutes of *Ontario*, 1881, p. 108, that "upon a "motion for judgment, or for a new trial, the court may "if satisfied that it has before it all the materials neces- "sary for finally determining the questions in dispute "or any of them, give judgment accordingly." As the appellants' motion in the court below was for a new trial, under this rule 321 the whole question of the liability of the appellants was open for the court to determine on the pleadings and evidence upon hearing such motion for new trial. This case having already been twice tried by jury, another new trial should not be granted for the mere purpose of asking the jury one additional question, the answer to which the court can foresee to a certainty upon the evidence now before the court and upon which the court itself has full power to find and give judgment by the above mentioned O. J. Act, rule 321, and upon which the evidence is conclusive in favour of the respondents. *Hamilton* v. *Johnson* (1).

The *United States* courts have decided railway companies are liable in cases like the present, although there was no actual collision with the train and it is well known that no practical inconvenience or injustice has resulted to the railway companies in that country, where the statute law, in nearly every state, is identical with our own.

It cannot be fairly contended that the signals were only required by the statute to prevent persons travelling on the highway from coming into actual collision with the train, because, if the only purpose the legislature had in view in requiring the signals, were to prevent cases of actual collision, signals twenty feet from the crossing would have answered quite as well as signals eighty rods away.

It is of the greatest importance to the people of this

(1) 5 Q. B. D. 263.

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country, travelling upon the public highways, that the signals required by the statute, to give warning of the approach of trains towards level crossings, should be in all cases strictly observed. See *Redfield* on Railways (1).

In the case of *Slattery* v. *The Dublin and Wicklow Railway Co.* (2), it is stated, at pages 1172 and 1175 of the report of that case, that the particular signal for warning people on the highway, which is required by statute, and no other, is what the traveller on the highway is entitled to depend upon.

There was no evidence of any contributory negligence, and the jury found there was none.

The learned counsel also cited and commented on the following authorities:

Stewart et al v. *Rounds* (3); *Hill* v. *Portland and Rochester Railroad Co.* (4); *The People* v. *The New York Central R. R. Co.* (5); *Hill* v. *Louisville & Nashville R. R. Co.* (6); *Dyer* v. *Erie Railway Co.* (7); *Whitney* v. *Maine Central Railroad Co.* (8); *Kelly* v. *St. Paul, Minn. & Man. R. Co.* (9); *Renwick* v. *New York Central R. R. Co.* (10); *Plummer* v. *Eastern R. R. Co.* (11); *Daun* v. *Simmins* (12); *Rosenberger* v. *Grand Trunk Rwy. Co.* (13).

Mr. *James Bethune*, Q. C. in reply.

The judgment of the court was delivered by

GWYNNE, J.:—

We are all of opinion that this appeal should be dismissed. We entirely concur in the opinion of the learned judges of the Common Pleas division of the

(1) Vol. I., p. 566.
(2) L. R. 3 App. 1155.
(3) 7 Ont. App. R. 515.
(4) 55 Maine 438.
(5) 25 Barb. N. Y. Sup. C. Rep. 199.
(6) 19 Ladd's Am. Ry. Rep. 400.
(7) 71 N. Y. 228.
(8) 69 Me. 208.
(9) 29 Minn. 1.
(10) 36 N. Y. 132.
(11) 73 Me. 591.
(12) 48, L. J. of 1879, C. L. 343.
(13) 8 Ont. App. Rep. 482.

High Court of justice, and of the Court of Appeal of the Province of *Ontario*, namely, that the benefit of the 104th section, chap. 66 of the Consolidated Statutes of *Canada*, is not confined to the case of persons injured in person or property by actual collision with an engine or train crossing a highway. In the neighboring States, where a precisely similar enactment is inserted in railway companies Acts, the courts of law recognize no such limitation, and neither in the language of the clause, nor in reason, is there, in our opinion, anything which would justify such a limitation of the application of the clause. It clearly, as we think, applies to, and must be construed as inuring to, the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage, either in their persons or in their property, from the neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle, as they are directed to do by the statute, whether such damage arises from collision or is occasioned in any other manner by the neglect referred to.

The learned judge, before whom the case was tried, submitted certain questions to the jury, accompanied by a most careful charge, of which the defendants have no just reason to complain, explaining the reason why each of such questions was put to them, so as to exclude all possibility of the jury failing to understand their object. He told them that the action was founded upon negligence in the defendants:

It is alleged, [he told them], that the railway company had a certain duty to perform, and that they neglected that duty, and that it was by reason of that neglect that the accident happened, and [he told them] to bear in mind these two or three principles, because all these things have to be established to entitle the plaintiffs to recover. They must satisfy you, [he said], not merely that the defendants neglected their duty, but that the neglect caused the injury. It is not sufficient for them to show that the railway company neglected to

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do something which by the statute they were bound to do; they must go further, and satisfy you that the injuries were in no degree caused by their neglecting something which they themselves should have done. I want you, [he said], to understand as clearly as I can explain it, the grounds upon which the plaintiffs, if entitled to recover, must establish their claim. They must show, before they are entitled to recover, that what has happened was brought about by no fault of their own—not by neglect of anything which they should have done, or which persons who were reasonably cautious and careful would have done under the same circumstances. It must appear that what happened to them was occasioned altogether by the fault of the company—I mean, of the persons who were running the train and who represent the company for this purpose. The company, [he said] is bound to ring the bell or to sound the whistle, and that signal or one of those signals, it does not matter which, has to be repeated at short intervals, not kept continuously going, until the train crosses the highway, the signal to commence at the distance of eighty rods. The company are liable to a penalty if they neglect that duty, whether any person is hurt or not. It does not, however, follow, that if this duty is neglected that necessarily the person who suffers has a right of action. If a person neglects proper caution upon his part, if he has the means of seeing that the train is coming and if his own carelessness has something to do with bringing about the accident which occurs, he cannot excuse himself and claim damages against the railway company because they neglected to give the signals. If he could, by keeping his eyes and ears open, have protected himself, he cannot hold the company responsible. The case is not made out unless the jury are satisfied that the accident was caused altogether by the negligence of the company.

With these preliminary observations and further observations to the like effect, he submitted to the jury the following questions. It was the duty, he said, of the persons in charge of the locomotive to sound the whistle or ring the bell at the distance of at least 80 rods from where the rails cross the highway, and to keep the bell ringing or the whistle sounding at short intervals, until the train had crossed the highway, and he put this question:

1st. Has it been proved to your satisfaction that that duty was not performed?

The learned judge further explained to the jury that he put the question in that shape because he was of opinion that the onus lay upon the plaintiffs to prove, not merely that the train frightened their horse, and so caused the damage, but that the whistle was not sounded nor the bell rung, and he added:

If you are satisfied, upon the evidence, that the whistle was not sounded nor the bell rung, either one or the other of them during this space of 80 rods, you will answer "yes." If you are satisfied that the bell was rung or the whistle sounded during that distance, or if it is left doubtful, you should answer "no," because the question is, are you satisfied that it was so?

2nd Question.—If you find the signal was given, but not so far as 80 rods from the highway, would it have been heard by the plaintiffs if they had been careful and listening, so that they could have avoided the accident? Was there such signal as those people should have heard if they had listened?

The learned judge then drew the attention of the jury to the whole of the evidence bearing upon these two questions, in a very careful manner, and concluded that it was for the jury to weigh the probabilities and to decide upon the evidence as they should think proper. The evidence was certainly contradictory, but it was for the jury to say which side they believed, and there cannot be, nor is there, any complaint as to the manner in which it was left to them by the learned judge. The jury answered the first question in the affirmative, thereby establishing that they were satisfied that the bell had not been rung, nor the whistle sounded, as required by the clause of the statute. The second question they all answered in the affirmative, adding that by this answer they did not mean that the bell was rung. Conveying their meaning to be that if the signal required by the statute, which, by their answer to the 1st question, had not been given, had been given, it would have been heard by the plaintiffs, so as to have enabled them to avoid the accident.

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3rd Question.—Was it a prudent thing for the plaintiffs to have driven the horses they did where the railway had to be crossed ?

And he asked this question in view of the evidence given by witnesses who spoke as to seeing the plaintiffs when they started out.

4th Question.—Did the plaintiff use such care as a reasonably cautious person would, under the circumstances, have used in approaching the railway ?

This question he accompanied with these further observtions :

People, he said, are bound to use reasonable care. You are not to have in your mind's eye a timid woman or a rash man, but a person of reasonable caution, able to manage the horse and to drive. Did they act as such ? Did they do anything they should not have done, or did they omit to do anything they should have done ? Should they have stopped to listen? Did they omit to do anything that a reasonable person, under the same circumstances, would have done ?

The jury answer these 3rd and 4th questions in the affirmative, thereby conveying their opinion to be, as I think, in view of the charge of the learned judge accompanying the question, we must understand them, that the plaintiffs were not guilty of any contributory negligence.

5th Question.—What ought they have done which they did not do ?

To this question the jury gave no answer, from which circumstance the natural and fair inference is, that they could not say that the plaintiffs could have done anything to avoid the accident which they did not do. The learned judge, then, premising that there was still another question which he would put to them, and which touched the right of the plaintiff, to recover, and that was, did they stop their horse as soon as they knew that there was danger, put this 6th question :

If the plaintiffs had known the train was coming, would they have stopped the horse further from the railway ?

which question the jury answered in the affirmative. To the 7th question, which was as to the amount of damages the plaintiffs should receive, the jury answered that one should receive $600 and the other $500.

Now, that these answers given to questions accompanied by such clear explanation from the learned judge of what, in his opinion, the jury should be satisfied before the plaintiffs could recover, were intended by the jury to be taken as a verdict for the plaintiffs, and that the entry of a verdict upon them for the plaintiffs by the learned judge was a proper entry, cannot, we think, admit of a doubt. It is, however, now objected by the learned counsel for the defendants that the 6th question is too vague to warrant the conclusion being drawn, from the affirmative answer of the jury, to it that the accident would not have happened, even if the signals required by the statute had been given, but admitting that this question might have been put more clearly we cannot, in view of all the questions and of the whole charge of the learned judge accompanying them, doubt that the intention of the jury by their answers to all the questions, taken as the whole, was to convey their opinion to be that the neglect of the defendants' servants to give the signals required by the statute to be given, was the sole cause of the accident; and that the plaintiffs were not guilty of any contributory negligence, and we think that the answers so given did warrant a verdict and judgment to be entered for the plaintiffs. When questions are submitted to a jury, as they were in this case, if counsel for the defendants should be of opinion that they are not framed so as to elicit answers which would enable the court thereupon to enter a verdict for the plaintiff or defendant, they should object at the time when, if necessary, the question or questions objected to or omitted could be amended or supplied,

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and if he fails to do so, he should not, after running the chance of the jury answering the questions put in a sense favorable to his client, and failing in that expectation, be heard to make the objection, unless at least the defect in the questions is so apparent that the ends of justice seem to demand their rectification. In the present case we do not think there is any such defect, or any such ambiguity as to how judgment should be entered upon the answers of the jury, as would require us to send this case to another jury. Upon the only objection which was taken by the learned counsel for the defendants, when the questions were submitted to the jury, namely, that the learned judge should have told the jury that the proximate cause of the accident being the appearance of the train, there is no cause of action, we are of opinion, that for the reasons given by the majority of the learned judges in the court below, this objection cannot prevail As to the point taken, that the findings of the jury are against the weight of evidence, we cannot say that this is so. The evidence was contradictory, no doubt, as in cases of this kind it always is, but two courts below have concurred in the opinion that the findings of the jury are not against the weight of evidence. To justify us in arriving at a contrary conclusion, the onus lies upon the defendants to establish their contention beyond all reasonable doubt, and this, it is sufficient to say, they have failed to do.

Appeal dismissed with costs.

Solicitor for appellants : *John Bell.*

Solicitors for respondents : *Bowlby & Clement.*