Supreme Court of Canada
Canadian Pacific Ry. Co. v. Walker, (1918) 57 S.C.R. 493
Date: 1918-11-18

The Canadian Pacific Railway Company (Defendant) Appellant;

and

Joseph Walker (Plaintiff) Respondent.

1918: October 18, 21, 22; 1918: November 18.

Present: Sir Louis Davies C.J. and Idington, Duff, Anglin and Brodeur JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Negligence—Railways—Master and Servant—Switch stand—"Fixed signal"—"Knowledge."

The respondent was an engineer on an east-bound train which collided on a west-bound track with another train through the improper setting of a switch. He alleged that he could not see the switch lights from his side of the engine owing to clouds of escaping steam and drifting snow obstructing his vision and that he passed them, on his fireman's assurance that they were "all right," without feeling any motion to cause him to realize that he had diverged to the west-bound track. Rule 401 of the Rule Book of the appellant company provided that "engineers must know the indication of all fixed signals before passing them," and a "fixed signal" was thus defined: "A signal of fixed location indicating a condition affecting the movement of a train."

Judgment of the Court of Appeal (11 Sask. L.R. 192), affirming on equal division the judgment of the trial court with a jury, against the company, confirmed, Davies C.J. and Duff J. dissenting.

Per Idington and Brodeur JJ.:—Upon the evidence, the signals on the target of a switch stand are not "fixed signals" within the meaning of Rule 401. Davies C.J. *contra.*

Per Anglin J.:—The words "must know" do not import knowledge acquired by the use of the engineer's own eyes to the exclusion of every other source of knowledge however reliable.

APPEAL from the judgment of the Court of Appeal for Saskatchewan[1], affirming, on equal division, the judgment of the trial court with a jury which maintained the plaintiff's action.

The material facts of the case are fully stated in the above head-note and in the judgments now reported.

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Tilley K.C. and Reycraft K.C. for the appellant.

[1] 11 Sask. L.R. 192; 40 D.L.R. 547.

P. M. Anderson for the respondent.

THE CHIEF JUSTICE (dissenting).—This was an action brought by the plaintiff, respondent, to recover damages for injuries sustained by him in a head-on collision which occurred between the east-bound express, of which he was the engineer in charge, going out from Moose Jaw to Regina, and the west-boun d'express coming in to Moose Jaw, about a mile east of that station. The collision was the result of the plaintiff's train improperly getting across from its proper track to the track of the west-bound express, and the broad question to be determined is whether the plaintiff contributed by his negligence to the collision which caused his injuries. The jury found in his favour and awarded him $15,820 damages, made up of special damages $2,320, and general damages $13,500, and the trial judge entered judgment for that amount.

On appeal to the Appeal Court of Saskatchewan the court was equally divided. The Chief Justice and Elwood J.A. being to allow the appeal and dismiss the action, while Newlands J.A. and Lamont J.A. were to dismiss the appeal, so that the judgment in plaintiff's favour stood.

This is an appeal from that judgment of the Court of Appeal.

The two learned judges of the Court of Appeal, Newlands and Lamont JJ., who supported the judgment in plaintiff's favour, did so on the sole ground that, in their opinion, the switch light was not a "fixed signal" according to the rules of the company and that the plaintiff therefore did not break the rule 401 requiring that

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> engineers must know the indications of all fixed signals before passing them.

Newlands J. says:—

> It was admitted by counsel on the argument before this court that if a switch light is a "fixed signal" the plaintiff, respondent, should not have passed this point without ascertaining that this light was burning, and if so, the colour of it,

and Lamont J. says:—

> It was not a question of construing the rule. The rule is clear. It is a question of determining whether or not a disc or light placed on a switch brings it within the rule and this, in my opinion, is a question for the jury.

The other two judges held, as did also the trial judge, that it was a fixed light and they pointed out that the plaintiff himself admitted in his evidence that there was nothing to which the definition of a target signal would apply except the disc or target set on a switch stand.

There was no difference of opinion in the Court of Appeal as to what the result should be if the switch lights were held to be *fixed* signals.

As to the damages awarded plaintiff, which is made a ground of appeal as being excessive, I am inclined to think them very large and beyond what the evidence justified, but in the view I take of the law and the evidence upon the other points of the case I do not feel it necessary to deal with the question of damages.

The essential points on which this appeal must be decided are whether the disc or target on a switch stand is a "fixed signal" within the rules, and whether the engineer was justified in passing on the occasion in question the switch signals at points X and Y shewn on the sketch of the railway track at Moose Jaw without knowing the indications they gave would lead the train from No. 3 track, which was its proper track, to No. 2 track, which was the track of the incoming express with which the plaintiff's train collided.

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The Tri Cities Express, so called, with plaintiff as engineer in charge, left Moose Jaw about 10 p.m. for Regina on the night of the 4th January, 1916.

The plaintiff had been running as an engineer over the route for a year and five months previous to this date, and always left the depot at Moose Jaw by the same tracks as on the night of the accident and was well acquainted with defendant's east, yard at Moose Jaw.

In my opinion, the trial judge properly charged the jury on the question as to whether the target signal on the switch stand was a "fixed signal" or not, but the jury ignored his direction and found, contrary to the evidence, which was all one way, that the switch stand and target signals at X and Y did not comply with the rules defining a target signal. Even Walker himself admitted that there was nothing to which the definition of target signal would apply except the disc or target set on a switch stand. I think in the light of the trial judge's charge to them on this point the finding of the jury that these signals were not "fixed signals" was "perverse," and I cannot understand why, after having charged them as he did on the point, the trial judge left the question to them at all.

A "fixed signal" is stated in the rules to be a

> signal of fixed location indicating a condition affecting the movement of a train.

Now the target on a switch is of fixed location and admittedly indicates

> a condition affecting the movement of a train.

For myself I do not entertain a doubt upon the question.

That leads us to the second question, whether the engineer was justified in passing the switch signals at points X and Y on the plan of the track without knowing

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the indications the lights gave that they would lead his train from its proper track No. 3 on to track No. 2, which was the track of the incoming express.

Rule 401 says:—

> that engineers *must know* the indications of all fixed signals *before* passing them.

The reason why such imperative language is used is obvious. The lives in many cases of hundreds of innocent passengers may be imperilled by the engineer of an express train ignoring the rule. In the case before us the engineer not only did not *know* but took everything for granted and did not attempt personally to acquire knowledge of what indications the signal lights upon them gave. He knew all about the incoming express, all about the "cut-off" at the switches X and Y which, if improperly set, would carry him over to the west bound express track. He knew the location of these two switches and what the lights upon the target of the switch stand indicated. It appears to me after carefully reading his evidence that he knew everything necessary to be known by an engineer in charge of an express passenger train to induce him to take special precautions before passing these switches X and Y to assure himself beyond doubt and to know, as the rule states,

> the indications of all fixed signals before passing them.

If these signal lights shewed green, then he could safely go straight ahead along his own track, while, if they shewed red, he would know that the switches were set for a divergence to the west-bound main line, in which case, of course, he must *stop* and have the switches properly set.

As a fact, though unknown to plaintiff, signal lights on these two switch stands X and Y shewed red, and consequently the train passed over the cut-off to the

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west-bound line and proceeded along it some three quarters of a mile until a head-on collision occurredo

Neither before or when his train passed across from its proper track to the west-bound track or afterwards did the engineer know anything about the lights or what track he was on. He neither looked himself nor did he instruct the fireman to look. He ran his train across to the west-bound track in ignorance, inexcusable, I think, of what the signals indicated.

The plaintiff's excuse for not knowing how the switches were set and what the lights on their targets indicated was that he could not see them from his side of the engine as they were on the left, or fireman's side, of it and the wind was blowing the smoke and steam past his, that is, the plaintiff's side of the engine cab. It was a stormy night and one which called for more than ordinary precautions. The train was going very slow, just crawling through the station yard and for about seven car lengths before coming to the switches the fireman, to plaintiff's knowledge, was not looking out. Curiously enough, although, as he says, he had instructed him to watch for the signals on the several switch stands which they had first passed on leaving the station, he did not instruct him to look out for these in question. The plaintiff knew the fireman had ceased to keep a look out when the engine was at least seven car lengths or 140 yards from the switches in question, as Walker himself testifies. The fireman was attending to his fire, plaintiff knew he was so attending. Two paces across the car would have enabled him to see and know for himself whether the lights on the targets of these switch stands entitled him to go on or required him to stop and avoid going over to the west-bound track. But the plaintiff neither took this, what one would think, necessary precaution nor instructed the

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fireman to look out and see what the signals indicated, and so the train passed across to the wrong track and along it for three-quarters of a mile till it collided with the incoming express. The plaintiff simply ignored rule 401, which said:—

> engineers *must know* the indications of all fixed signals before *passing them.*

But this man not only did not himself know or find out what the signals indicated before passing them, nor did he instruct the fireman to see although he knew the latter had given up looking out and was attending to his fires for some considerable distance before reaching the signal lights on these two switch stands X and Y. The fact is he took everything for granted, ignored the rule I have quoted and assumed all was right.

In the face of the facts I have stated, the perfect knowledge the plaintiff possessed with regard to all the necessary facts relating to this railway yard, the location of the different switches, the indications which the signals on the targets of these switches gave as to the train's movements, &c., the necessity imposed upon him of *knowing* the indication of all fixed signals before passing them, and the utter ignorance he acknowledges himself to have been in as to the indications of the signal lights on the switches X and Y when he diverged to the west bound track,—I am at a loss to understand how any jury could be found in the face of the judge's charge to them as to what were "fixed signals" to say that plaintiff was not guilty of negligence in passing these switches at the time he did and without any knowledge of the indications they gave.

In my humble opinion, the plaintiff should have been nonsuited on his own evidence. As he was not, I can only hold the verdict to have been perverse.

The excuse put forward that he got what he called

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a high ball or proceed signal from the switch tender at the station and that this entitled him to assume that the line was safe and the switches all right for him is not, in my judgment, worthy of consideration That he did not believe in it himself is shewn by his own evidence that as they were leaving the station he instructed the fireman "to keep a sharp look-out" for the switches, which, he says, he did until the train reached what is shewn on the plan in evidence as the Creek Bridge, when the fireman got down from looking out and said "all right". But this place where the fireman got down from looking out was quite a distance from the switches in question, some seven car lengths plaintiff says, and the train was just crawling at a rate of two to four miles an hour. During all this time no one was looking out and the plaintiff simply assumed, without knowing, as the rule required him to do, that the switches were set properly for his train's track. The plaintiff himself, on his evidence, shewed clearly why he was so careless and negligent respecting the indications which the

light signals of switches X and Y gave. He relied upon the signal given to him, as he says, by the switch-tender when he was leaving the station.

Q.—Do you think there was no duty after you passed those switches to see again whether you were on the right track or not?

A.—No, as long as I had got the signal from that man, whose place and duty it is to line up those switches, and has always done it.

Q.—That is Mr. Weeler?

A.—Yes. As long as he gave me the signal that all those switches were lined up, that relieved me.

Q.—Having got the signal or high ball from the switch-tender at the station?

A.—Yes.

Q.—You then felt perfectly warranted in going ahead. A. Yes.

Q.—Notwithstanding you could not see your track?

A.—Yes. Because he gave that signal to me to say that those switches were all lined up.

Q.—Having got the signal from Mr. Weeler on the station, and

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started on the right track, you would have felt—in consequence of that you would have felt perfectly safe in going on without anything further?

A. Yes. I did.

Q.—And there was no further duty cast upon you? A. No.

Q.—And that was what you relied on? A. Yes.

HIS LORDSHIP:—Why did you tell the fireman to keep an extra look out?

A.—As an extra precaution.

Those clear and explicit statements of the plaintiff himself as to why he passed the fixed signals X and Y without knowing what they indicated as to his proceeding or stopping effectually disposed of the other excuses offered by him as to his not crossing the engine cab and seeing for himself what these signals indicated; one of these excuses was that possibly he might, by crossing over, miss seeing a fusee burning or flaring on the track indicating danger. The fact being that he had already sworn positively that remaining in his

post on his right hand side of the cab he could see nothing outside on the track because of the wind blowing the smoke and steam on his side of the car. This fusee excuse in the light of his sworn reasons for passing the switch stands without knowing the indications they gave respecting the movements of his train seems to me to be simply an afterthought and a very questionable one at that.

My conclusions, after a very full study of the evidence and after hearing the arguments at bar, are that the signals on the target of a switch stand are "fixed signals,' within the meaning of the rules beyond reasonable doubt, and that the plaintiff, in running his car across the "cut-off" at the switch stands X and Y on to the west-bound track, did so in ignorance of what these signals indicated and in careless and negligent assumption that they indicated all was right for him to go ahead on his own proper track because of the signal or high ball, as he called it, he got from the

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switch-tender when leaving the station; and that, in acting on such unwarranted assumption, he violated rule 401 which required him unless and until he knew what the signals indicated to stop his train and find out; that the train was running at a very slow rate and could be stopped in a moment as he himself said and that there was nothing to justify him in acting as he did upon his unwarranted assumption that the signals indicated all was right for him to proceed; that his duty clearly was if his fireman was busy with his fire in order to get up speed to step across the engine cab before reaching the switch stand and see for himself what their lights indicated, and if anything prevented his doing that to stop the train till he did know whether safety or destruction lay ahead of him.

I think the appeal should be allowed and the action dismissed.

IDINGTON J.—The question raised herein of the interpretation and construction of the rules bearing upon the duty of the engineer in charge of a locomotive drawing a train when it involves, as herein, the determination of whether a switch stand in a railway yard constitutes a "fixed signal" or not, is of such a technical character as to require expert evidence to assist the learned trial judge in order that he may direct the jury aright.

Notwithstanding the apparent simplicity of such a phrase as "movement of a train," I am unable to hold that these rules, so far as defining a "fixed signal" when using such said phrase, are framed in such plain ordinary language that the learned judge could and must,

unaided by such like evidence as I have indicated, direct the jury as to the meaning thereof in the way that the law requires relative to documents framed in plain ordinary language.

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I take the law to be correctly laid down in Taylor on Evidence, 10th ed., at pp. 45-6, as follows:—

> Matters of great nicety arise in connection with this subject. But the clear general rule is that the construction of all written documents is for the court alone. The construction of these is, as we have said, for the court alone so soon as the true *meaning of the words* in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court, either absolutely., if there be no words to be construed as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. The term "written documents" includes Acts of Parliament, judicial records, deeds, wills, negotiable instruments, agreements and letters. A misconstruction by the court is the proper subject of appeal to a court of error; but a misconstruction by the jury cannot in any way be effectually set right. The effect of the rule consequently is to render the law certain. A marked instance of its application occurs in the case of the construction of the specification of a patent, for, though the interpretation of such an instrument—relating as it does to matters of science and skill—would seem peculiarly adapted to the practical information of jurors, the court must construe it after merely ascertaining from the jury an explanation of technical terms. Again, the construction of all written contracts is for the court.

The onus of making appellant's contention in that regard clear rested upon it in order to establish that respondent had been guilty of contributory negligence.

It failed at the trial to adduce any evidence save such as elicited by its counsel in the cross-examination of the respondent.

That evidence clearly declared that none of the switch stands passed by him in the Moose Jaw yard at the time in question were fixed signals.

He had long experience and before that had passed an examination on these rules and acted according to his understanding thereof.

The requirements of the rules as to fixed signals, in relation to switch stands in the yard, do not seem to have been observed, for he passed three or four of them in the same yard in his usual manner; which was hardly consistent with a rigid and literal observance of his

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duties relative to actual "fixed signals" well known to be such.

Indeed, such observance would hardly be practicable in a station yard where many switches had to be passed in the course of shunting trains.

Moreover, the switch-tender's signal, given respondent, seems to have been something intended to have been done and acted upon in the usual manner, and as if a necessary requirement which he was accustomed to observe; clearly in disregard of the switch stands being treated as fixed signals.

The incident of that non-observance strongly suggests that the switch stands in the yard were not considered by any one in appellant's service as fixed signals.

There were two trials in this case, and if such a vital point as raised herein really in fact seriously intended to be determined I should have expected the appellant to have met it fully and fairly and to have put beyond doubt the true solution of the question involved by proving that switch stands were in fact part of that which expert railwaymen understood by the ambiguous term in question.

The learned trial judge submitted the question to the jury and they answered adversely to appellant.

I am not surprised at the result in face of the evidence. Nor, leaving aside the propriety of the submission of the question, can I see how the appellant can complain.

Indeed, it seems to me that the plain duty of the appellant was to have proved conclusively that such switch stands were fixed signals which every engineer knew and in relation to which the respondent was bound to observe duties relative thereto as such. Failing to do so, or even make an attempt to aid the

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court in the way the law as laid down in the above quotation, and much more, from, Taylor indicates, I cannot see how it can now complain.

Had it done so and proved as it now claims instead of the contrary as its counsel seems to have intentionally or otherwise done, I could see some ground of complaint.

The minor inferences and arguments based on suggestions of other neglect on the part of respondent were clearly all for the jury and its verdict final.

I think the appeal should be dismissed with costs.

DUFF J. (dissenting).—I am to allow this appeal with costs.

ANGLIN J —The plaintiff was the engineer on an east-bound train of the defendants running from Moose Jaw to Saskatoon. On a cold and windy winter night this train collided on the west-bound track with a westbound train about a mile and a half east of Moose Jaw. It is now admitted that the plaintiff's train had been diverted to the west-bound track owing to the misplacing of two switches controlling a "cut-off" or crossover track connecting the two main tracks, at a point about three-quarters of a mile west of the place of collision and that this constituted actionable negligence imputable to the defendants which renders them liable unless the collision should be ascribed to fault or negligence of the plaintiff.

If the mechanism of the switches in question was not out of order, of which there is no evidence—and no such suggestion was made at the trial—set as they were for diverging tracks they must have shewn red lights-Had he seen or been otherwise informed that the switch stands shewed red lights the plaintiff would have known that should his train proceed it would pass from

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the east-bound to the west-bound track. He was under orders to proceed on the east-bound track.

The defendants assert that in passing these red switch lights, as he did, not merely was the plaintiff grossly negligent but that he broke a definite rule of the company sanctioned by the Board of Railway Commissioners. They also charge him with further neglect in having failed to discover that he was on the westbound track before the collision became inevitable.

In reply he asserts that from the right hand side of the engine cab—admittedly "the engineer's side" on which he says it was his duty to be—he was unable, owing to clouds of escaping steam and drifting snow obstructing his vision, to see the switch lights in question, which were on the left-hand side of the track, and that he passed them without being aware that they were set for the "cut-off" and did so in reliance on his fireman's

assurance that they were "all right"—an assurance which he the more readily accepted (as he maintains he was entitled to do) because he had already received from the switch tender what is known as a "high ball" signal to the same effect. In his evidence he says that owing to the slow speed of his train he did not feel any motion that would cause him to realise that he had diverged at the "cut-off," and that, after it had passed to the west-bound track, although he was looking out, the clouds of steam and drifting snow prevented his noticing that there was a parallel track to his right which would not have been there had he been on the east-bound track.

The plaintiff's fireman was killed in the collision, and the only evidence of the circumstances preceding it is given by the plaintiff himself. The defendants offered no evidence. Upon a charge not objected to

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at the trial, or now, a jury has found that there was no negligence on the part of the plaintiff. This implies that they believed the plaintiff's evidence and found all controverted matters of fact bearing upon that issue in his favour. They accepted as sufficient his explanation of his inability to see the indicating lights of the switches set against him and of his failure to realise that his train had passed to and was proceeding on the west-bound track. These were matters which it was within their province to pass upon and I am not prepared to hold that their implied findings in regard to them were so clearly perverse that we should set them aside.

It follows that, unless the defendants can establish that the plaintiff disregarded some rule which he was bound to obey at all hazards—a rule so imperative that failure to comply with it would conclusively debar him from recovery regardless of any considerations of negligence or reasonable excuse—the judgment for the plaintiff cannot be disturbed. The defendants submit that rule 401 is such a rule and that it was disregarded by the plaintiff. The relevant part of that rule reads as follows.—

> Engineers must know the indications of all fixed signals before passing them.

Conceding this rule to be imperative, the plaintiff answers the defendants' contention based upon it by averring that the switch stand signals which he passed although set against him were not "fixed signals," and that if they were, he complied with the requirements of the rule properly interpreted.

On the first of these two questions there has been much divergence of judicial opinion The trial judge asked the jury to determine it and acted upon their negative answer. The Court of Appeal would appear

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to have regarded it as a question proper to be dealt with by the court. The four learned appellate judges were equally divided in opinion upon it, Newlands and Lamont JJ. agreeing with the construction placed by the jury on the term "fixed signals" and the Chief Justice of Saskacthewan and Elwood J. holding that switch stand signals are "fixed signals" within the definition of that term contained in the book of rules.

It would almost seem to be a hardship for the plaintiff should he, against his sworn statement of his understanding to the contrary, which the jury must have accepted and without any expert or other evidence opposed thereto, be held bound, (at the peril of being held blameworthy should he act on the contrary view), by an adverse interpretation of this term as used in rule 401, as to which learned judges have disagreed. While there is a great deal to be said for the opposite view, with such light as we now have on the question I would be inclined to agree with the contention put forward by the defendants, substantially for the reasons stated by Elwood J.[2] I am satisfied moreover, that without any such special rule as that under consideration, an engineer's disregard of a switch stand signal or indicator set against him, whether it be technically a "fixed signal" or not, would disentitle him to recover for injury sustained in an ensuing collision, if he saw, or if, under the circumstances, it should be held that but for his own fault he would have seen that it was set against him. But I find it unnecessary, and on this record I think it would be unwise, to express a definite or concluded opinion on the question whether switch stand signals are or are not "fixed signals."

Assuming that they are, whether the plaintiff did or did not comply with rule 401 depends, in my

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opinion, on the meaning to be attached to the words "must know." In the strict sense knowledge is, of course incompatible with error. One cannot "know" that which is not the fact. But nobody contends that rule 401 means that fault on the part of an engineer will be conclusively established should he proceed under a mistaken conviction as to the

[2] 40 D.L.R. 547, at page 552; (1918) 2 W.W.R. 336, at page 342.

indication of a switch light although he had exhausted every means humanly possible to ascertain the fact. "Must know" does not import that there must be a certainty which it is quite beyond our finite and fallible powers to attain—does not imply that mistake however caused will always be inexcusable. The defendant's contention is not that. It is that the engineer is obliged to have a conviction that the indication of every fixed signal entitles him to proceed, *based on personal ocular observation,* before he does so; that if he proceeds without "knowledge" thus acquired he does so at his peril If the words "must know" import exclusively, as the defendants contend, know edge acquired from the testimony of the engineer's own eyes, rule 401 admittedly was not obeyed. If, on the other hand, information on which a reasonably prudent man would, under the circumstances, have been justified in believing that there was certainty, as great as the limitations of human fallibility permit should exist, that the switches in question were set in his favour suffices as the foundation of the "*knowledge"* of that fact demanded by the rule, and the jury was satisfied, as it must have been, that the plaintiff had information of that character, his right to recover cannot be successfully impugned although the switch signals were in fact set adversely to him and personal observation, if feasible, might have so informed him.

I have selected the following definitions of the

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active verb "to know" from standard English dictionaries:—

> To have cognizance of (something) through observation, inquiry or information; to be aware or apprised of (F. savoir, Ger. wissen) to become cognizant of, learn through information or inquiry, ascertain, find out:
>
> To be congnizant, conscious, or aware of (a fact), to be informed, to have learned; to apprehend (with the mind), to understand. With various constructions: a. with dependent statement, usually introduced by *that.* Murray.
>
> To be convinced or satisfied regarding the truth or reality of; to be informed of; as, to know things from information. The Imperial.
>
> To perceive or understand as being fact or truth (primary definition) and, in a general sense to have definite information or intelligence about; be acquainted with either through the report of others or through personal ascertainment, observation, experience or intercourse. The Century.
>
> To perceive or apprehend as true; to recognize as valid or as a fact on the basis of information possessed, or of one's understanding or intelligence, to have mental certitude in regard to, together with a clear comprehension of; to perceive with understanding and conviction. Webster.

A moment's reflection will suggest many material truths within our certain knowledge of which, although not founded upon any testimony afforded by our eyesight, we would immediately challenge any denial. Knowledge based on the testimony of our fallible senses is far from being universally accepted as the highest or the most certain. There are other sources of moral certitude.

Walker, in his evidence, asserts that he had duties to discharge which required him, at least while running within the Moose Jaw yard limits, to remain on the right-hand side of his engine. He particularises the necessity of his being in a position to see a possible flagman's signal or a burning fusee on his side of the track which, were he on the left-hand side of the engine, might escape his attention. Rule 11 forbids passing a burning red fusee. A flagman's light swung across the track would have required him to stop (r. 12). Any

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object waived violently by any one at or near the track is a signal to stop (r. 13). Common knowledge tells us that he might have added that the position of the throttle, the lever and the air-brake controller, all of which he might be suddenly required to use with the utmost promptitude to meet an emergency, also made it incumbent upon him, at least while within yard limits, to retain his position on the right-hand side of the engine cab. While there appears to be no rule imposing on the engineer in explicit terms the duty of remaining on his own, or the right-hand side of the cab, rule 35, in three places, implies such a duty:

> 35.—A yellow flag or a yellow light placed beside the track on the same side as the engineer of an approaching train, indicates that the track 3,000 feet distant is in condition for speed of but six miles an hour unless otherwise instructed, and the speed of a train will be controlled accordingly. A green flag or a green light, placed beside the track, on the same side as the engineer of an approaching train, at a point beyond the slow track, indicates that full speed may be resumed.
>
> A "slow" sign placed beside the track, on the same side as the engineer of an approaching train, may be used to mark a point where a slow order is in effect.

Having regard to the definitions, the uncontradicted evidence and the passages from the rules to which I have referred, I have no hesitation in concluding that the words "must know" in rule 401 do not import knowledge acquired by the use of the engineer's own eyes to the exclusion of every other source of knowledge however reliable. The rule may be satisfied by knowledge acquired by inquiry or information from the fireman, when the engineer cannot himself see the signal indication from the place he occupies in the cab,

provided he takes adequate precautions to ensure, as far as reasonably possible, the accuracy of such information. Thus the engineer may rightly be required to see that his fireman, if he is relying upon him to communicate

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information as to signals, is in a position to see them, has taken what appear to be reasonably sufficient means to ascertain what they are and has communicated the information in such a manner as to obviate any reasonable possibility of misunderstanding. The plaintiff has sworn that he discharged his duty in all these particulars, and the jury whose function it was to pass upon his credibility, have accepted his statement. I find nothing in the rules which prevents an engineer, under these circumstances, from relying upon the information given by his fireman that switch stand signals or indicators on the left-hand side of the track which he may be unable to see himself appear to be in order and "ranged up" to allow the train to proceed. On the contrary, were an engineer obliged to cross over to the left-hand side of the cab to verify with his own eyes the indication of every switch light on the left-hand side of the track encountered in a yard such as that at Moose Jaw, not only would the running of trains be seriously impeded but other dangers above indicated, against which it was his duty to guard, would not be provided for.

Upon the findings of the jury the proper conclusion, in my opinion, is that Walker had the "mental certitude"—the "conviction" based on information—necessary to satisfy rule 401.

If I thought that on its proper construction rule 401 imposes on the engineer the duty under all circumstances of ascertaining by personal observation the indications of every switch stand light on the left-hand side of the track before passing it, I should have had to consider very carefully indeed before holding the plaintiff disentitled to recover, whether the discharge of duties inconsistent with the observance of it was not also required of him, and, if so, whether the

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defendants could invoke against him a failure to comply with that rule caused by the necessity of fulfilling such other duties.

The verdict is no doubt large, but it is not so excessive that it is possible to say that the jury must have been influenced by improper considerations in arriving at it, and while I might, if trying this action, have reached different conclusions as to some facts deposed to by

Walker relevant to the question of contributory negligence, I could not, without usurping the functions of the jury in regard to these matters, substitute my views for theirs

I would, for these reasons, dismiss this appeal.

BRODEUR J.—This is a railway accident in which the plaintiff, respondent, was seriously injured. He was the engineer on a passenger train of the appellant company and he was bound to go east on a double track.

His train was then on track No. 1 at the station at Moose Jaw, and in order to reach track No. 3 or the east-bound main track, on which he was to run to reach the next station, the switches had to be lined up by an employee called the switch-tender.

Having received from the conductor of the train the order to start, and having received from the switch-tender the high ball signal indicating that the switches were properly laid, he started his train, which went down on the east-bound track; but by a very serious and evident mistake of the switch-tender the switch at the end of the yard through which the train could be transferred from the east-bound track to the westbound track had been left open and the train engaged itself on the west-bound track and came into collision with another train a few minutes after.

It is common ground that the switch, which I will

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call the Y switch because it is indicated in that way on the plan filed in the case, was not properly set. There was negligence on the part of the company's employees in giving Walker instructions to proceed with his train when that switch was not properly lined up. Then there is no doubt as to the company being liable for that negligence.

But the contention of the company is that the proximate cause of the accident was the negligence of Walker, because he should have ascertained and known the indication that this switch was set in such a way that his train would be brought on a west-bound track instead of being kept on the east-bound track. He is then charged with having failed in the duties which he had to perform and with being guilty of contributory negligence.

The jury found in favour of the plaintiff on that question of contributory negligence and that verdict was accepted by the trial judge and confirmed by the Court of Appeal.

Mr. Tilley, for the company, relied on rule 401 of the General Train Rules, approved by the Railway Commission, which says:—

> Engineers must know the indication of all fixed signals before passing them. At railway crossings, drawbridges, junctions or train order offices, they will require the fireman to observe and communicate the indications of signal.

It is contended on the part of the respondent that he had ascertained through his fireman that the Y switch was properly set and that he could proceed and, besides, he adds that a light on a switch stand is not a fixed signal and that rule 401 does not apply in this case.

The accident happened during the night of the 4th of January, 1916. It was a dark, stormy and very

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cold night, 30 below zero, A strong wind was blowing from the north and the steam coming from the engine was passing over to the right side of the engine, the engineer's side, so that the latter was enveloped in a fog, it being practically impossible for him to see on his side. His fireman had been instructed to keep a lookout. The switches were on the side of the fireman, and he reported that everything was all right. The poor fireman was killed as a result of the collision and his evidence unfortunately was not available at the trial.

The jury has found, as I have said, that the engineer, in those circumstances, was not guilty of contributory negligence. He could not see himself, in view of the fog which was surrounding his side of the engine, and it was proper for him to instruct his fireman to look and see.

Besides, has that rule any reference to the lights on the switch stand? I do not think so, because then there would be a conflict between the rules 10 and 661 and rule 401. Rule 10 says that a red light means that the train should stop. Rule 661 says:—

> Trains or engines may be run to but must not be run beyond a signal indicating stop.

These two rules read together mean that when a red light is seen the engine must stop and the train must not go further. It could not apply to lights on switch stands, because there the trains are not bound to stop; but lights on the switch stand simply indicate that the green is set for the main track and the red is set for the diverging track. If rule 401 was to be read as applying to switch stands, then the duty of the engineer in this case would

have been to stop at the four red lights which were on the switch stands before he reached the Y switch, and nobody contends that.

The plaintiff has said in his evidence, and it was not

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contradicted, that those switch stands are simply indicators and not fixed signals as included in rule 401. I think he was right in his contention; because otherwise there would be conflict between the rules 10 and 661 on one side and rule 401 on the other.

I have come to the conclusion that the jury was right in declaring that there was no contributory negligence on the part of plaintiff.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Willoughby, Craig & Company.

Solicitors for the respondent: Anderson, McNiven, Fraser & Rose.