

FEBRUARY 2ND, 1905.

DIVISIONAL COURT.

CHAMPAGNE v. GRAND TRUNK R. W. CO.

Railway—Injury to Person Crossing Track—Negligence—Failure to Give Warning of Approach of Train—Reasonable Excuse for Omission to Look for Train before Crossing—Question for Jury—Nonsuit Set aside—New Trial.

Action to recover damages for injuries sustained by plaintiff at a highway crossing of defendants.

Plaintiff was driving in a southerly direction, at night, along a road called the Luzon road, which crosses defendants' line at a right angle. The carriage in which he was driving was struck at the crossing by an express train of defendants from the east. Plaintiff was thrown out and injured, and his carriage was damaged.

The action was tried at Sandwich before TEETZEL, J., and a jury.

At the close of plaintiff's case, the trial Judge determined that there was no evidence to submit to the jury, and dismissed the action.

Plaintiff appealed, and his appeal was heard by BOYD, C., STREET, J., IDINGTON, J.

R. C. Clute, K.C., for plaintiff.

W. R. Riddell, K.C., for defendants.

STREET, J.—For the purposes of this appeal we must assume in favour of plaintiff that defendants failed to give the statutory warning, as they approached the highway, by sounding the whistle and ringing the bell of the engine. The evidence shews, however, that for a distance of about 1,000 feet to the east of the crossing there was no obstruction of any kind to hinder the view of a train coming from that direction, as the train in question was.

Plaintiff says that he neither saw nor heard the train approaching until he found himself actually crossing the track, immediately before he was struck, when it was too late to avoid it. He says that the night was so dark that he could not even see the fences at the side of the road, and that he mistook his position in consequence, and supposed that he