THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS;

AND

ERNEST PERRAULT (PLAINTIFF) ... RESPONDENT.

1905
*Oct. 31.
*Nov. 29.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Railways—Farm crossings—Jurisdiction of Board of Railway Commissioners for Canada—Statutory contract—Railway Clauses Act, 1851 — *Grand Trunk Railway Act*, 1852 — *"Railway Act*, 1888"—*"Railway Act*, 1903"—*Appeal — Controversy involved— Jurisdiction.*

Orders directing the establishment of farm crossings over railways subject to "The Railway Act, 1903" are exclusively within the jurisdiction of the Board of Railway Commissioners for Canada.

The right claimed by the plaintiff's action, instituted in 1904, to have a farm crossing established and maintained by the railway company cannot be enforced under the provisions of the Act, 16 Vict. ch. 37 (Can.) incorporating the Grand Trunk Railway Company of Canada.

Judgment appealed from reversed, Idington J. dissenting in regard to damages and costs.

An application to have the appeal quashed on the grounds that the cost of the establishing the crossing demanded together with the damages sought to be recovered by the plaintiff would amount to less than $2,000 and that the case did not come within the provisions of the Supreme Court Act permitting appeals from the Province of Quebec was dismissed.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Arthabaska, and maintaining the plaintiffs' action with costs.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

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The action was to compel the defendants to establish and maintain a farm crossing for the use of the plaintiff in passing from one part of his farm to another where it was intersected by the railway and to recover fifty dollars damages occasioned by the defendants' refusal to furnish the crossing when required to do so. The principal defence was that the court had no jurisdiction to make any order as prayed for since the enactment of the "Railway Act, 1903," vesting the exclusive jurisdiction in regard to such matters in the Board of Railway Commissioners for Canada. The action was dismissed in the Superior Court, where Mr. Justice Carroll held that the jurisdiction to make such orders had been taken away from the courts and vested solely in the Board of Railway Commissioners. His decision was reversed by the judgment now appealed from on the ground that the plaintiff, by law and by the special Act incorporating the company (16 Vict. ch. 37), as well as by the general railway Acts in force at the time of the construction of the railway, was entitled to have the farm crossing as demanded by his action.

Lafleur K.C. and *P. H. Coté K.C.* for the appellants (*Beckett* with them). The present appeal affects the lands of the railway and a servitude asserted in relation thereto by the plaintiff and, consequently, is of the class of cases in which an appeal will lie to this court. We refer to *Chamberland* v. *Fortier*(1); *McGoey* v. *Leamy*(2); and the established jurisprudence of the court under numerous decisions since the reports mentioned.

The express provisions of the "Railway Act, 1903," vesting plenary and exclusive jurisdiction in all

(1) 23 Can. S.C.R. 371. (2) 27 Can. S.C.R. 193.

matters such as those now in question in the Board of Railway Commissioners for Canada have the effect of ousting the jurisdiction of courts of law or equity: *Cates* v. *Knight*(1); *Breakey* v. *Carter*(2); *Mayor of Montreal* v. *Drummond*(3), at p. 412; *The Ottawa, Arnprior and Parry Sound Railway Co.* v. *The Atlantic and North-West Railway Co.*(4); *Ontario Lands and Oil Co.* v. *Canada Southern Railway Co.*(5); *Canadian Pacific Railway Co.* v. *Northern Pacific & Manitoba Railway Co.*(6); *Grand Trunk Railway Co.* v. *McKay*(7).

The special statutes affecting the Grand Trunk Railway impose no greater liability as to crossings that can be required under the general railway Acts: *Vézina* v. *The Queen*(8); *Guay* v. *The Queen*(9); *Grand Trunk Railway Co.* v. *Therrien*(10).

Beaudin K.C. and *J. E. Perrault*, for the respondent. The respondent asks the construction of a crossing with two gates to communicate from one part to the other of his farm, the cost of which would not exceed one hundred dollars, as shewn by the affidavits filed and also $50 damages. Consequently, the total amount of his claim is $150, and is not sufficient to give this court jurisdiction to hear an appeal. The case does not come within the class of cases in which appeals from the Province of Quebec are permitted by the Supreme Court Act: *Cully* v. *Ferdais*(11); arts. 1209, 1211, C.P.Q.; *Desaulniers* v. *Payette*(12); *Shaw* v. *St. Louis*(13).

(1) 3 T.R. 442.
(2) 4 Q.L.R. 332.
(3) 1 App. Cas. 384.
(4) 1 Can. Ry. Cas. 101.
(5) 1 Ont. L.R. 215.
(6) 5 Man. R. 301.
(7) 34 Can. S.C.R. 81.
(8) 17 Can. S.C.R. 1
(9) 17 Can. S.C.R. 30.
(10) 30 Can. S.C.R. 485.
(11) 30 Can. S.C.R. 330.
(12) 35 Can. S.C.R. 1.
(13) 8 Can. S.C.R. 385.

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Under the Acts, 16 Vict. ch. 37, sec. 2, and 14 & 15 Vict. ch. 51, sec. 13, the appellants are bound to establish and maintain the farm crossing as required by the plaintiff. The right accrued over fifty years ago, when the railway was constructed, and the "Railway Act, 1903" cannot operate retrospectively to take away that right: *Grand Trunk Railway Co.* v. *Huard* (1). Under the special Act incorporating the Grand Trunk Railway Co., as well as under the general Acts concerning railways, the Superior Court has always had, and still has, jurisdiction to enforce the rights of individuals under what may be termed the statutory contract. This court, in the case of the *Canada Southern Railway Co.* v. *Clouse* (2), did not entertain any doubt as to the jurisdiction of the Superior Court. See *per* Gwynne J. at page 157; *Canada Southern Railway Co.* v. *Erwin* (3). In the case of the *Grand Trunk Railway Co.* v. *Therrien* (4); the question as to the right to a crossing was decided on the merits, this court admitting, implicitly, that it had jurisdiction over the case. See also *Dubuc* v. *Compagnie du Chemin de Fer de Montréal et Sorel* (5); *Smith* v. *Atlantic and North-West Railway Co.* (6).

Section 23 of the Railway Act does not give to the Board more power than the Railway Committee had under the Act of 1888. The Railway Committee, under that Act, had the same jurisdiction as the present Board, nevertheless the courts heard cases similar to the present one and have always declared that they were competent to do so. The "Railway Act, 1903," has not created a new recourse, nor a special tribunal,

(1) Q.R. 1 Q.B. 501.
(2) 13 Can. S.C.R. 139.
(3) 13 Can. S.C.R. 162.
(4) 30 Can. S.C.R. 485.
(5) 7 Legal News 5.
(6) M.L.R. 5 S.C. 148.

applicable to this case, inasmuch as the recourse of the respondent existed long before the passing of that Act.

Parliament could not take away the jurisdiction of the Superior Court except by an express enactment absolutely clear and positive: *Vide* Lord Kenyon C.J., and Ashurst J., in *Cates* v. *Knight* (1); Ashurst J., in *Shipman* v. *Henbest* (2); Loranger, Commentaire du Code Civil, vol. 1, p. 140, No. 25; Ramsay J., in *Grenier* v. *City of Montreal* (3); Hardcastle (3 ed.), at p. 133; *Balfour* v. *Malcolm* (4); Endlich, Interpretation of Statutes, p. 736, No. 522. The "Railway Act, 1903," does not contain any text expressly taking away the jurisdiction of the Superior Court, nor which necessarily implies that it has not jurisdiction over a case like the present one. Section 198 speaks of farm crossings, but it does not give any exclusive power to the Commissioners. The Board has the power to act if application is made to it, but there is no obligation to have recourse to the Commissioners. The Commissioners can act only at the instance of the proprietor. In the present case the proprietor brought suit before the Superior Court. He has chosen his tribunal; he could not go before the Commissioners and make the same demand, and, under section 198, the appellants could not do so because the Commissioners can act only upon the request of the owner of the land.

THE CHIEF JUSTICE.—Mr. Justice Davies has written in this case an opinion in which I fully concur that the appeal should be allowed.

Mr. Justice Carroll's reasoning in the Superior

(1) 3 T.R. 442, at p. 445.
(2) 4 T.R. 109, at p. 116.
(3) 25 L.C. Jur. 138, at p. 144.
(4) 8 Cl. & F. 485.

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Court, I may add, is conclusive, and his judgment, reversed by the Court of Appeal, is restored, with costs in all the courts against the respondent. An application to quash made by the respondent at the hearing must be dismissed. Our jurisdiction to entertain the appeal is incontrovertible. The action is unfounded in law, and dismissed for that reason.

GIROUARD J.— Whatever doubt might exist under prior railway Acts, none is possible under the Act of 1903, sec. 42. I entirely agree with my brother Davies.

DAVIES J.—The judgment appealed from in this case determined that the plaintiff's right to a farm crossing on the appellants' railway, which ran through his farm, did not arise under the "Railway Act" of 1888, or that of 1903, but was a right which was created and existed under the original Act of Incorporation of the Grand Trunk Railway Company. Trenholme J., who delivered the judgment of the Court of Appeal, says:

> It is, therefore, in virtue of the original Act of Incorporation of the Grand Trunk Railway Company that appellant, as owner of a farm severed by respondent's railway, is entitled to a crossing in the present case.

That being so, the court held that jurisdiction of the ordinary courts to give effect to plaintiff's right had not been taken away by the general "Railway Act" of 1903, and they accordingly reversed the judgment of the Superior Court at Arthabaska, which had dismissed plaintiff's action, declared the plaintiff entitled to the crossing he demanded, and ordered the same accordingly with the necessary subsidiary orders to make their judgment effective.

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The judgment proceeded upon the ground that the court was bound by its judgment in a previous case of *Grand Trunk Railway Co.* v. *Huard,* rendered in June, 1892(1),

based on the same statutes as are applicable in the present case (and which they held to be a) direct authority for our course in this case both in declaring appellant's right to a farm crossing and in ordering it.

I am of opinion that the judgment appealed from is erroneous and that the old charter of the Grand Trunk Railway Company, to which the court of appeal refers, does not confer any such right upon the plaintiff to a farm crossing.

The question was discussed at great length in this court in the cases of *Vézina* v. *The Queen*(2), and *Guay* v. *The Queen*(3).

The meaning of sections identically worded as that upon which the court of appeal decided in this case were there considered and determined. This court there held that these statutes (that is, the Consolidated Railway Act prior to 1888) did not give a right of crossing over the railway apart from contract. This same conclusion was re-affirmed in the case of *Grand Trunk Railway Co.* v. *Therrien*(4). By these decisions we are bound and, as far as I am concerned, I may say I fully concur in them.

The only statutory right, therefore, to a crossing which the plaintiff has is that conferred by the railway Acts of 1888 and 1903. The question then arises whether the enforcement of this right is within the exclusive jurisdiction of the Board of Railway Commissioners.

I am of opinion that it is. In the case of *Grand*

(1) Q.R. 1 Q.B. 501.
(2) 17 Can. S.C.R. 1.
(3) 17 Can. S.C.R. 30.
(4) 30 Can. S.C.R. 485.

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Trunk Railway Co. v. *McKay*(1), we had occasion to consider the question of the exclusive jurisdiction of the Railway Commissioners with respect to the speed of trains when crossing highways at level crossings through thickly populated parts of cities, towns and villages, and with respect to the safeguards which in such cases should be maintained for the safety of the travelling public. In that case we reached the conclusion that the jurisdiction of the Railway Commissioners in the section there in controversy was exclusive, and, from the very nature of the case, was intended by Parliament to be so. My reasons for judgment in that case were expressly concurred in by the Chief Justice and Killam J., and were substantially those advanced by Sedgewick J. On that point there was no difference of opinion, Girouard J. basing his dissenting opinion upon other grounds.

I feel it, therefore, unnecessary to repeat at length this reasoning. It is true the special section relating to crossings, 198 of the Act of 1903, was not before us in the case of *Grand Trunk Railway Co.* v. *McKay*(1), but, in my judgment, the same reasoning which led this court to the conclusion that the jurisdiction of the Railway Commissioners was exclusive with respect to the sections of the Act involved in that case, applies to this section 198 of the Act of 1903. The sub-section of that section says:

> The Board may upon the application of any land-owner order the company to provide and construct a suitable farm crossing across the railway wherever in any case the Board deems it necessary for the proper enjoyment of his land on either side of the railway and safe in the public interest; and may order and direct how, when and where, by whom and upon what terms and conditions such farm crossing shall be constructed and maintained.

(1) 34 Can. S.C.R. 81.

We are not now dealing with a common law right or with an antecedent vested statutory right, but with a right of crossing created by the section itself, of which I have quoted the sub-section. The crossing is to be given

> wherever in any case the Board deems it necessary for the proper enjoyment of his land * * * and safe in the public interest.

Many considerations have to be weighed in reaching a conclusion under this section, and some of them relating to the "public interest" may be quite apart from the immediate surroundings. What weight, if an ordinary court was considering the question, would they give or have a right to give to the "public interest?" The special Board of Commissioners is enjoined to consider what would be safe in the public interest. The ordinary court is not so enjoined, and I know not on what ground but one of statutory injunction they would be justified in such a matter as farm crossings in considering the safety of the general public. These considerations on which alone its judgment would be based would, I should imagine, be limited to the rights and interests of the land-owner on the one side and the railway company on the other.

Then consider what an extraordinary jumble might and probably would arise if two courts proceeding on different considerations reached opposite conclusions. Section 3 of section 42 enacts explicitly that

> the finding or determination of the Board upon any question of fact within its jurisdiction shall be binding and conclusive on all courts.

So that, if there existed concurrent jurisdiction, the exercise by the Board of its powers must override and control, so far as facts are concerned, any conclusions of other courts. If, as I have stated, the considerations

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the conflicting courts were to consider were necessarily different the result would be startling.

I am of opinion that this is a case of a statute giving a right and prescribing a mode of giving effect to it, and looking at the whole Act and especially at sections 24, 42 and 198, I entertain no doubt that the jurisdiction conferred on the Board by the latter section was intended to be exclusive.

I think the appeal should be allowed and the judgment of the Superior Court restored with costs in all the courts.

IDINGTON J.—The respondent claims a farm crossing but fails to establish exactly when the appellants built their road over which he seeks a crossing.

Had he shewn that it was before the time when the statute was changed by substituting "at" for "and" in 14 & 15 Vict. ch. 51, sec. 13, as explained by 20 Vict. ch. 35, I would have been prepared to consider the meaning of the statute before that change.

I do not think the change was merely the immaterial one it has been represented to be. In the evidence that is now before us such loose expressions as that the road was built "about fifty years ago" do not warrant me in considering the respondent's rights, if any, as having arisen under the earlier law, especially so when this evidence is only given by a man of forty-three years of age. The respondents can, therefore, if at all, only claim such rights as may have accrued since the change of words to which I have adverted.

This court has by the cases of *Vézina* v. *The Queen* (1), and *Guay* v. *The Queen* (2), put upon "The Government Railways Act," R.S.C. ch. 38, secs. 16, 17, 18 and 19, which are to me not distinguishable

(1) 17 Can. S.C.R. 1. (2) 17 Can. S.C.R. 30.

from Consolidated Statutes of Canada, ch. 66, secs. 13, 14, 15, and 16, in regard to the question of farm crossings, an interpretation that precludes us now from holding that any right to a farm crossing, save by contract or possibly by way of necessity, could arise or exist in consequence of anything done, from the time of the coming into force of the Consolidated Statutes of Canada to the passing of the "Railway Act" of 1888.

It seems to me that *Huard* v. *The Grand Trunk Railway Co.*(1), relied upon in the court below, may have been rightly decided if the right arose before the Act was amended in consolidating the statutes in 1859, but otherwise the decision would seem to be inconsistent with the principle affirmed in the decisions of this court above referred to.

It does not get over the difficulty these cases have created to refer to them as decisions upon another statute, when that other statute has for its aim the creation of exactly the same sort of right or regulating power, and uses almost identical words with that of the Consolidated Statutes of Canada, ch. 66.

For a period of twenty-nine years the railway companies and land-owners accommodated their relations in regard to crossing rights, without the law creating a right thereto, as it turns out, but probably in light of the decisions of the Ontario and Quebec courts, as if the law had imposed the duty upon the railway company to furnish a crossing where needed.

Then, about the time the question of the crossings arose in the cases, referred to, as decided by this court, the "Railway Act" of 1888 was passed, whether in consequence of the doubt which had arisen in these

(1) Q.R. 1 Q.B. 501.

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particular cases or generally, in previous litigation, does not appear.

The decisions were not given until 1889. The cases were pending in March, 1888. The enactment of section 191, in the Act of 1888, and section 198 in the "Railway Act, 1903," providing for farm crossings becomes in the light of this history of the question most perplexing.

Is it remedial legislation? Is it declaratory? Is it to apply to the cases where the railway had been constructed at any time antecedent to such enactment? Assume that, and it might, if taken absolutely so, and in the widest sense, apply to cases where the railway company may have compensated in full for the damages that severance of the land produced, or in respect of which they may have contracted to be freed from the burthen of making and maintaining a crossing.

On the other hand, confine the operation of either provision to the cases of future railway building and for that purpose future expropriations, and the numerous cases that the past railroad construction, and legal uncertainty, have no doubt given rise to, are then left quite unprovided for, and the land-owners unprotected, though all parties may have proceeded upon the supposition that the law already provided what these cases decide it had not.

There is no provision in the "Railway Act" of 1888 for damages. In the "Railway Act" of 1903, there is by section 294 the express recognition of such a right. I am of the opinion that this case falls under the latter Act, and that such a right of action exists here, and that the solution of this case and the questions it raises is, as to damages, an action upon the statute; and as to the specific relief of ordering a

crossing the provision of the statute confers the right and the remedy given therefor must be followed.

We are not embarrassed by the question of the company's acquisition of the title in the road allowance, as was the case in *Ontario Lands and Oil Co.* v. *Canada Southern Railway Co.*(1).

We have, however, before upholding the claim for damages here or indeed any right in the respondent, to meet the question of what is meant by the words *"across whose lands the railway is carried"* in section 198.

They are quite comprehensive enough to cover such a case as the title here. More apt words could easily have been selected for the purpose, I assume, of giving a remedy retrospectively, where the rights of the parties depend on such facts as found here.

I go no further. Each way one looks at this section of the statute difficulties are presented, and some of them most formidable. When, however, we look at the purview of the Act I cannot think it was intended to cut off the claims of those who had, without any fault of theirs, lost in law, without compensation, such rights of crossing as both they and the railway company, I have no doubt, until the decision I refer to, conceived there existed.

It is to be observed that this legislation was also probably meant to deal with the cases of sub-divisions, not within the probable consideration of either party when a railway was built.

To meet that phase of farm crossings the whole question of granting or refusing is remitted to the discretion of the Board of Railway Commissioners.

That is not all that is remitted to that tribunal to dispose of in the case of farm crossings. I venture to

(1) 1 Ont. L.R. 215.

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think that so much is, and if so, why should the whole field of such crossings whether arising from future railway building or future sub-divisions of lands, or the cases arising out of past railway building not also be provided for?

It seems when these questions are all borne in mind that we must conclude they were all present to the mind of Parliament, and the result was the use of words capable of furnishing a remedy for each and every case so arising.

It would seem as if the question of the jurisdiction of the superior courts having been taken away or not, has, though the contest throughout has been in regard to that, never in law arisen. It never existed, except as to damages.

It follows that this case has been throughout contested on an entirely erroneous basis.

I cannot accede to the proposition put before us that the right created by this legislation is one of a conditional character, only to come into effect upon the granting or issuing of an order by the Board of Railway Commissioners.

The right may be limited by the discretion of the Commissioners, in some of the many kinds of cases that are sure to arise.

It seems to me, however, that the companies cannot safely assume, and ought not to act upon the assumption in all cases, that until an order is got no right exists, and especially ought not to do so on such facts as this case presents.

I am of opinion that the judgment, directing a crossing to be made, must be set aside, and the application for an order be left to the authority appointed by this Act, that created the right to grant it, and the manner of its performance or execution. This is one of

the cases, however, in which the granting of the order might also be said to be administrative so clear does the right seem to be. The appellants are liable, in my view, for damages for failing to observe the statutory duty created by sub-section 1 of section 198 of the "Railway Act" of 1903. If authority be needed section 294 of this Act seems clear. And it is equally clear to me that the first sub-section creates a right here quite independently of the second sub-section.

The demand was made for a crossing. It might have been made in better form. Nothing was done. No explanation is offered by the defendants. It certainly ought not, I think, to be laid down as law that before the land-owner, who is given this statutory right, can hope to enjoy it he must, in every case, simple or complex, alike institute proceedings that the railway company ought to help to avoid. And especially so in such a case as this where years ago they had recognized the right and duty. I think in the result that each party should pay his own costs of appeal to this court and the costs in the Court of Appeal below, and that the judgment in the trial court should be with such costs as the amount of damages will carry.

MACLENNAN J.—I concur for the reasons stated by Mr. Justice Davies.

Appeal allowed with costs.

Solicitor for the appellants: *P. H. Coté.*

Solicitors for the respondent: *Perrault & Perrault.*