

upon the east-bound track, when a train was seen approaching them from the west. The men all got off the east-bound track, stepping to the north upon the west-bound track. Four of them went further to the north and entirely off the west-bound track; but the deceased and one other continued to walk westerly upon the west-bound track, when they were overtaken and run over by the light engine running reversely.

The deceased was not in the employment of the Toronto Hamilton and Buffalo Railway Company. He was not upon their tracks by any permission of that company, express or implied. There was no evidence of permission by the Toronto Hamilton and Buffalo Railway Company to any of the men in the employ of the Canadian Pacific Railway Company to walk upon these tracks. If it should be deemed of any importance that these workmen, on the occasion in question, used a hand-car upon the tracks of the Toronto Hamilton and Buffalo Railway, or that workmen of the Canadian Pacific on other occasions used a hand-car to go to and from their work, I cannot say that there was evidence of any express permission by the Toronto Hamilton and Buffalo Railway Company to the Canadian Pacific Railway Company or to the employees of that company. It would be a fair inference that the use of a hand-car by the Canadian Pacific men upon the tracks of the Toronto Hamilton and Buffalo Railway Company was permitted by the latter company, but that does not affect the present case.

The jury have found that it was actionable negligence to use a red light instead of a white light at the rear end of a locomotive—front end when running reversely—so as to create liability to a person injured when rightfully upon the track. I neither assent to nor dissent from that finding, but I am of opinion that the accident to the deceased was not occasioned by the absence of a white light.

I put my decision upon the ground that the unfortunate deceased was a trespasser as to the Toronto Hamilton and Buffalo Railway Company, and that there was no duty on the part of that company to the deceased to use a white light, or any other than not wilfully to run him down or put him in danger.

I do not think that there was any evidence to go to the jury as to negligence in the use of red or white lights on the part of the Toronto Hamilton and Buffalo Railway Company.

The accident did not occur by reason of any neglect on the part of the Toronto Hamilton and Buffalo Railway Company to fence. There was a notice warning persons who were not em-