FREDERICK BELL (PLAINTIFF) .....APPELLANT; 1913

AND

*Nov. 26.
*Dec. 23.

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

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Evidence—Onus—Railway company—Negligence—Excessive speed—"Railway Act," s. 275—8 & 9 Edw. VII. c. 32, s. 13.

By 8 & 9 Edw. VII. ch. 32, sec. 13, amending section 275 of the "Railway Act" no railway train "shall pass over a highway crossing at rail level in any thickly peopled portion of any city, town or village at a greater speed than ten miles an hour" unless such crossing is constructed and protected according to special orders and regulations of the Railway Committee or Board of Railway Commissioners or permission is given by the Board. In an action against a railway company for damages on account of injuries received through a train passing over such a crossing at a greater speed than ten miles an hour.

Held, reversing the judgment of the Appellate Division (29 Ont. L.R. 247), that the onus was on the company of proving that the conditions existed which, under the provisions of said section, exempted them from the necessity of limiting the speed of their train to ten miles an hour or that they had the permission of the Board to exceed that limit, and as they had not satisfied that onus the plaintiff's verdict should stand.

Sub-section 4, of sec. 13, prohibits trains running "over any highway crossing" at more than 10 miles an hour, if at such crossing an accident has happened subsequent to 1st January, 1900, "by a moving train causing bodily injury," etc., "unless and until" it is protected to the satisfaction of the Board.

Per Duff and Brodeur JJ.—The appellant's action could also be maintained on the ground that the prohibition of sub-section 4 applies to the crossing in question.

The Grand Trunk Railway Co. v. *McKay* (34 Can. S.C.R. 81), distinguished.

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

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APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1) setting aside a verdict for the plaintiff and ordering a new trial.

The facts of the case were not in dispute and are shewn by the above head-note.

Laidlaw K.C. and *E. H. Cleaver* for the appellant.
D. L. McCarthy K.C. for the respondent.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario ordering a new trial on the ground of misdirection. The main question at issue between the parties below was whether, in the circumstances of this case, sub-section 4 of section 275 of the "Railway Act," as now amended by 8 & 9 Edw. VII. ch. 32, sec. 13, made it incumbent upon the company to prove that they were exempt from the limitation as to speed which that section imposes. There was a difference of opinion in the lower court. The Chief Justice, dissenting, held that the onus was upon the company and that the appeal should be dismissed. In reaching the same conclusion, I prefer to rely on sub-section 3 of the same section, which was also considered by the majority below. It appears to me after carefully reading the opinion of Mr. Justice Hodgins, that he failed to appreciate the precise point raised in *Grand Trunk Railway Co.* v. *McKay*(2), by which he considered himself bound. In that case, it was held that so long as the railway fences on both sides of the track were maintained and turned in to the guard at the highway

(1) 29 Ont. L.R. 247. (2) 34 Can. S.C.R. 81.

crossing, as provided by the Act, the maximum speed of the train was not limited to six miles an hour in passing through a thickly peopled portion of a city, town or village. There was no question raised as to the burden of proof; the railway fences were admitted to be properly constructed as required by the statute.

At the time of the accident here, the train was going at about forty miles an hour over a highway crossing at rail level in a thickly peopled portion of a town, and the jury found that the plaintiff when using the crossing was injured by the negligence of the defendants in running their train at that speed. There was no proof that the special requirements of the statute as to construction or permission of the Board had been complied with.

The question is, therefore: What is the rate of speed at which a train may pass over a highway crossing at rail level in a thickly peopled portion of any city, town or village, in the absence of proof that the special requirements as to construction or permission of the Board provided by sub-section 3 of section 275 of the "Railway Act" have been complied with? That section reads:—

> Subject to the provisions of sub-section 4 of this section, no train shall pass over any highway crossing at rail level in any thickly peopled portion of any city, town or village, at greater speed than ten miles an hour, unless such crossing is constructed and thereafter maintained and protected in accordance with the orders, regulations and directions specially issued by the Railway Committee of the Privy Council or of the Board in force with respect to such crossing, or unless permission is given by some regulation or order of the Board. The Board may from time to time fix the speed in any case at any rate it deems proper.

Nothing can be plainer, it seems to me, than the object which Parliament had in view when that sub-section was introduced in amendment of the "Railway

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Act." The history of the legislation and, what is more important, the language used, make it abundantly clear that the purpose was to provide for the greater security of those who are obliged to use the public highway under admittedly dangerous conditions. The sub-section is applicable to "highway crossings at rail level in thickly settled districts" and it provides that at such crossings the speed limit of a train shall not exceed ten miles an hour unless such crossings are constructed and maintained in accordance with the orders and regulations specially issued by the Railway Committee of the Privy Council or of the Board, or unless by special permission of the Board acting presumably with a proper regard for the public safety. The plain and obvious meaning of the section is that at such dangerous places the speed of the train must not exceed ten miles an hour, but that general prohibition is subject to this limitation that such speed may be exceeded by permission of the Board or if provision is otherwise made for the public safety by way of protection. That is to say, the words after "unless" are to be read as a proviso creating an exemption from the general prohibition contained in the first part of the section. If this is the proper construction of the language used, then it follows necessarily that where the statutory provision is departed from, the company must allege and prove by way of justification that they come within the exception (*The King* v. *James*(1)). This is made abundantly clear when sub-section 3 is read in conjunction with sub-section 5. The latter fixes the time within which the provisions of sub-section 3 are to be complied with by the company. That is to say, to be exempt from the limitation

(1) [1902] 1 K.B. 540, C.C.R.

as to speed the company must within a fixed time make the necessary application to the Board, and unless it is established that the application has been made and granted, the general prohibition governs if an accident occurs under the conditions present here.

To hold otherwise would, it seems to me, amount to saying that it was upon the plaintiff to prove in anticipation that the company had no defence under this head. It has been urged that this is merely a negative requirement, but assuming that to be the case, where is the difference between prescribing that a thing shall not be done unless certain precautions are taken as to construction and so forth, and in prescribing that, if that thing be done, the particular precautions shall be taken? This case comes, in my opinion, within the rule laid down in *Britannic Merthyr Coal Co.* v. *David*(1), followed in *Watkins* v. *Naval Colliery Co.*(2).

I am, therefore, of opinion that the trial judge properly directed the jury in placing upon the defendants in this action the burden of proving that, in the circumstances, the rate of speed which admittedly exceeded ten miles an hour was not excessive, and that this appeal should be allowed with costs. It follows that the cross-appeal must be dismissed also with costs.

DAVIES J.—This is an appeal from the appellate division of the Supreme Court of Ontario directing a new trial of the action on the ground of misdirection by the trial judge on both branches of plaintiff's claim.

The plaintiff sued for injuries sustained by him

(1) [1910] A.C. 74. (2) [1912] A.C. 693.

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from one of defendant's trains when passing over a highway crossing at rail level in a thickly populated district at a much higher rate of speed than the ten miles an hour, permitted by sub-section 3 of section 275 of the "Railway Act" as amended by 8 & 9 Edw. VII. ch. 32. A second branch of his case was a claim under sub-section 4 of the same Act for injuries caused by such excessive speed over a "highway crossing" at which "an accident had happened subsequent to the first day of January, 1900, by a moving train causing bodily injury or death to a person using such a crossing."

The appellate division held there was misdirection on both branches of appellant's claim. With respect to the claim under sub-section 4 based upon the happening of a previous accident at the highway crossing in question, I do not find it necessary to express any opinion, as I have reached the conclusion that there was no misdirection by the trial judge on the claim of the plaintiff under sub-section 3, and that the judgment of the trial court on that claim should be restored. I confess I am not quite clear as to the meaning of the judgment of Hodgins J. speaking for the appellate division upon this sub-section 3.

The learned judge says that the direction of the trial judge "was wrong in not qualifying the statement by the exception contained in section 275, that is as to protection and was not warranted by the "Railway Act as interpreted by *Grand Trunk Railway Co.* v. *McKay*(1)."

The judgment in that case was founded upon the *admission* that the fences of the railway on both sides of the track were maintained and turned into cattle

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

guards at the highway crossing as provided by the "Railway Act," and was to the effect that under such conditions there was no limit placed by the Act upon the speed of the trains when crossing the highway. No question arose as to the onus of proof in that case. The fact of the existence of the fencing was admitted. So far from supporting the judgment delivered by Mr. Justice Hodgins, that decision in *McKay's Case* (1) seems to me to be against the learned judge's conclusion.

The only question which appears to me to be open to any doubt with respect to this sub-section 3 is as to which party the onus of proof lies upon. Is a complainant obliged to disprove the existence of the facts which would justify a higher rate of speed than ten miles an hour over level highway crossings in thickly populated districts, or does the onus lie upon the company of justifying a rate of speed in excess of the statutory limit ?

Read in connection with sub-section 5 of the same section 275 which extended the time "to the company" until the 1st of January, 1910, to comply with the provisions of sub-section 3, I cannot doubt that the onus of proof rests upon the company.

They must justify a rate of speed exceeding the statutory limit, and as they did not attempt to do so in this case, but admit a speed of 45 or 50 miles which the jury have found as the cause of the accident, and as I do not think the trial judge misdirected them, I am of opinion that the appeal should be allowed with costs in this court and in the appellate division and the judgment of the trial court restored.

As to the cross-appeal, I think the evidence sufficient to uphold the finding of the jury that the plain-

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tiff exercised reasonable care in approaching the railway line and that such care would not have avoided the accident.

I would dismiss the cross-appeal with costs.

DUFF J.—I think the judgment in favour of the appellant giveu at the trial can be sustained under either sub-section 3 or sub-section 4 of section 275 of the "Railway Act" as amended by 8 & 9 Edw. VII. ch. 32, sec. 13. The whole of section 13 is as follows:—

Sec. 13. Section 275 of the "Railway Act" is amended by adding thereto the following sub-sections:—

3. Subject to the provisions of sub-section 4 of this section no train shall pass over any highway crossing at rail level in any thickly peopled portion of any city, town, or village at a greater speed than ten miles an hour, unless such crossing is constructed and thereafter maintained and protected in accordance with the orders, regulations and directions specially issued by the Railway Committee of the Privy Council or of the Board in force with respect to such crossing or unless permission is given by some regulation or order of the Board. The Board may from time to time fix the speed in any case at any rate that it deems proper.

4. No train shall pass over any highway crossing at rail level at a greater speed than ten miles an hour if at such crossing an accident has happened subsequent to the first day of January, nineteen hundred, by a moving train causing bodily injury or death to a person using such crossing, unless and until such crossing is protected to the satisfaction of the Board; and no train shall pass over any highway crossing at rail level at a greater speed than ten miles an hour in respect of which crossing an order of the Board has been made to provide protection for the safety and convenience of the public and which order has not been complied with.

5. The company shall have until the first day of January, one thousand nine hundred and ten, to comply with the provisions of sub-section 3 of this section.

First, as to sub-section 4: the evidence shewed that at the crossing in question an accident had occurred on the 11th of October, 1910, when one George Lillicrop was injured in the following circumstances:—In broad daylight at about 4 o'clock in the afternoon of

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the day mentioned Lillicrop, who was driving on the highway between Burlington and Aldershot, and being very near the railway track within the line of the railway fence was warned that a train was coming; there being no chance to turn round, and judging that to be the safest course, he hurried his horse across the track and succeeded in crossing just in time to escape the on-coming train with the result, however, that his horse ran into the ditch and he was thrown out and severely injured. I think that in these circumstances it can be affirmed that "an accident has happened by a moving train causing bodily injury to a person using the crossing in question" within the meaning of this sub-section; and that the crossing, therefore, falls within the letter of the description of the class of crossings to which the provisions of the sub-section apply. It is contended, however, and this appears to have been the view taken by the majority of the Court of Appeal, that a term ought to be implied to the effect that the operation of the section is limited to those crossings at which an accident has occurred of which the railway company has had notice or ought to be held to have had notice through its employees. I am unable to find any satisfactory ground upon which such an implication can be based. I do not think we are entitled to speculate as to the theory upon which this legislation proceeds, or to read into it qualifying provisions with the object of causing it to conform to our own notions as to how far a legislature might reasonably be expected to go in measuring the responsibility of railway companies for injuries suffered through accidents at level crossings. The provision in question falls very far short of the point to which

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some people would go. I do not think we are entitled to assume that if the legislature intended the enactment only to go into effect subject to the qualification suggested it would have failed to express that qualification. In this view of the section the liability of the company is not disputed.

As to sub-section 3: It is not denied there was evidence from which the jury might properly find that the crossing in question is situated in a thickly peopled portion of the Village of Burlington; and no evidence was given shewing that the crossing was constructed or maintained and protected in accordance with the orders of the Board of Railway Commissioners or that any permission had been given by the Board for the running of trains at a greater speed than 10 miles an hour over it.

I think the effect of the sub-section is this: The rule is laid down with regard to crossings situated as the statute describes that the speed of trains over them shall be limited to ten miles an hour. That is the general rule. Exceptions to that rule may, however, arise in two ways. First, there is the case in which the Board of Railway Commissioners make special provision with regard to a particular crossing for its construction, maintenance, and protection. In that case the general rule does not apply. Then there is the other case in which permission is given by the Board for the running of trains at a higher rate of speed. If a railway company alleges that a particular crossing is taken out of the operation of the general rule by reason of falling within one or other of these exceptional classes of cases, then the onus is on the railway company to establish the facts necessary to bring the crossing

within the exception. This is so on the simple principle that where a party affirms the existence of a state of facts which is alleged to take his case out of the operation of a general rule, then, generally speaking, the onus is on him to establish that state of facts. The case of *The Grand Trunk Railway Co.* v. *McKay* (1) seems to have been misunderstood. I can find nothing in the decision or in any of the judgments to support the view advanced by the respondents.

ANGLIN J.—Sub-sections 3 and 5 of section 275 of the "Railway Act," as enacted by 8 & 9 Edw. VII., ch. 32, sec. 13, are as follows:—

13. Section 275 of the "Railway Act" is amended by adding thereto the following sub-sections:—

3. Subject to the provisions of sub-section 4 of this section, no train shall pass over any highway crossing at rail level in any thickly peopled portion of any city, town or village at a greater speed than ten miles an hour, unless such crossing is constructed and thereafter maintained and protected in accordance with the orders, regulations and directions specially issued by the Railway Committee of the Privy Council or of the Board in force with respect to such crossing, or unless permission is given by some regulation or order of the Board. The Board may from time to time fix the speed in any case at any rate that it deems proper.

* * * * * *

5. The company shall have until the first day of January, one thousand nine hundred and ten, to comply with the provisions of sub-section 3 of this section.

Upon sufficient evidence the jury at the trial found that the plaintiff was injured by the negligence of the railway company; and, in answer to the question, "What did the negligence consist of?" they said, "By excessive speed through a thickly populated district." The speed was admittedly about 40 miles an hour and the district was proved to be thickly populated. The

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

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accident, as found by the jury, resulted from the defendants' railway train being driven at this high rate of speed; and it admittedly occurred on a highway crossing in the town of Burlington.

The defendants contend that the learned trial judge erred in charging the jury that sub-section 3, above quoted, imposed on them the duty of restricting their speed at the Burlington crossing to ten miles an hour under the circumstances in evidence in this case. No evidence had been given of the existence or non-existence of any

> orders, regulations or directions specially issued by the Railway Committee of the Privy Council, or of the (Railway) Board in force with respect to (the) crossing

in question as to its construction or protection, or of any "permission given by a regulation or order of the Board" to run at a higher speed than 10 miles an hour. The Appellate Division was of the opinion that the direction of the learned judge

> was wrong in not qualifying the statement by the exception contained in section 275, that is as to protection, and was not warranted by the Railway Act as interpreted in *Grand Trunk Railway Co.* v. *McKay*(1).

I presume that by this the court meant to hold that the burden of proving that the defendants were not within the exception or exemption created by the concluding clause of sub-section 3 lay upon the plaintiff. Otherwise I am unable to understand the judgment on this branch of the case.

The question is one of interpretation of sub-section 3 of section 275, read with, and in the light of, sub-section 5. Sub-section 3 differs materially from the pro-

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

vision considered in the *Grand Trunk Railway Co.* v. *McKay*(1), which limited the speed to

> six miles an hour unless the track is properly fenced in the manner prescribed by this Act.

It was proved that the railway was properly fenced on both sides as required by the Act; and it was, therefore, held that the conditions upon which the rate of speed was limited did not exist. No question arose as to where the onus lay of proving the existence or non-existence of the conditions upon which the statute makes the speed limit inapplicable.

Sub-section 3 of section 275 contemplates an order, regulation or direction as to construction and protection, specially made in respect to the particular crossing either dealing with it individually or as one of a class to which it had been ascertained to belong either by the Railway Committee of the Privy Council or by the Railway Commission. Its operation was suspended by sub-section 5 for a definite period in order to give the company an opportunity to obtain such order, regulation or direction, if none already existed, and to comply with it, or to procure the requisite permission. After the expiry of the period allowed the obligation to limit the speed to ten miles an hour came into force unless such special order, regulation or direction as to protection existed or had been obtained and had been complied with, or permission for a speed exceeding ten miles an hour had been given by some regulation or order of the Railway Board. The sub-section in effect gives permission to run at a rate exceeding ten miles an hour on such order, regulation and direction being procured and

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

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complied with, or upon permission being obtained. *Legh* v. *Lillie*(1). The obtaining and compliance with the order, regulation and direction as to construction and protection, or procuring permission for the higher rate of speed is in the nature of a condition precedent, fulfilment of which has to be established before the right to exceed the speed of ten miles an hour arises.

The clause of sub-section 3 introduced by the word "unless" creates an exception or exemption from the duty or obligation of limiting speed imposed generally by the earlier clause of the sub-section. "Unless" is an apt word to introduce an exception. *Wilson* v. *Smith*(2), at page 1556. It "unloosens" what follows it from what precedes it. *Manning, Bowman & Co.* v. *Keenan*(3), at page 57. The question is upon whom rested the burden of proving whether the defendants were or were not within this provision of exception or exemption ?

Although as a general rule where a plaintiff relies upon the breach by the defendant of a statutory provision which imposes a duty, but contains an exception, he must allege and shew that the defendant is not within the exception, *Spieres* v. *Parker*(4), at page 145; *Williams* v. *The East India Co.*(5); Dwarris on Statutes (Potter ed.), p. 119 (a rule which has been most often enforced in criminal and penal cases; *Rex* v. *Jarvis*(6), at page 154; *The King* v. *Jukes*(7); "where the subject-matter of the allegation lies peculiarly within the knowledge" of the defendant, while,

(1) 6 H. & N. 165, at p. 169.
(2) 3 Burr. 1550.
(3) 73 N.Y. 45.
(4) 1 T.R. 141.
(5) 3 East 192.
(6) 1 Burr. 148.
(7) 8 T.R. 542.

as a matter of pleading, the plaintiff should allege the negative, Bullen & Leake's Precedents of Pleading, 3 ed., p. 60, the defendant must adduce the evidence necessary to bring himself within the exemption; and this exception from the general rule is recognized in criminal cases notwithstanding the strong presumption of innocence. Taylor on Evidence, par. 376*a*; *Apothecaries' Co.* v. *Bentley*(1); *The King* v. *Turner* (2); *Morton* v. *Copeland*(3); *Kent* v. *Midland Railway Co.*(4); *Rex* v. *Thistlewood*(5); *Mahony* v. *Waterford, Limerick and Western Railway Co.*(6), at page 280. It should perhaps be noted that in the statute, 55 Geo. III., ch. 194, sec. 14, dealt with in *Apothecaries' Co.* v. *Bentley*(1), the clause of exception is introduced by the word "unless." If the defendants in the present case had the right to run at a speed exceeding ten miles an hour over the Burlington crossing, they must be presumed to know of the special orders, regulations or directions, or permission under which they enjoy that right. Having regard to sub-section 5, the subject-matter of the existence or non-existence of the conditions under which the exception or exemption provided for in sub-section 3 arises, lies peculiarly within their knowledge.

No question has been raised either in the provincial courts or in this court as to the sufficiency of the plaintiff's pleading. Had objection been taken on that ground any necessary amendment would, no doubt, have been allowed. The burden of proving that

(1) 1 Car. & P. 538; R. & M. 159.
(2) 5 M. & S. 206.
(3) 16 C.B. 517.
(4) L.R. 10 Q.B. 1.
(5) 33 How. St. Tr. 682 at p. 691.
(6) [1900] 2 Ir. R. 273.

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such special order, regulation or direction had been made and complied with, or that such permission had been given as sub-section 3 contemplates, rested, I think, upon the defendant company. In that view of the case the direction of the learned trial judge was right, and the judgment for the plaintiff should not have been disturbed.

If the contrary view of the construction of sub-section 3 had prevailed the logical result would appear to have been not to order a new trial for misdirection, but to dismiss the plaintiff's action on this branch of his case, unless, as a matter of indulgence, he should have been allowed a new trial to supplement his evidence, because the former trial had proceeded upon a misapprehension as to the effect of sub-section 3.

The view which I have taken as to the construction and effect of sub-section 3 renders it unnecessary to consider the questions raised in regard to sub-section 4, as to the kind of previous accident to which that sub-section refers and as to its applicability where neither the railway company nor its officials or servants had knowledge of such previous accident. On these points I express no opinion.

The appeal should be allowed with costs in this court and in the Appellate Division and the judgment of the learned trial judge should be restored.

BRODEUR J.—I would allow this appeal for the reasons given by Mr. Justice Duff.

Appeal allowed with costs.

Solicitor for the appellant: *E. H. Cleaver.*
Solicitor for the respondent: *W. H. Biggar.*