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*Jan. 29.

*June 12.

THE CANADA SOUTHERN RAILWAY COMPANY (DEFENDANTS)... } APPELLANTS;

AND

CHARLES S. JACKSON (PLAINTIFF)...RESPONDENT.

ON APPEAL FROM THE COMMON PLEAS DIVISION OF THE HIGH COURT OF JUSTICE FOR ONTARIO.

Railway Co.—Negligence—Accident to employee—Performance of duty—Contributory negligence.

J., a switch-tender of the C.S. Ry. Co., was obliged in the ordinary discharge of his duty to cross a track in the station yard to get to a switch and he walked along the ends of the ties which projected some sixteen inches beyond the rails. While doing so an engine came behind him and knocked him down with his arm under the wheels and it was cut off near the shoulder. On the trial of an action against the company in consequence of such injury the jury found that there was negligence in the management of the engine in not ringing the bell and in going faster than the law allowed. They also found that J. could not have avoided the accident by the exercise of reasonable care.

Held, that The Workmens' Compensation for Injuries Act of Ontario, 49 V. c. 28, applies to the C.S. Ry. Co., notwithstanding it has been brought under the operation of the Government Railways Act of the Dominion.

Held also, Gwynne and Patterson JJ. dissenting, that there was no such negligence on J's. part as would relieve the company from liability for the injury caused by improper conduct of their servants and the judgment of the court below sustaining a verdict for the plaintiff was right, therefore, and should be affirmed.

APPEAL by consent from a decision of the Common Pleas Division of the High Court of Justice for Ontario, sustaining a verdict and for the plaintiff at the trial.

Jackson, the plaintiff in this case, was a switch tender in the employ of defendants, and the action was brought in consequence of injuries caused by an en-

*PRESENT—Sir W. J. Ritchie C.J., and Fournier, Taschereau, Gwynne and Patterson JJ.

gine knocking him down when endeavoring to walk over the track to a switch in the performance of his duties. The accident, the facts of which are not disputed, are related by the plaintiff at the trial as follows:—

I was attending to my daily duties to switch engines from one track to another as was required; I was going to let in engine number 328, which was going east on the east bound main line, and I had about 100 yards to go to where I thought she wanted to get into. I was in the shanty cleaning lamps and came out of the shanty door and walked up the side of the west bound track on the outside of the rail; when I was just about four or five rails length from the shanty an engine came up behind me, a switch engine, without ringing the bell or warning me in any way, and struck me. A man by the name of Hugh McCourt halloed to me and I turned around in time for my feet to be knocked from me and I fell in front of the engine. It was the left hand, and I had no way to catch on, and I had to throw myself off; therefore my right hand went under the wheel and was taken off close to the shoulder

Cross-examination

Q. How far from the rails did you walk? A. On the end of the ties.

Q. How far do the ties project beyond the rail? A. About fifteen or sixteen inches.

Q. And you kept going on on the ends of these ties until the engine overtook you? A. Until I was going to step off to go to my switch.

Q. The east-bound track was the one next to the shanty? A. The west-bound was the one next to the shanty.

Q. How far is the shanty from the track? A. The shanty is about five or six yards.

Q. Well, don't you think it was a very imprudent

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thing for you to do to walk on the end of the sleepers? A. How could I get across the track unless I walked there?

Q. Were you going across the track? A. I was going to cross the track when I got to my switch.

Q. You said you were going along the track on the outside of the rails? A. Yes.

Q. And walking on the end of the sleepers? A. Yes, and I was going to cross the track, and how could I get to the switch?

Q. I am asking you why you walked on the ends of those sleepers? A. Because I could not walk in any other way without being in more danger.

Q. Why not? A. I never walked in the centre of the track.

Q Was there no other way of your getting to your destination except by walking on the ends of these sleepers? A. Yes; I could have crossed right over from the shanty door, but this other engine was coming along; I was keeping out of that engine's way.

Q. Is there no space between the two tracks? A. Yes.

Q. How wide is the space? A. A little wider than the track.

Q. Why did you not go between the east and the west bound tracks? A. Well, of course, it was a sort of wet weather and it was drier on the ties, and I had wet feet at the time.

Q. And you went on the ends of these sleepers because the ground was drier there? A. Yes.

Q. That is the reason why you went? A. That is the reason.

Q. Did you always walk on the sleepers? A. No, I never picked my way just that way. I went which way was the handiest to get to my switch.

Q Were you accustomed to go any other way?

A. I always took the opposite track from the one I used to let the engine in on.

Q. You took the space between the east-bound track and the west-bound track? A. No, sir, I kept outside of the west-bound track.

Q. Do you mean outside the north side? A. Yes.

Q. You always kept on that side? A. No, not always, for if the engine was ahead of me I would cross over ahead of the shanty right across the tracks and follow the engine on the track it was on.

Q. Then you never walked in the space between the east and the west-bound tracks? A. Yes, I must have done that. I worked there for over a year.

His Lordship.—It is admitted that it is the duty of the servants of the company to have the bell rung while an engine is passing through the yard?

Mr.—German. Yes.

Mr.—Cattanach. Yes.

Mr. German.—Q. Do you know of your own personal knowledge how fast the engine was running? A. I know this that the engine had not started to leave the yard, it had not been coming up the side track when I left the shanty, but I only got five rails length when I was struck; Hugh McCourt hollered to me.

Q. You say you did not see it coming; did you look to see? A. Yes, I looked when I came out of the shanty.

Q. And there was no engine coming up that track? A. No; there was an engine on the east-bound track.

Q. That you went to switch on? A. Yes.

Q Where would the engine that ran you down have to start from? A. Have to start about 200 yards away.

Q. And so the time that you walked three or four rails length this engine came that distance and struck you? A. Yes.

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Certain questions were submitted to the jury which, with their findings thereon, are as follows:—

1. Was there negligence in the management of the engine? A. Yes.

2. If so, what was it? A. By not ringing the bell, and to the best of our belief the engine was moving more than four miles per hour.

3. How did the accident occur? A. Plaintiff was in the act of crossing the track to go to the switch in the performance of his duties.

4. Could the plaintiff have avoided it by the exercise of reasonable care? A. No.

5. Assuming that the plaintiff is entitled to recover, what do you think would be a fair sum for the company to pay him as damages? A. $45 a month, in all $1,620.

Upon these findings judgment was entered for the plaintiff, which was affirmed by the Divisional Court on a motion to set it aside. The defendants then appealed to the Supreme Court of Canada, basing their objection to the judgment on two grounds:—

First, that the injuries being caused by a fellow-servant of plaintiff, he could only recover by virtue of the Workmen's Compensation for Injuries Act, and that act does not apply to the defendant's company, which has been declared a work for the benefit of Canada, and brought under the operation of the Government Railways Act of the Dominion.

Secondly, if the plaintiff could maintain an action, he was guilty of such contributory negligence as would preclude him from recovering damages.

Symons for the appellants. As to contributory negligence see *Woodley* v. *Metropolitan Railway Company* (1); *Ryan* v. *Canada Southern Railway Company* (2).

(1) 2 Ex. D. 384.

(2) 10 O. R. 745.

That the Ontario Act is *ultra vires* as regards this company see *Darling* v. *Midland Railway Company*(1); *Conger* v. *Grand Trunk Railway Company* (2); *Clarkson* v. *Ontario Bank* (3).

S. H. Blake Q.C., for the respondent, referred on the question of negligence to *Bridges* v. *North London Railway Company* (4).

The constitutional question is decided by authority. *Parsons* v. *Citizens Insurance Company* (5); *Dobie* v. *Temporalities Board* (6); *In re Toronto Harbor Commissioners* (7).

Sir W. J. RITCHIE C.J.—(After stating the facts as given in the judgment of Galt C.J. in the Divisional Court His Lordship proceeded as follows:)

On the trial the learned judge submitted certain questions to the jury (8), and on the argument the whole case turned on the fourth question submitted to the jury, namely, "could the plaintiff have avoided the accident by the exercise of reasonable care?" And to which as we have seen they answer "No." The objection to the finding on this question is that it is not supported by any evidence and is against the weight of evidence. At the sitting of the Divisional Court the defendant moved against the verdict, which was sustained. The learned Chief Justice of that court in delivering judgment says :—

As to the contributory negligence of the plaintiff the only ground on which this could be maintained would be if the plaintiff had not taken the trouble to look towards Montrose station before he started on the discharge of his duty ; he swears positively that he did, and that when he did so no engine was visible. This question was very clear for the

(1) 11 Ont. P. R. 32.
(2) 13 O. R. 160.
(3) 15 Ont. App. R. 166.
(4) L.R. 7. H.L. 213.
(5) 4 Can. S. C.R. 215 ; 7 App. Cas. 96.
(6) 7 App. Cas. 136.
(7) 28 Gr. 195 ; 1 Cartwrights Cons. Cas. 825.
(8) See p. 320.

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jury, for one witness of the name of Francis, called by the defendant who was the fireman of the engine which occasioned the injury, gave evidence which, if believed by the jury, would unquestionably have established the defence. He swore not only that he saw the plaintiff from time to time look towards the engine, but in answer to the question: "Did you see the accident? Yes, What did you see? I saw him jump sideways on the footboard of the engine and catch hold of the rail with his right hand, stepped on with his right foot. Stepped on the footboard? Yes, with his right foot, and stumbled with his left, made the second stumble with his left foot which caused his right foot to slip off the board and he went right along side of the track and threw his arm across the rail." The jury did not believe this witness, and I confess I do not see how it would be possible for the accident to happen as described by this witness. The plaintiff had been so unfortunate as to lose his left arm by a former accident and how he could, after having caught hold of the rail of the engine fall in such a way as to bring his right arm under the wheel of the engine, I do not understand; his own account was as I have stated, namely, that his feet were knocked from under him, and in using his right arm to throw himself off the track his arm was crushed. It was plainly a question for the jury.

It was also urged that it was contributory negligence on the part of the plaintiff that he did not at once, on leaving the shanty, cross the northern track and walk between the two tracks. The jury must have thought that there was no negligence on the part of the plaintiff when in discharge of his duty he availed himself (the ground being wet) of the ends of the ties in approaching the switch which was distant some 100 yards from the shanty, and speaking for myself, considering the nature of the railroad tracks, and that they were built on a narrow embankment, I think it was very natural for him to do so.

The motion was accordingly dismissed. An appeal was, by consent, taken direct to this court under the provisions of section 26, sub-section 2 of R. S. C. c. 135.

Had the bell been rung, as it was admitted at the trial it was the duty of the servants of the company to have the bell rung while the engine is passing through the yard, it is difficult to conceive that the accident could have happened. The plaintiff was in the ordinary discharge of his duty. His duty required him to cross the track and he had about 100 yards to go. He was walking on the ends of the ties intending to cross the track when he got to the switch which

he could not reach without crossing the track. His evidence on the point is this (1).

I know of no rule of law which required the plaintiff to cross opposite the shanties in preference to going down the track and crossing opposite the switch. In either case he would have had to go down the track to reach the switch. It seems to me that the evidence in the case, in connection with the non-ringing of the bell and the rate of speed at which the jury find the engine was moving, could not have been withdrawn from the jury, and they having found that the plaintiff could not have avoided the accident by the exercise of reasonable care, and this finding having been confirmed by the Divisional Court, it should not now, in my opinion, be disturbed.

I concur in the view that the Workmen's Compensation for Injuries Act applies to the appellants' Railway.

FOURNIER J. concurred.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed with costs. On the question of the application of the Workmen's Compensation for Injuries Act to Dominion railways, I am clear that Rowland's case was well determined.

GWYNNE J.—A servant of a railway company is, in my opinion, as liable as a stranger to be found guilty of contributory negligence when an injury occurs to him when unnecessarily walking on the railway track in a station yard, although he does so for the purpose of discharging some duty connected with his employment, which however, as in the present case, did not require him to walk upon the track in order to perform the service in which he was at the time engaged ; and I am further of opinion that the doctrine of contributory negligence had better be abolished altogether if it can

(1) See p. 317.

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be held that the plaintiff was not a party contributing by his own culpable negligence to the injury which unfortunately he has received; while we sympathise with him in his misfortune we cannot, in my opinion, acquit him of having himself by his negligence contributed to his misfortune. In my opinion, therefore, this appeal should be allowed and the action in the court below dismissed.

PATTERSON J.—I am of opinion that we should allow this appeal. The real question at issue was whether the injury to the plaintiff had been caused by the negligence of the defendants. It was not simply whether or not the defendants or their servants had been guilty of negligence, because they may have been guilty of negligence without that negligence being the cause of the injury. The plaintiff may have contributed to his own injury, and if he did so he cannot properly ascribe it to the negligence of the defendants. It frequently happens that the proof given of the negligence charged in actions like this will *primâ facie* sustain the charge that that negligence caused the injury, and in those cases the allegation of contributory negligence becomes a separate issue. But if in proving the circumstances under which the injury occurred the plaintiff shows that he contributed to it himself, the result is that he fails to prove the essential fact that it was caused by the negligence of the defendants. In a case of that sort the defendants are entitled to a non-suit or a verdict in their favor upon the plaintiffs own showing (1).

It was palpable from the plaintiff's own evidence in this case that having two routes to choose between to

(1) See Smith on Negligence 237. *Davy* v. *London & S.W. Ry. Co.*, 12 Q. B. D. 70; L. R. 6 Q. B. 377, 394. *Bridges* v. *N. London Ry. Co.*, L. R. 7 H. L. 213. *Peart* v. *Grand Trunk Ry. Co.*, 10 Ont. App. R. 191. *Wright* v. *Midland Ry. Co.*, 51 L. T. N. S. 539. *Wakelin* v. *London & South-Western Ry. Co.*, 12 App. Cas. 41.

reach the switch, one of which was safe, but somewhat muddy, and the other dangerous, he for his own convenience alone chose the dangerous one. The case might, therefore, properly have been withdrawn from the jury.

The position is not altered by the circumstance that the jury pronounced the opinion that the deceased could not, by the exercise of reasonable care, have avoided the accident. I might adopt, almost literally, the language of Lord Halsbury in *Wakelin* v. *London & S. W. Railway Company* (1) where he said:—

> I do not know what facts the jury are supposed to have found, nor is it, perhaps, very material to enquire, because if they have found that the defendant's negligence caused the death of the plaintiff's husband, they have found it without a fragment of evidence to justify such a finding.

The negligence charged against the defendants was that of a fellow servant of the plaintiff. I do not rest at all upon that fact in holding against the plaintiff's right of action, because I see no reason to doubt the application to this case of the provincial statute, R.S.O. (1887), ch. 141. It is not legislation respecting such local works and undertakings as are excepted from the legislative jurisdiction of the provinces by article 10 of section 92 of the B. N. A. Act. It touches civil rights in the provinces. The rule of law which it alters was a rule of common law in no way dependent on or arising out of Dominion legislation, and the measure is strictly of the same class as Lord Campbell's Act which, as adopted by provincial legislation, has been applied without question to all our railways.

I agree that the appeal should be allowed.

Appeal dismissed with costs.

Solicitors for appellants: *Kingsmill, Cattanach & Symons.*

Solicitor for respondent: *W. M. German.*

(1) 12 App. Cas. 46.