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*Nov. 24, 25.
*Dec. 24.

THE TORONTO RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

FRANCIS JOHN PAGET (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of statute—General and special Act—Inconsistency—Ontario Railway Act, 6 Edw. VII. c. 30, ss. 5 and 116—Charter of Toronto Railway Co., s. 17.

The Ontario Railway Act of 1906 (6 Edw. VII. ch. 30) is, by sec. 5, made applicable to street railway companies incorporated by the legislature, but, by the same section, if provisions of the general and special Acts are inconsistent, those of the latter shall prevail. By sec. 116 of the general Act, a passenger on a railway train or car who refuses to pay his fare may be ejected by the conductor; and by sec. 17 of the Act incorporating the Toronto Railway Co., a passenger in such case is liable to a fine only.

Held, that these two provisions are not inconsistent, and the conductor of a street railway car may lawful eject therefrom a passenger who refuses to pay his fare.

In this case the company was held liable for damages, the passenger having been ejected from a car with unnecessary violence.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of a Divisional Court by which the verdict for the plaintiff at the trial was maintained.

The plaintiff sued for damages alleging that he had been wrongfully thrown from a car of the defendant company with such violence that he was laid up for several weeks and permanently injured. A verdict in his favour for $2,500 damages was maintained in

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

the Ontario courts, and the company appealed to the Supreme Court of Canada, asking for a verdict in their favour or a new trial.

The main point urged on this appeal was that there was no statutory authority for the conductor to eject a passenger for non-payment of fare, and the company was not responsible for his act in doing so without authority, because, while the "Ontario Railway Act of 1906" provides for such expulsion, the special Act incorporating the company makes provision for a fine only in such case, and such special Act overrides the provision in the general Act.

Nesbitt K.C. and *D. L. McCarthy K.C.*, for the appellants. At common law a passenger could not be put off a train for non-payment of fare. *Grand Trunk Railway Co.* v. *Beaver*(1). The "Ontario Railway Act of 1906" authorizes it, but the special Act incorporating the defendant company makes a different provision, and the latter must prevail.

Evidence of what was said by passengers on the car was improperly admitted. *Wright* v. *Doe d. Tatham*(2). See also *Gilbert* v. *The King*(3); *Garner* v. *Township of Stamford*(4); *Beard* v. *London General Omnibus Co.*(5).

Young and *T. H. Lennox*, for the respondent, cited *Loughead* v. *Collingwood Shipbuilding Co.*(6), and argued that even if the evidence of what was said by passengers on the car should not have been admitted, there was enough without it to support the verdict referring to *Tait* v. *Beggs*(7), and Rule 785 of the "Ontario Judicature Act Rules."

(1) 22 Can. S.C.R. 498.
(2) 7 A. & E. 313, at p. 359.
(3) 38 Can. S.C.R. 284.
(4) 7 Ont. L.R. 50.
(5) [1900] 2 Q.B. 530.
(6) 16 Ont. L.R. 64.
(7) [1905] 2 Ir. R. 525.

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Davies J.

THE CHIEF JUSTICE.—I would dismiss this appeal with costs.

DAVIES J.—As put in the appellants' factum, the chief bone of contention between the parties is whether or not, as a matter of law, the respondent can hold the appellant corporation liable for the act of its servant, the superintendent, in putting the plaintiff off the car.

The answer to that question depends upon whether the 116th section of the "Ontario Railway Act of 1906," giving conductors and train servants of the company powers to expel without unnecessary violence passengers who refuse to pay their fares, is or is not inconsistent with section 17 of the special Act of the company which subjected passengers refusing to pay fares or leave the cars to a fine of not more than ten dollars and not to expulsion.

After a good deal of consideration I have reached the conclusion that these sections can well stand together, are not necessarily inconsistent, and may be construed as complementary one to the other.

Having reached this conclusion adverse to the appellants I cannot, in the conflicting state of the evidence, under the findings of the jury do otherwise than confirm the judgment below and dismiss the appeal with costs.

IDINGTON J.—Having due regard to the purpose and scope of the respective Acts, I fail to find any inconsistency between section 17 of the appellants' Act of incorporation and section 116 of the "Ontario Railway Act, 1906." Hence, both being in force at the time of the happenings out of which this action arose, the appellant and its properly authorized servants had

that authority denied by it in maintaining this appeal. It, therefore, fails.

I cannot attach importance to the other objections taken, and especially so in the absence of objections at the trial to lay a foundation for them in the courts appealed to.

The appeal should be dismissed with costs.

DUFF J.—There seem to be two possible views of the effect of section 5 of the "Railway Act of Ontario" where you have a provision in that Act and a provision in a prior special Act dealing with the same subject-matter in diverse ways. One possible view is that in such cases the provision in the general Act is to be wholly discarded from consideration; the other is that both provisions are to be read as applicable to the undertaking governed by the special Act so far as they can stand together, and only where there is repugnancy between the two provisions and then only to the extent of such repugnancy the general Act is to be inoperative.

I think the latter is the correct view. The question in the present case is whether section 116(1) of the "Railway Act" can in all respects stand with section 17 of the appellant's special Act, or whether that part of the first named enactment which authorizes the servants of the company to expel from its cars a passenger who refuses to pay his fare is necessarily displaced by the provision in the special Act dealing with the same subject. It may, of course, be argued that the special Act treats such a passenger as a trespasser and that the grant of the special remedy there provided negatives the existence of the remedy with which the common law would arm the company as

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against any person who, without a right to be there, should persist in remaining on its cars—in short, that resort to expulsion is prohibited. This appears, however, a strained and artificial reading of the section. The true account of the matter seems rather to be that the legislature has not in the special Act declared the passenger refusing to pay his fare and refusing to leave a trespasser for all purposes, but in such circumstances has given the company one remedy and has not given another. If this be the correct view of the section there is clearly no repugnancy and nothing to prevent the operation of both sections.

On the other points argued I agree with the judgment of Magee J., and there is no occasion to add anything to what he has said.

ANGLIN J.—The defendants appeal from the judgment of the Court of Appeal for Ontario, which dismissed their appeal from the judgment of a Divisional Court, upholding a verdict for the plaintiff for $2,500.

The action was brought to recover damages for personal injuries sustained by the plaintiff, as he alleges, either through his having been unwarrantably ejected from a street car by a divisional superintendent of the defendant company, or because of undue violence in his removal, if the removal itself was justifiable. To this claim, under a plea of "not guilty by statute," the defendants make several answers:

(*a*) They deny that the plaintiff was in fact ejected by their superintendent and say that he fell from the car in lunging forward to strike that official;

(*b*) They assert that if the plaintiff was, as he alleges, ejected merely for refusal to pay fare, the company had no power to forcibly expel a passenger for

this cause and, therefore, is not liable for the illegal act of its official, which it did not and could not authorize;

(*c*) They say that if the company has the right to eject a passenger who refuses to pay fare the superintendent was not charged with the execution of any such duty and that they are, therefore, not answerable;

(*d*) They assert that the plaintiff's conduct upon the car had been such that he had become a nuisance and that his removal was, upon this ground, justified;

(*e*) They deny that any undue or unnecessary violence was used in removing the plaintiff, and say that, if he was in fact ejected, his injuries are attributable to his own violent and improper resistance.

Upon this statement it is apparent that there were several issues of fact and law presented, and it is to be regretted that the learned trial judge did not, instead of taking a general verdict, submit to the jury a series of questions, each covering one of the issues of fact to be determined. It would have then been comparatively easy to ascertain what view of the facts was taken by the jury and upon what findings they based their verdict.

That the plaintiff was, in fact, seriously injured is not disputed and, in this court, the verdict has not been attacked as excessive.

Upon the issue whether the plaintiff fell from the car because he lost his balance while striking at the superintendent or whether he was pulled or thrown from the car by the latter there was direct conflict of testimony. This question was explicitly put to the jury in the learned judge's charge and the verdict necessarily implies a finding upon it in the plaintiff's favour which, upon the evidence, cannot be disturbed.

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It would certainly have been more satisfactory had the question whether there was or was not excessive force used in removing the plaintiff been presented to the jury as a distinct issue. They were not explicitly told that, if conditions existed which in fact and in law warranted the plaintiff's removal, a verdict against the company would be justified only if they should find that there had been improper violence on the part of the superintendent and that this was the cause of the plaintiff's injuries.

But the conflict in testimony as to what took place immediately before the plaintiff was thrown to the ground is very pointed—so much so that the learned trial judge was impelled to say,

> there has been false swearing in this case, been testimony given that is not true, and not true to the knowledge of those persons who have given it.

The plaintiff had sworn that he was pushed or pulled violently to the ground by the superintendent; the superintendent had denied that the plaintiff had been pushed or pulled at all. The learned judge told the jury that

> if what the plaintiff says is true, then this act was something that Argue (the superintendent) ought not to have done in the exercise of his duty, and it was an abuse of the plaintiff pushing him violently in that way and, in my opinion, if that is the true story, the defendants are liable in this action.

Again he said:

> Technically, Mr. Argue admitted that he was guilty of an assault upon this plaintiff; he caught him by the coat, and, unless he can justify that that would be an assault so far as the mere technical offence is concerned, because an assault is defined as an attempt to do corporal injury to another coupled with present ability, or any act or gesture from which an intention to commit a battery may be implied is an assault if the person is near enough to strike. While that is technically an assault, that is not what this action was brought for. If he had simply taken him by the coat or simply pulled

him down, it would not be an action such as this, or to the same extent at all events in damages. The serious assault that is complained of is what the plaintiff and his witness say, and that is what is denied, and so we are to deal with the case on its merits, without dealing with it merely as a matter of law as to what may be an assault or not.

And again:

Was this assault committed by the defendants in the way described by the plaintiff and his witness, or was it as described by the officers and men on the part of defendants? If the latter, there is no liability; if in the way described by the plaintiff, then you may find a verdict for the plaintiff, if you believe the evidence.

And again:

He (the plaintiff) says * * * "you (the superintendent) then got up on the car and you gave me a violent push, and it is from that violent push you gave me that my injuries have resulted.

Although these passages in the charge are unfortunately somewhat closely connected with discussion of the plaintiff's alleged misconduct, and of the question whether it amounted to a cause justifying his removal, and also with the issue as to whether he was, in fact, removed by the superintendent or whether he fell from the car because he lost his balance in an effort to strike the superintendent, looking at the charge as a whole it is not possible to say that the attention of the jury was not directed to the question whether there had been excessive violence in removing the plaintiff.

The conditions which would have justified the removal of the plaintiff (as the case was presented to the jury), might be either refusal to pay fare or misconduct of the plaintiff such that he had become a nuisance. His misconduct might be aggravated by his refusal to pay fare and the manner of such refusal.

Did the plaintiff refuse to pay his fare? The officials of the company say that he did emphatically

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refuse. He says that he merely declined to pay until the car should become less crowded, when he might more conveniently reach his pocket. The fare was payable upon his entering the car. That the superintendent was justified in treating the plaintiff as a person who had refused to pay his fare is, I think, upon the evidence incontrovertible. His declining to pay when called upon was, in my opinion, in law a refusal to pay. The learned trial judge in effect told the jury that, although the demand for payment of fare may, in the circumstances, have been rash, the plaintiff, according to his own story, did "refuse point blank to pay" his fare. It cannot be assumed that the jury found against this direction.

On the issue of misconduct the evidence is contradictory. The plaintiff says he was sober and inoffensive; the defendants' witnesses say he was intoxicated, abusive and profane. This issue was fairly presented to the jury. The difficulty is to know how they found upon it. Does their verdict mean that the plaintiff was not a nuisance, and that his removal on this ground would have been unjustifiable; or have they merely found that although he had been such a nuisance as warranted his removal, there was an undue use of force and violence in expelling him; or have they found in the plaintiff's favour upon both these questions?

If the element of non-payment of fare were eliminated it would not be very material to know upon what ground the jury proceeded, because the verdict for the plaintiff would necessarily imply that the jury had found for him, if not upon both questions, upon one or the other; and either finding would suffice to support the verdict.

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But, upon a direction that refusal to pay fare would justify removal from the car and a direction or finding that such refusal had been shewn, a finding in the plaintiff's favour on the issue as to misconduct would not suffice to sustain the verdict. In that view of the case a finding that there was excessive force in removing him would be indispensable.

After careful consideration I have reached the conclusion that the verdict, in the light of the charge read as a whole, involved a finding that the superintendent used unnecessary and excessive force in expelling the plaintiff from the car and that this was the cause of his injuries. The learned judge in effect directed the jury that, as a matter of law, the defendant company had the right to expel for refusal to pay fare; his presentation of the case appears to proceed upon this view; he told them, at least impliedly, that the real issue for them to determine was whether the removal being otherwise justifiable it was or was not accompanied by undue violence.

But the defendant company maintains that it has no power to expel a passenger for mere refusal to pay fare. The Act of incorporation of the company (55 Vict. ch. 99 (Ont.)), which also ratifies their contract with the city, provides, in section 17, as follows:

> The fare of each passenger shall be due and payable on entering the car or other conveyance of the company, and any passenger refusing to pay the fare demanded by the conductor or driver, and refusing to quit the car or other conveyance when requested so to do shall be liable to a fine of not more than ten dollars besides costs. And the same shall be recoverable before any justice of the peace.

The contract itself does not contain this provision.

In 1906, the Legislature of Ontario passed a general railway Act (6 Edw. VII. ch. 30). This Act expressly defines the field of its application. By section 3, it is provided that it shall apply

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when so expressed to street railways within the legislative authority of the Legislature of Ontario * * * and shall be incorporated and construed as one Act with the special Act, subject as herein provided.

Section 5 reads as follows:

If in any special Act heretofore passed by the Legislature it is enacted that any provision of the "Railway Act of Ontario," or of the "Electric Railway Act," or of the "Street Railway Act" in force at the time of the passing of such special Act is excepted from incorporation therewith, or if the application of any such provision is, by such special Act, extended, limited or qualified, the corresponding provision of this Act shall be taken to be excepted, extended, limited or qualified in like manner; and, unless otherwise expressly provided in this Act or the special Act, this Act shall apply to every railway company incorporated under a special Act or any public Act of this province and the sections expressly made applicable shall apply to every street railway company so incorporated; but, where the provisions of the special Act and the provisions of this Act are inconsistent, the special Act shall be taken to override the provisions of this Act, so far as is necessary to give effect to such special Act.

Section 116 of the "Railway Act of 1906" is as follows:

116 (1). The fare and toll shall be due and payable by every passenger on entering the car or other conveyance, and every passenger who refuses to pay may, by the conductor of the train and the train servants of the company, be expelled from and put off the car with his baggage at any usual stopping place, or near any dwelling house, as the conductor elects, the conductor first stopping the train and using no unnecessary force.

(2) This section shall apply to street railways.

Counsel for the plaintiff maintained that this provision of the general "Railway Act" applies to the Toronto Street Railway. Mr. McCarthy contended that, because section 116 of the general Act deals with a subject already dealt with in the company's special Act, and also because it is, as he said, inconsistent with section 17 of the special Act, it does not apply to his clients.

No doubt, as a general rule, where a particular matter is dealt with by a special Act, the application

of the provisions of a general Act dealing with the same matter is excluded. Maxwell on Statutes (3 ed.), pp. 242-3. But this rule does not apply where it appears on the face of the general Act that

> the attention of the legislature has been turned to the earlier special Act, and that it intended to embrace the special cases within the general Act. Maxwell on Statutes (3 ed.), p. 250.

It is quite apparent that, when enacting the "Railway Act of 1906," the legislature had in mind the fact that a number of the railways to be affected had special Acts. It is also apparent that it was intended that, although certain subjects had been dealt with by such special Acts, the provisions of the general Act dealing with the same subjects should apply to the companies governed by such special Acts, unless and except in so far as the provisions of the general Act are inconsistent with those of the special Acts, in which case "the special Act shall be taken to override the provisions" of the general Act, but only "so far as is necessary to give effect to such special Act."

It is not enough to exclude the application of the general Act that it deals somewhat differently with the same subject-matter. It is not "inconsistent" unless the two provisions cannot stand together.

> It is obvious to inquire: Where is the inconsistency if both may stand together and both operate without either interfering with the other. *Tabernacle Permanent Building Society* v. *Knight*(1), at p. 302, *per* Halsbury L.C.
>
> I think the test is whether you can read the provisions of the later Act into the earlier without any conflict between the two. (*Ibid.*, *per* Lord Herschell, at p. 306.)

As put by Fry L.J., in the same case(2):

> Section 24 provides that the Act shall apply to every arbitration under any Act passed before the commencement of this Act, "as if the

(1) [1892] A.C. 298. (2) [1891] 2 Q.B. 63, at p. 69.

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arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorized or recognized by that Act." Now, what is the meaning of "inconsistent with the Act regulating the arbitration?" Section 19 creates, no doubt, an obligation to state a case when directed by the court or a judge, and, of course, in one sense, the presence of the obligation to state a case is inconsistent with the absence of such obligation. Therefore, it may be argued that, where under a previous Act there was no obligation to state a case, while under a later Act such an obligation is created, there is an inconsistency between the Acts. But that is not, in my view, the real meaning of the "inconsistency" referred to in section 24. I think there must be an inconsistency of this kind, viz., that the obligation to state a special case would be so at variance with the machinery and with the mode of procedure indicated by the previous Act, that, if that obligation were added, the machinery of the previous Act would not work.

So here the existence of the right of expulsion is in a sense inconsistent with the absence of such a right; but the existence of the right of expulsion as an additional remedy is not so at variance with the other remedy conferred by the special Act that the existence of this added right would prevent resort being had to the other remedy. To quote Lord Watson:

> In my opinion the object of the legislature was to add to the remedies,

and, I may add, to supplement what might, in the case of a passenger refusing to give his name, or of his giving a false name, be found a totally inadequate remedy, by providing another which would be always available and efficacious.

Unless the existence of the right conferred by the general Act would render it impracticable to carry out the provision of the special Act there is not, in my opinion, such an inconsistency as is referred to in section 5 of the general "Railway Act of Ontario."

Having regard to the pointed and explicit provisions of sections 3 and 5 of that Act, the case in the

English courts to which I have referred—although it deals not with a special Act and a general Act, but with two general Acts, one of which is of less general application than the other—is, I think, clearly in point and an authority against the contention that section 116 of the general "Railway Act of 1906" is inconsistent with section 17 of the defendants' special Act in the sense in which the word "inconsistent" is used in section 5 of the general railway Act.

The wording of section 116 is similar to that of the corresponding section of the "Dominion Railway Act" from which it was, no doubt, taken. Its provisions as to the passenger's baggage and that he must be put off at a regular stopping place or near a dwelling house seem somewhat incongruous when the section is applied to street railways in cities and towns. But the Act applies to suburban and interurban railways as well; and, subject to the question of inconsistency, the application of this section to all street railways is concluded by its second sub-section.

It follows that at the time when the plaintiff was put off the company's car it had the right to expel him as a passenger who had refused to pay fare.

But, if it had not that right, its right to expel for misconduct amounting to a nuisance was not questioned at bar. Although no particular authority was referred to as conferring this right, its existence seems essential to the operation of a railway, and was not challenged by Mr. McCarthy. It was stated by divisional superintendent Argue, in his evidence, that the rules of a company authorize a conductor or motorman to put a passenger off if he is a nuisance. This evidence appears to have been accepted by both parties as a correct statement of the effect of the rules which

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were not themselves in evidence. It is this right which the superintendent says he, in fact, exercised. I think that in these circumstances, notwithstanding the plaintiff's contention that he was removed merely for refusal to pay fare, the defendants should not now be heard to say that he was not put off in the exercise of the power which they admittedly had to expel for misconduct. The superintendent says that he believed he had not the power to put the plaintiff off for refusal to pay fare and that he would not have put him off had he not been misconducting himself. Elsewhere he says he would not have put him off as a nuisance had he paid his fare. Upon this evidence it may well be that the superintendent regarded the plaintiff's manner of refusal to pay merely as part of or an aggravation of his misconduct; and it may be that it was so in fact. But, in the view which I take that the defendant company, under the "Railway Act of 1906," had the right to expel a passenger for mere refusal to pay fare, it is unnecessary to pursue this question further. Excessive violence, which, as I have stated, I think the jury must be taken to have found, suffices to support the verdict whether the plaintiff was put off as a nuisance or for refusal to pay fare.

Then it is said in the appellants' factum, quoting the language of Osler J.A., in *Coll* v. *Toronto Railway Co.*(1), at page 61, that a divisional superintendent is not an official who has

> authority to remove passengers or others and, therefore, his act in pushing the plaintiff off the car was not of a class of acts entrusted to his discretion to perform and so not an act done in the excessive or erroneous execution of a lawful authority.

(1) 25 Ont. App. R. 55.

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The conductor has the right to expel whether for non-payment of fare or misconduct amounting to a nuisance. The divisional superintendent was his superior officer to whom the conductor referred his difficulty with the plaintiff. I agree with Magee J. that there was in these facts enough to raise a presumption that it was within the scope of the superintendent's authority to remove the plaintiff from the car and also to warrant the jury

in assuming that what he did was at the request of the conductor who had brought him and stood by.

This distinguishes the present case from *Coll* v. *The Toronto Railway Co.*(1). That the superintendent's purpose was to serve his employers, the defendants, is, upon the evidence, indisputable. The act being one which the company itself could legally do, it cannot escape responsibility therefor.

I also agree that it is extremely improbable that the result of the trial was affected by the admission of evidence of exclamations or statements of passengers made in the presence of the superintendent and during or immediately following the occurrence in which the plaintiff was injured. No objection was taken at the trial to the allusion by the learned trial judge to this evidence in his charge. It is, I think, too late to raise such an objection upon an appeal; and it is not at all clear, assuming the inadmissibility of the evidence, that any substantial wrong or miscarriage was thereby occasioned within the meaning of the Ontario Consolidated Rule, No. 785. I am by no means satisfied that the evidence complained of was not in fact admissible as part of the *res gestæ*. See Chamberlayne's Best on Evidence (1908), pp. 448-9; Taylor on Evi-

(1) 25 Ont. App. R. 55.

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dence (10 ed.), 583; Phipson on Evidence (3 ed.), pp. 47-8. But this question it is unnecessary to determine.

The defendants have come here largely on points not taken at the trial. The Divisional Court and the Court of Appeal for Ontario have, I think, correctly found them not entitled to a new trial as a matter of right. Those courts had power to direct a new trial as a matter of discretion. If they were not asked to exercise that power, or if, having been asked, they refused, this court should not, in my opinion, now exercise any discretion which it may have to interfere.

For these reasons I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *McCarthy, Osler, Hoskin & Harcourt.*

Solicitors for the respondent: *Lennox & Lennox.*