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DIVISIONAL COURT.

GUNNING v. SOUTH WESTERN TRACTION CO.

Railway—Electric Railway—Animal Killed on Track—Electric Railways Act—Ontario Railway Act—Duty to Fence—Passing "along" a Public Highway—Negligence.

Appeal by defendants from judgment of County Court of Elgin in favour of plaintiffs, upon the findings of a jury, for the recovery of $175 for a horse killed by an electric car of defendants upon their line in the township of Southwold, owing to the alleged negligence of defendants in omitting to fence their line.

The appeal was heard by FALCONBRIDGE, C.J., TEETZEL, J., MAGEE, J.

T. H. Luscombe, London, for defendants.

W. K. Cameron, St. Thomas, for plaintiff.

FALCONBRIDGE, C.J.:—The whole case turns on whether there is any obligation on defendants to fence their track at the place in question. It is well settled that the liability of a railway company to fence arises by statute only; there is no common law liability to fence, either as respects the highway or as respects the adjoining properties; see the cases cited in Westbourne Cattle Co. v. Manitoba and North-Western R. W. Co., 6 Man. L. R. 553.

The English railway cases, and those which have been determined on the construction of the Railway Acts of the

Dominion, have, owing to the different wording of the statutes on which they depend, to be regarded with caution, and are not in fact a guide in this case. The obligation, if any, is to be found in the statutes of the province of Ontario.

The Act of incorporation of defendants is the 2 Edw. VII. ch. 96. By sec. 20 thereof the several clauses of the Electric Railways Act and its amendments are incorporated with the special Act. The Electric Railways Act, R. S. O. 1897 ch. 209, sec. 42 (1), . . . sub-secs. 1, 2, and 3, . . . are the same provisions as are contained in the Ontario Railway Act, 1906, sec. 87, sub-secs. 1, 2, and 3. And by 6 Edw. VII. ch. 121, sec. 4, the Ontario Railway Act is to govern wherever the provisions of the special Act and the Railway Act relate to the same subject matter.

It is quite clear that the portion of the railway in question is not "passing along" a public highway. "Along" here means "on" and not "alongside of," or "by the side of:" see several cases decided in different States of the Union and collected in Am. & Eng. Encyc. of Law, 2nd ed., vol. 2, p. 175. The section would be quite insensible if the word had any other meaning.

Even if full and literal effect be not given to the very broad words of sub-sec. (3) in both statutes, it has been found upon competent evidence that the accident was caused by the want of a fence, and defendants are liable, unless they can be exonerated by sec. 87, sub-sec. 6, which does not apply here: or by sec. 238. . . . This section applies where the animals are permitted to be at large within half a mile of the intersection of a highway with a railway, and we are relieved from considering whether the horse was permitted to be at large, by the fact that there is no evidence that it was within half a mile of a railway.

Of course no agreement by land owners with the railway company can have any effect in taking away the plaintiff's rights.

The appeal must be dismissed with costs.

TEETZEL, J., concurred.

MAGEE, J., dissented, for reasons to be stated in writing.

RIDDELL, J. JUNE 27TH, 1907.

WEEKLY COURT.

VILLENEUVE v. CANADIAN PACIFIC R. W. CO.

Railway — Negligence — Death of Servant — Neglect to Keep Bridge in Repair—Fault of Railway Company or Officer—Criminal Responsibility—Suggested Intervention of Attorney-General—Civil Action by Widow of Servant to Recover Damages for Death—Fatal Accidents Act—Consent Judgment—Civil Remedy not Suspended—Approval of Court—Apportionment of Damages.

Motion by plaintiffs for judgment in the terms agreed upon between the parties, and for the approval thereof by the Court on behalf of the infant plaintiffs, and for an apportionment of the sum of $2,318.58 among the plaintiffs, and for payment into Court of the shares of the infant plaintiffs.

The motion was heard at the Ottawa Weekly Court.

E. P. Gleeson, Ottawa, for plaintiffs.

W. H. Curle, Ottawa, for defendants.

RIDDELL, J.:—On the 29th April, 1907, Andrew M. Villeneuve, a railway operative in the employ of the defendants, while upon an engine of that company, was killed. Before me it was admitted by counsel for the defendants that the engine upon which the unfortunate man was, fell through a bridge, owing to the fact that the bridge had been allowed to become deteriorated. Villeneuve was thus killed. The claims agent of the defendants investigated the facts and found that the defendants had no defence to an action at the instance of the widow and step-children of the deceased. Accordingly an agreement was come to that the defendants should pay the sum of $2,318.58, the amount of three years' wages of the deceased. A writ was issued by the widow and her two children, step-children of the deceased; and the case was brought on before me at the Weekly Court at Ottawa, on 22nd June, by way of motion that the plaintiffs be awarded judgment for the sum of $2,318.58, for an apportioning of the amount among the plaintiffs, and for an order for payment into Court of the infants' shares.

Counsel for the defendants appeared and admitted that the defect in the bridge was due to the negligence of some person for whom the defendants were responsible (though he was unable to name the particular persons, the superintendent was suggested by counsel for the plaintiffs), stated that there was no defence, and consented to judgment as asked.

The facts of this case, if correctly stated, disclose a crime.

The Criminal Code, R. S. C. 1906 ch. 146, sec. 284, provides: "Every one is guilty of an indictable offence and liable to two years' imprisonment who by any unlawful act or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily harm to any other person."

In the Supreme Court of Canada, in Union Colliery Co. v. The Queen, 31 S. C. R. 81, the effect of this section was carefully considered and authoritatively settled. The company in that case "in pursuance of their corporate powers, had for a long time been operating a railway . . . by means of locomotives. . . . The road crossed the Trent river by means of a bridge. . . . The company, neglecting to use reasonable care in maintaining the bridge so that it became unsafe, ran a train . . . across it, which train broke through, owing to the rotten state of its timbers, causing the death of six persons then being on the train:" per Sedgewick, J., at pp. 83-84. An indictment was laid against the company by the Crown officers in Victoria, B.C., and the jury convicting, the trial Judge, Walkem, J., imposed a fine of $5,000 upon the defendants. Upon appeal to the full Court in British Columbia, the conviction was affirmed, upon the ground that the section quoted (then sec. 252 of the Criminal Code, 1892), applied to a corporation, that an indictment rightly lay against the defendants on the facts, and that, as the corporation could not be imprisoned, a fine was rightly imposed. The case in the Supreme Court of British Columbia is reported in 3 Can. Crim. Cas. 523. The matter was then taken to the Supreme Court of Canada, and the learned Judges in that Court consider the questions raised, and in doing so cite from former cases in England. The result is stated by Mr. Justice Sedgewick, p. 84: "It has long been settled that they (i.e., corporations) are liable for indictment for nonfeasance, or for negligence in the performance of a legal duty. It was not till 1846 that their

liability for misfeasance or active negligence was determined to be subject to like proceeding." Page 86: "It is manifest that a corporation can render itself amenable to the criminal law for acts resulting in damage to numbers of people, or which are invasions of the rights or privileges of the public at large, or detrimental to the general well-being or interests of the state. . . . A public franchise was granted to the defendants to maintain and operate a railway between two certain points. . . . Having once accepted and acted upon it, they were under an obligation to exercise proper care and diligence in the performance of their corporate powers. Holding themselves out . . . as public carriers, they were bound to carry their passengers safely. . . . They were equally bound to see to the safety and protection of their employees. Whether the persons alleged in the indictment to have been killed were employees or passengers does not appear, but whether passengers or employees, the company defendants were under an equal obligation to both, and the offence committed was an offence not so much against individual right or against people in their private capacities, as against the public at large, and therefore, in the public interest, indictable." And at p. 88: "The defendants have in their charge and under their control, and they maintain, a railway the running and operation of which without precaution or care must necessarily involve danger to human life. They were therefore under a legal duty to take precautions against such danger. They disregarded this duty. The anticipated event occurred, and they are criminally responsible for it." Page 90: "It is possible that the facts alleged in the indictment would be sufficient to sustain an indictment for manslaughter against an individual, but the offence alleged here is not manslaughter; it is criminal negligence in the discharge of duty."

I have quoted thus largely from this case because it is exactly in point. Here the defendants maintain a railway, they have a bridge, it is their duty to so maintain it that an engine will not fall through; they disregard that duty; the anticipated event happened (that such an event was to be anticipated is manifest—it is notorious that but the other day a similar occurrence took place in a city in Ontario, fortunately without loss of life)—"they are criminally responsible for it"—and it makes no difference that the unfortunate victim was an employee. No doubt, also, in this

case, there may be some one person—perhaps more than one—who is guilty of personal negligence, and therefore equally liable to an indictment—and for manslaughter.

Were then the law in the condition in which until very recently it was believed by many to be, this might prevent my approval of the proposed settlement. It has long been considered "established as the law . . . that where an injury amounts to the infringement of the civil rights of an individual and at the same time to a felonious wrong, the civil remedy, that is, the right of redress by action, is suspended until the party inflicting the injury has been prosecuted:" per Cockburn, C.J., in Wells v. Abrahams, L. R. 7 Q. B. at p. 557; and this was considered "a very wholesome rule, tending to prevent the composition of felonies under pretence of seeking remedy by action." As is said elsewhere: "The policy of the law requires that before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offence:" per Lord Ellenborough, C.J., Crosby v. Leng, 12 East 413.

So far was this rule carried that in some cases, upon it appearing at the trial that a felony had been committed in respect of the subject matter of the action, the trial Judge nonsuited the plaintiff, as in Wellock v. Constantine, 2 H. & C. 146; or, if he refused to enter a nonsuit, a nonsuit was ordered by the full Court, as in Livingston v. Massey, 23 U. C. R. 156. See also Topence v. Martin, 38 U. C. R. 411; Reid v. Kennedy, 21 Gr. 86; McDonald v. Ketchum, 7 C. P. 485; Williams v. Robinson, 20 C. P. 255.

And in our Courts, so late as 1885, in Taylor v. McCullough, 8 O. R. 309, it appearing that a prosecution had been brought against the defendant criminally, a civil action for the same cause was stayed until the criminal charge was disposed of.

But exceptions were found to the rule, as, e.g., it was held in Regina v. Reiffenstein, 5 P. R. 175, that the rule had no application to a case to which the Crown is a party.

As regards the existence of the rule, there does not seem to be any doubt, but the enforcement of it is a different question; and this has been the subject of judicial decisions binding upon me. In Wells v. Abrahams, L. R. 7 Q. B. 554,

the matter came squarely up. The plaintiff endeavoured to obtain a loan upon the security of some jewelry. Upon the loan being refused, a package alleged by the defendant to contain this jewelry was handed back, and upon this being opened a few days afterwards part of the jewelry was found to be missing. An action brought resulted in a verdict for the plaintiff. A new trial was moved on the ground (amongst others) that the evidence tended to disclose a felony. The Court, however, held that though there was ample authority for the existence of the rule spoken of, the trial Judge was bound to try the issues on the record, and that he was right in not having nonsuited the plaintiff. The authority of this case has never been questioned.

While the present motion is not a trial, I think I am bound to give effect to the decision just cited, as though the matter came before me at nisi prius. Whether the rule can be applied in a case under Lord Campbell's Act, or where the crime is not called a felony (now that the distinction between a felony and misdemeanour is abolished); and whether the fact that a servant of the defendants is or may be guilty of manslaughter, and, therefore, a "felony" in fact has been committed, though not by the defendants, should cause the rule to apply, are all questions interesting in themselves which I need not here consider.

The settlement, therefore, is approved.

It being the duty of the Crown, if so advised, to prosecute for crimes, "offences against the public at large," as this kind of offence has been held to be, by the Supreme Court, a copy of this part of my judgment will be sent to the Attorney-General for such action against the company or any employee or officer thereof as may be considered justified by the facts.

The accident, it is said, took place at Fire Hill, Nipissing (north of Lake Superior).

As to the apportionment, the stepson, a young man of 18 years of age, generously asks that the share to which he might be entitled be given to his mother and sister. He is still under age, and I think it better that he shall have the gratification of personally handing some of the money to them upon his attaining full age; and shall not, therefore, now award the whole sum to the mother and sister.

I think the widow should receive a very substantial part of the amount.

The division will be as follows:—

To the plaintiff Susan M. Villeneuve	$1,250 00
Lavan Ferguson	318 58
Mary Ferguson	750 00
In all	$2,318 58

The infants' shares will be paid into Court.

The defendants also are to pay to the plaintiffs' solicitors the sum of $130 for costs, out of which are to be paid the costs of the official guardian of appearing upon this motion.

A sum of $100 per annum will be paid out (with the privity of the official guardian) to the widow for the education and support of Mary Ferguson, such sum to be paid out of the sum to which Mary Ferguson is entitled, and the payments to be for 4 years.

Note.—Counsel for the defendants, after this judgment had been delivered, appeared before RIDDELL, J., and stated that he had not intended to admit more than that the cause of the accident was a "defect in the condition of the ways, works," etc., of the defendants, for which they were liable under the Workmen's Compensation for Injuries Act.

Of this RIDDELL, J., forthwith notified the Attorney-General.

JUNE 28TH, 1907.

C.A.

GREEN v. GEORGE.

Judgment—Issue as to Validity of Default Judgment—Motion to Set aside Judgment after 15 Years—Service of Writ of Summons—"Signing Judgment"—Sufficiency—Form of Judgment—Special Indorsement of Writ—Price of Goods Sold—Stated Account—Interest—Nullity of—Irregularity—Setting aside Judgment—Terms.

Appeal by plaintiff from order of a Divisional Court, 8 O. W. R. 787, 13 O. L. R. 189, affirming judgment of BRITTON, J., 8 O. W. R. 247.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

C. Millar and C. McCrea, Sudbury, for plaintiff.

C. A. Moss, for defendant.

OSLER, J.A.:—This was an issue directed by the Master in Chambers on an application made by the defendant on 17th March, 1906, to set aside a judgment entered on the 6th October, 1890, in an action brought against him by one William George, since deceased, and now revived and continued in the name of George's widow and administratrix. The question in the issue was whether the defendant in that action, the plaintiff in the issue and hereafter referred to as the plaintiff, was entitled to have the judgment set aside and vacated. At the trial the plaintiff failed on all the grounds specified in the notice of motion and in the order directing the issue as grounds for vacating the judgment. He was found to have been duly served with the writ in the action; no misrepresentation as to the service was proved; the judgment was signed and entered in fact by the proper officer in compliance with the Rules in that behalf; and as regards the merits of the defence to the action, the trial Judge held that the agreement relied upon had not been proved. No fault can be found, in my opinion, with the judgment at the trial, or with the judgment of the Divisional Court affirming it, in any of these particulars.

But at the trial the plaintiff took the further objection that the writ in the action had not been specially indorsed so as to entitle his opponent to sign judgment on default of appearance under Rule 245 of the Consolidated Rules of 1888. This ground was not specified in the notice of motion, nor in the order directing the issue. If the judgment is a mere nullity by reason of the alleged defect in the indorsement, it may be that the ground is covered by the general objection "on other grounds appearing in the plaintiff's affidavit and the exhibits therein referred to." But if the objection can be put on no higher ground than that of irregularity, the plaintiff ought not to have been permitted to raise it at the trial, in the face of Rules 311 and 362, the first of which provides that an application to set aside proceedings for irregularity shall be made within a reasonable time, and the second, that a no-

tice of motion to set aside proceedings for irregularity shall specify clearly the irregularities intended to be complained of, and the several objections intended to be insisted on.

I do not think that the judgment was a nullity. One of the claims indorsed upon the writ, namely, the claim for balance due to the plaintiff on account for goods sold and delivered, rendered to the defendant and admitted by him to be correct—in short, for an amount due upon an account stated—was properly the subject of a special indorsement; the other claim was a charge or claim for interest, which, not being shewn or stated to be payable under contract or by statute, was merely an unliquidated claim for damages in the nature of interest, and therefore recoverable only as damages. The case was thus one within the exact terms of Rule 711 of the Rules which came into force on the 1st September, 1888, in which the writ was specially indorsed for a liquidated claim and for damages, and in which, on non-appearance, the plaintiff in the action was entitled to enter final judgment for the former and interlocutory judgment for the latter. Instead of doing so, however, he entered judgment for the whole, not only for the debt, but also for the sum claimed as interest thereon. Such a judgment, had it been attacked within a reasonable time, might, in my opinion, have been amended, inasmuch as one part of the claim was properly the subject of a special indorsement, and, therefore, of a final judgment on non-appearance, and the only fault to be found with it was that it was signed for too much. The plaintiff was not bound, that I know of, to have signed interlocutory judgment for or to have pursued the residue of his claim. His omission to do that could not have affected a judgment properly signed for the debt for which the writ was rightly specially indorsed.

The effect of Rule 711 is concisely stated by Street, J., in Hollender v. Ffoulkes, 16 P. R. 175, and it was fully considered by this Court in Solmes v. Stafford, ib. pp. 264, 270, 271. In both cases the difference between a judgment on default of appearance, to which the Rule did apply, and a motion for summary judgment after appearance, under Rule 739, to which it did not, is pointed out. I have found no case by which we are bound—I may say no case—decided while Rule 711 was in force, which would compel us to hold that such a judgment as was here entered was a nullity, and therefore not amendable. Conceding that it was irregular,

and no doubt it was, the plaintiff was, nevertheless, in my opinion, precluded by one if not both of the Rules 311 and 362, above referred to, from taking the objection at the trial, and not less so because he did not rely upon objections of irregularity alone, but tried out the merits of his alleged defence. And if the learned trial Judge, and the Divisional Court, under the circumstances entertained the objection for the purpose of giving the plaintiff a further opportunity of setting up in the action a defence already found against him, I think that they were at liberty to impose and that they properly imposed the reasonable terms which the defendant has now twice refused. I would dismiss the appeal with costs, or if it be thought right again to give the plaintiff a locus pœnitentiæ, he should pay the costs below and of this appeal.

MOSS, C.J.O., GARROW, and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissented, for reasons stated in writing.

JUNE 28TH, 1907.

C.A.

HAMILTON STEAMBOAT CO. v. MACKAY.

Water and Watercourses—Navigable Waters—Hamilton Bay—Deed—Grant of Wharf on One Side of Slip—Derogation from Grant—Use of Slip so as to Prevent Access to Wharf—Evidence of Mode of User at Time of Grant—Admissibility—Injunction.

Appeal by defendants from judgment of MABEE, J., 7 O. W. R. 465.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

W. Nesbitt, K.C., and J G. Gauld, Hamilton, for defendants.

G. F. Shepley, K.C., and E. H. Ambrose, Hamilton, for plaintiffs.

Moss, C.J.O.:—The plaintiffs' claim is for an injunction restraining the defendants from obstructing the plaintiffs in mooring their steamboats at their landing place on the westerly side of wharf premises owned by the plaintiffs, situate on the east side of the line of James street produced into the waters of Hamilton Bay; and also restraining the defendants from mooring or permitting to be moored vessels on the easterly side of wharf premises owned by them, and situate on the west side of the line of James street produced, thereby obstructing, as it is alleged, the access of the plaintiffs' steamboats to their landing place at the plaintiffs' wharf premises.

The plaintiffs found their claim upon a conveyance dated 29th November, 1888, made in pursuance of the Act respecting short forms of conveyance, by the defendants to the plaintiffs. Prior to the making of this conveyance, the defendants were the owners of certain parcels of land on James street, a public highway in the city of Hamilton, and of portions of certain water lots in front thereof and extending into Hamilton Bay, the waters of which are navigable.

The defendants' parcels of land and water lots were situate upon each side of the line of James street produced, and they had constructed on each side wharves which they used in their business as wharfingers, forwarders, and carriers of freight and passengers.

In the year 1887 the plaintiffs and defendants entered into an agreement whereby the defendants agreed to furnish suitable accommodation at their wharves at the foot of James street for three steamboats owned or leased by the plaintiffs, and running from the wharves to points on Hamilton Bay and Lake Ontario; and they also agreed, so far as they could, to give no other person or company, firm or steamboat, the right to use any of their said wharves for the purpose of steamboats running on Hamilton Bay and Lake Ontario, for excursion or regular passenger-boat business; but if obliged to do so, would make charge against such company or steamboat, and account for one-half to the plaintiffs. There are also provisions in the agreement for regulating the user of the wharves, for the payment of a rental and other charges, and for the duration of the arrangement for 3 or 5 years as expressed in the agreement.

During the season of 1888 the plaintiffs and defendants used the wharves under the terms of the agreement, but as

a general thing the plaintiffs used the wharf on the east side of James street for the landing of passengers and freight from their steamboats, though there was nothing to that effect expressed in the agreement.

Upon the execution of the conveyance of 29th November, 1888, the agreement was treated by all parties as at an end. No further rent or other charges were paid under it, and the term mentioned in it came to an end on 1st May, 1890.

Contemporaneously with the making of the conveyance to the plaintiffs, an agreement was entered into between the plaintiffs and the defendants, bearing the same date, whereby, after reciting that the defendants own the wharf property on the west side on which they are carrying on business as wharfingers, carriers of freight and passengers, and coal-dealers, and the plaintiffs are the owners of the wharf on the east side of James street, described in the conveyance bearing even date with the agreement, and are engaged in business as carriers of passengers and freight between Hamilton and Toronto, Hamilton and Niagara, and the owners of certain steamboats used for the said purposes, and that the defendants are also owners of other wharf property mentioned in the agreement, and that it had been agreed between the parties, for the better protection and promotion of their interests, to enter into the conveyance and agreements thereinafter set forth, the parties mutually covenanted and agreed with each other that for 20 years the defendants should not transact at any of their wharves any passenger business between Hamilton and Toronto, or Hamilton and Niagara or Lewiston, or intermediate ports, or would not allow any vessels belonging to others to call at, touch, or transact any such business at, any of their wharves. Then follows a proviso that the defendants shall be at liberty to transact and permit others to transact through-passenger business at their said wharves between Hamilton and all points except Toronto and Niagara and intermediate points; and to transact their freight and other business with any other company, free from all control or interference of the plaintiffs.

During the season of 1888 the steamboats which the plaintiffs used in their business of carrying passengers from Hamilton to Toronto and Niagara, and intermediate points, were the Macassa and Modjeska. During the same time the

defendants were operating a certain number of steamboats in passenger and freight trade between Hamilton and points on the lakes other than Toronto and Niagara; and it appears that during that year, and for some years after, the steamboats used by the defendants were of such beam as not to interfere, when lying at the defendants' wharf on the west side of James street, with the plaintiffs' steamboats lying at their wharf on the east side of James street. Within recent years, however, the defendants have become the owners of a number of steamboats of greater beam, and the effect is that when they are lying at defendants' wharf on the west side of James street, there is no room in the slip between plaintiffs' and defendants' wharves for either of plaintiffs' steamboats to come in and lie at plaintiffs' wharf on the east side of James street.

The plaintiffs' contention is, as expressed in the statement of claim, that the grant by the defendants to the plaintiffs of the lands and water lots described in the conveyance of 29th November, 1888, was upon an implied condition that the defendants should not derogate from the purposes of their grant by interfering with the plaintiffs in their enjoyment of their premises by taking their vessels into the slip at all times without any hindrance or prevention on the part of the defendants by reason of their steamboats lying or being tied up at the defendants' wharf on the west side. The plaintiffs do not claim, in fact they disclaim, any case of unreasonable user by the defendants of the slip between the wharves. Their claim is of a right founded on the grant.

The trial Judge held that the plaintiffs were entitled, upon the terms of the conveyance, to use the waters of the slip as an approach to their wharf in the manner and to the same extent as they were used by them under the former agreement, and as they used the waters at the time of the sale by the defendants to the plaintiffs of the premises.

The judgment perpetually restrains the defendants from using, or permitting to be used, the waters of the slip lying between the wharf premises of the plaintiffs and those of the defendants respectively, in any manner that will prejudicially interfere with the user by the plaintiffs of the waters of the slip as an approach to their wharf premises on the westerly side of the slip, by the steamboats Macassa

and Modjeska, or by any other steamboat of no greater size that may be substituted for either of them.

The whole question, therefore, turns on the effect of the conveyance, having regard to all the facts and circumstances of the case at the time when it was made.

There was evidence at the trial that during the negotiations which culminated in the conveyance and agreement of 29th November, 1888, the plaintiffs were desirous of obtaining from the defendants an express right to the exclusive use of the slip for their steamboats at all times when they desired or required its use for that purpose; but the defendants refused to agree to that, giving as a reason the enlargment of the Welland canal which was in progress at the time and was nearing completion; and that the defendants were looking forward to building or acquiring larger steamboats as the trade increased, and would need the use of the slip for them. The plaintiffs were fully aware of the position taken by the defendants and their reasons for it.

Throughout this action the plaintiffs seem to have been under an erroneous impression as to the rights of the parties in respect of the waters of the slip; and the formal judgment seems to have been drawn up under the same impression. It is scarcely necessary to say that the waters of the slip being navigable waters neither party has any proprietary right therein. Their rights therein are no greater than those of the rest of the public. They are entitled to access to and from their abutting properties to the waters of the slip, and being upon them they are entitled, together with the rest of the public, to make a reasonable use of them for their business or pleasure, but they have no right to use them to the exclusion of others of the public, or to make any unreasonable user as against one another. Their proprietary rights are in respect only of their wharves and premises adjoining the slip, and of these they can make such exclusive use as they see fit, or as their business justifies when carried on in a legal way.

The plaintiffs, however, contend that by reason of the conveyance to them made under the circumstances already stated, they are entitled to control the defendants' use of their premises in a manner not ordinarily exercisable by a proprietor of one parcel of land over that of another. Their claim, though it has not been awarded to them in precisely the terms asked, is that the defendants are ob-

liged to make use of their premises for their business in subordination to the use made by the plaintiffs of their premises for the purposes of their business.

It is trite law that the grantor is not permitted to derogate from his own grant. But that rule does not confer upon a grantee a right to insist upon his grantor limiting the use of premises retained by him to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant to the knowledge of the grantee.

The claim as made and allowed in this case certainly seems to extend very far the rule of implied grant or obligation not to derogate from a grant, and even if there was nothing in the circumstances existing at the time and in the actions of the parties connected with the making of the conveyance and contemporaneous agreement, it would be matter for consideration whether there should be imported into an ordinary conveyance under the Act respecting short forms of conveyances and such far-reaching effect. The language of sec. 12 of R. S. O. ch. 119 does not appear to lend assistance to the plaintiffs' contention. None of the words there used seems applicable to the right which is claimed under the conveyance in question. The language of the conveyance may properly pass easements and privileges legally appendant and appurtenant to the property conveyed. But it cannot be contended that the temporary right which existed solely under the agreement of 28th December, 1887, came within the character of an easement or privilege legally appendant or appurtenant to the property. Certainly no special right or easement or privilege in respect of the use of the navigable waters of the slip was appendant or appurtenant to the property. The conveyance does not even purport to grant eo nomine the pier or dock, nor is there any mention made of it. There is simply a grant of a parcel of land and of portions of three water lots, forming one parcel described by metes and bounds. Does such a grant carry with it an implied obligation on the part of the defendants to conduct their business in such manner as to ensure to the plaintiffs, so far as the defendants are concerned, the use of the slip for the purposes of their two steamboats at all times when they require it? In dealing with this question the whole facts and circumstances must be taken into consideration, including the plaintiffs' knowledge of

the defendants' intentions as to the use of the retained property in the future. The provision in the contemporaneous agreement giving to the defendants the liberty to transact and permit others to transact through passenger business at their wharves between Hamilton and all points except Toronto and Niagara, and intermediate points, and to transact their freight and other business free from all control and interference of the plaintiffs, is important. It shews the plaintiffs' knowledge of the defendants' intention to make use of their wharves to the fullest extent, except so far as passenger business between Toronto and Niagara and intermediate points is concerned. Subject to the exception, they were, upon the language of the instrument, at liberty to carry on their business with such vessels as they required, without limitation as to size or tonnage.

In thus dealing, the parties had in mind, no doubt, what would be reasonably apparent to any persons engaged in the business in which they were engaged—that probably in the near future, owing to the enlargement of the canals, larger vessels would be put in commission for through trade on the upper lakes. Both parties must be considered as knowing that their right to use the navigable waters in the slip was publici juris. There is nothing in what took place to shew that the defendants intended or that the plaintiffs believed that the defendants intended to prosecute their business otherwise than according to the best methods, including the acquisition and use of improved freight and passenger steamboats according as the advance of trade called for improvement in that direction. There is, on the contrary, much to shew that the plaintiffs understood that it was the intention of the defendants to so carry on their business. If there was nothing else there is the proviso in the contemporaneous agreement which goes far to displace the idea of an intended restricted use by the defendants of the retained premises. This, coupled with the admission of the plaintiffs' witness who was concerned in the negotiations and dealings between the parties, shews the plaintiffs' knowledge and understanding of the defendants' intentions. And with that knowledge and understanding they accept the conveyance. That being so, there is no good ground for the contention that any implied obligation of the kind now insisted on arose upon the conveyance by the defendants of the premises which the plaintiffs now own and are making use of for their business.

If the rights of the parties to the use of the slip are to be dealt with, it must be by ascertaining whether there is any unreasonable use by either party of the waters forming a public highway between their respective properties. That question the plaintiffs did not enter upon and were not willing to enter upon at the trial, resting their case entirely upon their rights under the conveyance.

As these rights do not carry the absolute rights which the judgment has granted in this case, the appeal must be allowed, and the plaintiffs' action be dismissed with costs.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

JUNE 28TH, 1907.

C.A.

HARRIS v. LONDON STREET R. W. CO.

Negligence—Street Railways—Injury to Motorman—Collision with Another Car — Failure of Motive Power — Stranded Car—Neglect to Signal Approaching Car—Disobedience of Rules by Injured Motorman—Actual Cause of Injury—Contributory Negligence—Finding of Jury.

Appeal by defendants from judgment of MEREDITH, C.J., in favour of plaintiff, upon the findings of a jury, in an action for damages for personal injuries.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

I. F. Hellmuth, K.C., for defendants.

G. T. Blackstock, K.C., for plaintiff.

OSLER, J.A.:—The plaintiff was a motorman in charge of a car running upon the defendants' line of railway, and on the night of 23rd August, 1906, met with the injuries, the subject of the action, in a collision between that car

and another car of the defendants, which had preceded it on the same track, and which had been stalled or "stranded" there in consequence of the stoppage or failure of the motive power. The negligence charged and relied upon was the omission of the defendants, or their servants in charge of the first car, to notify or warn those in charge of the car following it of the danger which might be caused by the stoppage of the former.

The facts are simple. It may be conceded that there was evidence for the jury of negligence on the part of the men in charge of the first car, in failing to signal the following car of its situation, but the important question in the case is whether the plaintiff's own neglect in disobeying a clear and positive rule applicable to the condition in which he found himself, was not the cause of the collision, rather than the omission of the motorman or conductor of the other car to warn him.

That rule, with which the plaintiff was perfectly familiar, was one of a "code of rules for the government of conductors and motormen" of the company, and provides: "Rule 212. Power off line. When the power leaves the line, the controller must be shut off, the overhead switch thrown, and the car brought to a stop. The light switch must then be turned on, and the car started only when the lights burn brightly."

The accident happened about 9.30 on the evening in question. At this time the first car had been stationary for some 10 or 15 minutes. It was about 300 feet west of a place on the overhead wires where there was what is called a circuit breaker. From that point west the power was off, and of course the lights out along the line, by reason, as it seemed, of a broken wire. Whether it was off at the time that car passed the circuit-breaker, and the car had rolled along from thence to the place where it was standing, or whether it went off after the car passed the circuit-breaker, is unknown. The power had been weak and intermittent for some little time before the plaintiff's car arrived at the place referred to, but there, according to the plaintiff's own evidence, the power went off and the lights went out. He did act upon the rule so far as to shut off the controller, and thus prevent the action of the power upon the car on its return to the line, until he opened the controller, but, instead of bringing the car to a stop by applying the brakes, he allowed it to roll on by the momentum it had acquired

on its journey, until it was stopped by collision with the stationary car in front of it. He said that he could have brought the car to a stop by the application of brakes, had he seen the other car, and the evidence admits of no doubt that at the rate he was going and within the distance at which that car was from the circuit-breaker, he could easily have done so.

Under these circumstances, it appears to me that there is no escape from the conclusion that plaintiff was the author of his own injury, and that there was nothing to justify the finding of the jury, in answer to the 4th question, that his negligence and breach of duty did not cause or so contribute to the accident, that but for such neglect or breach of duty, it would not have happened. The rule was made to provide for the exact situation, and for the obvious purpose of preventing accidents, either to the property of the defendants or the persons of their servants, from a car continuing in motion when the power left the line. It was a plain and sure guide for the plaintiff. His duty was to bring the car to a stop, not to reason about possibility of the power soon returning to the line or the lights soon beginning to burn. Had he acted in compliance with the strict requirements of the rule, there would have been no collision, and, that being so, the appeal must be allowed and the action dismissed with costs, if the defendants ask for them.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.