

The place where this accident happened was not a thickly peopled portion of any city, town, or village.

276. Whenever in any city, town, or village any train is passing over or along a highway at rail level, and is not headed by an engine, moving forward in the ordinary manner, the company shall station on that part of the train, or of the tender, if that is in front, which is then foremost, a person who shall warn persons standing on, or crossing, or about to cross, the track of such railway.

This accident did not occur at a crossing. The deceased was not standing on, or crossing, or about to cross the track of the railway, and there was a man on the foremost car. There was a light—a small light. If a light was necessary, in the absence of statute or rule, in a case like the present, a small light like that of the ordinary lantern should be reasonably sufficient on a train moving towards a person walking between the rails, to warn such person of the train's approach. The jury, in answering, said that the defendant company did not take "enough precaution when approaching the boarding-cars." Apart from the light, it was not suggested what should have been done, the not doing of which was negligence. Apart from the questions submitted and the answers, I am of opinion that the defendant company should succeed upon the motion for dismissal of the action. Upon the undisputed evidence, the action should be dismissed.

The deceased and those with him had been working for months near this track on which trains were running. The deceased took the dangerous road between the rails instead of the safe way alongside. The deceased was a trespasser in using the railway track as a foot-path.

The case of *Phillips v. Grand Trunk R.W. Co.*, 1 O.L.R. 28, seems expressly to govern. The trial Judge in that case bases his decision in part upon there being clear and undisputed evidence of contributory negligence—not necessary for the jury to find it—no dispute about it. The Divisional Court judgment, delivered by Street, J., is upon the ground, in part, that the plaintiff had not shewn that it was the defendant company's negligence that caused the accident. I quote from p. 33: "It is necessary, however, that the plaintiff should shew that the defendant company's negligence caused the accident; and in this I think he has failed. He chose to walk in a place of extreme danger, that is to say, between the rails, when a place of perfect safety, that is to say, in the space between the tracks and off the line of rails, was open to him and known to him. Therefore,