

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N.S.]

[Dec. 13, 1907.]

McMULLEN v. NOVA SCOTIA STEEL & COAL CO.

Negligence—Railways—Breach of statutory duty—Common employment—Employees' Liability Act.

Section 251 of the Railway Act of Nova Scotia provides that when a train is moving reversely in a city, town or village, the company shall station a person on the last car to warn persons standing on or crossing the track, of its approach, and provides a penalty for violation of such provision.

Held, that this enactment is for the protection of servants of the company standing on or crossing the track as well as of other persons.

M. was killed by a train, consisting of one engine and coal car, which was moving reversely in North Sydney. No person was stationed on the last car to give warning of its approach, and owing to frost the bell could not be heard. Evidence was given that on a train of the kind the conductor was supposed to act as brakeman and would have to be on the rear of the coal car to work the brakes, but when the car struck M., who was engaged at the time in keeping the track clear of snow, the conductor was in the cab of the engine.

Held, IDINGTON, J., dissenting, that the evidence was not sufficient to prove a system or rule of the company, by means of which the obligation imposed by section 251 of the Railway Act would be performed by the company; that the negligence therefore, was that of the company and not of its servants; and that the doctrine of common employment could not be invoked.

Held, per IDINGTON, J., that though the negligence was that of a fellow-servant of M., for which the company was not liable under the Fatal Injuries Act, they were guilty of common law