CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES AND THE TERRITORIAL COURT OF THE YUKON TERRITORY.

KATHARINE ANDREAS, ADMINISTRATRIX OF THE ESTATE OF NICHOLAS ANDREAS, DECEASED (PLAINTIFF) .... } APPELLANT;

1905
*Oct. 25.
*Nov. 27.

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS) . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Negligence—Finding of jury—Evidence.

A. brought an action, as administratrix of the estate of her husband, against the C.P.R. Co., claiming compensation for his death by negligence and alleging in her declaration that the negligence consisted in running a train at a greater speed than six miles an hour through a thickly populated district and in failing to giving the statutory warning on approaching the crossing where

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

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the accident happened. At the trial questions were submitted to the jury who found that the train was running at a speed of 25 miles an hour, that such speed was dangerous for the locality, and that the death of deceased was caused by neglect or omission of the company in failing to reduce speed as provided by "The Railway Act." A verdict was entered for the plaintiff and on motion to the court, *en banc*, to have it set aside and judgment entered for defendants a new trial was ordered on the ground that questions as to the bell having been rung and the whistle sounded should have been submitted to the jury. The plaintiff appealed to the Supreme Court of Canada to have the verdict at the trial restored and the defendants, by cross-appeal, asked for judgment.

Held, Idington J. dissenting, that by the above findings the jury must be held to have considered the other grounds of negligence charged, as to which they were properly directed by the judge, and to have exonerated the defendants from liability thereon, and the new trial was improperly granted on the ground mentioned.

Held, also, that though there was no express finding that the place at which the accident happened was a thickly peopled portion of the district it was necessarily imported in the findings given above; that this fact had to be proved by the plaintiff and there was no evidence to support it; and that, as the evidence shewed it was not a thickly peopled portion, the plaintiff could not recover and the defendants should have judgment on their cross-appeal.

APPEAL from a judgment of the Supreme Court of the North-West Territories (1) setting aside a verdict for the plaintiff and ordering a new trial.

Wetmore J., in his opinion on giving the judgment appealed from, states the facts as follows:

"On the 22nd June, 1903, the deceased Nicholas Andreas passed west on what is known as South Railway Street in the Town of Regina, came to Albert Street and then proceeded north on this last-mentioned street towards the defendants' railway. There was a railway crossing at Albert Street. In attempting to cross the railway at this crossing the horses and waggon in which he was driving were struck by one of the defendants' trains coming from the west,

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and he and the horses were killed and the waggon practically destroyed. The acts of negligence alleged and attempted to be proved were:

"1st. There was a failure to blow the whistle or ring the bell of the engine as provided by section 256 of 'The Railway Act,' 51 Vict. ch. 29, which was the Act in force at the time;

"2ndly. That the *locus in quo* was a thickly peopled portion of the town and the locomotive was passing there at a speed greater than six miles an hour;

"3rdly. That in view of the character of the crossing, it being one over which a great many people and teams passed, and the fact that there was a tool shed, which would to some extent obscure from view an approaching train, the crossing was dangerous, and the train was running at a dangerous and reckless rate of speed. In coming along South Railway Street and passing along Albert Street, up to about opposite where this tool-house was, an approaching train coming from the west could be seen without any obstruction at a distance of at least one mile and a half away. This tool-house was ten feet three inches by twelve feet three inches, the height was twelve feet from the ground to the peak, and the sides were seven feet seven inches. Among other things it was contended on behalf of the defendants that the uncontradicted evidence established conclusively that the death of Andreas was solely due to his own negligence; that if he had, as an ordinary prudent man would have done, looked in the direction of the west from which the train came he would have seen it; and that it must be assumed that he either omitted to take this ordinary precaution or if he did take it that he recklessly undertook to pass in front of the train and so his

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death was brought about by his own carelessness or recklessness; and that the trial judge should have nonsuited the plaintiff at the conclusion of the case or directed a verdict for the defendants at the close of the whole case.

"Questions were submitted to the jury, which they answered as follows:

"1. Q. At what rate of speed was the engine running at the time it crossed Albert Street?

"A. Twenty-five miles per hour.

"2. Q. Was such a rate of speed a dangerous rate of speed for such a locality?

"A. Yes.

"3. Q. Was the death of the deceased caused in consequence of any neglect or omission of the company; is so, what was the neglect or omission which caused the accident?

"A. First, yes; second, failure to reduce speed of train as provided in 'Railway Act.'

"4. Q. If you find the plaintiff entitled to recover, at what do you assess the damages?

"A. (*a*) By reason of the killing of the deceased, $5.000. (*b*) For the destruction of the horses and the waggon, $400.

"The above questions were submitted on behalf of the plaintiff, and the following questions were submitted on behalf of the defendants and answered as stated below:

"1. Q. Could Andreas had he used ordinary care have seen the train in time to have avoided the accident?

"A. No, owing to the tool-house obstructing the view of the track for a considerable distance.

"2. Q. Could an ordinary man by the exercise of reasonable care have avoided the accident?

"A. Same as No. 1.

"3. Q. Did the plaintiff's husband exercise reasonable care to avoid the accident?

"A. Same as No. 1.

"4. Q. Might he have exercised greater care, and if so in what respect?

"A. No.

"5. Q. Did the condition of the approaches to the crossing on Albert Street in any way contribute to the accident, if so, how?

"A. No.

"6. Q. Could Andreas when he first observed train No. 2 have jumped and avoided death?

"A. No."

On these findings judgment was entered for the plaintiff for the amount of the damages assessed. The defendants then appealed to the Supreme Court of the North-West Territories, *en banc,* to have the said judgment and findings set aside and judgment entered for them on the ground of failure by the plaintiff to prove negligence making them liable. On this appeal a new trial was ordered(1) on the specific ground that questions as to the bell being rung and the whistle sounded when the train approached the crossing should have been submitted to the jury.

The plaintiff then brought the present appeal seeking to have her judgment at the trial restored and the defendants, by cross-appeal, again asked for judgment.

Ford Jones, for the appellant, having stated the proceedings in the courts below, the court decided that the order for a new trial could not stand and called upon respondent's counsel to support his cross-appeal.

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Blackstock K.C. for the respondent referred to *Wright* v. *Grand Trunk Railway Co.*(1); *Lloyd* v. *Woolland Bros.*(2); *Skelton* v. *London & Northwestern Railway Co.*(3).

Ford Jones, for the appellant, cited *Lake Erie & Detroit River Railway Co.* v. *Barclay*(4); *Smith* v. *Southeastern Railway Co.*(5); *Bonnville* v. *Grand Trunk Railway Co.*(6).

THE CHIEF JUSTICE.—This action was brought, in 1903, by the appellant as administratrix of the estate of her deceased husband, one Nicholas Andreas. She alleges that:

1st. On the 22nd day of June, 1903, the said deceased was driving across the line of the respondents' railway with his team of horses and waggon, at a crossing on Albert Street, in the municipality of the Town of Regina, and that although all proper care and precaution was taken by him, a railway train, locomotive or railway engine in charge of the respondents' servants was illegally, wrongfully and negligently run or brought into collision with the horses and waggon of the said deceased, whereby the said deceased received such personal injuries that he and his said horses were immediately killed and his said waggon destroyed:

2ly. That the said train, locomotive or railway engine was being run through, and the said crossing was situate in, a thickly peopled portion of the said town at a greater rate of speed than six miles an hour, although the track of the said railway was not fenced according to the provisions of the statute in that behalf, namely, section 259 of the "Railway Act of 1888," and that the said death of the said deceased and the killing of his said horses and the destruction of his said waggon were caused thereby.

3ly. That it was the duty of the respondent company to ring the bell with which the said engine on the said train was furnished or to sound the whistle on the said engine at a distance of at least 80 rods westerly from the place at which the said railway crosses the said highway, and to keep the said bell ringing or to sound the said whistle at short intervals until the engine of the said train had crossed the said highway pursuant to the provisions of section 256

(1) 5 Ont. W.R. 802.
(2) 19 Times L.R. 32.
(3) L.R. 2 C.P.631.
(4) 30 Can. S.C.R. 360.
(5) [1896] 1 Q.B. 178.
(6) 1 Ont. W.R. 304.

of the "Railway Act" of Canada; that the respondent company neglected to ring the said bell or to sound the said whistle and to keep the said bell ringing or to sound the said whistle at short intervals until the said engine had crossed the said highway; and the said injuries to and the said death of the said deceased and the killing of his said horses and the destruction of his said waggon, were caused thereby.

4ly. That the said train negligently and unlawfully approached and crossed the said highway at a very dangerous and reckless rate of speed; no warning or signal of the approaching train was given; no watchman with signals was placed at the said crossing, and no fence or gates were constructed thereat; and the death of the said deceased and the killing of his horses and the destruction of his waggon were caused by reason thereof.

The respondents pleaded, 1st, denying the allegations of the appellant and not guilty by statute; 2ndly, that the death of Andreas was due to his own negligence, and that he could have avoided the accident by the exercise of reasonable care.

The case was tried at Regina before Mr. Justice Newlands. At the close of the appellant's case the respondents moved for a nonsuit, but the motion was refused. Questions were then submitted to the jury, and answered as follows:

Questions submitted at the request of the appellant.

At what rate of speed was the engine running at the time it crossed Albert Street? A. 25 miles per hour.

2. Was such rate of speed a dangerous rate of speed for such locality? A. Yes.

3. Was the death of the deceased caused in consequence of any neglect or omission of the company? If so, what was the neglect or omission which caused the accident? (1) Yes. (2) Failure to reduce speed of train as provided in "Railway Act."

4. If you find the plaintiff entitled to recover, at what do you assess the damages? A. (*a*) By reason of the killing of the deceased $5,000; (*b*) For the destruction of the horses and waggon $400.

Questions submitted on behalf of the defendants.

1. Could Andreas, had he used ordinary care, have seen the train in time to have avoided the accident? A. No, owing to the tool-house obstructing the view of the track for a considerable distance.

2. Could an ordinary man, by the exercise of reasonable care, have avoided the accident? A. Same as No. 1.

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3. Did the plaintiff's husband exercise reasonable care to avoid the accident? A. Same as No. 1.

4. Might he have exercised greater care, and if so, in what respect? A. No.

5. Did the condition of the approaches to the crossing on Albert Street in any way contribute to the accident? If so, how? A. No.

6. Could Andreas, when he first observed train No. 2, have jumped and avoided death? A. No.

The respondents then moved for the dismissal of the action, but that motion was refused and a verdict for appellant entered for $5,400. The respondents then appealed to the Supreme Court of the North-West Territories, where it was held (1) that though the verdict could not be sustained and the respondents' appeal had to be allowed, yet their motion for the dismissal of the action could not prevail, but that a new trial had to be ordered upon the ground that the jury were not asked special questions as to the ringing of the bell and sounding of the whistle. Against this order both parties now appeal, the plaintiff asking a restoration of the judgment she obtained at the trial, the defendants asking that the action be dismissed and the order by the court *en banc* for a new trial set aside.

Under the circumstances, the respondents' motion for a judgment dismissing the action and their appeal from the judgment refusing that motion is the first to be considered.

The jury's finding that Andreas was killed by the negligence of the respondents in failing, on the occasion in question, to reduce the speed of their train as provided by the "Railway Act" is exclusively based on section 259 of the "Railway Act of 1888," which enacts that:

No locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town or village at a speed greater

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than six miles an hour unless the track is fenced in the manner provided by this Act.

That was the first charge of negligence against the respondents in the statement of claim. Now, it is evident that this finding necessarily imports a finding that this accident occurred in a thickly peopled portion of Regina, a fact which the appellant had to prove, but of which there is no evidence to justify the verdict. In fact the contrary clearly appears. The evidence on the point is that east of Albert Street stretches the railway reserve extending from South Railway Street across the railway track to Dewdney Street about 500 yards north of the track. On this there are no houses. Then west of Albert Street the railway reserve extends from South Railway Street across the railway to a line 150 feet north of the track. There are no houses thereon nor within 200 feet of the railway (including streets) and that for a mile and a half west as previously stated there were no houses within the same limits. North of the railway reserve and street adjoining it and west of Albert Street between the reserve and Dewdney Street were a few scattered houses, west of which was open prairie.

Q. Are there many buildings? A. There is hardly any buildings,

says Watson, and Powel says:

There was not a great deal of settlement on the north side of the track. There are six or seven houses on Albert Street; one or two on Dewdney Street north and quite a number south. There was a fairly good settlement on Dewdney Street. The Government offices were there, mill, electric light. Considerable traffic across it. (Cross-examined). No residence within 200 feet of railway track. Train not running through residence portion of city. Not running through dwelling house or on a street.

And that evidence is not contradicted. Indeed it could not be. So much so that Mr. Justice Wetmore felt justified in remarking with the concurrence of all

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the other three judges that, if allowed the privilege of exercising his own knowledge of the locality, he would have had no hesitation in stating that in his opinion "the place of the accident was not a thickly peopled portion of the town." The verdict of the jury on this fact cannot, therefore, be sustained.

If this was not proved to be then a thickly peopled portion of Regina, this charge of negligence, it is conceded, fails and it is the only one found. The case was rightly left to the jury, however, because in answer to question No. 3,

> was the death of the deceased caused in consequence of any neglect or omission of the company, if so, what was the neglect or omission which caused the accident?

they might have felt justified in finding that the respondents had been guilty of the other negligence charged by the statement of claim, that is, in not sounding the whistle or ringing the bell as required by the statute. The judge had properly told them that:

> The first question is whether, from the evidence which has been given to-day, the provision of ringing the bell and blowing the whistle has been complied with. It is for you to find from the facts submitted to you whether these provisions I have mentioned have been complied with or not. You have heard all the evidence and I am going to leave it to you whether from that evidence these provisions were complied with and whether from the quarter-mile post they rang the bell and blew the whistle at intervals until they came over that crossing.

Now the jury, with such clear and direct instructions on the point, having answered that the cause of the accident was the failure to reduce speed under section 259 of the Act, must be considered as having negatived all the other charges of negligence. It is true that their finding as to the failure to reduce speed rendered it immaterial whether the bell had been rung

or the whistle sounded. But the appellant shaped her own questions to the jury and, by not pressing this charge before them or insisting upon an answer, must be held under the circumstances to have abandoned it. She cannot have been under the impression that each of her charges could form the subject of a separate trial. If the jury had answered to that third question: "Yes, failure to blow the whistle and ring the bell as required by the statute," and the court had set aside that verdict, no second trial could have been given her, whatever the evidence might have been, simply to enable her to try again her complaint of failure by the respondents to reduce the speed of the train on the same occasion.

The result is that the main appeal should be dismissed, the cross-appeal allowed and the action dismissed, with costs in all the courts against the appellant on both appeals.

GIROUARD J.—The appeal should be dismissed and the cross-appeal allowed, both with costs, for the reasons given by Mr. Justice Davies as to contributory negligence on the part of the deceased.

I express no opinion on the other branch of the case.

DAVIES J.—This case came before us as an appeal from the judgment of the Supreme Court of the North-West Territories and by way of cross-appeal.

Mr. Blackstock, for the Canadian Pacific Railway Co., which cross-appealed, admitted that he could not, in consequence of the late decision of this court in *Grand Trunk Railway Co.* v. *Hainer*(1), maintain the judgment appealed from on the ground stated. He

(1) 36 Can. S.C.R. 180.

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contended, however, under his cross-appeal, either that the verdict of the jury should be set aside and judgment entered for the defendant or that there should be a new trial on the grounds, (1st.) that there was no evidence of negligence on defendants' part; (2ndly.) that, if there was, the deceased had been guilty of contributory negligence; and (3rdly.) that the damages awarded to the widow and her child, of $5,000, were grossly excessive, and that no evidence whatever of any pecuniary damage had been given.

I have read through the evidence given at the trial most carefully and have reached the conclusion that it is impossible to sustain the verdict and that the defendants are entitled to have judgment entered for them.

The accident which resulted in the death of Andreas took place where the main line of the Canadian Pacific Railway crosses Albert Street in Regina, N.W.T. The locality is in the outskirts or suburbs of the town, and one of the most important questions, in fact under the findings of the jury the most important question, to be determined is whether or not the locality where the railroad crossed Albert Street was a thickly populated part of Regina.

The only finding of negligence on the part of the Canadian Pacific Railway Co. was the rate of speed at which the train crossed the street. The track was admittedly not fenced as prescribed by the Act, and if the place was a thickly peopled portion of the town the speed at which the train crossed the street, about twenty-five (25) miles an hour, was in direct violation of the provision of section 259 of the "Railway Act" as amended by 55 & 56 Vict. ch. 27, sec. 8. If it was not a thickly peopled portion the rate of speed was not negligence.

The question of negligence or no negligence therefore depended entirely upon the fact of the locality where the accident occurred being a thickly peopled part of the city or town.

This question of fact is one which might well under certain circumstances and conditions give rise to fair and reasonable doubts, and if the evidence in this case could do this I would hesitate long before interfering with the finding of the jury.

It was strongly contended by Mr. Blackstock that there was no express finding of the jury on the point at all and that as it was a crucial fact, and one on the existence of which the sole negligence of the railway company could be imputed, the plaintiff's case necessarily failed.

But while I think it is to be regretted that a question was not distinctly put to them whether this locality at Albert Street through which the railway passed was a thickly peopled portion of the Town of Regina, still I think a reasonable construction of the answers given by the jury to the questions as put cannot have any other interpretation than that they did so find. The sole question remaining is whether or not there was any evidence to justify the finding. Certainly none was given on behalf of the plaintiff. On the contrary the evidence of the witnesses called on her behalf conclusively establish, to my mind, that the locality at the crossing was not "a thickly peopled portion of the town" within the Act. I need not quote the evidence because there is no contradiction with respect to the facts stated by the witnesses. The result may be broadly stated to be, that the point where the railway track crosses Albert Street is about 200 feet north of South Railway Street and 1,050 feet, or about 350 yards, south of Dewdney Street, each of which

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streets Albert Street runs into and at right angles with. The railway track runs substantially east and west and Albert Street north and south; that there was no person living between South Railway Street and the railway track, nor for one hundred yards on the south side of South Railway Street, and no one living along the track anywhere within one hundred yards; that from South Railway Street to the track on the west side the land was simple prairie or open common, and on the east side was reserved and held vacant by the railway. The railway reserve was 150 feet wide west of Albert Street on both the north and south sides of the railway and east of Albert Street 200 feet wide, south of the track, and over 500 yards wide north of the track extending up to Dewdney Street. That there was some settlement north and west of Albert Street up to Dewdney Street, and that these houses, 6 or 7, with one or two exceptions, face on Albert Street, and behind them to the west is prairie or open common. The east side of Albert Street to the north of track as far as Dewdney Street, like the east side between the track and South Railway Street, was not built on at all. The Government offices and public buildings and the grist mill and electric light building were between one-quarter and one-half a mile to the westward and there was a fairly good settlement along Dewdney Street some 400 yards away. As Powell, the plaintiff's witness, put it:

> There are six or seven houses on Albert Street, one or two on Dewdney Street north and quite a number south. There was a fairly good settlement on Dewdney Street. The Government offices were there, mill, electric light.

And again,

> The Albert Street sidewalk joined the Dewdney Street sidewalk. There was a trail from the crossing across the prairie to the Government offices, barracks, etc.

Had it not been, therefore, for the evidence given by the company's engineer (Sims) to the effect that he had at the time of the trial swung a circle with a quarter mile radius centering on Albert Street crossing and found 155 dwelling houses within it, the question would not on the evidence have been open to the slightest doubt. This evidence, however, is quite consistent with the undoubted fact that there was "considerable settlement" along Dewdney Street and South Railway Street, but chiefly near the outside of the radius he swung and not near the centre of the circle. Unless all the plaintiff's evidence is to be disbelieved on this point that is the only explanation of the existence of 150 dwelling houses within the one-half mile circle.

The onus of proving the fact of the crossing being in "a thickly peopled portion of the city or town" lay upon plaintiff. She entirely failed to discharge it. The finding of the jury on the point, assuming that there has been a finding, is without any evidence to support it, and, therefore, the only evidence of any negligence on defendants' part is wanting.

Even if, however, there could be any doubt upon this point, I am also of opinion that defendants are entitled to judgment on the issue of contributory negligence. The finding of the jury on this point is as follows:

> Could Andreas, had he used ordinary care, have seen the train in time to have avoided the accident? A. No, owing to the tool house obstructing the view for a considerable distance.

Now, what are the facts? There is no finding that he did not see, or could not if he had used ordinary care have seen, the train coming in towards the crossing he was moving towards from the time he turned at South Railway Street into Albert Street and all the

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time he was moving slowly with his team along Albert Street towards the crossing until his view was obstructed by the tool-house.

Now, the tool-house was a small house 10 ft. by 12 ft. and about 8 ft. high, standing up and alongside of the west side of Albert Street within, say, 18 ft. of the railway track. For the moment of time that he was passing this little tool-house his view would be obstructed, but to ask any reasonable being to hold that such momentary obstruction released him from the plain, simple and obvious duty which lay upon him of exercising reasonable care in looking at and for the train from the time he left South Railway Street until the moment when his vision was obscured by the little tool-house, is asking too much. He may not have looked during the passage of his team from South Railway Street till he actually passed the tool-house, and his horses were almost, if not quite, upon the track certainly within a few feet of it. Certainly the evidence would justify a finding that he did not look. But under the circumstances he was bound to look. His view was uninterrupted. Had he looked he could and must have seen the train coming towards the crossing he intended to pass over, at least a mile away. The evening was clear, bright and without wind. Everybody else who was called as a witness was looking and saw the train and the danger and feared an accident unless the deceased stopped. He alone appears to have been stolid, careless and indifferent. If ever a man jogged along carelessly to his death he appears to have done so.

An argument was attempted to be raised that his attention was distracted by an engine of the defendant company on a switch on the other side of the crossing and by a whistle from this engine and the shouting

of some workmen alongside of it calling upon him to stop. But the jury have not found this. On the contrary, they carefully limit the excuse for his negligence in not looking for nor seeing the fatal train approaching to the little tool-house obscuring his view. In effect they negative, or at any rate decline to accept, the suggestion that the deceased's attention had been distracted by the engine noises and calls of the workmen on the other side of the track and I think they were right in so doing.

I am, therefore, of opinion, alike on the ground of the failure on plaintiff's part to give any evidence from which reasonable men looking fairly at the whole circumstances could justify a finding of negligence on defendants' part, and also on the ground of contributory negligence on deceased's part, even if defendants' negligence had been proved, that the defendants' cross-appeal must be allowed and judgment entered for the defendants on the whole case.

I do not wish, by my silence on the point, to be understood as even remotely sanctioning the view that a verdict for $5,000 for the death of a man of the class and condition of the deceased in this case could be sustained in any event under Lord Campbell's Act without at least some evidence of the pecuniary damage his widow and child sustained.

The only property of any kind he ever was shewn to have owned was the team he was driving at the time of his death and this ownership is asked to be assumed from his possession only. What his occupation was, whether he did or did not own a farm, and if so, what was its value, or whether he was a mere servant or labourer, and if the latter, what wages he earned, and all other information from which reasonable inferences might be drawn of the pecuniary dam-

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ages incurred by his wife and family from his death, seem studiously to have been kept in the back ground.

The cross-appeal should be allowed with costs in all the courts and the main appeal dismissed with costs.

IDINGTON J. (dissenting).—In this case the plaintiff, as administratrix, recovered, by the verdict of the jury, $5.400, and judgment for her was entered thereupon by the learned trial judge.

Upon appeal therefrom to the Supreme Court of the North-West Territories, *en banc,* that court, not having before it the judgment of this court in *The Grand Trunk Railway Co.* v. *Hainer*(1), seemed so pressed with the exposition of the law in *The Grand Trunk Railway Co.* v. *McKay*(2) (as read by the members of the court), set aside the verdict and granted a new trial, in order that the other grounds taken at the trial by plaintiff, but not passed upon by the jury, might be tried out.

Thereupon the plaintiff, becoming aware of our decision in *The Grand Trunk Railway Co.* v. *Hainer* (1), took an appeal to this court.

Upon the opening of the argument it was properly conceded that if the findings of the jury were entitled upon the evidence to stand, *The Grand Trunk Railway Co.* v. *Hainer*(1) must entitle the plaintiff to succeed in this appeal.

The respondents had, however, by way of cross-appeal, raised the question that upon the whole of the evidence the plaintiff should have been nonsuited.

The case has, therefore, been argued upon this contention.

(1) 36 Can. S.C.R. 180. (2) 34 Can. S.C.R. 81.

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The plaintiff sued for damages caused by the collision of the defendants' train with the team of the plaintiff's late husband, at a crossing in the Town of Regina, which resulted in the death of her said husband and the destruction of his team.

The defendants' railway, at the place in question, was unfenced in any way. The train was moving confessedly at the rate of twenty-five miles an hour.

The first question presented thus for consideration was whether or not this rate of speed was a violation of section 259 of the "Railway Act," ch. 29, of the statutes of Canada of 1888, which, as amended by 55 & 56 Vict. ch. 27, sec. 8, provides as follows:

> 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 an hour unless the track is fenced in the manner prescribed by this Act.

The portion of the Town of Regina through which the train in question passed at the place of the accident is alleged by the defendants not to have been then thickly peopled.

The evidence on this point is not as clear as it might have been made. It should not have been a difficult matter to have shewn how many houses actually existed at the time within a given radius of the spot where the accident occurred, and what these houses were, whether dwelling houses or other houses of that public character that would lead people to visit them.

I think, however, that there was sufficient evidence furnished (the most pointed being given by defendants' witnesses) at the trial, under the circumstances, to entitle the plaintiff to have the case on this point passed upon by the jury.

The learned trial judge had during the trial

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called attention to the fact that all the jurors lived in Regina and knew the locality. No one objected to the learned judge taking that view, and when he reiterated in his charge, without objection, the same thing, I think we must take it that the respondents by their silence assented to that way of treating the case.

If so they ought not now, in this court of appeal, to be heard to take any advantage of it.

There was nothing extraordinary in it. Every day in trying cases those engaged therein assume that to be common knowledge which, perhaps, is not strictly within the technical meaning of such kinds of evidence as renders notice thereof as part of common knowledge permissible.

If it is assumed as being assented to no one can complain. No one should complain.

Many of the allusions in the evidence bearing upon this point, that seem vague and almost unmeaning to me, were no doubt well understood by the court and jury possessed of a local knowledge.

I need not say that counsel can insist on shutting out such appeals to the personal knowledge of the jury, unless by means of a view directed by the court in the ways provided therefor by law.

They can, if they choose, in a civil trial at least, permit, instead of a view, the jurors to act on the knowledge of locality that they may possess.

The finding of the jury, read as it must be in light of the learned judge's charge, is clearly intended as a finding that the place in question was so thickly peopled as to require the train of defendants to move at a rate not exceeding six miles an hour. The court below seemed unanimously to think the evidence such as to render it a question for the jury.

The respondents say, however, that even if they otherwise should be so found liable, the deceased by his own want of care brought about his own death. What is there to support this contention? Is it a case for ignoring the jury and withdrawing the case from them? Is the evidence of want of care all one way? Was the want of care inexcusable? What measure of care is called for on the part of travellers coming to a crossing?

It is not the measure of care that I or any judge or lawyer, whose sense of danger is quickened by long experience in dealing with such cases, may possess that is to be exacted. It is the care that must be expected on the part of an ordinary prudent man.

This case does not disclose whether or not deceased knew from daily or long experience that trains coming from the west approached the station there at such a high and, to a stranger, probably unexpected rate of speed.

For aught we know he may have crossed there only once before.

This crossing was just beside the station grounds. And if, as is highly probable, he assumed all trains stopped at the station a short distance east of the crossing he would likely know that such a high rate of speed as this train moved at might not be expected.

He did know that on his right hand and immediately beside him there was in the yard an engine moving backwards and forwards, which needed, or might be reasonably assumed to need, on his part, constant watchfulness.

We are asked to say, as *matter of law,* that whilst guarding his horses and exercising that constant watchfulness thus imperatively called for, he must be held wanting in the care of an ordinary man of

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prudence, and guilty of negligence, because he did not discover (within about twenty seconds, as I will shew) by also looking the other way, until too late, the incoming train on his left hand. Is that a proposition that in law can be maintained?

The only case nearly like it is the recent case of *Wright* v. *The Grand Trunk Railway Co.*(1), where undoubtedly the engine or train that engaged the injured man's attention was standing. In this case the engine diverting attention was, if two of the witnesses are to be believed, moving from time to time nearly, if not quite, up to the moment deceased came to the crossing.

It matters not here that other witnesses say to the contrary. It was for the jury to decide which were telling the truth.

It would seem also as if the motion of the reins in deceased's hands indicated that he had looked to the west and discovered his danger, but too late. And the few moments that the tool-house hid the coming train from the view of the deceased might, but for that obstruction, have enabled him to see it sooner and turn his horses aside and save himself.

To say that he could have looked before coming there is true. I am unable, however, after a most careful perusal of this evidence and of much of it several times, to feel quite sure just what he could have seen by looking. Those who tried the case were much more likely to understand the allusions in the evidence and know just how far such looking would have served deceased. How far from, in approaching, a crossing must a man look both ways?

The deceased had driven westward along South Railway Street which runs alongside on the south

(1) 5 Ont. W.R. 802.

side of the track. Then at the junction of South Railway Street with Albert Street which crosses the track the deceased turned northward along Albert Street. How far that point of turning is from the railway track in question I am quite unable to discover, with certainty, from the evidence before us. Why this was not made clear I am unable to understand. It is not only the turning point on the road, but the turning point of the case. Up to this turning point it is not probable that the deceased could have seen the incoming train from the west with which he collided. The track is, to a person on the eastern part (over which deceased drove) of that street, obstructed from view by the buildings of one Sinton, who was one of the witnesses. At the south-east corner of the said junction of streets are these buildings. And so far as I can make out, from the plans exhibited in argument, they are immediately facing that part of South Railway Street, to the east of them, over which deceased had come. There was a jog in that street, at the junction with Albert Street, that makes for our present consideration as if the South Railway Street had ended there. While we have heard a great deal about the possibilities of seeing the incoming train in question at the distance of a mile, we have not been shewn or pressed with any argument that would shew that any one could expect the deceased to have seen through Sinton's buildings or past them, so as to have seen the train before he turned, at the jog I refer to. How far had he then to go until he reached the crossing? How far past Sinton's buildings northerly could he go without seeing a train if it were a mile away? How far could he see along the railway track to the west, at any and each step of what he had to travel over, going northerly? I am unable on this evidence

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to do more than guess the answer to any of these questions. Yet it is upon an accurate answer to such questions, or some of them upon which we can rely, that this case hinges.

The witness Sinton stated that his house was about one hundred and sixty-six feet from the railway track. In cross-examination he was pressed, by counsel for defendants, to say whether it was not two hundred and thirty-seven feet and a half, and he was unable to say that he would contradict any one if he swore to that. The railway officials failed to clear this up. Defendants put in a plan that has a mark on Albert Street two hundred and thirty-seven and a half feet, but it does not shew properly from where or to where it is estimated to designate. And all the witness is asked by way of verifying it is as follows:

> Now I notice on this plan certain measurements. Are those measurements correct? A. Yes.

This plan seems more for other purposes than any relating to this question of the distance from Sinton's house to the track. How am I to verify it? Am I to guess how wide South Railway Street is or was, and how wide Albert Street was or is, and apply this vague and uncertain kind of evidence and determine for myself the exact distance deceased had to go after reaching a point where he could see a train? Am I in short in a better position to know than the jurors who knew the locality and everything that was said by the witnesses in relation to the different localities, and understood everything that was said?

On the evidence it is purely guess work, to make any accurate estimate of the distance that the deceased had to travel after making the turn and getting out past Sinton's house so far on to Albert Street that

he could have had a view of the coming train or westward track. We do know from the evidence that the tool-house was nineteen feet from the track. We also know that the tool-house took up twelve or fourteen feet further space, but how it stood in relation to the track, whether with the length or the width facing Albert Street or the railway, which does not cross Albert Street at right angles, we are not told. These trifling differences might make but a few feet in the distance to be travelled to get past the house. But when evidence is put before the court that the house is only six or seven feet high and no explanation given as to which way the roof runs which was, at the peak thereof, twelve feet high, I think we are not helped as much as we might have been to an understanding of the exact situation. Then, assuming that the south side or end of this tool-house would be fifty-two to fifty-five feet south of the track and that one hundred and sixty-six feet from Sinton's is to be taken as the correct measurement, there would be one hundred and one or one hundred and four feet from Sinton's to the tool-house. From this should we deduct sixty-six feet for width of South Railway Street? If so, we then have only thirty-five or thirty-eight feet that the deceased passed without looking where he might have seen. Double the distance for argument's sake, and then we are left to say as matter of law that a man *whose attention was diverted to an actual danger on his right hand,* having missed the opportunity of looking whilst passing a particular seventy or eighty feet of road, is to be held guilty of such inexcusable negligence as to deprive him and his representative, by reason thereof, of any remedy, is something which I venture to say has never yet been ruled in an English or Canadian case.

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Let us consider the plans and compare them and then try another way. Plan Exhibit 1, that the company produced, shews what I take to be a measurement of two hundred feet from the track to the south line of the eastern part of South Railway Street, which line seems, when projected, to come out on the face of the north side of Sinton's buildings, which the evidence shews do mark on the ground the south boundary of the South Railway Street at that part. To understand this the jog must be borne in mind. Deduct from two hundred feet the width of the street, and we have a distance of one hundred and thirty-seven feet to travel, after the turn was fully made and deceased passed the junction. Let that be reduced by the distance taken up by the tool-house and nineteen feet beyond and it leaves only eighty-two or eighty-five feet over which deceased in his travelling could have looked westward and seen anything coming from the west on the track. Of course, I refer to such a distance, away west on the track, as the train must, according to the evidence, have been at this time when the deceased, it is said, ought to have looked.

Another way to find the distance from the track to Sinton's house is to assume the track, as the plan indicates it, in the centre of a road allowance of 300 feet, and add 66 feet for width of road to half of this and we have 216 feet altogether. Deduct one-half the width of the track, the distances to the tool-house and past that house, and part of road allowance, to get where team had got past Sinton's house; and this being fairly done, we have not in one way as much as above, or to take as an extreme view the other way of looking at it, more than one hundred feet for deceased to travel. Assume any of these results of estimated distances to be correct. Then at the rate of three or

four miles an hour the deceased had to cover such distance only about twenty seconds in which to look, whilst passing the open space, where he is charged with neglecting to look: Suppose he postponed doing so till nearer the track—and as a stranger not regarding the house, but the track—was it unreasonable neglect? Was it such neglect under the circumstances of having to watch to the right? Was it so especially when in law the defendants' train ought not to have travelled there at more than six miles an hour? What right have they to insist under such pressure from them, to the right and to the left of the driver, on such promptness of action—and decision on the part of the driver? Surely they had no right to create, by their unlawful act, a condition of things demanding such urgency on the part of deceased, and then turn round in light of the results and claim the benefit of their own wrong? The case of *Correll* v. *The Burlington, etc., Railroad Co.*(1), at p. 125, has some remarks which might be adopted here on this point. It is to be observed that once past the tool-house the team could not have been turned round. The approach to the crossing of the track sloped up, and was too narrow to permit of turning.

Another thing lost sight of in the evidence of some witnesses is the curve in the track within the mile back that has to be reckoned with, on this point of the case, and weighing the evidence given. What use to tell us about the possibility of seeing a train a mile distant, as witnesses do, who had from their point of view nothing to allow for obstruction or for this curve? Why was the evidence not confined to the point or points of view that deceased had and that alone? Why have we not a single witness that speaks

(1) 38 Iowa 120.

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pointedly as having tested any of those points of view, at any one of the places deceased is by the argument of defendants required to have looked? To my mind it is very singular indeed, if not suspicious, that if the company really had such a clear case from any of these points of view, that we are not favoured with any such tests. It is true that the engineer of the coming train, presumably as was his duty looking ahead, says he saw the deceased or his team. His evidence is open to comment, it is not quite consistent and leaves room for mistakes on his part. The degree of credence to be attached to it was peculiarly for the jury.

It is made clear that standing on the track, at the point where deceased was killed, and looking westward, one can see a long distance. It does not seem to have served deceased to look just then for the train was too near.

It devolved upon the defendants to make all this clear. Have they done so? It was no part of the plaintiff's duty to clear this up. She is entitled to insist that the burthen of proof which rests upon the defendants, setting up contributory negligence, should be met with that degree of certainty that will enable the court to say before submitting it to the jury that there is evidence of contributory negligence. And then, before withdrawing it from the jury as clearly proven, and entitling a judge to dismiss the action, the proof must be so clear and satisfactory that twelve reasonable men cannot be supposed honestly and reasonably to find it possible to come to the conclusion that it is not sufficient. And there must be no evidence to the contrary. If there be evidence to the contrary the case must go to the jury. Is that the case here? To grant a nonsuit on such evidence, as

in this case, seems to go further towards the abolition of the right to a juror's judgment than any case has yet gone.

In many cases where there was no excuse for failing to look the courts have, in absence of that or any other evidence rebutting or explaining such failure, nonsuited. But here exists strong reason excusing, if ever a man had an excuse, for watching to the right more than the left. And to pass upon it the jury were the proper tribunal. I think the deceased had far more excuse than the unfortunate people in the *Hainer Case*(1). In that case the people were walking and had only to guard a few steps.

I think, also, that probably the jury here were quite as competent as I to determine what degree of foresight should be exacted from a man driving a team under the circumstances I refer to.

So far as the law has yet gone, I am unable to hold that a man must in law have looked both ways within the limits of a distance of only seventy-five to one hundred feet before reaching such obstruction to view as existed here at a railway crossing, or be thereafter his own assurer.

The "stop, look and listen" rule in Pennsylvania exacts in substance nothing more.

Another feature, pressed in argument as if against deceased, I take entirely the other way.

Men undoubtedly called to him and raised a great cry. But I think their efforts, however kindly meant, in all probability diverted him from looking to the west and made him look more intently the other way. Am I to forget also the many cases in which it has been said that momentary forgetfulness as a possible

(1) 36 Can. S.C.R. 180.

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factor in the conduct of every man is a thing to be considered in weighing what a prudent, careful man of the ordinary reasonable type may be held in law bound to do?

I cannot, having regard to all these considerations, which we must observe and which, indeed, so to speak, form part of this case and must in law be reckoned with, on the evidence before us, see how this case could properly have been withdrawn from the jury.

It was their province to weigh and decide upon such matters as I have adverted to, and they have decided adversely to the defendants, after a proper charge from the learned trial judge.

I think their finding must stand.

It was possible for the finding to have been the other way, and had it been so the result must have stood.

I think the appeal of the plaintiff ought to be allowed and the cross-appeal of the defendants dismissed and both with costs to the plaintiff.

The court below, upon contradictory evidence as to the point of ringing of the bell and blowing of the whistle, not passed upon by the jury, thought proper to direct a new trial. I understand that some of the majority of this court decide that the verdict covers the point because the jury gave only one reason and omitted any other.

With respect I must add, that without the majority of this court agreeing that such contributory negligence has been shewn as defeats the action, we ought not to interfere with the discretion of the court below in granting a new trial to clear up the issue upon which no verdict has been given.

MACLENNAN J.—After a very careful consideration of this case I am constrained to the conclusion that there was no sufficient evidence to warrant the finding of the jury that the part of the town at which the unfortunate accident occurred was a thickly populated part thereof, and, therefore, that the speed of the train was not illegal.

On this point I concur in the reasons of my brother Davies, which I have had an opportunity of reading.

I also agree with him in the opinion that there was no sufficient evidence of pecuniary damage suffered by the plaintiff and her child, by the death of her husband, to warrant the verdict of $5,000 to be divided equally between them.

On the question of contributory negligence I think the jury might quite properly find, as they did, upon the whole of the evidence, although they specify only one particular ground for their finding.

I am of opinion that the appeal should be dismissed with costs and that the cross-appeal should be allowed with costs here and in the court below.

Appeal dismissed with costs and cross-appeal allowed with costs.

Solicitors for the appellant: *Jones & Gordon.*

Solicitors for the respondents: *Mackenzie & Brown.*