

COURT OF APPEAL.

SEPTEMBER 27TH, 1912.

SMITH v. GRAND TRUNK R_W. CO.

4 O. W. N. 42.

Negligence—Death of Engineer—Train Running into Open Canal—Disregard of Signals—Rules of Defendants—Negligence of Conductor—Engineer Bound by Orders of—Concurrent Negligence.

Action by widow and administratrix of an engineer in employ of defendants, to recover damages for his death, caused by his train running through an open drawbridge into the Welland Canal. On arriving at the canal semaphore the engineer had found it set against him. He thereupon stopped up, and after a pause, proceeded a short distance past the semaphore to the water tank and took on water. Thereupon, without looking again at the semaphore, which was still set against him, or for the signals of the bridge-tenders, he signalled to the conductor that he was going ahead, to which the conductor, who was in a much less favourable position to see the semaphore than the engineer, signalled "all right." Deceased then proceeded with his train and went into the open canal a short distance further on. The act of the conductor was the negligence relied on by plaintiff. The jury found the conductor guilty of negligence in giving the signal he did in place of a signal to back up, and the engineer guilty of contributory negligence in passing the semaphore without permission.

BRITTON, J. (20 O. W. R. 654; 3 O. W. N. 379), *held*, that, at the best, the engineer was guilty of concurrent negligence, causing the accident, and dismissed the action without costs.

DIVISIONAL COURT (21 O. W. R. 236; 3 O. W. N. 659), *held*, that the accident was caused by the negligence of the conductor, to whose orders deceased was bound to conform.

Appeal allowed, and judgment entered for plaintiff for \$1,800 and costs.

COURT OF APPEAL restored judgment of trial Judge and dismissed action, costs of appeals to defendants, if demanded.

An appeal by the defendant from a judgment of Divisional Court, 21 O. W. R. 236; 3 O. W. N. 659, reversing a judgment of HON. MR. JUSTICE BRITTON, at trial, dismissing the action; 20 O. W. R. 654; 3 O. W. N. 379.

The action was brought by the plaintiff, the widow and administratrix of Charles Franklin Smith, to recover damages caused by his death under circumstances of alleged negligence while in the employment of the defendant as a locomotive engineer. The accident in which the deceased met his death, occurred about 10.30 p.m., on the 20th July, 1911, at Port Colborne, where the engine on which he was employed was by some one's fault thrown into the Welland Canal, through an open drawbridge, and he was killed.