THE ACADIA COAL COMPANY, LIMITED (DEFENDANT) ..... } APPELLANT;

AND

ANGUS MACNEIL (PAINTIFF) ..... RESPONDENT.

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*May 12.
*June 17.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Negligence—Railways—Children walking on tracks killed by train—Licensees—Duty of railway company—Statutary prohibition to walk on tracks—Nova Scotia Railways Act, R.S.N.S. 1923, c. 180, s. 268 (1).

Plaintiff occupied a house belonging to defendant in its railway yard. Defendant's train, while working in the yard, ran over and killed two of plaintiff's children who were walking on the tracks on their way to school. The train was moving reversely and there was no one on the car in front to look out. Plaintiff sued for compensation under *The Fatal Injuries Act,* R.S.N.S. 1923, c. 229. The jury found, among other things, that the children were on the tracks by defendant's permission, and that the accident was caused by defendant's negligence, and judgment was entered for plaintiff for damages, which was affirmed on appeal to the Supreme Court of Nova Scotia *en banc* (59 N.S. Rep. 154). On appeal to this Court it was urged that, by reason of the prohibition in s. 268 (1) of *The Nova Scotia Railways Act* (R.S.N.S. 1923, c. 180) to walk upon the tracks, there could be no lawful permission granted by defendant, and, moreover, that, if the permission found were in any way effective, it conferred on the children no rights beyond those of bare licensees, and therefore there was, in the circumstances, no negligence, as defendant did nothing other than to carry on its shunting operations within its yard in the ordinary and usual manner.

Held, that the judgment below should be sustained; conduct which is negligence does not cease to be so if or because it is ordinary and usual; the children's presence on the tracks by defendant's permission was an element which should have influenced the operation of the train; defendant was bound to use ordinary care not to run over them, and that duty it did not fulfil; s. 268 (1) of *The Nova Scotia Railways Act* did not affect the case; the decisions in *G.T.R.* v. *Anderson* (28 Can. S.C.R. 541) and *Maritime Coal, etc., Co.* v. *Herdman* (59 Can. S.C.R. 127), while governing in identical cases, should not be extended; the statutory prohibition should not be taken to have the effect of relieving a railway company from liability for damages caused by negligent operation to persons who would have been entitled in the absence of the clause; if it applied to the children, and if, as found, they had permission to walk along the tracks, defendant ought not to be allowed to maintain trespass against them contrary to the fact, or to escape the responsibility which it incurred by its agreement to treat them as licensees; moreover, the children being only seven and nine years of age, and there being no finding as to their capacity

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

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for crime, the case could not be treated upon the footing that they were bound by the statute, nor could the principle that knowledge of the law is presumed be invoked against them.

APPEAL by the defendant (by special leave granted by the Supreme Court of Nova Scotia *en banc*) from the judgment of the Supreme Court of Nova Scotia *en banc* (1) dismissing its appeal from the judgment entered upon the findings of the jury, in an action, tried before Carroll J. with a jury, to recover from the defendant compensation to the plaintiff and his wife under *The Fatal Injuries Act*, R.S.N.S. 1923, c. 229, for the death of two children of the plaintiff who were run over and killed by a train belonging to the defendant. The material facts of the case are sufficiently stated in the jugdment now reported. The appeal was dismissed with costs.

S. Jenks K.C. and *H. Ross K.C.* for the appellant.

R. Douglas Graham and *J. Doull* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The Acadia Coal Co. Ltd., engaged in the business of coal mining in Pictou Co., Nova Scotia, operates in connection with its mines, a railway at the town of Stellerton, under the authority of *The Nova Scotia Railways Act*, R.S.N.S., 1923, c. 180. It is the defendant and appellant in this action. Angus MacNeil, the plaintiff, is a coal miner in the employ of the company, and, at the time of the accident, was, and had been for several years, occupying with his family, a miner's house belonging to the company which was situate in the company's railway yard, near the entrance of the Allan shaft of the company's workings at Stellerton. At about, or shortly before, nine o'clock in the morning of 1st December, 1924, a train belonging to the company, in charge of its employees, which was working in the yard, ran over and killed two of the plaintiff's children, Frank and Evelyn, aged respectively seven and nine years, who were passing through the yard on their way to school. The action is brought to recover compensation under *The Fatal Injuries Act*, R.S.N.S., 1923, c. 229.

(1) (1926) 59 N.S. Rep. 154.

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The important facts are not in dispute. The plaintiff's house is situate a short distance to the eastward of the most southerly of the tracks. The school which the children attended is to the northward, somewhat beyond the northern limit of the yard, and there is a trail or roadway, leading northwesterly from the house in the direction of the school, which crosses the tracks at a considerable distance from the house and connects with the highway from Stellerton to New Glasgow. It was the habit of the children generally, when late for school, to walk along the tracks from this crossing, as by that way the distance was shorter and they found better walking. On the morning in question they were somewhat late and, approaching the crossing, they turned off the trail to the northward, pursuing their usual course. They were accompanied by an elder sister thirteen years of age. The morning was clear, but there had been a fall of several inches of snow the night before. While the children were on their way, a light shunting locomotive came down the main track of the yard from the northward, passing a switch which is situate between the place of the accident and the crossing. Here the engine stopped and backed into no. 2 track, which runs thence in a northwesterly direction from the main track. On this branch track or siding the tender of the engine was hooked to a large car which is thus described in the evidence:—

Q. When you got up there did you hook on some cars?—A. We hooked on one car.

Q. That is on to the tender end of your engine?—A. Yes.

Q. What would that be, a big gondola?—A. Yes, I call it an iron car.

Q. It is a large coal box car?—A. It is an open car.

Q. It is one of the large varieties?—A. It is a 50-ton car.

Then the engine, thus connected with car, moved forward again on to the main line, passing the switch, where it reversed and proceeded again to the northward upon the main line and continued thereon, headed by the car, until it ran over the children, who were then walking on this line, going northward to school. Wilda MacNeil, the eldest of the three, was thrown from the track and injured, but the two small children who were ahead, walking hand in hand, were both killed. There were a conductor, engineman and fireman on the train, and when the engine was coming down the main track, going southerly, the con-

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ductor, who was in charge, and the fireman had seen the three children on their way, going northward in the yard, near the railway, on the east side. Cummings, the conductor, gives the following evidence:—

Q. When going down and standing on the front of the engine did you see the MacNeil children?—A. Yes, I saw the MacNeil children.

Q. That is the little boy, Frank, and Evelyn and Wilda?—A. Yes, I saw the three of them.

Q. You knew the children, you were familiar with them?—A. Yes.

Q. You knew where they lived?—A. Yes.

Q. I suppose you would be seeing them in the course of your duty nearly every day?—A. Mostly every day, yes.

Q. You would be shunting back and forth there?—A. Yes, most of the time.

Q. The weigh scales are quite handy the MacNeil house almost opposite?—A. Yes, not far from it.

The trouble seems to have been that the large car, which was at the head of the train, obstructed the view of the tracks from the engine, and there was no one on the car to look out. The conductor, instead of going to the front of the car, when the train started to move northerly from the switch, as he should have done, says, speaking of this occasion:—

Q. Then what happened, did you get on the train?—A. I got on the engine, on the side of it.

Q. What do you call that, the steps into the cab?—A. Yes.

Q. When you got on the engine you would then be on the western side of the engine, that is north looking towards New Glasgow, you would be on the western side of the engine?—A. Yes.

Q. The side on which you had seen the children would be the other side, the eastern side?—A. Yes.

Q. When you were then in that position your train would be running reversely?—A. Yes, tender first.

Q. And in front of your tender was your gondola car?—A. Yes.

Q. Was there any person standing on the front end of the gondola car?—A. No.

In another place he explains that he got on the engine in order to give instructions to the engineman as to what was to be done with the car which they were shunting, and it was while he was in conversation with the engineman in the cabin of the locomotive that they felt the shock and realized that an accident had happened.

There was a jury in the case and the learned judge, at the conclusion of his charge, to which no objection is taken before us, submitted questions which the jury answered. The substance of the findings is that the accident was caused by the negligence of the company, which consisted

in the fact that the conductor, knowing children to be in the vicinity, should have given his engineer instructions, if necessary, before putting his train in motion, and should have taken his place on the gondola, where he could have kept a lookout; that there was no contributory negligence on the part of the deceased children; that, if there were contributory negligence on their part, the defendant could have avoided the accident by the exercise of ordinary care; that the children were at the time of the accident upon the track of the defendant company by permission of the company; that up to the time of the accident the public habitually travelled along the route taken by the children on the morning of their death; that the defendant company had knowledge thereof; and that the damages were $1,250, of which $250 were allowed to the father and $1,000 to the mother. Upon these findings judgment was entered for the plaintiff.

Upon appeal to the Supreme Court of Nova Scotia *en banc* the usual objections were taken. It was alleged that the findings were against the evidence, perverse and unreasonable; that evidence had been improperly received and rejected, and that there was misdirection. A question had been raised at the trial as to the effect of ss. 1 of s. 268 of *The Nova Scotia Railways Act,* which provides that:

> Every person, not connected with the railway, or employed by the company, who walks along the track thereof, except where the same is laid across or along a highway, is liable on summary conviction to a penalty not exceeding ten dollars.

And it was contended that the children must therefore be treated for the purposes of this action as trespassers.

The appeal was heard, *en banc;* the judges were Chisholm, Mellish and Graham JJ., and the appeal was dismissed. Upon the question of contributory negligence Mellish J., who pronounced the judgment, said that there was sufficient evidence that the defendant by the exercise of ordinary care could have avoided the accident, notwithstanding any negligence on the part of the children, and that the real cause of the accident was the negligence of defendant's servants in keeping no lookout, in which case there was no room for a finding of contributory negligence.

Upon the appeal to this Court two questions only were pressed. It was urged that, by reason of the statutory prohibition to walk upon the tracks, there could be no

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lawful permission granted by the company, and the appellant relied upon the cases of *Grand Trunk Ry. Co.* v. *Anderson* (1), and *Maritime Coal, etc., Co.* v. *Herdman* (2). It was contended, moreover, that, if the permission found were in any way effective, it conferred upon the children no rights beyond those of bare licensees, and therefore there was, in the circumstances, no negligence, for it was said that the appellant did nothing other than to carry on its shunting operations within its railway yard in the ordinary and usual manner.

I do not think, however, that conduct, which is negligent, ceases to be so, if, or because, it is ordinary and usual. The presence of the children upon the tracks by the company's permission was an element in the situation which should have influenced the operation of the train, but which seems to have been entirely disregarded. I cannot escape the conclusion that the appellant company owed a duty to the children which, in order to maintain the present judgment, need be put no higher than this, that the company, in the operation of its train upon the track which the children were using by its consent, was bound to use ordinary care not to run over them, and that duty it did not fulfil.

The house in which the plaintiff lived with his family was in the defendant's railway yard. It was not reached by any highway, and the father had to pass through the yard to reach the shaft. His children likewise, if they went to school, had to cross the yard, and could conveniently go by the way which they were using at the time of the accident; this necessarily brought them upon the tracks. There were no signs, fences, or obstructions anywhere in the locality to direct the children in their course or to prevent them choosing their own course. I do not suppose that the family were obliged to live where they did. What the plaintiff says is that he formerly, while in the appellant's employ, lived at Westville, but that he went to the company and rented this house. "I was trying to get a house down there and this is the house they gave me." That was the situation in which the family was placed and which it was permitted to ocupy. The children would naturally take the most convenient way, and if they took the more direct route, which they were following when the accident

(1) (1898) 28 Can. S.C.R., 541. (2) (1919) 59 Can. S.C.R., 127.

occurred, as was natural and not unusual, they came to a place where their way took them upon the tracks. In these circumstances the appellant's employees projected a blind train to follow the children reversely upon the track which they were pursuing, when they should reasonably have known that the children were there, and that no opportunity could be afforded to see or to warn them, or to stop, if necessary to avoid an accident. This sort of conduct, in the circumstances, is unreasonable and may, I think, be described as negligence of a grave character. One sees in the evidence a case for the application of a very just observation by Mellish J., in delivering the judgment of the Court below, when he said that "a railway company, notwithstanding the duty of all persons not to go upon its line, may so use its premises by not fencing them or otherwise as to practically invite children to use them."

The jury is upheld by the Court of Appeal in its finding that permission of the company to use the tracks is to be inferred from the facts and circumstances of the case, and we cannot justifiably set aside this concurrent finding. Indeed the fact of permission is, as intimated at the hearing, accepted by the appellant for the purposes of the appeal, and therefore, apart from the statute, there is liability.

As to the statute, I do not consider that it affects the case. The decisions of this Court in *Grand Trunk Ry. Co.* v. *Anderson* (1), and *Maritime Coal, etc., Co.* v. *Herdman* (2), to which we are referred, would govern in identical cases, but in my view of the law, I am not disposed to extend them. It seems unlikely that the subsection is framed with the intention of relieving the railway company from the consequences of negligent operation, or from liability for damages thereby caused to persons who would have been entitled in the absence of the clause. If it applied to the children who were killed, and if, as found by the jury, they had permission to walk along the tracks, the company ought not to be allowed to maintain trespass against them contrary to the fact, or to escape the responsibility which it incurred by its agreement to treat them as licensees. There are, I think, as said by Lord Sumner, with reference to a New Zealand statute, in *Rex* v. *Broad* (3), cogent reasons for thinking that the subsection was framed *alio intuitu*.

(1) (1898) 28 Can. S.C.R., 541. (2) (1919) 59 Can. S.C.R., 127.
(3) [1915] A.C. 1110, at p. 1118.

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The present case is, however, readily distinguishable. Children aged seven and nine years have by the common law the benefit of something in the nature of a presumption that they have not sufficient capacity to know that they are doing wrong. The presumption, it is true, may be rebutted by evidence; but although the parents of the children, when endeavouring to establish a case for damages, testified that their children were bright and intelligent, the defendant company neglected at the trial to obtain a finding as to their capacity for crime, and I do not think that we would be justified to make such a finding. Therefore the case cannot be treated upon the footing that they were bound by the statute, or that the principle that knowledge of the law is presumed can be invoked against them. The provision of the Criminal Code of Canada as to the competency of young persons is to be found in s. 18 of the *Criminal Code,* which is thus expressed:—

> No person shall be convicted of an offence by reason of an act or omission of such person when of the age of seven, but under the age of fourteen years, unless he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong.

For the reasons stated above, and in the judgment of the Court *en banc,* I am of the opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Hugh Ross.*

Solicitor for the respondent: *R. Douglas Graham.*