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BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY (DEFENDANTS) ..... APPELLANTS;

*Oct. 5.
*Nov. 6.

AND

ANNIE LOUISA WILKINSON (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence — Carriers — Operation of railway — Defective system — Gratuitous passenger—Free pass—Limitation of liability—Employer and employee—Fellow-servant—Evidence—Onus of proof.

The plaintiff's husband was an employee engaged as a mechanic in the company's workshops and was travelling thither to his work on one of the company's passenger cars, as a passenger, without payment of fare. A freight car became detached from a train, some distance ahead of the passenger car and proceeding in the same direction; it ran backwards down a grade, collided with the passenger car and the plaintiff's husband was killed. The manner in which the freight car became detached was not shewn. On the body of deceased there was found a permit or "pass," which was not produced, and there was no evidence to shew any conditions in it, nor over what portion of the company's lines nor for what purposes it was to be honoured. On the close of the plaintiff's case the defendants adduced no evidence whatever, and the jury found that the company was at fault, owing to a defective system of operation of their trains, and assessed damages, at common law, for which judgment was entered for the plaintiff.

Held, that there was a presumption that deceased was lawfully on the passenger car and, in the exercise of their business as common carriers of passengers, the company were, therefore, obliged to use a high degree of care in order to avoid injury being caused to him through negligence; that there was nothing in the evidence to shew that deceased occupied the position of a

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*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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fellow-servant with the employees engaged in the operation of the trains which were in collision; and that, in the absence of evidence shewing any agreement, express or implied, or some relationship between the company and deceased which would exclude or limit liability, the plaintiff was entitled to recover damages at common law.

Judgment appealed from (16 B.C. Rep. 113) affirmed. *Nightingale* v. *Union Colliery Co.* (35 Can. S.C.R. 65) distinguished.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming the judgment at the trial by which the plaintiff's action was maintained with costs.

The action was brought by the plaintiff, the widow of Archer Samuel Wilkinson, deceased, on behalf of herself and of a minor child, for the recovery of $25,000 damages suffered through the death of her said husband caused, as alleged, by the negligence of the defendants. The circumstances in which deceased met his death are stated in the head-note. On the verdict of the jury judgment was entered for $8,000 damages awarded to the plaintiff, for herself, and $3,000 for her infant daughter. This judgment was affirmed by the judgment now appealed from, Mr. Justice Irving dissenting.

The principal grounds urged on behalf of the appellants were: (1) That no evidence was supplied by the plaintiff as to the circumstances under which the deceased was upon the car of the company. (2) That there was sufficient evidence that deceased was an employee of the company and was being carried to Westminster as such employee. (3) That there was some evidence that the deceased had a pass in his pocket when killed. (4) That the address of plaintiff's counsel to the jury proceeded upon the assump-

(1) 16 B.C. Rep. 113.

tion that the deceased was travelling upon a pass. (5) In his charge to the jury, the trial judge pointed out that there was no evidence that deceased "was in the position of an ordinary passenger under contract for carriage. There is no evidence of payment of fare and there is evidence of the fact that he had in his pocket-book a pass." (6) That there is no evidence whatever as to the cause of the accident. (7) That the onus was upon the plaintiff to prove all that was necessary to obtain a verdict and that onus was not discharged.

Ewart K.C. for the appellant.

Chrysler K.C. for the respondent.

THE CHIEF JUSTICE and DAVIES J. agreed with Duff J.

IDINGTON J.—The deceased husband of the respondent was a passenger on the appellants' railway car when, by reason of its servants' negligence, he met his death.

Primâ facie, his widow, who sues as his personal representative, on behalf of herself and her children, is entitled to recover as any other, in like circumstances, might recover.

If there were any specical circumstances to differentiate this case from that which the outstanding facts present, it devolved upon those claiming such exemption to have proven the facts to support it. Mr. Ewart's suggestion of there being a duty devolving on a plaintiff in such cases to negative or explain is clearly unfounded. Who ever heard of such negative proof being tendered in such a case? It would re-

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quire in each accident case that the passenger injured proved he never had a pass.

The bare statement that, after his death, the respondent found a pass in her deceased husband's clothes, without shewing for what or where, or that by the terms of the pass or conditions upon which it issued he assumed all risks, or even that he had presented it to the appellant's conductor on the occasion in question in answer to a demand for fare, goes for nothing.

Even a man travelling upon an unconditional pass cannot be killed with impunity by such gross negligence as apparent here on the part of those carrying deceased.

It is suggested that he was a fellow-servant of those guilty of the negligence and, hence, by reason of the doctrine of common employment, no recovery can be had at common law.

If so employed there is no evidence that he was where he met his death by reason of that employment.

He was, for all we know, entitled to get by any means he chose to the place where he had to work for the appellants.

Until he entered on that employment and was actually engaged therein, how can he be said to have fallen within the principle of the doctrine of common employment ?

That doctrine rests upon the implication that a person employed is presumed to have undertaken the risks incidental to such employment.

This case is not brought within this fundamental reason for the doctrine, and hence, it cannot apply.

There may arise questions of a nice character in this regard when, if ever, it is shewn in such a case

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that the terms of the contractual relation between employer and employee establish that the employment began when the employee stepped into the employer's carriage.

I do not desire to express any opinion on such a case till it actually arises. I merely refer to a possibility which has not arisen here, but which the ingenuity of counsel suggested might be inferred by another jury.

I do not think when, as here, the proof of anything tending to raise a mere suspicion was made by appellant and then the further relative facts peculiarly in its own hands are withheld or avoided with care, that it can fairly ask any court to exercise its discretion to prolong such litigation.

The appeal should be dismissed with costs.

DUFF J.—The deceased, Archer Samuel Wilkinson, met his death in a collision while travelling in one of the appellant company's passenger cars from Vancouver to New Westminster. The inference that the collision was due to a want of ordinary care on part of the officers or servants of the company is indisputable. The company seeks to escape liability on the ground that the evidence fails to shew facts which enable us to say whether this absence of care involved any breach of duty for which the company is answerable to the respondent.

Wilkinson, who resided in Vancouver, was employed in the shops of the company at New Westminster, and was on his way thither on the morning when the accident occurred. It does not appear whether he did or did not pay his fare. It is suggested that he may have been carried gratuitously;

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and this suggested possibility is made the ground of the contention upon which the appeal was mainly based, viz.: that since we are ignorant of the character in which Wilkinson was on the appellant's car — whether, that is to say, as a passenger paying his fare, or as a passenger travelling free, or as a servant being carried to his work; and, since we are equally ignorant of the character of the negligence out of which the collision arose, the plaintiff must fail as we obviously cannot, in these circumstances, affirm either the existence of the gross negligence alleged to be necessary to attach liability to the company in the second case, nor the existence of negligence other than that of a fellow-servant which is necessary for success in the third.

This contention appears to me to be without substance.

I do not agree that in such an action as this it is necessary to prove that the traveller who has been killed had paid for his carriage or had entered into a contract to pay for it or that he was not being carried in the character of fellow-servant of those responsible for the accident. The appellants are a railway company carrying on the business of common carriers of passengers. The obligation to take reasonable care to carry safely arises out of the acceptance of the passengers. The law as settled is stated in the passage quoted by Mr. Chrysler from the treatise on carriers in the "Laws of England," art. 80:—

> The duty of a railway company (speaking, of course, of a railway company when in the exercise of its trade of common carriers of passengers), to use a high degree of care towards its passengers does not depend on any contract with the passenger; it is bound not to injure by negligence any person lawfully on its railway, whether such person has made a contract with it or not.

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The case of *Nightingale* v. *Union Colliery Co.* (1), cited by Mr. Ewart, is not a relevant decision. There the person injured was not being carried in a public conveyance by a railway company in the course of its business of common carrier of passengers. He was travelling on a locomotive attached to a freight train and was there in violation of an express rule of the company. In the case before us the presumption is that Wilkinson was lawfully on the car and the rule above stated applies unless something is shewn (some agreement, express or implied, or some relationship between the passenger and the company) which excludes or limits the application of it.

The doctrine of common employment or more accurately the doctrine of *Priestly* v. *Fowler*(2), was invoked; but there is nothing in the evidence to justify the application of that doctrine. Wilkinson's work was in the shops; at the time he met with the accident his day's work was not begun; and the risk of injury on the railway can not, therefore, be regarded as a risk incidental to his service, unless it be shewn that he was being carried by the appellants not in the character of common carriers, but in that of employers — in other words, under some arrangement which was part of or ancillary to his contract of service. (See *Coldrick* v. *Partridge, Jones & Co.*(3).) Of this there was not the slightest legal evidence and there was, consequently, on this head, no question which could properly be left to the jury. The sole point, therefore, upon which the jury had to pass was the amount of damages to be awarded; and, on that

(1) 35 Can. S.C.R. 65. (2) 3 M. & W. 1.
(3) [1910] A.C. 77; [1909] 1 K.B. 530.

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point, there is no adequate reason for disturbing their verdict.

ANGLIN and BRODEUR JJ. agreed with Duff J.

Appeal dismissed with costs.

Solicitors for the appellants: *McPhillips & Wood.*

Solicitor for the respondent: *B. P. Wintemute.*