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*May 25-27.
*June 15.

KATE FRALICK (PLAINTIFF).....APPELLANT;

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway—Accident—Negligence—Railway rules—Special instructions—Defective system—Common law negligence—Workmen's Compensation Act.

The "Railway Act" prescribes that rules and regulations for travelling upon and the use or working of a railway must be approved by the Governor-General in Council and that, until so approved, such rules and regulations shall have no force or effect; when approved they are binding on all persons. Rule 2 of the rules of the Grand Trunk Railway Co. provides that "In addition to these rules, the time-tables will contain special instructions, as the same may be found necessary. Special instructions, not in conflict with these rules, which may be given by proper authority, whether upon the time-tables or otherwise, shall be fully observed while in force." Trains running out of Brantford, Ont., are under control of the train-despatcher at London. The railway time-table has for many years contained the following foot-note:—

"Tilsonburg Branch.—Yard-engines at Brantford are allowed to push freight trains up the Mount Vernon grade and return to Brantford B. & T. station without special orders from the train-despatcher. Yard-foreman in charge of yard-engine will be held responsible for protecting the return of the yard-engine, and for knowing such engine has returned before allowing a train or engine to follow.—A. J. Nixon, Assistant Superintendent."

This regulation or instruction had not then been submitted for the approval of the Governor-General in Council.

By Rule 224 "all messages or orders respecting the movement of trains * * * must be in writing."

Held, Davies J. dissenting, that assuming the foot-note on the time-table to be a "special instruction" under Rule 2, it is inconsistent with the train-despatching system in force at Brantford and if,

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*PRESENT:—Girouard, Davies, Idington, Duff and Anglin JJ.

as the evidence indicates, it purports to authorize the sending out of engines under verbal orders to push freight trains up the grade it is also inconsistent with Rule 224. Such instruction has, therefore, no legal operation.

Held, per Girouard and Anglin JJ., that it was not a "special instruction" but a regulation, and not having been sanctioned by order in council operation under it was illegal.

By "The Railway Act" a "train" includes any engine or locomotive. Rule 198 provides that it "includes an engine in service with or without cars equipped with signals."

Held, per Girouard, Idington and Anglin JJ., that an engine returning to the yard after pushing a train up the grade, is a "train" subject to the provisions of Rule 224, and to the rules of the train-despatching system.

The accident in this case occurred through the yard-foreman failing to protect the engine on its return to the yard.

Held, Davies J. dissenting, that the company operated the yard-engines under an illegal system and were liable to common law damages and that sub-section 2 of section 427 of the "Railway Act" applied.

Held, per Duff J., that since, as regards the danger of collision with trains stopping at Brantford for orders, the system of operating the yard-engines through the telegraphic despatchers would clearly have afforded greater protection than that in use, and since there was admittedly no impediment in the way of adopting the former system, there was evidence for the jury of want of care in not adopting the safer system; and the fact that the existing system had been in operation for 25 years was evidence from which the jury might infer that the general governing body of the company was aware of it. And further, following *Smith* v. *Baker* ((1891) A.C. 325), and *Ainslie Mining and Railway Co.* v. *McDougall* (42 Can. S.C.R. 420), that, in these circumstances, the company was responsible for the defects in the system.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial awarding the plaintiff damages under the "Workmen's Compensation Act" and refusing her common law damages.

The material facts are set out in the above headnote.

Gibbons K.C. and *G. S. Gibbons* for the appellant.

D. L. McCarthy K.C. for the respondents.

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Davies J.

GIROUARD J.—I agree in the opinion stated by Mr. Justice Anglin.

DAVIES J. (dissenting).—As far as this court is concerned our late judgment in *Ainslie Mining and Railway Co.* v. *McDougall*(1), lays down the law binding upon us that, as between master and servant, the duty of the former to

> provide, in the first instance at least, fit and proper places for the workmen to work in, and a fit and proper system and suitable materials under and with which to work

is one which cannot be got rid of by delegating its discharge to others, and as to which the doctrine of common employment cannot be invoked. I am, therefore, quite prepared to accept the argument of Mr. Gibbons, for the appellant, that if there was sufficient evidence to justify the jury in finding that the death of Fralick, the engine driver, was caused by a defective system in respect of the operation of the defendant company's trains on the Mount Vernon grade not authorized by the rules sanctioned and approved by the Governor in Council the doctrine of common employment could not be invoked by the company to enable them to escape a liability for which they would but for the application of such doctrine be liable.

During the course of the argument before us a very important question was raised as to the *legality* of this system which the company had inaugurated some twenty-five years before the accident, and continued down to the present time, of permitting the yard-engine at Brantford under the special circumstances and conditions which existed at this particular spot to push freight trains up the Mount Vernon grade and

(1) 42 Can. S.C.R. 420.

return to Brantford B. & T. station *without special orders from the train-despatcher.* That departure from the general system prescribed by the rules seems to have been accepted in the courts below as at any rate not illegal or in conflict with the general rules, the only question raised being whether it was or was not in itself a defective system.

The jury found it was defective, exposing the employees to unnecessary danger for the reason that when away from the yard it was not and should have been *under the control of the train-despatcher.* They further found that the adoption and use of the system was due to the negligence of Superintendent Gillan and yard-master McGuire, and that the collision which caused the death of the engineer, Fralick, was due to McGuire allowing the "engine to leave the yard without protection," and that the accident would have been prevented if the defects in the system had not existed.

The defendant company contended that the system in operation at the place in question was established under an instruction printed on the employee's time-table and authorized by Rule 2 of the general rules and regulations; that the uncontradicted evidence shewed it to be a good system affording adequate protection; that it had been in force and observed at all necessary times for some twenty-five years without any accident resulting from it; that it was not in conflict with the other general rules, and that, as found by the jury, it was McGuire's negligence in not protecting the return of the engine as the instructions required him to do, which caused the death of the deceased engineer.

The situation at the place where the accident occurred, as I gather it from the factums and plans and

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the statements of counsel, was somewhat peculiar, but the facts relating to it were not in dispute.

The Buffalo and Goderich lines of the Grand Trunk Railway, and the main line to Sarnia tunnel, pass through the City of Brantford. At right angles to these two main lines and running underneath them is the line to Tilsonburg, and, in order to get to the Tilsonburg line, the trains or engines have to go down a steep grade, and by means of a sharp curve switch on to the Tilsonburg branch by means of an under-pass. About seven or eight miles out of Brantford on the Tilsonburg branch is a steep grade known as the Mount Vernon grade, and it frequently happens when freight trains are very heavy on this branch that the yard-engine at Brantford has to assist in pushing trains up this grade. When the yard-engine is required for this purpose the yard-foreman in charge of the engine is required to remain either in the yard, or station on the Tilsonburg branch, or at one of the switches leading down the grade to the Tilsonburg branch to see that no train follows on that branch until his engine has returned from pushing the train up the Mount Vernon grade. The rule in the "employees' time-table" governing this and what is put in as exhibit at the trial, is as follows:

> Yard-engines at Brantford are allowed to push freight trains up the Mount Vernon grade and return to Brantford B. & T. station, without special orders from the train-despatcher. Yard-foreman in charge of yard-engine will be held responsible for protecting the return of yard-engine, and for knowing such engine has returned before allowing a train or engine to follow.

On the morning of the accident the yard-engine at Brantford was in charge of yard-foreman or conductor McGuire, the engine was required to be used as a pusher up the Mount Vernon grade, and the yard-fore-

man saw the engine placed at the rear of the train preparatory to starting. After leaving his engine on the Tilsonburg branch, McGuire came up the main line and jumped on a train that was pulling into the Brantford station on the Buffalo and Goderich line, instead of remaining at the switch to protect his engine from any trains that might follow. While doing this he failed to notice a train on the other side of the train on which he had ridden into the station and which was going up the Tilsonburg branch, and, owing to his neglect allowed that train to pass the switch down the Tilsonburg branch, where he should properly have stationed himself to protect his engine until its return, the result being that this engine, in returning, collided with the train which he should have stopped at the switch, and the engineer, Fralick, was killed.

The defendant company tendered a large mass of experienced railway men to testify with respect to the adequacy of the system provided on this Tilsonburg branch. After a number of these had been examined the trial judge thought it unnecessary to call further witnesses of the same class. The substance of the evidence given by these railway experts was to the effect that similar systems to that provided for by the instruction at Tilsonburg prevailed on the railways with which they were connected; that it was a good, safe system providing adequate protection and in throwing the responsibility upon one competent man had advantages over systems which divided the responsibility between the train-despatcher and others. No evidence was given to the contrary unless that of element is so considered. His evidence, however, was simply to the effect that yard-engines were controlled in other parts of the defendants' system by

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train-despatchers, and that this particular yard-engine could have been so controlled while and when it was used as a pusher on the Mount Vernon grade. He, however, did not venture to say that the existing system was defective or that a double protection of train-despatcher and yardman, involving divided responsibility, would be a better system.

The trial judge directed judgment to be entered for the plaintiff for the $3,300 awarded under the "Workmen's Compensation Act" and dismissed the action at common law. The Court of Appeal confirmed his judgment on appeal by the plaintiff on the ground that there was no evidence to justify the jury in finding the system a defective one. Both courts proceeded on the assumption, which apparently was not challenged, that the instruction or rule on the time-table making the yard-foreman responsible for protecting the return of the engine when pushing trains up the Mount Vernon grade and return, without special orders from the train-despatcher and for knowing such engine had returned before allowing a train or engine to follow, was legal in the sense that the company had power to make it and was not inconsistent with the general rules. The only question argued in the courts below with regard to the instruction, as I gather, was whether it inaugurated and sanctioned a defective system of regulating the trains or not.

If I had to give my opinion upon the question whether or not the evidence justified the jury's finding of a defective system I should answer "No, it did not," and my judgment would be to maintain that of the trial judge and the Court of Appeal on the appeal to this court. However, a new question was raised and the legality of this instruction was for the first time

directly challenged as being in conflict with the general rules which had been approved by the Governor in Council, and were by statute made binding upon all parties. Rule 2 of the "General Rules" under which Mr. McCarthy endeavoured to support the validity of the instruction reads as follows:

> In addition to these rules the time-tables will contain instructions as the same may be found necessary. Special instructions, not in conflict with these rules, which may be given by proper authority, whether upon the time-tables or otherwise, shall be fully observed while in force.

If the instruction in question can be deemed to be a "special instruction, not in conflict with the rules," then the question whether or not the evidence justified the finding of the jury that the system it provided for was defective would necessarily have to be determined on this appeal.

If the instruction, however, is determined to be "in conflict with the rules" then, it appears to me, that the question whether it authorized or created a good or bad system is irrelevant and that it offers no defence to the action. See section 311 of the "Railway Act."

If the "control of the train-despatcher" over the yard-engine when engaged in pushing a train up Mount Vernon grade was necessary as part of the system authorized by the rules, then the system established under the present authority of Rule 2 would be legally and fatally defective. On this important question I have from the first entertained grave doubts which I cannot say are even now entirely removed.

It is, I think, clear that while no rule explicitly declares that the movements of trains are to be under the control of the train-despatcher, it is the general scheme of the rules that they should be so controlled,

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and it is not unfair to say that any departure from that general scheme must be clearly justified.

In the case of the movements and shunting of all yard-engines when in the railway yards or of any engines or cars between semaphores on the line of railway it is conceded that no such control of the train-despatcher is requisite. I take it such control would not be possible. All such movements of trains within railway yards and between semaphore signals on the line are impliedly exceptions from the general scheme. Then comes Rule 2 authorizing special instructions as the same may be found necessary which, I take it, involves departures under special circumstances from the general scheme or system which do not conflict with any particular rule. Any instruction within those rules must be fully observed while in force. No one contends that any instruction under Rule 2 could justify a defective system, and, assuming as I have that the instruction in question here introduced a good and proper system, the only remaining question is: Was it in conflict with the general rules?

As the yard-system and the system of shunting between semaphores, though at variance with the general scheme, is nevertheless not in conflict with any special rule and not illegal, so, it seems to me, the system authorized by this instruction, good in itself and not contravening, in my opinion, Rule 450 with regard to movements varying from or additional to the time-table, is not illegal. I think it may fairly be held to come within Rule 2 and, therefore, authorized if not in itself defective.

Mr. Gibbons invoked Rule 224, requiring all messages or orders respecting the movement of trains or the condition of track or bridges to be *in writing*, as

being in conflict with the instruction or system relied upon by the company, but I do not agree with that. Apart from the facts that this rule does not come under the class of Rules 450 and following, relating to the movement of trains by telegraphic orders, there is no finding that the yard-master's order was not in writing. It must be conceded that the rule does not and cannot apply to the movements of yard-engines in yards and of other engines within semaphores in shunting or otherwise moving trains, and I see no reason why under Rule 2 a special system for special conditions otherwise good and proper could not be introduced without a written order for every movement just as in the case of yard-engines, or engines shunting or moving cars or trains between semaphores.

My conclusions are, therefore, that there was no evidence whatever before the jury which would justify their finding the system, under which the engine which caused the accident was operated, a defective system; that there was no particular rule of the general rules of the company, as sanctioned and approved by the Governor in Council, which required an order from the train-despatcher to justify the running of the yard-engine as a pusher up the steep grade at Mount Vernon, although the general scheme of these rules contemplated the movements of trains generally being under the control of the train-despatcher and that Rule No. 2 of those so sanctioned and approved was passed for the purpose of giving the railway authorities power, in exceptional circumstances and conditions such as those existing in this case, to authorize instructions with regard to assisting trains up steep grades such as the one here relied upon.

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In these circumstances, the common law liability which otherwise would arise as against the company cannot be invoked.

Idington J.

IDINGTON J.—This appeal arises out of an accidental collision on the respondents' railway between an engine in charge of Engineer Yapp sent out by a verbal order of the yard-foreman, from Brantford yard, to push a freight train up a grade about seven miles out on the Tilsonburgh branch (and running on its return trip from such service) and a freight train which the yard-foreman had failed to stop. In the result the appellant's husband was killed.

The company admit liability but only within the "Workmen's Compensation for Injuries Act," for which damages were assessed at $3,300. This is not appealed against. The appellant claimed to recover as at common law and damages on such basis were provisionally assessed at $8,250.

The jury found all questions submitted in favour of the appellant, but the learned trial judge and the Court of Appeal held she could not in law recover beyond the first named sum.

The appeal involves an examination of the law relative to the movements of trains on the respondents' road.

The respondents' management framed rules for their transportation department, pursuant to the provisions of the "Railway Act" then in force and had them so sanctioned by the Governor in Council as to come into force on the first of July, 1901.

The Act, as amended by 63 & 64 Vict. ch. 23, rendered it obligatory that all by-laws, rules and regulations made by directors or company should be reduced

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to writing and, except as to such as related to tolls and such as were of a private or domestic nature and did not affect the public generally, should be submitted to the Governor in Council for approval.

Unless so sanctioned they are declared to have no effect. The Governor in Council might rescind such sanction or any part thereof. No one else can.

When so approved they were binding upon and to be observed by all persons, and sufficient to justify all persons, acting thereunder.

Rule 2 was as follows:

2. In addition to these rules, the time-tables will contain special instructions, as the same may be found necessary. Special instructions, not in conflict with these rules, which may be given by proper authority, whether upon the time-tables or otherwise, shall be fully observed while in force.

Many years before this some one in authority framed a special instruction put upon the time-table and made to read as follows:

TILSONBURG BRANCH.

Yard-engines at Brantford are allowed to push freight trains up the Mount Vernon grade and return to Brantford B. & T. station, without special orders from the train-despatcher. Yard-foreman in charge of yard-engine will be held responsible for protecting the return of yard-engine, and for knowing such engine has returned before allowing a train or engine to follow.

A. J. NIXON,
Assistant Superintendent.

The time-tables, no doubt with this, were issued periodically for years before said rules, and the superintendent in charge for some years previous to and at the time of the accident in question adopted and used same form.

If it can be made effective merely by such a method the superintendent and his predecessors are the proper authority to issue it. Each time-table which has these

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instructions upon it is framed so as to lead one to infer it is issued by the sanction of the second vice-president and general manager of the company and other leading officers thereof.

There is no provision in it or by its author for orders given under it being reduced to writing. Its later use in that regard is, in the particular case now under inquiry, shewn by what transpired in connection therewith. Yapp, the engineer, says he simply was told by the yard-foreman to take the yard-engine out as he had repeatedly done before on the like service.

In view of the evidence of such conduct having extended for years previously I take it none of these incidents of the method had ever varied and that oral orders of the yard-foreman or yard-master were part of the method of applying such instruction.

Among the rules above referred to are Rules Nos. 224 and 226, which read as follows:

> 224. All messages or orders respecting the movement of trains or the condition of the track or bridges must be in writing.
>
> 226. Extra trains must not be run without an order from the superintendent or train-master.

After the enactment of such stringent rules as these there surely was an end to any shadow of authority for the continuation of such a system.

If it ever had any legal existence that was surely abrogated by Rule No. 1, which reads as follows:

> 1. The rules herein set forth apply to and govern all roads operated by the Grand Trunk Railway system. They shall supersede all prior rules and instructions in whatsoever form issued which are inconsistent therewith.

How can any system dependent on oral order be more "inconsistent" with or "in conflict with" these rules? Rule 1 uses the word "inconsistent," and Rule No. 2, these latter words.

The rules are intended, I take it, from their general scope, to cover, as far as possible, every phase of operating the transportation department of the railway.

Let us see if anything exists to detract from the force of this glaring "conflict" and "inconsistency."

Let us note the statutory meaning of train, and also observe that Rule 198 says:

> Whenever the word "train" is used it must be understood to include an engine in service with or without cars, etc.

And, by the same rule,

> extra trains are those not represented on the time-table.

Then, Rule No. 200 distinguishes extra trains as "passenger," "special," "freight," "extra" and "work-train."

The rules above quoted shew the absolute need for orders being in writing and that an "extra," of which this "working-train" or engine in charge of Yapp was one, could not run without an order from the superintendent or train-master.

Neither ever gave any such order as, expressly and implicitly, is here recognized.

There is no other method adopted or sanctioned by these rules than the telegraphic method for the movement of trains. Once they are despatched and in motion on their way pursuant to order so given, there is a section of these rules headed, "Movement of Trains," which provides for their conduct towards each other and in their own movements and the precautions to be taken, but does not provide for their starting otherwise than indicated by telegraph messages.

It is in this section that the above quoted Rules 224 and 226 are placed, as if to emphasize their import.

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Then, we have next after that section, headed in large type "Rules for the Movement of Trains by Telegraph Orders." And in this there are twenty rules and a great many illustrations of how the operations are to be carried on, covering together in all some nineteen pages of the book.

Amongst those illustrations are given those applicable to "work-trains," of which class Yapp's engine was one.

Then, take Rule 450 in this section of the rules as an illustration of what is directed generally and is key to the whole situation.

It provides for special orders varying from or additional to the time-table. They are to be issued by the train-master.

> They are not to be used for movements that can be provided for by rule or time-table.

The context and heading, as well as the rule above quoted, indicate that they are to be in writing and as emergencies arise, and only permissible of communication by telegraph.

This instruction now in question seems to have been just of that character that a time-table could not provide for, but which a rule most certainly could and the rules most certainly had already provided for.

A rule such as the instruction implies would have required governmental sanction.

If such a thing had ever been submitted I cannot believe it ever would have been listened to.

Why was the thing of so long standing never tried ?

Does it not follow from all these considerations that the instruction was in conflict with the rules?

How can the rule be conflicted with better than by

an implied repeal *pro tanto* and systematic observance of substituted orders ?

It is clear that an additional safeguard against accident may well be provided by instructions in this way.

If, for example, this instruction could be read as if the action to be taken were upon the hypothesis of a train-despatcher's order, or a train-master's order, in writing and this protection supplementary thereto, no harm could follow. It would be consistent with the rule. Such no one pretends to have been the mode of applying it.

But how can something which no one pretends to be in itself superior to the safeguard supplied by the telegraphic rules expressly designed to govern the movements of trains be justified?

It must never be forgotten an engine is declared to be a train.

If an official of any kind can provide thus for one train he may, if he see fit, provide for half a dozen, or more. What limit can be assigned to his power ? Clearly if he can take one train he can take every train and substitute an entirely different system. Indeed, counsel for respondent suggested the movement of trains could, if seen fit, be done by telephone.

I should hope no one, in face of the statute rendering these rules obligatory and the obtaining of the sanction of the constituted authority in that behalf also as a necessarily binding obligation, will, if he regard his personal liberty, try that without such sanction.

Yet that is just, on a large scale, what has been done by some one here on a small scale.

Experts were able to say what was adopted was,

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in their opinion, safe. The statute has not left it to experts to determine.

Train masters have large authority to exercise over trains, but even they and the superintendent are enjoined to put their orders for such car or extra train in writing; yet this superintendent put his in the shape of an overriding instruction committing the duty to a yard-foreman without more than the printed instruction contains and, apparently, in entire disregard of Rule No. 224 which requires every order respecting the movement of trains to be in writing.

The clear inference from the evidence of Yapp, the engineer who took the pilot engine (a train) out, is that any order was oral.

I think the fair inference is there never was compliance with this Rule 224 so far as regarded the movement of any engine sent out by virtue of these instructions.

If all these considerations do not demonstrate this instruction as inconsistent with the purview of the rules as a whole and, hence, in conflict therewith, I do not know what would.

Indeed, if this method of procedure is permissible, the rules, so far as they can have any relation to the movement of trains, including every detail therein which directly concerns the safeguarding of the public may be frittered away and the obligatory sanction of governmental supervision in that regard reduced to a solemn mockery.

This gives rise to more than one point of view in its result.

In the first place: Is there not thus created a condition of things that entitles the servant to say (quite independently of the liability directly given by statute,

to which I will refer presently), the protection he was entitled to at common law has not been given ?

Can he be said to have contracted against risks which implied a violation of the statutory rules, which have the force of law; yes, a systematic violation ?

Is it not just as clearly this had become an indefensible mode of which the respondents knew or ought or must be taken to have known ?

No doubt rules had been enacted before and received governmental sanction, but it is to be observed that just at this stage of growth of railway legislation, 63 & 64 Vict. ch. 23, sec. 9, sub-sec. 2, had proposed governmental assistance to frame such rules and, whether given or not, it was something of which the directors of this company must be held to have had notice, and, it might not be unfair to infer, had, as the result, produced the rules before us which govern or ought to have governed this case.

The express language of Rule No. 1, as already noted, swept away every previous instruction inconsistent with the new rules.

Why was this one retained in use ?

It surely must have come to the knowledge of the directors revising such work. Its then long use for preceding years clearly implies it was only by crass neglect that it could have been overlooked. Its operation continued nevertheless. Whose duty was it to see that its operation ceased ?

Was it not the duty of the company to have taken steps to protect its servants by expressly prohibiting the use of such an antiquated method ? The rules, as I read them, not only sweep away the instruction, but forbid its continuance.

The continuation of this instruction was, no doubt,

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due to neglect on the part of every one, from the directors down to the superintendent.

It was, I incline to think, incumbent on the respondent at the trial to have removed the presumption of neglect or ground to infer same on the part of the directors relative to the instruction having been repealed. It may have been that such was done and the evidence of continual and continuous use is untrue. The case of *Britannic Merthyr Coal Co.* v. *David* (1), seems to me, in principle, to throw upon the respondents the onus of proof of the condition of things, at this new starting point, and of inference of orders being otherwise than indicated.

It may be answered, the directors had done so by inviting its company's servants to read the new rules. I doubt if that suggestion should suffice to excuse when the thing continues for seven years afterwards and the inconsistencies not pointed out.

If this inference is not the proper one to draw, it then comes back to the use of an unjustifiable mode or system for so long a time being, of itself, sufficient, under said conditions, to bring home to the company the knowledge that their servants were not properly protected.

If proof were needed, do we not find it in this very case ? Who is defending it ?

It is being justified. If in law, as I have found it, unjustifiable, how can the company say and be permitted to prove it, rely on it, if thus unjustifiable, unless there is to be implied the authority of the company to do that complained of ?

I submit this reasoning in this connection as relative to the line of argument which was presented by

(1) [1910] A.C. 74.

the law as laid down in *Wilson* v. *Merry*(1), and herein much relied upon, and to overcome the difficulty thereby created.

If that difficulty is thus surmounted and the proof brought home to the company of knowledge of negligent, and in this case, in my view, illegal (which quality of illegality adds evidence) methods that case no longer applies and the law as laid down in *Smith* v. *Baker*(2) applies.

The jury have found, and I must say, after a perusal of the entire evidence bearing upon such issues, most properly found that the defendants' superintendent was negligent in permitting such a state of things to exist, as to rest upon the obviously imperfect safeguard when the rules provided an obviously safer one.

The ability and right of juries to find, as against so-called experts, is criticized in this and another case before us. I dissent therefrom. As the learned trial judge intimated in answer to such contentions, the issues here, (and, I may add, in most cases involving accidents on a railway) are easily understood by men of ordinary common sense.

The classes from which juries are drawn are quite as ready as others to appreciate all that and especially the mechanical and other devices so often to be considered, and, with every respect, I may say, a great deal better than others, their superiors in other respects, the habit of thought of, and how much load the brain of, the average workman on the railway can and is likely to carry into effective use.

It was this latter factor in this case that failed and the failure of any expert to appreciate that fact and

(1) L.R. 1 H.L.Sc. 326. (2) [1891] A.C. 325, at p. 345.

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admit the system of the rules was superior to trusting a man loaded as this man was, would condemn the expert, in my humble opinion. I do not read their evidence as a denial of that, but as palliation and excuse.

The juryman has his limitations of efficiency, just as others, but he did not fail in this case.

I have now to point out another ground which, with respect, hardly got full justice done it.

The point is taken in a few lines, at the end of the appellant's factum, that what was done gave a right of action at common law for a breach of a statutory obligation, but the failure to comply with our rules requiring statutes relied upon to be quoted leaves me in doubt as to what was really intended to be raised.

I agree in the claim put forward that such an action would lie, but, how far does that carry us ?

Does it get over the doctrine of common employment ?

It still leaves the superintendent the fellow-servant who committed the breach unless knowledge and consequent authority can be imputed in some such way as I have outlined.

I doubt if it can be treated as if, as definite and absolute as, a statute for fencing machinery, for example. I should have liked to have heard argument on this, or, perhaps, what was covered in the defective factum. The "Railway Act" expressly gives the right of action by section 427, sub-section 2.

If this is the common law claim made in pleadings, and they are wide enough to cover it, or in the factum equally so, then, it seems to me maintainable and overcomes all the difficulties in the appellant's way.

Indeed, it seems conclusive, having regard to the

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frog-packing case of *LeMay* v. *The Canadian Pacific Railway Co.*(1), which arose under the "Railway Act" of 1888, being 51 Vict. ch. 29, the forerunner of this Act now in question.

It was sought there to have the Act interpreted as if excluding the servant from its benefits, but, the Court of Appeal, upholding the learned trial judge and the Chancery Division, held the servant had the same right under it as any other person — in short, that he was a person.

The case of *Washington* v. *The Grand Trunk Railway Co.*(2), upon the same Act and provision, except with regard to a license given not to pack, but in which the point, if the Court of Appeal had erred in the previous case, was still open if the defendant had seen fit to take it and bring it here and to the Privy Council.

I suspect the reasoning upon which the courts had gone in the earlier case was thought to have rendered this hopeless.

As I agree in that and cannot distinguish this case therefrom, I think the appellant entitled thereby to maintain her claim.

I need not say that it is only upon the ground that I hold the instruction I have dealt with as invalid that this sub-section of section 427 becomes clearly operative.

The provision of subject-matter, respecting which the company had power to make rules, when these were made, distinctly enumerated such as to render it applicable here. The rules, though brought into force before this amending sub-section, are, I think, being

(1) 17 Ont. App. R. 293.

(2) 28 Can. S.C.R. 184; [1899] A.C. 275.

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in force, those which fall within the exact words of the section 427, sub-section 2.

I do not mean to express or imply any opinion as to the right of action in a like case on the Act as it stood before this amendment, nor do I wish to imply that my opinion of the inconsistency between the instruction and the rules holding former invalid is the only basis upon which the action resting upon the sub-section in question can stand.

Out of respect I followed the line of conflict forcibly pointed out though not followed up in detail in argument and examined the case from every point of view suggested on either side with such reflections as I could add, but regret the importance attached throughout the entire proceedings to what seems to me, perhaps erroneously, so entirely irrelevant, to the exclusion of that consideration the said sub-section and whatever may be said as to it certainly has seemed to me entitled to.

I think the appeal should be allowed with costs here and below and judgment be entered for the full amount of damages assessed with costs of suit.

DUFF J.—I find myself unable to agree that the plaintiff's claim can be sustained under section 427 of the "Railway Act." I am not able to discover any necessary *ex facie* conflict between the time-table instruction under which McGuire acted and the approved rules. The rules do not in terms declare that the method of moving trains by telegraphic orders is to be the one exclusive method to be employed upon the respondents' system. I think that omission is a very pointed one. There is sufficient evidence in this case to shew that the practice authorized by the instruction in question is one which has been in operation in dif-

ferent places on the system for many years, and if it had been the intention to abolish that practice I should have expected to find an explicit provision to that effect.

Then there is Rule 224 which requires that all orders for the moving of trains shall be in writing. On the face of it there is certainly nothing in the instruction repugnant to this rule, assuming in the meantime the rule to apply to a yard-engine when outside the limits of its yard. It was suggested on the argument that the instruction necessarily implies the operation of the engine under oral orders from the yard-foreman to the engineman. The instruction itself does not require that the orders shall be given by the yard-foreman. It says nothing about who is to give the orders. If it is to be assumed that the yard-foreman is to be a person not competent to give written instructions — I am afraid that is rather a venturesome assumption for this court — that is a sufficient reason not for reading the instruction as conflicting with one of the rules, but for inferring that the yard-foreman was not the person to give the orders.

The evidence is conflicting respecting the origin of the order on the morning of the accident. The engineman says it came from McGuire; McGuire denies this. The impression one gets is that the order was an oral one; but the evidence is not directed to the point and is quite equivocal. Nor is there any evidence as to the practice commonly observed in that regard. Strange to say no such official as a yard-foreman appears to be mentioned in the book of rules produced. If the engineman of the yard-engine when operating under the instruction is to be treated as an "engineman" within the rules, then it is quite clear from Rules 50 and 52

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that he is not under the orders of the yard-foreman. I should have thought indeed unless there is something in the circumstances of railway practice generally or of the locality in question here making it obligatory upon us to give to the instruction a different interpretation, that one must read it as subject to the paramount authority of the rules and not as conflicting with them. I am disposed, however, to read the rules governing the movement of trains as not applying to yard-engines except when coupled with one or more cars. I think that where you have two distinct classes of engines mentioned and you have the "train" defined to the extent of saying that it shall include one of these classes, that is a sufficient indication that it excludes the other. If it be said that there is nothing in the rules authorizing yard-engines to leave the limits of their yards, the answer seems to be that there is nothing in the rules prohibiting it and that Rule 2 does authorize the giving of special instructions not inconsistent with the rules themselves. I have no doubt that an instruction confined in its application to the yard-engines of a particular station and authorizing the use of those engines in a specified limited service is a special instruction.

I have perhaps not made it clear that I should not wish to express a confident opinion that an examination of the rules with such light as might be thrown upon them by extrinsic evidence properly admissible, might not shew that the instruction relied upon is one which is in conflict with the approved rules and therefore does not come within the authority conferred by Rule 2. To me it is sufficient for discarding the consideration of the question for the purposes of this appeal that I feel satisfied, first, that the instruction

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is capable of being read as not in conflict with the rules, and secondly, that I am not satisfied that we have before us all the evidence which might throw light upon the question whether, on the true construction of both, there is any such conflict. It has been repeatedly held that this court will not consider a view of the facts not put forward before if there be any question whether further relevant evidence might have been adduced if it had been advanced at the trial. *Lamb* v. *Kincaid*(1); *The "Tordenskjold"* v. *The "Euphemia"*(2). And see *Seaton* v. *Burnand*(3); *Nevill's Case*(4); *Browne* v. *Dunn*(5); *City of Victoria* v. *Patterson*(6).

I have, however, come to the conclusion that the plaintiff is entitled to succeed upon the ground upon which she placed her case at the trial. With great respect for the courts below, I think there was evidence from which the jury might conclude that the system under which the yard-engine was used beyond the yard limits on the Tilsonburg branch was a system not to be reconciled with the exercise by the appellants of that degree of care they were bound in the circumstances to exercise for the purpose of avoiding collisions on that branch. First, a word about the law. Having regard to the consequences of such a mishap as a collision between trains moving in opposite directions upon a single track line, the defendants, I think, were bound to exercise a very high degree of care to prevent such accidents. They owed that obligation, — as respects the system of managing trains — in my opinion, as well to their servants as to others. If it would be

(1) 38 Can. S.C.R. 516.
(2) 41 Can. S.C.R. 154.
(3) [1900] A.C. 135, at p. 145.
(4) [1897] A.C. 68, at p. 76.
(5) 6 R. 67, at p. 75.
(6) [1899] A.C. 615, at p. 619.

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clear to reasonable persons with competent knowledge that by the adoption of one system they would in an appreciable degree enhance the risk of such collisions, or that by the adoption of another system they could in an appreciable degree diminish that risk, and if the adoption of the comparatively safer system would not involve them in any appreciable difficulty or expense in the working of the railway, then, in my judgment, it was their plain duty to adopt the safer system. Now, it is not disputed that by subjecting McGuire's engine to the orders of the despatcher the company would have brought upon themselves no increased difficulty in management, no appreciably increased expense. The experts called on behalf of the respondents support the system in operation simply because they say the precautions are sufficient. The question of fact then for the jury on this branch was: Did the system in operation involve any unnecessary peril to persons travelling on the Tilsonburg branch, that is to say, any peril which might have been avoided or lessened by placing this yard-engine under telegraphic orders ? I do not agree, with great respect, with the learned judges of the courts below that on this point it was the duty of the jury to accept the opinions of the experts. Indeed, I am not confident that if I had been a juryman and the evidence had impressed me as it now impresses me, reading it in the record, I should not have concluded from the evidence of those witnesses that any competent and careful man applying himself to the subject in the course of his duty and with a real appreciation of the responsibility of the company, would have seen that with regard to one class of trains at least there would be a distinct advantage in point of safety by placing the engine in question under the control of the

despatcher. With respect to trains obliged to stop at Brantford for orders, I do not think it is seriously disputed that such an accident as that which led to this litigation — although it might conceivably have occurred — could hardly have taken place if the yard-engine and the train had been under the control of the same set of persons. It appears to me that that of itself is sufficient to support the verdict on this branch of the argument. If in respect of a certain class of trains one system affords greater safety than the other, assuming that in respect of all other trains it afford only equal safety, and if this comparatively greater degree of safety can be had without any extra cost, without any disturbance or dislocation of other arrangements, without any added embarrassment or difficulty, — what possible excuse could there be for not adopting the safer system ? I think, however, notwithstanding the opinions of the experts, that there was sufficient evidence to justify the jury in finding as regards all trains that the telegraphic system is the safer, and that reasonably competent persons ought to have known that.

The responsibility of the company for the defects in the system is sufficiently established, in my opinion, by the cases of *Smith* v. *Baker*(1), at pages 339, 353 and 364, and *Ainslie Mining and Railway Co.* v. *McDougall*(2), at pages 424 and 426. The system in question had been in operation for twenty-five years; that, in my judgment, is sufficient to put the onus upon the company to shew that it was not brought home to the general governing body.

There remains another contention of Mr. McCarthy — that the plaintiff has not sufficiently con-

(1) [1891] A.C. 325. (2) 42 Can. S.C.R. 420.

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nected the alleged negligence of the respondents with the collision that caused her husband's death. The precise point taken, and very forcibly put, is that the proximate cause was the negligence of McGuire. It was, I think, McGuire's first duty to protect his engine, and, given the system in operation, it was his default unquestionably which led to the accident. I do not think, however, that the case is governed by the principle relied upon by Mr. McCarthy; it seems to be outside the decision in *Dominion Natural Gas Co.* v. *Collins*(1), and ought rather to be referred to the principle of a series of cases from which Lord Dunedin distinguished the last mentioned case, at page 646, in this sentence:

> The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter.

It is pointed out again and again in the evidence given by the expert witnesses that no system can be devised by which the human element, and therefore the possibility of human error and carelessness, can be excluded. The desideratum is a system which consistently with reasonable efficiency reduces to as low a degree as possible the risks arising from the imperfections of human instruments. The charge against the company is, and the default found is, that they failed to adopt a system which to a much greater degree (and — in the case of trains obliged to stop at Brantford for orders as Fralick's was — almost entirely) would have eliminated the chances of any lapse such as that which McGuire was guilty of. It is no answer then to say that McGuire was in fault; because it was in not providing a better means of preventing such defaults and

(1) [1909] A.C. 640.

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avoiding the evil effects of them when they take place that the respondents' failure of duty consisted.

ANGLIN J.—Having obtained judgment for $3,300 under the "Workmen's Compensation Act," the plaintiff appeals from the refusal of the Ontario Court of Appeal, affirming the judgment of Meredith C.J., to direct the entry of judgment for her for $8,250, the amount at which the jury assessed her damages if she should be held entitled to recover at common law for the death of her husband.

In my opinion the appellant is entitled to succeed, but on a ground not presented at the trial, or before the Court of Appeal, and, if taken, not at all adequately developed in her factum in this court.

In the local working time-table for the middle division of the Grand Trunk Railway System (No. 33), the following "regulation" or "instruction" (which it should be deemed I shall discuss later) was inserted:

TILSONBURG BRANCH.

Yard-engines at Brantford are allowed to push freight trains up the Mount Vernon grade and return to Brantford B. & T. station without special orders from the train-despatcher. Yard-foreman in charge of yard-engine will be held responsible for protecting the return of yard-engine, and for knowing such engine has returned before allowing a train or engine to follow.

While returning from pushing a freight train up the Mount Vernon grade, pursuant to a verbal order of yard-foreman McGuire given under this regulation or instruction, the Brantford yard-engine collided with an engine drawing a special train driven by the plaintiff's deceased husband, who was killed in the collision. This train left Brantford under orders from the train-despatcher at London, given through the operator at Brantford, neither of whom knew that the yard-engine

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was then out on the Tilsonburg branch. Yard-foreman McGuire did not expect Fralick's train. Having other urgent duties to perform, after sending out the yard-engine he did not remain at the switch of the Tilsonburg branch, but went to another part of the yard to place some cars at a freight shed. While he was thus engaged, Fralick's train left the yard without his noticing it.

The defendants admit liability under the "Workmen's Compensation Act" in consequence of McGuire's failure to protect the return of the yard-engine. The jury have found that the system in use on the defendants' railway is not reasonably safe and adequate, and that it was defective and exposed the employees to unnecessary danger — because the yard or pilot-engine when away was not under the control of the despatcher, and that the accident in which the plaintiff's husband was killed would have been prevented had there not been such defects in the defendants' system. They further found that the deceased did not voluntarily undertake the risk to which the defective system exposed him.

Much argument was devoted to the questions whether the system under the time-table regulation or instruction above quoted was or was not reasonably safe, and whether the adoption of such a system was or was not *per se* negligent, having regard to the fact that the entire middle division, including the Tilsonburg branch, is operated under a train-despatching system controlled from London. In the view I take of this case we are not concerned with these questions. But, in the course of his able argument upon them, Mr. Gibbons demonstrated, in my opinion conclusively, that the operation of a yard-engine outside the limits of

the yard under such a regulation or instruction as that quoted from the time-table No. 33 rendered ineffectual and useless, on the portion of the railway affected by it, the precautions prescribed by the rules of the train-despatching system and was in conflict with and destructive of the fundamental principle of that system — viz., complete knowledge and control by the train-despatcher (except in cases of such inevitable accidents as engines becoming stalled or trains parting on a grade, for which the approved rules make other suitable provisions) of all movements of every train and engine outside yard limits.

The yard-engine while outgoing may be regarded as part of the train which it pushes, and, as such, moving under the train-despatcher's orders; but, when returning, its movement is solely under the direction of the yard-foreman and if, as happened in this instance, he should fail to discharge his duty, whether through his own fault or through inevitable accident, the elaborate precautions prescribed by the rules of the train-despatching system not only afford no protection to the returning yard-engine or to an outgoing train, but form a veritable trap for the employees in charge of the outgoing train by lulling them into a false sense of security.

No expert opinion evidence is necessary upon these matters. These conclusions are so obvious from a simple statement of the train-despatching system and the time-table regulation that a common jury can safely and properly draw them.

The findings of the jury in this case — that the system was not reasonably safe but was defective and that it exposed the employees to unnecessary danger, the defect in it being that the yard-engine when away from

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the yard was not under the control of the despatcher — probably involve a finding that the system of directing the movements of the yard-engine under the time-table regulation or instruction was in conflict with the train-despatching system and destructive of its essential principle. If this is not involved in these findings of the jury, since the learned trial judge reserved to himself

> the disposition of any question of fact not covered by the jury's findings, which might be necessary to be found in order to determine the rights of the parties,

the Court of Appeal could, and, therefore, this court may make any proper findings not inconsistent with the findings of the jury. The evidence, in my opinion, not only warrants, but renders inevitable, the finding that the operation of a yard-engine outside the yard limits under the sole direction and control of the yard-foreman and without communication with or orders from the train-despatcher was in direct conflict with the rules governing the train-despatching system in force at Brantford and on the Tilsonburg branch, and destructive of the protection which that system was designed to afford to employees operating, and to passengers being carried upon trains leaving Brantford on the Tilsonburg branch.

The rules of the transportation department of the Grand Trunk Railway System, produced by the defendants as those in force when the plaintiff's husband met his death, were sanctioned by the Governor-General in Council under section 217 of the "Railway Act" of 1888, to take effect on the 1st of July, 1898, or the 1st of August, 1901 (both dates are given in the book produced and, for the present, it is not material which is correct). By section 214 of that statute the company was empowered,

subject to the restrictions in this and the special Act contained to make rules and regulations * * * (*f*) for regulating the travelling upon, or the using or working of the railway.

By section 217 the company was obliged to submit such rules and regulations for approval by the Governor General in Council, and it was declared that they should have no force or effect until so approved. When so confirmed they were, by section 220, declared to be binding on all persons. These provisions, amended in immaterial particulars, were continued in the legislation of 1903, and are now found in sections 307, 310 and 311 of chapter 37 of the Revised Statutes of Canada. It is not suggested that the sanction of the rules and regulations so approved and confirmed, or of any part thereof, was ever rescinded (63 & 64 Vict. ch. 23, sec. 9, now R.S.C. [1906], ch. 37, sec. 310 (2)). There is no evidence in the record that the regulation or instruction printed at the foot of time-table No. 33 was ever submitted to or sanctioned by the Governor-General in Council. It appears that it has been upon the time-tables and that the Brantford yard-engine has been operated under it as a freight train "pusher" for about twenty-five years. By consent of counsel, an inquiry was made during the argument of this appeal to ascertain whether any such approval of this regulation or instruction had been obtained, with the result that counsel for the defendants admitted that none could be shewn. Inasmuch as this regulation or instruction is relied upon by the defendants as warranting the movement of the yard-engine, if it required the approval of the Governor-General in Council to render it valid, the burden, in my opinion, rested on the defendants to establish that such approval had been given. I, therefore, proceed upon the

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assumption that it had not been approved. If not so approved or sanctioned, and if it was a rule or regulation within sections 214, 216 and 217 of the "Railway Act" of 1888, it was of no force or effect (section 217), and operation under it was illegal. I think it was a regulation intended to govern "the working of the railway" and that as such the company was obliged to procure the sanction of it by the Governor-General in Council before operating under it.

Mr. McCarthy strongly urged that this foot-note to the time-table should be deemed not a rule or regulation requiring submission to and approval from the Governor-General in Council, but merely a "special instruction" within Rule 2 of the "General Rules," which reads as follows:

> 2. In addition to these rules, the time-tables will contain special instructions, as the same may be found necessary. Special instructions not in conflict with these rules, which may be given by proper authority, whether upon the time-tables or otherwise, shall be fully observed while in force.

Although upon the time-table and of local application only, the provision regarding the use and movement of the Brantford yard-engine as a "pusher" was permanent in character and scarcely fell within the description "special." It regulated the "using or working" of a portion of the railway. It was of such importance that it should, on that account alone, be classified as a rule or regulation rather than as a mere special instruction. It abrogated the rules of the train-despatching system in regard to the yard-engine to which it applied. Upon these grounds I think it required the sanction of the Governor-General in Council.

But, if it should, nevertheless, be regarded as a "special instruction," it would be authorized by Rule

2 only if not in conflict with the rules approved by the Governor-General in Council. For reasons which I have already given I regard the conflict between this "instruction" and the fundamental idea of the train-despatching system as irreconcilable. It is, moreover, inconsistent with the rules of that system. They provide for operating under written orders only; for a record of all such orders; that they should originate with a train-despatcher and should be transmitted through local operators, who are required to write them out, manifolding so as to prepare the necessary number of copies and to repeat back the order to the despatcher's office. An elaborate system of checks and counter-checks to minimize the possibility of mistakes is provided. All these regulations were set at naught when a yard-foreman was empowered, upon mere verbal order, to send an engine out of the yard without any order from, or even the knowledge of the despatcher or the local operator. Whether it should be regarded as a regulation within the statute, or as a special instruction within Rule 2 — the foot-note to time-table No. 33 purports to authorize a practice so utterly inconsistent with the train-despatching system that, in my opinion, it is not susceptible of justification or defence.

But, it is said there is nothing in the rules making the use of the telegraphic train-despatching system obligatory and, therefore, that the adoption of the practice which the time-table foot-note purports to authorize was not a breach of the statute. The first of the general rules says that:

> The rules herein set forth apply to and govern all roads operated by the Grand Trunk Railway system.

If this does not suffice to render the use of the tele-

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graphic train-despatching system obligatory on the defendants — I rather think it does — the fact that they have adopted it for and have applied it to the entire middle division, including the Tilsonburg branch, precludes the possibility of their legally making any regulation or giving any instruction in conflict with that system or with the rules approved for carrying it out.

It is not pretended that the foot-note to time-table No. 33 contemplated that the yard-foreman's orders to the engineman on the yard-engine should be in writing. The form of the foot-note itself, the character of the employee who was to act upon it, and the circumstances in which he was to act all indicate that he was meant to give merely verbal directions. That is the practice which has prevailed and that practice, as followed on the occasion in question, is justified by the defendants. Yet Rule 224 provides that:

> All messages or orders respecting the movement of trains * * * must be in writing.

This rule is not in the group relating to the movement of trains by telegraphic orders. The time-table foot-note seems to have been in direct conflict with it also.

Mr. McCarthy further contended that the yard-engine when executing the movement in question was not a "train" within the meaning of the rules, and he referred to Rule 198, which reads, in part, as follows:

> Whenever the word "train" is used it must be understood *to include* an engine in service with or without cars, equipped with signals as provided in Rules 155 and 156.

The application of this defining provision to the entire book of rules is questionable. But, if it is generally applicable, the statement that the word "train"

shall *include* an engine with certain equipment does not necessarily mean that an engine lacking such equipment is never to be regarded as a train for the purposes of any of the rules. Such interpretative provisions are inapplicable when the context indicates a contrary intention. A contrary intention is abundantly indicated in the rules governing the train-despatching system. The "Railway Act" defines the word "train" as including any engine or locomotive. I have no doubt that a yard-engine sent several miles out from its yard limits to push a freight train up a grade forms part of that train while outgoing, and is, when returning alone, itself a train. The rule that a yard-engine is not required to display markers does not necessarily mean that such an engine when employed outside the yard should not display these signals. I rather think this exemption applies only when it is employed in the yard as a yard-engine properly so-called, and that, when sent abroad, for whatever purpose, it should carry markers under Rule 155. But, whether it should or should not display markers when sent out as a "pusher," I have no doubt that it is then within the provisions of the rules governing the train-despatching system and must be regarded as a train to which those rules apply.

I, therefore, reach the conclusion that, in operating under the regulation or instruction contained in the foot-note to the middle division time-table, the defendants were contravening section 311 of the "Railway Act" (R.S.C. [1906], ch. 37), and were doing what was illegal. This renders superfluous any consideration of the intrinsic merits or demerits of the system under which the Brantford yard-engine was operated as a "pusher."

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It was argued that this illegal practice was not the proximate cause of the collision in which the unfortunate Fralick was killed; that the sole proximate cause was McGuire's neglect of his duty to protect the yard-engine by preventing Fralick's train from going out on the Tilsonburg branch until its return. There can be no reasonable doubt that had the movement of the yard-engine when on the branch been directed by the train-despatcher, Fralick's train would not have been allowed to leave Brantford until its return, and the collision would never have occurred. The jury have found that the accident would have been prevented had the defects in the system not existed. As forcibly put by Mr. Gibbons, one main purpose of the train-despatching system is to prevent as far as possible the occurrence of disasters likely to result from entrusting the protection of trains to such an employee as a yard-foreman, charged with other duties, often of a pressing nature, and apt, through momentary carelessness, or excessive zeal and eagerness to perform all his work promptly, coupled with an inadequate appreciation of the danger involved, to fall into the error of taking what he may consider a slight risk — just as McGuire seems to have done. If not the immediate cause of the collision in which Fralick was killed, the partial abandonment or abrogation of the train-despatching system was eminently calculated sooner or later to lead to such a result; and it was, in fact, an operative cause of the collision. In case of a breach of statutory duty by a defendant such causation of the injuries for which damages are claimed suffices to support the action.

If a defendant, who is required by statute to provide certain means of protection, has chosen to sub-

stitute for them other means, however effective when properly carried out, but which have failed to afford protection owing to negligence of the person employed to carry them out — and if it be found on sufficient evidence that had the statute been obeyed the injury complained of would not have been sustained, the defendant's position is that of a man from whose failure to discharge an absolute statutory duty injury has resulted. He substitutes means other than those prescribed by the statute entirely at his own peril, and if he would discharge himself from liability he must see to it that the protection thus provided proves efficacious. He takes the risk of all injuries which observance of the statute would probably have prevented.

In such cases his breach of statutory duty may be regarded as the cause of the injury jointly with any other neglect of duty (not being contributory negligence chargeable to the plaintiff), which may have been the more immediate occasion of it. *Illidge* v. *Goodwin*(1); *Dixon* v. *Bell*(2); Beven on Negligence (Can. ed.), p. 546.

If a man obliged under the "Factory Act" to guard dangerous machinery should fail to do so and, instead, should place a watchman to protect persons obliged to move about it, he would have no defence to the claim of such a person (based on an injury sustained while the watchman was negligently absent and which, if present, he would in all probability have prevented) if a proper guard on the machinery would have saved the victim.

Had the regulations approved under the statute been observed and had the "pusher" engine been operated under the control of the train-despatcher, he

(1) 5 C. & P. 190.

(2) 5 M. & S. 198.

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would, no doubt, have held Fralick's train either at Brantford station or at the Tilsonburg switch and McGuire's breach of duty under the time-table footnote would not have resulted in the collision. In this sense the defendants' breach of their statutory duty was a proximate — if not *the* proximate cause of the collision. In *McKelvey* v. *Le Roi Mining Co.*(1), notwithstanding that the immediate cause of the fall of an elevator was carelessness of the engineman in allowing it to strike the sheave-wheel with force, since the consequences of this carelessness would probably have been avoided had the defendants supplied proper guide-rails, their negligence in failing to do so was found to be the proximate cause of the accident. This court refused to set aside the finding, and upon it held the plaintiff entitled to recover.

If a defendant is a wrong-doer without whose wrong-doing the plaintiff would not have been damaged, he cannot be heard to say that there is some other wrong-doer who contributed to the damage.

Sault Ste. Marie Pulp and Paper Co. v. *Myers*(2).

Finally, it was contended for the defendants that, having employed competent officials to frame their rules and time-tables, as the jury have found, they cannot be held responsible at common law for the introduction or continuation by those officials of a regulation in contravention of the statute.

This regulation appears on a time-table bearing the signatures of Charles M. Hays, second vice-president, E. H. Fitzhugh, third vice-president, W. G. Brownlee, general transportation manager, and U. E. Gillen, superintendent. It has been in force on the Tilsonburg branch since it was opened — for a period

(1) 32 Can. S.C.R. 664.

(2) 33 Can. S.C.R. 23, at p. 32; 3 Ont. L.R. 600., at p. 605.

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of about twenty-five years. In these circumstances knowledge of it may, I think, be imputed to the company.

But, whether this be so or not, the duty to submit rules and regulations for the working of the railway to the Governor-General in Council is statutory: the prohibition against departure from these rules sanctioned by the Governor-General in Council is absolute. To an action founded on the breach of such duties, the defence of common employment is not available. *Groves* v. *Wimborne*(1); *David* v. *Britannic Merthyr Coal Co.*(2), at page 152. Moreover, by section 427(2) of the "Railway Act" (R.S.C. [1906], ch. 37), for injuries resulting from breaches of their statutory duties railway companies are declared to be liable to the full extent of the damages sustained. *Curran* v. *Grand Trunk Railway Co.*(3).

I am, therefore, of the opinion that the plaintiff's appeal should be allowed and that the judgment entered for her should be increased to the sum of $8,250. She should have her costs of this appeal, but no costs of the appeal to the Court of Appeal for Ontario because of her failure to raise in that court the point on which she has now succeeded.

*Appeal allowed with costs.**

Solicitors for the appellant: *Gibbons, Harper & Gibbons.*

Solicitor for the respondents: *W. H. Biggar.*

(1) [1898] 2 Q.B. 402. (2) [1909] 2 K.B. 146.
(3) 25 Ont. App. R. 407.

*Leave to appeal to Privy Council refused, 25th July, 1910.