

DECEMBER 28TH, 1904.

DIVISIONAL COURT.

HAMMOND v. GRAND TRUNK R. W. CO.

Master and Servant—Injury to Third Person by Negligence of Servant—Scope of Employment—Railway—Watchman.

Action by George Hammond, an infant under the age of 21 years, by Elizabeth Hammond, widow, his next friend, and the said Elizabeth Hammond, against the Grand Trunk R. W. Co. and Horace Jarman, to recover damages for an injury sustained by the infant plaintiff at the hands of the defendant Jarman under the following circumstances.

The line of the Grand Trunk R. W. Co. crossed Queen street at the western outskirts of the city of Toronto; and bars crossing the highway, two or three feet above the level of the highway, were lowered when a train was approaching, so as to prevent traffic from proceeding along the highway crossing until the train had passed, when they were raised.

The defendant Jarman was the watchman employed by the company at the crossing, and his duty was to raise and lower the bars by means of a lever at the watchman's house or shelter close to the crossing. At the point in question the railway tracks ran east and west, and the watchman's lever was on the north side of the track. On 16th July, 1903, the infant plaintiff, who was then about 16 years of age, with two other boys, was coming along Queen street from the south, and found the bars down and a train approaching; they all leaned on the gate and watched the train pass, and as they followed it with their eyes they felt the jar of the bars caused by the effort of the defendant Jarman, the watchman, to raise them. They did not immediately remove their weight from them, and Jarman picked up a cinder and threw it towards them and struck the infant plaintiff in the eye, putting it out.

The action was tried before ANGLIN, J., with a jury, and resulted in a verdict for the infant plaintiff for \$800 against both defendants.

The action was dismissed so far as the claim of Elizabeth Hammond was concerned.

The defendant company appealed from the judgment, and moved in the alternative for a new trial, upon objections taken during the trial and to the charge of the learned Judge, that there was no evidence of liability on the part of the railway