Privy Council Appeal No. 93 of 1914.

The Canadian Pacific Railway Company - *Appellants,*

v.

Joseph Arthur Fréchette - - - *Respondent.*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 25TH JUNE 1915.

Present at the Hearing:
THE LORD CHANCELLOR (VISCOUNT HALDANE).
LORD DUNEDIN.
LORD ATKINSON.
[*Delivered by* LORD ATKINSON.]

This is an appeal from a judgment of the Court of King's Bench of Quebec (Appeal Side), dated the 9th March 1914, confirming the judgment of the Superior Court, sitting in Review, dated the 28th November 1913, whereby damages amounting to the sum of $12,000.00 were, in accordance with the verdict of the jury which tried the case, awarded to the respondent in respect of personal injuries sustained by him, through the negligence of the appellants, while he was engaged in working as a brakesman

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shunting a freight car or waggon on the line at Princess Louise Basin at Quebec. This line and the electrical apparatus for lighting it belong to and are controlled by the Commissioners of Quebec Harbour.

By the 264th section of the Canadian Railway Act, 1906, it is provided that—

" Every company shall provide and cause to be used on " all trains modern and efficient apparatus and appliances " and means . . . to securely couple and connect the " cars composing the train and to attach the engine to " such train with couplers which couple automatically " by impact and which can be uncoupled without the " necessity of men going in between the ends of the cars."

In obedience to this enactment the appellants have equipped most of their freight cars at each end with a certain coupling and decoupling machine called the Tower coupler. It is unnecessary to describe in detail the mechanism of these machines further than to say that the portion of each called the knuckle, designed for coupling the cars by impact, is kept close and in position by an iron pin or peg which fits into a sheath or socket in the knuckle, and that when this pin is withdrawn from its sheath the knuckle opens and the cars theretofore coupled together become detached from each other. These pins are each attached to one end of a lever fixed to the car. The other end or handle of the lever projects beyond the side of the car to such an extent that it can be worked so as to raise the pin by a person standing on the permanent way but clear of the car. The fore and aft levers of each car project beyond opposite sides of the car. If that on one end of the car projects beyond its left side, that on the other end projects beyond its right side. It was not disputed that when there is a strain on the coupling mechanism, which may happen in many ways, the pin may be nipped

so tightly by the knuckle that it cannot be withdrawn by the action of the lever, and that it is only at a moment when there is what is called a "slack" between the cars that the pin does not stick, and can be readily withdrawn by the action of the lever. But it was clearly proved, and was not, their Lordships think, seriously disputed, that this sticking of the pin does not show that the coupling machine is a defective machine. Strain will admittedly cause the pin to stick however perfect the machine may be.

The respondent was 27 years of age at the time of the accident, was educated and intelligent. He had been about three months in the employment of the appellant company as a "spare" brakesman, that is one who may be discharged in the slack season if no berth be found for him at some other place on the line.

On the 13th October 1912, he had work through the night. The electric lights on the jetty were extinguished about 1.30 a.m., but the men who were at work on the railway were furnished with lamps such as brakesmen use, good of their kind. About five o'clock in the morning of this day an engine, with fourteen or fifteen waggons, bound for three different destinations, attached, was standing on one of the sets of rails on the main line. It became necessary to divide up this train and shunt those of the cars destined for Winnipeg into one siding, those destined for Vancouver into another, and those destined for Montreal into a third. The car furthest from the engine was to be shunted into the Winnipeg siding. The respondent was aware of all this and was helping in the very work under the superintendence of a foreman named

Ernest Tremblay. The respondent threw over the switch lever which was situated on the north side of the line of rails upon which the engine and cars were standing, in order to let this foremost car pass into the Winnipeg siding, and, having done so, he recrossed the line to its south side. The engine was then pushing the car for Winnipeg up towards the points thus set, at a speed of about three miles an hour.

Tremblay signalled to the engine driver to stop the train, and then (at what interval of time is not clear) ordered the respondent to uncouple this truck. This the respondent proceeded to do. He tried to do it several times with the aid of the lever, but found that the pin was fixed and the machine would not work. He then, while the train was in motion, went in between the Winnipeg waggon and the succeeding waggon to endeavour to work the lever on the opposite side of the succeeding car. This he clearly deposes to. He failed to uncouple the cars. As he walked along between the cars his foot caught in the points, he was knocked down by the succeeding car and carried about 25 feet over the switches, when all the cars came to a standstill. He crawled out from under the cars. Tremblay then came to his aid and found him badly injured.

The only negligence on the part of the appellants relied on by the respondent, in his declaration, were, first, their negligence in permitting this shunting to be done in the absence of light, and second, their negligence in providing a defective coupling machine. But the pleadings developed; much new matter was introduced, and new issues raised upon it.

The appellants in their answer, in addition to traversing the material averments in the declaration, pleaded :—

(1) that the accident was solely due to the respondent's own negligence, and that they were not guilty of any fault or negligence whatever ;

(2) that the coupler attached to this car was a patent coupler of approved design, and was in good order ;

(3) that there was no necessity for the respondent to have gone in between the cars for the purpose of uncoupling them ;

(4) that even if it were necessary for him so to do, he should have given notice of this intention, and was bound to wait till the cars had stopped before attempting to enter between them while moving, and that this was a grossly negligent act on his part, forbidden by the orders of the company ;

(5) that if he had any difficulty in working the coupler he should have signalled to the engine-driver, as he had a right to do, to stop the cars, and should have given the signal to start again only after he had got clear of the cars ;

(6) that the appellants were not responsible for the want of light ; and

(7) that its absence was not the cause of the accident.

The respondent replied to this answer by traversing its material averments, and pleading—

(1) that it was necessary for him to go in between the cars to get the pin out and make the knuckle work, and that in so doing he had acted in the circumstances as all the other employees of the company act, and according

to the practice followed not only on the appellants' line of railway, but on all other railways: and

(2) that in doing what he did he conformed to the rules of the company, and the directions of his superior employees, namely, the yard master, John Vachon, and the foreman, Ernest Tremblay.

On these pleadings the case went to trial. The learned judge who tried the case left seven questions to the jury. The five following, with the answers to them, are alone of importance on this appeal. They run thus:—

"3. Is the said accident due solely to the fault and " negligence of the plaintiff, and if so, in what did such " fault and negligence consist?—No.

"4. Is the said accident due solely to the fault and " negligence of the defendant, its servants and employees, " and if so, in what did such fault and negligence " consist?—No.

"5. Is the said accident due to the common fault and " negligence of the plaintiff and of the defendant, its " servants or employees, and if so, in what did the respec- " tive fault and negligence of each consist?—Yes. The " plaintiff was imprudent in going between the cars to " uncouple them. The defendant was very much to blame " for not instructing the brakemen, as no rules were " shown to the jury that had a direct bearing on a " shunter's work in a yard, making up trains. Fréchette, " after working all day, was called out to take Tweedell's " place, who was hurt running to catch the engine in the " dark. Tweedell fell and injured himself. Further, the " defendant should not allow the shunters to make running " shunts during a dark night when there was no light, " only a signal lamp of about one candle power, which " was principally used for signalling. Further, the " coupling apparatus was proven to be out of order, and " Fréchette, acting on orders from Tremblay to uncouple " the car, tried to lift the pin on the other car. If there " was a double lever attachment, it would not be neces- " sary to do so. We find the defendant very negligent " for not stopping the work when the lights went out.

"6. Has the plaintiff suffered damage by reason of this " accident, and if so, for what amount?—$15,000.00.

"7. If you replied affirmatively to question No. 5 what "amount do you deduct from the damages suffered by the "plaintiff?—$3,000.00."

The appellants rely strongly on the answer to this fifth question as proving that the jury were misdirected and misled by the learned judge in his charge, inasmuch as they appear to have based this verdict to a large extent upon what they supposed to be improper methods of managing the business of the railway adopted by the appellants. Even if this were so it was irrelevant, as these methods did not materially, or at all, contribute to the plaintiff's injury, and upon this ground, with others, the appellants contend that they are entitled at the least to have the verdict set aside and a new trial granted.

But their main attack has directed against the answer of the jury to the third question. They contend that the evidence clearly establishes that the respondent's own negligence was the sole effective cause of the injury he received; that having regard to that evidence, no reasonable man could find as the jury have, in fact, found in answer to this question; and that as it is a crucial question the verdict should be set aside and judgment be entered for them.

There is no doubt that the law of Quebec differs from the law of England on the question of contributory negligence properly so called. If one takes, for example, such a plea of contributory negligence as might be framed in conformity with the judgment by Wightman, J., in *Tuff* v. *Warman* (5 C.B. (M.S.), 573, 585), to this effect:—

"That the plaintiff himself so far contributed to the "misfortune by his own negligence that but for such "negligence on his part the misfortune would not have "happened, and the defendants could not by the exercise

" of ordinary care and caution upon thier part have avoided
" the consequences of the plaintiff's negligence."

Now that plea, if proved, would be a perfectly good defence in England, *Radley* v. *London and North-Western Railway Company* (1 A.C. 754). It would be no defence in Quebec. The jury in Quebec, notwithstanding the proof of it, would be entitled to inflict a kind of penalty upon the plaintiff on account of his own negligence, proportioned, presumably, in their opinion to his culpability, deduct that sum from what they would have awarded to him had he been blameless, and give him a verdict for the balance, *Nichols Chemical Company of Canada* v. *Lefebvre* (42 S.C. Canada, 402). That is, in fact, what the jury have done in the present case.

But though this difference between the laws of the two countries on this subject does exist, it is equally certain, that in Quebec, as in England, a plaintiff suing for damages in respect of an injury sustained by him cannot recover if his own negligence be the sole effective cause of that injury. *See* judgment of Taschereau, J., as he then was, in *George Matthews Company* v. *Bouchard* (28 S.C.C. 580, 584). At p. 584 he said:—

" There is no evidence whatever that the negligence of
" the company, assuming negligence to be proved, caused
" the accident in question, and an affirmance of the con-
" demnation against it would unquestionably be at variance
" with our own jurisprudence."

The other members of the Court took a different view as to the existence of evidence of the defendant's negligence, but did not dispute this principle.

The ground of this distinction between the two cases is this, the latter is not, in the true sense of the term, a case of contributory

negligence at all. That term can only be properly applied to a case where both the parties, plaintiff and defendant, are each guilty of negligence so connected with the injury as to be a cause materially contributing to it. If the negligence of either party falls short of this it is an irrelevant matter, an *incuria*, no doubt, but, to use Lord Cairn's words, not an *incuria dans locum injuriæ*. *See* Lord Bowen's judgment in *Thomas* v. *Quartermain* (18 Q.B.D., 685, 698) and Lord Cairns' judgment in *The Directors of the Metropolitan Railway Company* v. *Jackson* (3 A.C., 193, 197–8).

Some of the observations of Lord Cairns reported at the two latter pages of the last-mentioned case are so applicable to the present case that it is excusable to quote them at length. He said (p. 197):

"There was not at your Lordships' bar any serious "controversy as to the principles applicable to a case of "this description. The judge has a certain duty to dis- "charge, and the jurors have another and a different "duty. The judge has to say whether any facts have "been established by evidence from which negligence may "be reasonably inferred; the jurors have to say whether "from those facts, when submitted to them, negligence "ought to be inferred. It is, in my opinion, of the "greatest importance in the administration of justice that "these separate functions should be maintained, and should "be maintained distinct. It would be a serious inroad on "the province of a jury if, in a case where there are facts "from which negligence may reasonably be inferred, the "judge were to withdraw the case from the jury upon "the ground that in his opinion negligence ought not "to be inferred; and it would, on the other hand, place "in the hands of jurors a power which might be exer- "cised in the most arbitrary manner if they were at "liberty to hold that negligence might be inferred from "any state of facts whatever. To take the instance of "actions against railway companies: a company might "be unpopular, unpunctual, and irregular in its service; "badly equipped as to its staff, unaccommodating to "the public; notorious, perhaps, for accidents occurring

"on the line, and when an action was brought for the
"consequences of an accident jurors, if left to themselves,
"might, upon evidence of general carelessness, find a ver-
"dict against the company in a case where the company
"was really blameless."

And at p. 198 he proceeds:

"In the present case I am bound to say that I do not
"find any evidence from which, in my opinion, negligence
"could reasonably be inferred. The negligence must in
"some way connect itself or be connected by evidence
"with the accident. It must be, if I might invent
"an expression, founded on a phrase in the Civil Law,
"*incuria dans locum injuriæ*. In the present case there
"was, no doubt, negligence in the company's servants
"in allowing more passengers than the proper number to
"get in at Gower Street Station, and it may also have
"been negligence if they saw these supernumerary pas-
"sengers, or if they ought to have seen them, at Portland
"Road, not to have removed them; but there is nothing,
"in my opinion, in this negligence which connects itself
"with the accident which took place."

Now, that was a very strong case. The carriage of the company in which Jackson, the plaintiff, was travelling, got overcrowded at Gower Street; three people were standing in it. At Portland Road some people, from a crowded platform, opened the door of this carriage, and others tried to force their way into it. The plaintiff stood up to prevent them, the train suddenly moved on; the plaintiff to save himself from falling, put his hand upon the lintel of the door, when a porter hastily slammed the door as the train was entering a tunnel, thereby catching the plaintiff's thumb in the door and crushing it. Yet, for the reasons stated by Lord Cairns, it was decided that the judge at the trial should have directed a verdict for the defendant company.

In reference to the right of a defendant, albeit guilty of negligence not amounting to *incuria dans locum injuriæ*, to have a

verdict directed for him where the plaintiff's negligence is the sole effective cause of the injury in respect of which he sues, the same great judge laid down the guiding principle of the English law applicable to it in a well-known passage of his judgment in the case of *The Dublin, Wicklow, and Wexford Railway* v. *Slattery* (3 A.C. 1155). At p. 1166 of the report he says:

> "If a railway train which ought to whistle when "passing through a station were to pass through without "whistling, and a man were in broad daylight, and with-"out anything either in the structure of the line or other-"wise to obstruct his view to cross in front of the advanc-"ing train and to be killed, I should think the judge ought "to tell the jury that it was the folly and recklessness of "the man, and not the carelessness of the company, which "caused his death. This would be an example of what "was spoken of in this House in the case of *Jackson* v. "*The Metropolitan Railway Company* as an *incuria*, but "not an *incuria dans locum injuriæ*. The jury could not "be allowed to connect the carelessness in not whistling "with the accident to the man, who rushed with his eyes "open on his own destruction."

The principle thus laid down has been many times applied. It was applied in the case of *Davey* v. *The London and South-Western Railway Company* (L.R., 12 Q.B.D., 70), and quite recently in the cases of *M'Leod* v. *The Edinburgh and District Tramway* (1913, S.C. 626), and *The Grand Trunk Railway* v. *McAlpine* (1913, A.C. 838). In each of these cases the act upon which the risk of injury attended, and from which the injury sustained resulted, was done by the person who suffered the injury.

The question, therefore, which arose and was most discussed in the case of *Smith* v. *Baker and Son* (1891, A.C. 325) namely, whether a man voluntarily incurred a risk attending his employment, where the act or negligence by

which he was injured was the act or negligence of some person other than himself, did not arise in these cases.

In cases such as *Smith* v. *Baker and Son* it must be shown (1) that plaintiff clearly knew and appreciated the nature and character of the risk he ran, and (2) that he voluntarily incurred it. Until both are established, the maxim *Volenti non fit injuria* cannot apply. If, however, a person, with full knowledge and appreciation of the risk and danger attending a certain act, voluntarily does that act it must be assumed that he voluntarily incurred the attendant risk and danger, and the maxim *Volenti non fit injuria* directly applies. Lord Halsbury, at page 338 of the report in *Smith* v. *Baker and Son*, points out this difference with great clearness. He said:

"As I have intimated before, I do not deny that a
" particular consent may be inferred from a general course
" of conduct. Every sailor who mounts the rigging of a
" ship knows and appreciates the risk he is encountering.
" The act is his own and he cannot be said not to con-
" sent to the thing he himself is doing. And examples
" might be indefinitely multiplied where the essential
" cause of the risk is the act of the complaining plaintiff
" himself, and where, therefore, the application of the
" maxim *Volenti non fit injuria* is completely justified."

The first question to be decided, then, resolves itself into this. Does the evidence show that the respondent's own negligence was the sole effective cause of the injury he sustained; that is, does it show that he, knowing the risk and danger of going in between cars in motion in order to uncouple them by means of this Tower coupler, voluntarily encountered that risk and danger, thereby sustaining the injuries he complains of? If he did so, then it must be held that there was no evidence before the jury upon which they could reasonably find as they have found in answer to question No. 3.

The presence or absence of evidence sufficient, in any given case, to support the finding of a jury as reasonable men, is a matter upon which different minds may well come to opposite conclusions. The division of judicial opinion in the present case is proof of this. And every appellate tribunal, conscious of the great advantage enjoyed by a jury in having seen and heard the witnesses, and in having had the whole trial conducted under their observation, must feel reluctant to disturb the decision of such a tribunal. This applies in a special degree to this Board, which has to deal with the administration of justice in distant and dissimilar parts of the Empire, and has always desired to strengthen the well-deserved confidence of the local public in their native tribunals; but if, despite this ever-present desire, the Board, after careful examination of the evidence, comes to the conclusion that the verdict of the jury cannot be sustained, no course is open to it but to set that verdict aside. Any other course would amount to a judicial wrong, the punishment of a litigant for something for which he has not been proved to be answerable.

Now, since the respondent again and again admitted that he knew that in going in between freight cars while in motion to uncouple them he endangered both his life and limbs, it could not be contended that he did not know and appreciate the risk he ran. He was acquainted with the place; knew where the switches were; knew they were open, since he himself had opened them. If the darkness increased the risk, he must have been aware of that fact also. Accordingly, Mr. Leslie Scott, who appeared for the respondent, was driven to contend that, though his client knew well the nature and

character of the risk he would run if he should act as he has done, he did not encounter that risk voluntarily, but, on the contrary, encountered it under the compulsion of a legal contractual obligation. Basing himself upon the supposed likeness of the case of *Sword* v. *Cameron* (1 Ses. Cas. 2 Series, 125), discussed at length by Lord Cranworth in the *Bartonshill Colliery* v. *Reid* (3 Macqueen, 266, at 289 and 290), he argued, borrowing Lord Cranworth's language, that a negligent and defective system of carrying on the operation of shunting was allowed to grow up upon the appellant railway, according to which brakesmen were only required to operate uncoupling levers from outside the waggons so long as the coupling machines worked satisfactorily, but were not only permitted but were bound by the terms of their hiring to get in between cars when in motion for the purpose of uncoupling them whenever the pin happened to stick or the coupler did not work satisfactorily—that is that the brakesmen, including the respondent, were employed to discharge their duties as such according to this defective and negligent practice which was so permitted to prevail.

This, he admitted, was the way most favourable to him in which the contention could be put. It will be considered presently how far the principle of *Sword* v. *Cameron* is applicable to the present case. Before proceeding further, however, it would be convenient to deal with the respondent's point as to the alleged defectiveness of the Tower coupler. The respondent himself admitted that in the best of couplers the pin may be held so tight sometimes that it will stick if there be not "slack" between the cars. He explained how this "slack" might be produced.

Tremblay, his witness, proved that the Tower was the "*avant dernier*" patent, the Sharon the *dernier* patent, and that some of the former work as satisfactory as the latter.

In addition, three or four witnesses were examined on behalf of the appellants on this point but not on the existence of this practice. They proved that this Tower coupler was a patent automatic coupler, the very best of its kind; that its ordinary life was about 10 to 15 years; that about 75 per cent. of the Canadian Pacific freight cars were equipped with it; that it was used on many other of the great Canadian railways; that the Railway Commission, whose rules, regulations, and requirements all Canadian railway companies are bound to obey and comply with, approved of it; that the Sharon patented coupler was 50 lbs. heavier than the Tower, had the same inside mechanism, but had the additional advantage of an attachment operating underneath; that the cars of the company were increased in size so that they were able to carry a load of from 50 to 60 tons, instead of 20 to 30 as theretofore; that the company equipped these larger cars with the heavier coupler because of its greater strength and its additional attachment; and that no cars are built in Canada with the levers attached to couplers running from side to side of the car.

This evidence was practically uncontradicted. Mr. Leslie Scott admitted, as, indeed, according to a well-established principle of law he was bound to admit, that the company were under no obligation whatever to their employees to equip their cars with the very latest improved coupler immediately after it was put upon the market. Their Lordships are clearly of opinion that the evidence does not establish that the Tower coupler is a defective machine, or that

the company failed in any way in their duty to their brakesmen to provide them with machines reasonably fit and proper for the work those brakesmen had to do. The learned Judge who presided at the trial was apparently of the same opinion.

It remains to deal with the evidence bearing on the main question in the case. Of the five witnesses examined on behalf of the respondent on this part of the case, two, Bégin and Therrien, were former employees of the company, and three, Tremblay, Desjardins, and Vachon were existing members of the company's staff. The respondent himself gave evidence, and there was this peculiarity in the proceedings that Vachon was first examined on behalf of the respondent, and afterwards examined on behalf of the appellant company.

A great deal of the evidence given went to show that the respondent, after working all day, was called upon to work at night as well—to take the place of a man named Tweedell, who had met with an injury. This evidence was given with the object, apparently, of showing that the company overworked the respondent, and, therefore, should pay him damages, although neither he nor any witnesses examined on his behalf proved he was fatigued or unable to do his work, or that he complained of being overworked, or that this alleged overworking had in any way contributed to the accident which caused his injury. It was, therefore, quite an irrelevant matter, and should not have been taken into consideration by the jury, as it evidently was.

Tremblay, the foreman, under whom both the respondent and Desjardins were working on the morning of the accident, was the first witness examined. He proved, amongst other things, that neither the Tower nor Sharon models

will work satisfactorily if there be not "slack" between the cars, that sometimes a car cannot be uncoupled by using the coupler attached to it, that the brakesmen then endeavour to detach the cars by working the coupler on the car succeeding the first, but that the lever of this latter being placed on the side of the succeeding car opposite to that, beyond which the lever first tried projects, the brakesman should go round the car sought to be detached, in order to get hold of the untried lever, that to do this the train ought to be stopped, but that sometimes the men go in between the two cars in motion to the extent of putting one foot between the rails upon which the cars are running, while keeping the other foot on the permanent way outside these rails; that there was a rule against doing even this, whether written or not he did not remember; that when he himself began to work as brakesman he was told not to do it; that he never saw the respondent going in between two cars in motion to endeavour to uncouple them; that had he done so he would have said, "*Va pas* "*là; c'est dangereux.*"

The witness was then asked, Why, if it was dangerous to go in between two cars in motion in order to uncouple them, he had, as he admitted, done this himself? He replied, "*Je* "*risquais*" (p. 28). In cross-examination the witness was again asked, If the lever does not work, is it not necessary to wait till the train stops? and he replied, "*Oui, on serait supposé* "*attendre.*" Mr. Leslie Scott suggested that Tremblay accompanied this reply with a shrug of his shoulders, more expressive than even Lord Burleigh's nod, as described in "The Critic," since, according to him, it indicated that the rule against going in between cars in motion was more honoured in the breach than

in the observance; that the systematic disregard of it was winked at (as he put it) by the officers of the appellant company; and that the negligent practice thus grew up which the respondent was by his contract of service entitled, indeed bound, to follow. There was no evidence that Tremblay accompanied his answer with a shrug of his shoulders, or any grimace or gesticulation whatever, and to the unimaginative his words would appear to mean no more than this, that the rule which should be observed was well known to the brakesmen, but that they sometimes somewhat surreptitiously transgressed it at their own risk. The witness then proceeded to give a detailed account of what happened on the night of the 12th and the morning of the 13th of October.

On most points there is little, if any, disagreement between his account and that of the respondent. He said, however, that at or about 4.45 on that morning, about three-quarters of an hour before dawn, the engine was pushing up a number of cars at the rate of about 3 miles an hour, as fast as a man could conveniently walk, towards the switches in order to shunt the foremost car into the Winnipeg siding; that the respondent was then standing westward of the points at the point marked B on P (1). That he signalled to the engine driver to stop the train, and that after he had so signalled he ordered the respondent to uncouple the foremost car; that in obedience to the order to stop, the foremost car ought to have been allowed to pass into the siding and then the remainder of the train pulled back in an opposite direction; that after giving the respondent the order to uncouple he himself turned away upon some other business, and did not see the respondent go in between the cars; but, attracted by his cries for help, went to

the respondent's assistance, and found him half way out from under the cars at point A on P (1). The cars, he said, were then standing still, the first still uncoupled. The witness further stated that he found the boot of the respondent between the rails of the switch at a place marked with a cross on P (1), that the distance of this latter point from the point marked A is 25 feet—just the length of one of these freight cars, which are 25 feet long by 8 feet broad. These distances are most significant. They show that the engine driver must, in obedience to the signal he had received from Tremblay, have so effectually slackened the speed of this long train of waggons that the first carriage came to a standstill some little over 25 feet from the points of the switches. This is the strongest corroboration of the respondent's evidence (p. 103) to the effect that when he tried to work the lever the train was only proceeding at the rate of one-quarter of a mile an hour.

An effort was made on behalf of the respondent to show that in this answer he underestimated the speed of the train, but the measured distances above given show that this was not so. They have a most important bearing upon the statement afterwards made by him setting forth the reasons which induced him to go in between the cars. Tremblay admitted that while the cars were standing still after the accident he tried, with the assistance of others, to uncouple the first car, but failed to do so. This, however, affords no proof that the coupler was defective since he did not ascertain, and did not state, whether there was or was not any "slack" between the cars at the time. He described at length the mode by which "slack" is produced, stated that in the course of a day a pin

may stick two or three times, and that the lamp that the respondent had was an ordinary signal lamp sufficient for the purpose of signalling and reading the numbers on the cars, and sometimes of showing where one was. Desjardins proved that occasionally the coupler will not work, and that when this happens one is obliged to stop the train to uncouple. He was then asked, did he always stop the train when this happened, and he replied, "*Celui qui veut*
"*faire le découplage en marche est obligé de*
"*prendre cela sur lui parce qu'on est obligé*
"*d'arrêter le train pour découpler quand la*
"*patente ne fonctionne pas,*" and then proceeded to add that he himself had gone in between cars *en marche* to uncouple them, that the yard foreman always reproached him for so doing, yet he had often done it, but when working with other brakesmen the yard foreman always reproached him and told him they ought to let the train stop before decoupling when the lever would not work.

Then Bégin, a man no longer in the employ of the company, was examined. He stated that when the lever attached to the Tower coupler would not work they endeavoured to pull out the pin by hand, and that in order to do this it was necessary to go in between the ends of the two cars, but Therrien, the other witness, examined after Bégin, who like the latter was no longer in the company's employment, stated that he knew it was dangerous to go between cars in motion, that he knew it was forbidden, that this very man, the foreman Bégin, had told him a couple of times not to do it, but that sometimes he did it notwithstanding. Bégin was not recalled to contradict this statement. Vachon was also examined; he proved that the company have no control over

the electric lighting of the Basin; that it frequently went out altogether; that when it did they worked through the night at the Basin all the same; that the men never complained of this; that there are 40 stations between Quebec and Montreal where there is no electric light, yet they worked through the night; that with the aid of the lamps supplied a brakesman would be quite able to do his work, and to see where he was if he went in between the cars. He could see the rails and the frog of the switch.

The respondent was then examined. He proved the opening of the points by himself, and the crossing and recrossing of the line, and then stated, amongst other matters not in dispute, that he was standing at the point marked B P 1 when Tremblay ordered him to uncouple the first car; that he ought to have done so before he came to the switch; that he tried to do it (he first said three or four times, and afterwards said two or three times), but without success, and then went in between the cars, "*comme tout le monde faisait*," to lift the lever on the second car; that it was so dark he put his foot in between the rails of the switch at the point marked with a cross on P 1; that he could not withdraw his foot; that he was knocked down by the second car and badly injured. He then explained how the Tower coupler worked. He admitted he was furnished by the company with a book of their rules when he entered their service, part of which he read. He stated the company never instructed him how to uncouple cars when the lever would not work; that he had been taught by the persons under whom Vachon placed him (not one of whom he named) to go in between the cars to

uncouple them ; that when he went in on any occasion between the cars to work the lever of the other car he followed the examples of his elders; that he had learned from the other employees of the company that they had done the same. He admitted he knew the train was to stop as it approached the switch. He said that nobody had ever told him, or had ever forbidden him to go in between cars in motion; that he knew in doing so he was exposing his life and limbs to danger. He then gave three reasons for acting as he had done. First, that when an attempt to uncouple does not succeed, it takes 8 or 10 minutes more to uncouple if one does not go between the cars "*et on a des bêtises de* " *l'homme en charge;*" (2) that he acted as all the others did, and to save time for the company; and (3) to save himself from the *bètises* he would have had. He admitted, however, that he never had *des bêtises* for this, and that he never had seen a foreman *dire des bêtises* to a brakesman because he did not enter in between cars in motion, but if he took 10 minutes more to uncouple that would be known by his foreman.

One can readily understand that if a brakesman took ten additional minutes to uncouple a car he might be considered deficient in dexterity; but one only has to look at P 1 to be convinced that this additional period of ten minutes was in this case a grotesque exaggeration. The train was on the point of stopping, as the respondent well knew. A quarter of a mile an hour is in such matters when speed is diminishing, little removed from standing still. In fact, the train did stand still after running about 25 feet. The siding was clear; whether one car or six cars passed over the points

into the Winnipeg section was a matter of perfect indifference. In any event, all the cars but the one to be detached for Winnipeg should be pulled back again in an opposite direction. To get round the Winnipeg car so as to reach the lever on the car succeeding it, the respondent would only have had to go along one side of the former 25 feet in length across the end of it, 8 feet in breadth, and along the other side of it 25 feet, 58 feet in length, between 19 and 20 yards, or thereabouts, in all. To say that this involved a delay of ten minutes, so detrimental to the interest of the respondent's employers that he shrank from subjecting them to it, is preposterous. The fear of having *bêtises* attributed to him, whatever that strange phrase may mean, is too fanciful. Indeed, if these difficulties in uncoupling cars arise as frequently as is said it would be strange that he should be blamed in any way for not uncoupling when the coupler would not work satisfactorily. The evidence of all of his witnesses bearing on this point shows conclusively that the rule prohibiting men from going in between cars in motion was perfectly well known.

The necessity of observing it was impressed upon brakesmen, and they were fully aware of the dangers attending the transgression of it. He must be bound by evidence given on his behalf. Now the argument advanced by Mr. Leslie Scott places him in this difficulty. If the respondent contracted to serve according to the defective system alleged to have been pursued, with or without light, he has no more right to recover for injuries arising from dangers inherent in that system than would a sailor, to take Lord Halsbury's illustration, be entitled to recover damages because he fell from the rigging when, in obedience to orders, he went

aloft, or a jockey who was retained to ride a steeplechase be entitled to recover damages because in the race he was thrown and injured, while if the defective system merely applied to acts done in the daylight or with clear and adequate artificial light, the respondent, knowing the dangers, as he admittedly did, was all the more rash and reckless in going in between the trucks at night. The case of *Sword* v. *Cameron* was a very peculiar one. The plaintiff was employed to work on or near a certain crane erected in a quarry. The position in which he had to remain to do this work was such that he was within reach, when a blasting shot was fired, of stones sent flying through the air.

There were only two ways of preventing this—one was by using bushes or such-like things to intercept these stones, or by giving to the plaintiff such timely warning as would enable him to get beyond the reach of the flying stones. The operation of blasting was regularly and habitually carried on to the knowledge of the employer with culpable negligence in this respect, that the warning given before the shot was fired was too short to enable the plaintiff to escape beyond the reach of the flying stones. It was sought to bring the case within the principle of the negligence of a fellow servant, namely, of the man who fired the shot, but it was shown that this servant was not guilty of any negligence, since he merely acted in strict conformity with the only method of working adopted in the quarry; and that the person guilty of negligence was therefore the employer, who knowingly permitted that system to be followed. That case, in their Lordships' view, bears no resemblance whatever to the present. There is no proof whatever in this case that

this practice of going in between moving cars was ever tolerated or approved of by the company, or the infraction of the rule against it systematically winked at by the company or its officers, and still less proof that the respondent was hired to act under any circumstances in violation of the rule.

It was proved that the brakesmen, though directed to observe the rule, violated it occasionally at their own risk. A company such as this are not required to have every rule for the guidance of their staff printed or reduced to writing. If their employees are aware of the existence and terms of the rule, they are bound by it whether it be written or not. Negligence is a breach of duty, and their Lordships are quite unable to discover what is the particular duty owed by the appellant company to the respondent which the company has violated. They supplied their brakesmen with machines reasonably effective for the purposes required. They caused their staff to be informed that certain rules should be observed. The fact that their employees violated these cannot enlarge the duties the company owed their staff, or impose new duties towards that staff upon them. The respondent has suffered very serious injuries, and is entitled to one's deepest sympathy; but on the whole case their Lordships are clearly of opinion that he is the unfortunate victim of his own rashness and recklessness, and that consequently he has no legal claim against the appellant company since they have done him no legal wrong. With moral claims, if any, this Board has no concern. They further think that the answer to question No. 3 is not such as a jury could, on the evidence, have reasonably found; that this appeal should therefore be allowed; the judgment appealed from over-ruled; the verdict

found by the jury set aside; and a verdict entered for the appellants; and they will humbly advise his Majesty accordingly.

The respondent must pay the costs here and below.

In the Privy Council.

THE CANADIAN PACIFIC RAILWAY COMPANY

v.

JOSEPH ARTHUR FRÉCHETTE.

JUDGMENT
DELIVERED BY LORD ATKINSON.

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