1891
June 25.

JOSEPH ADHÉMAR MARTIN, ES QUALITÉ .. .. } SUPPLIANT ;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Injury to person on a public work—Negligence of servant of the crown—Brakesman's duty in putting children off car when trespassers—Damages.

The crown is liable for an injury to the person received on a public work resulting from negligence of which its officer or servant, while acting within the scope of his duty or employment, is guilty.

City of Quebec v. *The Queen* (2 Ex. C. R. 252) referred to.

2. One who forces a child to jump off a railway carriage while it is in motion is guilty of negligence.

The fact that the child had no right to be upon such carriage is no defence to an action for an injury resulting from such negligence.

PETITION OF RIGHT for damages for injury to the person received on a public work.

The facts of the case appear in the judgment.

June 23rd, 24th and 25th, 1891.

Taché for the suppliant :

Under the regulations of the railway in force at the time of the accident (1) it was the duty of the brakesman in charge of a train to put trespassers off when the train was not in motion. Bélanger, the offending brakesman in this case, put the suppliant's son off a car which was in motion, and in consequence of being put off at such a time the boy fell on the track and his leg was crushed by the wheels of the car. It was gross negligence on the brakesman's part. He caused an injury to the person on a public work while acting within the scope of his duty, and the crown is liable therefor under 50-51 Vic. c. 16, sec. 16 (*c*).

(1) Rule 48 of the Rules and Regulations of the Government Railways of Canada, 1876.

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Argument of Counsel.

Hogg, Q.C. for the respondent :

The brakesman was not acting within the scope of his duty in causing the boy to get off the train at the time and in the manner charged. It was his duty to put trespassers off the train when it was not in motion, and if he put the boy off while the train was in motion he was acting contrary to his instructions and without the scope of his duty as clearly defined in the regulations.

(Cites *McKenzie* v. *McLeod* (1); *Clerk and Lindsell on Torts* (2); *Wright* v. *Wilcox* (3); *Wilson* v. *Rankin* (4)).

Casgrain, Q.C. following on the same side :

The boys, among whom was suppliant's son, took their lives into their own hands in getting on board the train in the manner they did. They were trespassers. The fact of suppliant's son being improperly on the train was the direct and proximate cause of the accident.

(Cites 20 *Laurent*, *No.* 585; 31 *Demolombe*, *Nos.* 613, 614, 615; *Dalloz*, *Repertoire de Jurisprudence*, *verbo Responsabilité*, *No.* 624; 2 *Sourdat*, *De la Responsabilité No.* 919; *Seymour* v. *Greenwood* (5)).

BURBIDGE, J. now (June 25th, 1891) delivered judgment.

On the question of the liability of the crown for an injury to the person received on a public work, resulting from negligence of which its officer or servant is guilty while acting within the scope of his duties or employment, I have nothing to add to what I said in the cases of the *City of Quebec* v. *The Queen* (6) ; and *Brady* v. *The Queen* (7).

With reference to the facts of this case, it appears that the suppliant's son, then a boy of eleven or twelve years of age, was, with a number of other boys on the day of the accident (in July 1884), upon the rear platform of

(1) 10 Bing. 385
(2) pp. 360—377.
(3) 19 Wend. 343.
(4) 34 L. J. Q. B. 62.
(5) 6 H. & N. 359.
(6) 2 Ex. C.R. 252.
(7) 2 Ex. C.R. 273.

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the rear carriage of an accommodation train at Rimouski, which was about to take the siding to allow an express train to pass. On this accommodation train one Bélanger was brakesman. The evidence as to whether or not the boys were invited to get on the carriage is conflicting. I think it probable, however, and in accordance with Bélanger's testimony I find that he did not invite the boys to get upon the carriage. I think that the boys had no right to be where they were, and that they knew it. They were in fact trespassers.

The evidence as to whether or not Bélanger attempted to get the boys off the carriage is also conflicting. That he threw some water upon them is not denied. He says that he did not attempt to put them off, that he did not tell them to get off, that he did not throw water upon them to get them off, and that at that time he had no intention of getting them off. Afterwards, he thought the throwing of the water might have had the effect of making them get off. The boy Poulin says that no one on that day told them to get off the train, and St. Laurent says that they jumped off because the water was thrown upon them. Both Poulin and St. Laurent were on the platform of the carriage, but Alfred Martin, another boy called by the suppliant, who was, at the time the water was thrown, inside the carriage, says that Bélanger when he threw the water cried out "get off, get off"! In this he is corroborated, it appears to me, by the evidence of Guay, a passenger on board the train, who was called by the respondent. Guay says, in substance, that Bélanger took the trouble to get the children off the train, that he went from one door of the carriage to the other to get them off, but that he did not persist. He says that he heard Bélanger telling them to get off, but he cannot say if this took place when the train was in motion.

In this connection, however, Bélanger's evidence is important. He says that upon the arrival of the accom-

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modation train at Rimouski he went to help unload the freight, and when he returned to the rear carriage the train was in motion; and from his account of what he did it seems that a very short interval must have elapsed between the time when he got upon the train and the time when he threw the water upon the boys. The result is, I think, and I find, that Bélanger was attempting to get the boys off the train while it was in motion and at the time when he threw the water upon them. Poulin goes farther and says that Bélanger pushed the suppliant's son off the train, but I am not inclined to accept his unsupported statement in the face of Bélanger's distinct denial. When the water was thrown upon the boys they jumped off. The suppliant's son had the misfortune to fall, and a wheel of one of the carriages crushed his leg, necessitating immediate amputation between the knee and the ankle. He was dangerously ill for two months, and did not recover for a year. His health has not since the accident been as good as it was before.

Now, it appears to me to be clear that this boy was injured on a public work through the negligence of a servant of the Crown. To force a child to jump off a moving train is, I think, negligence. To do this by throwing water upon the child, or to throw water upon the child when directing him to jump off, would be an aggravation of such negligence.

But it is argued that there was contributory negligence. I agree, as I have already intimated, with counsel for the Crown, that the injured boy had no right to be where he was; and, of course, if he had not been there the accident would not have happened. But that does not, it appears to me, excuse the brakesman whose negligence was the direct and proximate cause of the accident, without which it would not have happened.

On the question as to whether or not Bélanger was

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acting within the scope of his duty or employment, I entertain more doubt. For the respondent, it is said that his duty was to put the boys off the train when not in motion, and that in what he did he went beyond the scope of his duty or employment. But to make the master liable it is not necessary tha he authorize the wrongful or negligent act. If the servant is acting within the general scope of his duty or employment to further his master's interest, and not from motives or for ends of his own, the master is liable. In this case, I think, it was within the general scope of Bélanger's duty to put the boys off the train, and that the crown is liable for the consequence of his negligence in doing this at an improper time and in an improper manner.

I would be disposed, however, in directing judgment to be entered for the suppliant to reserve leave for the respondent (if counsel desired me to do so) to move to set aside the judgment on the ground that Bélanger was not acting within the scope of his duty or employment. But as, no doubt, there will be an appeal to the Supreme Court on the more important and fundamental question of the crown's liability for the negligence of its servant, to which I have briefly alluded, it is probable that it will be found more convenient to make the judgment final at the present time (1).

I assess the damages at three thousand dollars, for which amount there will be judgment for the suppliant with costs.

Judgment for suppliant with costs.

Solicitor for suppliant : *L. Taché.*

Solicitors for respondent : *O'Connor, Hogg & Balderson.*

(1) REPORTER'S NOTE.—Counsel for the crown concurred in the latter view.