IN THE MATTER of the Petition of Right of

ADELINE PARENT .....SUPPLIANT; 1910 May 4

AND

HIS MAJESTY THE KING.....RESPONDENT.

Government railway—Injury to the person—Crossing—Vehicle on crossing—Speed of train—Sec. 34, R. S. 1906, c. 36—Faute Commune—Reckless conduct of driver of vehicle—Identification.

Held, that as the point where the accident in question occurred was not a "thickly peopled portion of a . . . village," within the meaning of sec. 34 of R. S. 1906, c. 36, the officials in charge of the engine and train were not guilty of negligence in running at a rate of speed greater than six miles an hour. (*Andreas* v. *Canadian Pacific Railway Co.*, 37 S. C. R. 1, applied.)

2. Under the law of Quebec where the direct and immediate cause of an injury is the reckless conduct of the person injured the doctrine of *faute commune* does not apply, and he cannot recover anything against the other party.

3. Where a person of full age is injured in crossing a railway track by the reckless conduct of the driver of a vehicle in which he is being carried, as between the person injured and the railway authorities the former is identified with the driver in respect of such recklessness and must bear the responsibility for the accident. (*Mills* v. *Armstrong (The Bernina)* L. R. 13 A. C. 1) referred to and distinguished.

PETITION OF RIGHT for damages arising out of the death of a person on a public work alleged to have been occasioned by the negligence of certain servants of the Crown. The facts are fully set out in the reasons for judgment.

December 3rd, 1909.

By consent of parties the case was referred to L. A. Audette, K. C., Registrar of the Court, for enquiry and report.

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February 14th, 1910.

The Referee now filed his report, in which he found that the suppliant was not entitled to the relief sought by the petition of right.

April 25th, 1910.

The suppliant appealed from the report of the Referee.

A. Lemieux, K.C, for the suppliant, supported the appeal.

F. H. Chrysler, K.C, for the respondent, *contra*.

CASSELS, J., now (May 4th, 1910,) delivered judgment.

This is an appeal from the report of the Referee, the Registrar of the Court, dated the 3rd December, 1909.

A petition of right was filed on behalf of Adeline Parent claiming, on her own behalf and also as tutrix on behalf of her infant child, damages against the Crown occasioned by the death of her husband, the late Joseph Joubert, junior. Joseph Joubert, while crossing what is known as the "Chemin Metapedia" about 5.30 a.m. on the 31st August, 1908, in a buckboard in company with his father (who was driving the horse) was struck by an Intercolonial engine proceeding to the station at St. Flavie (known as the village of Montjoli), the station in question being about 800 feet east of the Metapedia road. The said Joseph Joubert, junior, died shortly after the collision, and as the result thereof.

The suppliant alleges negligence on the part of the employees of the railway. The main charges are:—

1. That those in charge of the engine and train omitted to sound the whistle, or to ring the bell as required by the statute.

2. In allowing the I.C.R. Ocean Limited Express to pass through the district where the accident happened, and which (it is alleged) was thickly populated, at a speed greater than six miles an hour, and in not having the

track properly and sufficiently fenced at the time of the accident.

3. In allowing the said crossing, which was at the time of the accident and still is at rail level, to remain unguarded and unprotected in any way, and without any cattle guard at the time of the accident.

4. In not erecting at the road crossing where the accident happened on each side of the highway a proper and sufficient fence.

These are the main grounds of complaint relied upon. There are other grounds set out of no materiality.

The suppliant claims that under section 20, sub-sec. (*c*) of *The Exchequer Court Act* she is entitled to recover. This sub-section reads as follows :—

> "(c) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment."

The statement in defence denies all liability, and sets up :—

> "3. The death of Joseph Joubert, junior, was solely caused by the negligence, imprudence, carelessness and fault of the deceased himself and his father Joseph Joubert, with whom he was driving at the time of the accident in which the deceased lost his life."

The pleadings being closed and the case at issue, counsel for the suppliant and the respondent agreed it would be proper to refer the trial of the action to a Referee, and an order was made referring it to Mr. Audette, the Registrar of the Court.

The action was tried at Rimouski, and the report of the Referee (appealed from) duly made, finding that the suppliant is not entitled to the relief sought by her petition of right.

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Various questions of interest are raised on the appeal, and although in my opinion it is not necessary for the determination of the action to deal with some of them, nevertheless, as the points have been discussed, I propose to consider and express my views thereon.

Before dealing with the various legal questions I think it well that the facts should be appreciated.

The train in question was due at the station of St. Flavie on the morning in question at 5.30 a.m.

The station immediately west of St. Flavie station is called St. Luce, a distance from St. Flavie station of about eight miles. The train in question, the Ocean Limited Express, had been running on the same time-table for some months previous to the accident, reaching St. Flavie each morning of the week (except one day) at the same hour of the morning, if on time. Montjoli or St. Flavie is a village containing 1,400 to 1,500 souls. The Metapedia road is a public highway running north and south and crossing the railway about 800 feet to the west of the station. The grade of the railway at the point of crossing is about five or six feet higher than the public highway on either side, and is reached by inclined approaches on both the north and south sides of the highway. The semaphore referred to in the evidence is situated south-west of the snow shed referred to, and is about two thousand feet west of the Metapedia road, according to the evidence of Theriault. Atkinson who measured it places it 2,470 feet west of the Metapedia highway. From the semaphore eastwards there is a considerable down grade which some distance west of the Metapedia highway crossing comes to a level, and the railway is from that point on a level grade to the station. The railway being higher than the roadway, five or six feet when on a level grade, presumably, although I am not clear that the evidence so states, the level of the track would be higher than the ground to the south as far as the station. The

platform of the station extends from the station a considerably distance to the west.

The father of the deceased Joubert had, for from two to three weeks previously, been working at Montjoli. His home was at St. Gabriel to the south of Montjoli, about two hours drive to the crossing. His son would drive to Montjoli for his father of a Saturday and take him to his home, and on Monday morning would drive back with his father to Montjoli, and then return to his home driving the horse and buckboard. The son was 24 years of age, and looked after the farm. He was familiar with the railway crossing.

The main line of the railway, and on which the train in question was running when the accident happened, was the southerly track. On the west side of the Metapedia road at the time in question there was one siding on the north side of the right of way. East of the Metapedia road there was a yard of the railway with from six to eight tracks used for shunting purposes. To the south of the crossing was situated the house of Bourdeau, having a frontage of thirty feet on the Metapedia road, and extending backwards about fifty feet. This house was three stories in height. Atkinson in his evidence produced a plan, which was marked as Exhibit "A". I do not notice in his evidence that it was referred to as being marked. It was however used as an exhibit, and in the evidence of Raphael Lemieux it is referred to as Exhibit "A". There is no question as to its having been filed. This plan shows the surroundings of the locality.

According to the evidence of Atkinson the distance from the north corner of Bourdeau's house to the track in question was about sixty-one feet. Other witnesses place the distance at about fifty feet. On the south of the right of way and extending westerly from the Metapedia road is a fence along the southern boundary of the right of way. The commencement of this fence is mark-

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ed "F" on the plan Exhibit "A". South of this fence and between it and the Bourdeau house is a "petite ruelle" or lane, under the charge of the muncipality. This lane runs westerly from the Metapedia road parallel to the railway fence. On the northerly side of the right of way is a fence extending from the Metapedia road westerly along the boundary of the right of way of the railway. East of the Metapedia road there is a fence running easterly from the Metapedia road enclosing the right of way of the railway on the north. South of the right of way and east of the Metapedia road is a road leading from the Metapedia road to the station, and south of this road and to the north of Voyer's house (immediately opposite Dr. Ross' house) is a fence extending from the Metapedia road easterly. South of the crossing, and some little distance, is the post required with the notice in French and English "Railway Crossing."

After passing the house of one Landry about 800 feet from the crossing the view of the track to the west is obscured by the houses. On passing the corner of Bourdeau's house there is a clear view of the railway track to the west for a distance of at least two thousand feet.

The morning in question was clear and still and the track was clear, and a train coming east could be clearly seen for a distance of at least two thousand feet if the driver and son looked. The deceased and his father were driving from south to north at a trot of about, I should judge, six miles an hour. They did not slacken speed or take any precautions to see if a train was coming from the west. Had they slackened speed and looked the accident need not have happened. They drove on intending to cross the track at the same rate of speed. As the horse almost reached the track the train was approaching at a distance of about 150 to 200 feet. It was running at the rate of from 20 to 15 miles an hour,

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having slackened speed after leaving the snow-shed. It was too late then to avert the accident, and the finding of the Referee to this effect, I presume, is with the view of showing that no care on the part of the driver of the engine could then have averted the disaster.

It must not be lost sight of, however, that if the train was bound by the statute to cross the highway at the speed of six miles an hour only, the engineer would necessarily require to slacken the speed of the engine at a point much further west than he did, and the horse and buckboard would perhaps have cleared the track before the train passed.

I have read and re-read the evidence carefully, and I am of the opinion that had the officials whose duty it was to sound the whistle and ring the bell neglected to do so, the case of the suppliant under the facts disclosed in the evidence would not be bettered. I concur with the finding of the Referee that the statutory provision in regard to the whistle and ringing of the bell was complied with. I do not think the Referee could have properly reached any other conclusion.

Section 34 of the Government Railways Act (1) is as follows:—

> "34. No locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town or village, at a speed greater than six miles per hour, unless the track is properly fenced."

This section is in the same language as section 69 of 44 Vict. cap. 25 (1881): "An Act to amend and consolidate the laws relating to Government Railways." A similar provision is contained in the statute relating to railways, other than Government railways, until 1892, when the section was amended. I will discuss the question of fencing later.

(1) Cap. 36, R. S. 1906.

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The Referee is of opinion that the provisions of this section apply, and that the engineer in charge of the engine was compelled to run his engine across the highway in question at a speed not exceeding six miles an hour. I do not agree with this finding. I do not think the engine and train in question was passing through "any thickly peopled portion of a village." See *Andreas* v. *Can. Pac. Ry. Co.* (1). The engine in that case was running at a speed of twenty-five miles an hour.

As I have stated the village of Montjoli or St. Flavie has a population of 1,400 to 1,500 souls—to use the expression of the witness.

I have previously explained the situation. I leave out of consideration for the present the fact that the right of way was fenced to the south, and of the existence of the "petite ruelle."

Emond, the only witness who deals with the question, points out that there are only four houses to the south of the railway. The first to the west is opposite the post marked "W," as stated by another witness. This post is 1,023 feet west of the Metapedia highway. These four houses are scattered over this length. Bourdeau's house makes the fifth. This house faces on the Metapedia road. To the north and west of the Metapedia road there is but one house.

I think the law as laid down in the case of *Andreas* v. *Can. Pac. Ry. Co.* (*sup.*) governs, and when one considers the fact that there is a municipal lane south of the right of way and a fence to the north of this lane, it would, I think be unduly stretching the meaning of the statute to apply it to a case like the present. I am of opinion therefore that there was no negligence on the part of the officials in charge of the engine and train.

These findings would dispose of the case, but as I

(1) 57 S. C. R. 1.

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stated above I will give my views on the other questions raised.

Was not the track in this case properly fenced? The question has been fully discussed and dealt with by the Supreme Court in *McKay* v. *Grand Trunk Ry. Co.* (1). That case was decided under the statutes relating to railways generally. The statute construed in that case is different from *The Government Railways Act*. The section in the Acts relating to railways generally was in similar language to the one copied above until 1892, when the statute was amended by adding the words "unless the track is fenced or properly protected" in the manner prescribed by the Act.

By cap. 37, R. S. C. 1906, section 254, it is provided that the railway fences shall "be turned into the respective cattle guards" on each side of the highway. It is unnecessary to state that a cattle guard is not a fence. It has been so decided in an American case, *Parker* v. *The Rensselaer and Saratoga Ry. Co.* (2)

The clauses of the Government Railways Act dealing with the question are as follows:—

Section 2. sub-section (k) interprets "highway":

> "'Highway' means any public road, street, lane or other public way or communication."

Section 15 of the statute, dealing with "highways and bridges," provides as follows:—

> "15. The railway shall not be carried along an existing highway, but shall merely cross the same in the line of the railway, unless leave has been obtained from the proper municipal or local authority therefor.
>
> 2. No obstruction of such highway with the works shall be made without diverting the highway so as to leave an open and good passage for carriages, and,

(1) 34 S. C. R. 81. (2) 16 Barb. S. C. N. Y. 315.

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on the completion of the works, the highway shall be replaced.

3. In either case, the rail itself, if it does not rise above or sink below the surface of the road more than one inch, shall not be deemed an obstruction."

Section 16 provides as follows :—

"16. No part of the railway which crosses any highway, unless carried over by a bridge, or under by a tunnel, shall rise above or sink below the level of the highway more than one inch; and the railway may be carried across or above any highway subject to the provisions aforesaid. R.S., c. 38, s. 11."

Section 22, dealing with "fences" provides :—

22. Within six months after any lands have been taken for the use of the railway, the Minister, if thereunto required by the proprietors of the adjoining lands, shall erect and thereafter maintain, on each side of the railway, fences at least four feet high and of the strength of an ordinary division fence, with swing gates or sliding gates, commonly called hurdle gates, with proper fastenings, at farm crossings of the railway, for the use of the proprietors of the lands adjoining the railway.

2. The Minister shall also, within the time aforesaid, construct and thereafter maintain cattle-guards at all public road crossings, suitable and sufficient to prevent cattle and animals from getting on the railway."

Sections 23 and 24 are as follows :—

"23. Until such fences and cattle-guards are duly made, and at any time thereafter during which such fences and cattle-guards are not duly maintained, His Majesty shall, subject to the provisions of this Act relating to injuries to cattle, be liable for all damages done by the trains or engines on the railway, to cattle, horses or other animals on the railway, which

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have gained access thereto for want of such fences and cattle guards. R.S., c. 38, s. 17.

24. After the fences or guards have been duly made, and while they are maintained, no such liability shall accrue for any such damages, unless negligently or wilfully caused. R.S., c. 38, s. 19."

These latter sections are not in the general Railway Act. They impose a liability against the crown for the injury to cattle if the provisions as to cattle guards are not complied with. They leave untouched the remaining question raised by section 20, sub-sec. (c) of the Exchequer Court Act.

In the case of *Grand Trunk Railway Co.*, v. *Hainer* (1) at page 190, Mr. Justice Nesbitt, who gives a very full and exhaustive resumé of the law, quotes numerous authorities for the proposition stated in the following terms:—

> "Mr. Riddell argued that as section 194 only prescribes the building of a fence on each side of the railway through the organized townships, that there was no liability to fence in cities, towns or villages, and section 259 did not apply; that as the object of the Act in maintaining cattle guards and return fences so as to prevent horses, cattle, sheep or swine, &c., from getting on the track was to provide for the safety of passengers the statute having created a duty with the object of preventing a mischief of a particular kind, persons who by reason of a neglect of the statutory duty suffered a loss of a different kind were not entitled to maintain an action in respect of such loss. This doctrine is of course well recognized in such cases as *Gorris* v. *Scot*, (2) *Buxton* v. *North-Eastern Railway Co.*, (3) *Vanderkar* v. *The Rensselaer and Saratoga Railroad Co.* (4)."

(1) 36 S. C. R. 180.
(2) L. R. 9 Ex. 125.
(3) L. R. 3 Q. B. 549.
(4) 13 Barb. (N.Y.) 390.

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His reasoning for a different conclusion in that case proceeded on the ground that the statute required the "fences to be turned into the cattle guards." These words are not in *The Government Railways Act.*

The road is, I think, properly fenced, and even if there were no cattle-guards I do not think it would assist the suppliant.

The suppliant alleged the absence of cattle guards in her petition of right. She has failed to prove the truth of this allegation. The only evidence is that of Thériault who testifies to the absence of gates, and the evidence of Napoleon Aubin. He states as follows:—

"D. A présent, sur la voie elle-même, du côté est, en partant du centre du chemin de Métapédia, voulez-vous dire s'il y a des calverts, ou quelque chose pour empêcher de passer les animaux, ou si tout est de plein pied?

R. Autrefois, il y avait ces choses-là.

D. L'année dernière, en mil neuf cent-huit?

R. Je crois qu'il n'y a plus rien de ça; je ne voudrais pas jurer ça, mais je crois qu'il n'y a plus rien de ça; la raison, c'est qu'ils ont fait deux sidings depuis."

He is giving evidence as to the east side of the Metapedia road, and as to this is only arguing. I would not find as a fact that the provision of the statutes as to cattle guards was not complied with.

Section 25 of *The Government Railways Act* evidently applies to private roads and farm crossings. A similar provision was contained in the general Railway Acts until 1888, 51 Vic. cap. 29, when the clause was amended so as to read "At every public road crossing".

The reasoning of the Judges of the Supreme Court in the cases cited and a consideration of the clauses as to highway crossings lead to the conclusion that the highway could not be fenced without authority.

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In addition to the case of *Wabash Railroad Co.* v. *Misener* (1) cited by the Referee, and the strong language of the Chief Justice and of Sir Louis Davies' therein, the authorities collected and commented on by Mr. Justice Nesbitt in his judgment in *Grand Trunk Ry. Co.* v. *Hainer* may be referred to. The authorities there collected fully support the finding. The case of *Davey* v *London and Southwestern Ry. Co.* (2) referred to in this judgment is peculiarly apposite although I think the headnote is not quite accurate, the judgment proceeding on the ground of contributory negligence.

A case decided by the Court of King's Bench of Quebec in February, 1905 is also very much in point,—*The Quebec and Lake St. John Railway Co.* v. *Girard*, (3) This case was decided after the judgment in *McKay* v. *Grand Trunk Ry. Co.* (4)

I think if the present case is to be considered and decided by the law of England or Ontario, there can be no possibility of recovery by the suppliant.

It is sufficient under the English and Ontario law to prove the contributory negligence. Numerous authorities cited show facts taking the cases beyond that of contributory negligence. Beven in his book on Negligence (Canadian Edition) citing authority at page 633 states "carelessness is not the same as intelligent choice."

It is now settled (if there ever was a doubt) that the principle of the French law which provides that where the case is one of "faute commune" the damages are to be apportioned is part of the law of Quebec: *Nichols Chemical Company of Canada* v. *Lefebvre* (5)

Assuming the railway company in this case were guilty of neglect of the statutory provision (which as I find they were not) nevertheless the proximate cause of the injury was the reckless conduct of those in the buckboard. It

(1) 38 S. C. R. at p. 99.
(2) 12 Q. B. D. 70.
(3) Q. R. 15 K. B. 48.
(4) 34 S.C.R. 81.
(5) 42 S. C. R 402.

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is not a mere question of carelessness. It was a wilful disregard of all care required of those approaching and driving over a railway crossing: *Roberts* v. *Hawkins* (1) overruling the Court of King's Bench. At page 226 the learned Judge, Mr. Justice Girouard, pronouncing the judgment of the Court states: "But we do not share "their opinion that the fault of the boy constitutes merely "contributory negligence. We agree on the contrary "with Mr. Justice Bossé that it was the principal and "immediate cause of the accident."

This case was not decided on the ground that the boy was a trespasser.

The learned Judge cites Dalloz J. G. Sup. Vo. *Responsabilite*, n. 193.

A case in Dalloz referred to under paragraph 193, is as follows:—

> "3a. Que l'accident de voiture, qui aurait été évité si le blessé avait tenu compte du cri de gare, poussé comme avertissement par le cocher, n'engage pas la responsibilité de celui-ci, si d'ailleurs, il conduisait ses chevaux à une allure moderée; et cela encore bien que le blessé se trouverait être un viellard (Paris, 16 févr. 1867, aff. Vautier, D.P. 67. 5.371)."

And here there was a signboard indicating "Railway crossing."

I am of opinion that the reckless conduct of those in the buckboard was the principal and immediate cause of the accident. *Tooke* v. *Bergeron*. (2)

Were it otherwise, and adopting the principle of "faute commune" I proceeded to apportion the blame I would under the circumstances of the case feel compelled to allow the suppliant no sum for damages.

See De Valrogers, "De la responsabilité des accidents et

(1) 29 S. C. R. 218. (2) 27 S. C. R. 569.

dommages sur les lignes de chemins de fer" (1907) p. 14. Lamothe on Accidents, p. 69.

Fromageot "De la Faute" (1891), page 48 :—

> "La régle est que celui qui se cause à lui-même un dommage ne peut pas, en principe, prétendre qu'on l'a lésé dans son droit 'volenti non fit injuria'. Toutes les législations n'ont cependant pas résolu la question dans le même sens. Tandis, en effet que le droit anglo-américain refuse toute action en cas de faute commune, les législations issues du droit romain donnent au juge un pouvoir d'appréciation : il doit répartir la responsabilité proportionnellement à la gravité des fautes de chacun, si chacun a subi un dommage, ou examiner si la faute imputable à la partie lésée est telle qu'elle doive atténuer ou annihiler toute responsabilité de la part du défendeur."

In "Schuster's German Civil Law," 1907, it is stated as follows at page 154 :—

> "149. Under English law the plaintiff's contributory default affects the defendant's liability in the case of claims for damage done by unlawful acts ; under the rules of the present German law the liability created by a contract or other act-in-the-law is affected in the same way by the contributory default of the other party as the liability for an unlawful act. Under German as well as under English law, the proof of the plaintiff's own default is relevant only for the purpose of showing that the defendant's default was not the 'decisive' or 'preponderant' (vorwiegend) cause of the damaging event ; but while under English law the fact that the defendant's default was not the decisive cause deprives the plaintiff of his entire claim to compensation (except in cases coming under Admiralty law) German law leaves it to judicial discretion to determine whether the defendant's liability to make compensation is

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entirely destroyed or merely reduced by contributory default onthe part of the plaintiff,—B. G. B. 254. The expression 'decisive' which is used by Sir F. Pollock (see Law of Torts, 7th edition, p. 455) is clearer than the expression 'proximate' generally used in the English authorities."

A case decided by the Court of Queen's Bench in 1883, —*Richelieu & Ontario Nav. Co.* v. *Cordelia St. Jean* (1) may be referred to as being apposite.

The last point raised, namely, that of "identification" and claiming the son was not responsible for the fault of his father, although not suggested by the petition, was discussed. Reliance is placed on the "*Bernina*" case,— *Mills* v. *Armstrong*. (2)

I do not think the decision in that case affects the present one.

If it were the case of a common carrier, like an omnibus or railway, I can understand the passenger not being bound, but the case in point is entirely different. The facts have been already stated at length.

The appeal is dismissed with costs.

Judgment accordingly.

Solicitors for the Suppliant: *Fiset, Tessier & Tessier.*

Solicitor for the Respondent. *E. L. Newcombe.*

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(1) 28 L. C. Jur. 91.

(2) L. R. 13 A. C. 1.