

4. Was the accident caused by reason of the negligence of any person in the service of the defendants, who had any superintendence intrusted to him, whilst in the exercise of such superintendence? A. Yes.

5. If your answer is "yes," who was the person and what was the negligence? A. (a) Mr. McNaughton; (b) in not carrying out his instructions from the plaintiff in taking the west-bound track, instead of the east-bound track.

6. Was the accident caused by the negligence of any person in the service of the defendants who had the charge or control of any locomotive or engine upon the defendants' railway? A. Yes.

7. If your answer is "yes," who was such person? A. Mr. McNaughton.

8. Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. No.

9. At what sum do you assess the damages? A. Common law, \$4,000; Workmen's Compensation Act, \$2,600.

McNaughton being a fellow workman, the plaintiff cannot recover at common law; but the case comes, I think, within the provisions of both sub-secs. 2 and 5 of sec. 3 of the Workmen's Compensation for Injuries Act.

For the work then in hand, McNaughton was in superintendence over the engineer who controlled the movement of the engine. This brings the case under sub-sec. 2. For the like purpose, McNaughton had charge or control of the points or switch whereby the engine could take the proper track, and also had control (through the engineer, a servant under him) of the engine, which brings the case within sub-sec. 5.

In *Gibbs v. Great Western R.W. Co.*, 11 Q.B.D. 25, affirmed in appeal, 12 Q.B.D. 208, which was an action against a railway company for injury caused by negligence of a man alleged by the plaintiff to have charge of the points of a railway. Field, J., dealing with the section of the English Act which, in its general language, corresponds with sub-sec. 5, says that it "provides that the common master shall be liable for the negligence of the particular persons who have charge, that is, who have the directing hand to carry out the general instructions of the master with respect to the specified things."

On receiving the plaintiff's order, McNaughton proceeded to carry it out. He got on the foot-board of the engine and directed the engineer to move the car easterly. On reaching a certain point, the engine and car stopped in order to proceed westerly when McNaughton turned the switch; but, instead of setting it for the east-bound main line, he made a mistake,