MARGARET NIGHTINGALE (PLAINTIFF)..... APPELLANT ;

AND

THE UNION COLLIERY COMPANY OF BRITISH COLUMBIA (DEFENDANTS)..... RESPONDENTS.

1904

*May. 27-30.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Negligence—Dangerous way—Operation of railway—Defective bridge—Gratuitous passengers—Liability of carrier for damages.

In the absence of evidence of gross negligence, a carrier is not liable for injuries sustained by a gratuitous passenger. [*Moffatt* v. *Bateman* (L. R. 3 P. C. 115) followed. *Harris* v. *Perry & Co.* ([1903] 2 K. B. 219) distinguished.]

Although a railway company may have failed to properly maintain a bridge under their control so as to ensure the safety of persons travelling upon their trains, the mere fact of such omission of duty does not constitute evidence of the gross negligence necessary to maintain an action in damages for the death of a gratuitous passenger.

Judgment appealed from, (9 B. C. Rep. 453) affirmed.

APPEAL from the judgment of the Supreme Court of British Columbia (1) *in banco*, reversing the judgment at the trial and ordering judgment to be entered for the defendants with costs,

The company owns and operates a railway on its own lands on the Island of Vancouver between Cumberland, in the Comox district, and Union wharf, on the sea shore, about ten miles distant. The railway was carried across the Trent river, about seven miles from Cumberland, by a bridge which broke as the train (on

*PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ

(1) 9 B. C. Rep. 453.

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which deceased, Richard Nightingale, was travelling) was passing over it and he was killed. The deceased had a contract with the company for repairing this bridge by adding two additional piers and, at the time of the accident, some of his workmen were engaged upon the contract. Deceased was then residing at Cumberland and could have reached the works by a passenger train or by the highway, but he entered the cab of the locomotive engine which was hauling a freight train towards the bridge in order to visit his work there. There was no conductor on this train and the engine driver had no authority to carry passengers and had been instructed that he should not allow persons to travel on his train without special permission from competent authority. It appeared, however, that, from time to time, the company's officers and servants and other persons authorized by the manager and master-mechanic were in the habit of travelling by this train. The death of deceased occurred at the time of the accident, on 17th August, 1893, in respect of which the company was, in another case, (1) indicted and convicted for breach of duty in omitting, without lawful excuse, to maintain the bridge in proper condition to avoid danger to human life.

The action was brought by the plaintiff as administratrix of the deceased, for her benefit, as his widow, and for the benefit of her infant children under the "Families Compensation Act" (2), and the liability of the defendants, at common law, was also relied upon. At the trial, before Mr. Justice Irving with a special jury, judgment was entered for the plaintiff upon the findings of the jury. By the judgment now appealed from, (3) the judgment at the trial was set

(1) *Union Colliery Co.* v. *The Queen* 7. B. C. Rep. 247; 31 Can. S. C. R. 81.

(2) R. S. B. C. ch. 58.

(3) 9 B. C. Rep. 453.

aside by the Supreme Court of British Columbia, *in banco*.

J. Lorne McDougall for the appellant.

Luxton, for the respondents, was not called upon for any argument.

SEDGEWICK and GIROUARD JJ. concurred in the judgment dismissing the appeal with costs for the reasons stated by Nesbitt J.

DAVIES J —I concur in the result of the judgment dismissing the appeal with costs.

NESBITT J.—We are all of opinion that this appeal should be dismissed.

The highest that the position of the deceased can be put is that he was riding on the engine in question by tacit permission. The rule laid down in *Moffatt* v. *Bateman* (1) is that, in case of a gratuitous passenger, gross negligence must be shewn, and there cannot be any pretence that the evidence in this case fulfils that description. The driver in the *Bateman Case* (1) was the defendant himself and the plaintiff was with him at the defendant's express request.

The recent case of *Harris* v. *Perry & Co.* (2) was pressed upon us as extending the rule laid down in *Gautret* v. *Egerton* (3). We do not think that the case can be so viewed. That case simply decided that the leaving of a loaded truck upon the tracks was in the nature of a trap or was equivalent to such an act of wrongdoing as to amount to gross negligence. If the case is assumed to be a departure from the law, as previously laid down, we would not follow it. We

(1) L. R. 3 P. C. 115. (2) [1903] 2 K. B. 219.
(3) L. R. 2 C. P. 371.

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think the doctrine of liability sufficiently extended already in the case of bare licensees.

We agree in the judgment of the court below. The opinions of the Chief Justice and Mr. Justice Martin contain a very valuable collection of the authorities.

The appeal is dismissed with costs.

KILLAM J. concurred in the judgment for the reasons stated by Nesbitt J.

Appeal dismissed with costs.

Solicitor for the appellant: *D. G. Macdonell.*

Solicitors for the respondents: *Pooley, Luxton & Pooley.*