

But the jury also found, in answer to questions 3 and 4A, that the system of shunting cars as practised in the Welland yard was a dangerous system, and the danger consisted in running without proper precaution in the yard. Had the finding stopped there, it would be a question whether it was wrong. But, on being asked to say what proper precautions should have been taken, they added "running backwards without a flagman contrary to the rules." The mere finding that a system is a dangerous one is not of itself sufficient to create liability. A system may be dangerous without involving negligence. It may be the only system that is practicable; and, if persons enter upon or continue willingly to work under it with full knowledge of its inherent dangers, they cannot complain if at some time those dangers culminate in injury. But here the finding is more specific, and it is that the system of running backward without a flagman, contrary to the rules, constitutes the danger. Had this reference to the rules been omitted, it might be said that by "flagman" they meant some one at the rear of the engine or tender, and different considerations might arise as to the propriety of such a finding. But the jury evidently considered that the danger was owing to the fact that it was contrary to the rules; and, if it were so, the existence of rules against it, known to the workman, would constitute danger, in that he would be tempted to rely upon them, whether they were written rules or those of ordinary practice.

Then, as I have said, the evidence does not shew any such rule; and the finding, in its present shape, is, to my mind, unwarranted. The Railway Act, R.S.C. 1906 ch. 37, does, in sec. 276, call for a man at the rear end of a backing engine or train, when crossing a highway, to warn the public thereon. But to say that in a busy yard, where there must be constant backward and forward movement of cars and engines, it is negligence not to have a man so stationed, is another matter.

In the present case there was a most unfortunate conjunction of circumstances, it would almost seem of all circumstances, likely to bring about an accident. A diligent workman engrossed in his work upon the track; an adjoining moving train, which would prevent him from hearing the approaching engine or any warning by bell or whistle from it; an engine moving backward, so that its crew would not have a view along the track ahead; a curve to the north, preventing a view from the south side of the engine; and the train upon the other track, preventing, owing to that curve, a view from the north side. And yet one would think just such concurrences not unlikely to happen frequently,