

negligence is not necessarily to be attributed to the passenger; but here the whole situation was as much known to the one brother as to the other. Each consented, I think improperly, to take the risk of making this descent in the darkness, and this negligence precludes either from recovering.

The action, therefore, fails, and must be dismissed with costs, if costs are asked.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 17TH, 1913.

MERCANTILE TRUST v. STEEL CO. OF CANADA,
LTD., & GRAND TRUNK R.W. CO.

5 O. W. N. 307.

Negligence—Railway—Operation of Cars on Siding—Negligence of Those in Charge of Cars—Damages—Quantum—Apportionment—Allowance for Maintenance.

MIDDLETON, J., in an action for damages for the death of a foreman employed by the defendant steel company by reason of the operation of cars upon a siding upon the property of such company, found the railway company guilty of negligence in connection with such operation and awarded the plaintiff \$2,500 damages.

Action brought under Lord Campbell's Act by the administrator of Walter Dynski, to recover damages for the death of Dynski on the 14th February, 1913, while engaged in removing ice from the rails of a spur upon the premises of the steel company. Tried at Hamilton, 30th October, 1913.

W. S. McBrayne, and Brandon, for plaintiff.

E. F. B. Johnston, K.C., for steel company.

D. L. McCarthy, K.C., for Grand Trunk R.W. Co.

HON. MR. JUSTICE MIDDLETON:—The line in question is a curved line used for the purpose of bringing cars upon the steel plant to a convenient position for loading and unloading. A gang plank was placed across the track for the purpose of enabling cinders, scrap, etc., to be conveniently moved by men with wheelbarrows. This plank ran from a platform at the works, across the track, to a bank on the opposite side of the tracks, and was from 2 to 3 feet from the rails. It consisted of two 3-inch boards, 1 foot wide and