1894

*Mar. 29, 30.
*May 31.

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

AND

NELSON WEEGAR (PLAINTIFF)..... ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Company—Injury to employee—Negligence—Finding of jury—Interference with on appeal.

W. was an employee of the G. T. R. Co., whose duty it was to couple cars in the Toronto yard of the Co'y. In performing this duty on one occasion, under specific directions from the conductor of an engine attached to one of the cars being coupled, his hand was crushed owing to the engine backing down and bringing the cars together before the coupling was made. On the trial of an action for damages resulting from such injury the conductor denied having given directions for the coupling and it was contended that W. improperly put his hand between the draw bars to lift out the coupling pin. It was also contended that the conductor had no authority to give directions as to the mode of doing the work. The jury found against both contentions and W. obtained a verdict which was affirmed by the Div. Court and Court of Appeal.

Held, per Fournier, Taschereau and Sedgewick JJ., that though the findings of the jury were not satisfactory upon the evidence a second court of appeal could not interfere with them.

Held, per King J., that the finding that specific directions were given must be accepted as conclusive; that the mode in which the coupling was done was not an improper one as W. had a right to rely on the engine not being moved until the coupling was made, and could properly perform the work in the most expeditious way which it was shown he did; that the conductor was empowered to give directions as to the mode of doing the work if, as was stated at the trial, he believed that using such a mode could save time; and that W. was injured by conforming to an order to go to a dangerous place, the person giving the order being guilty of negligence.

*PRESENT:—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

1894]

THE GRAND TRUNK RAILWAY COMPANY v. WEEGAR.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) by which a verdict for the plaintiff at the trial was sustained.

The facts of the case and material evidence given at the trial are set out in the judgment of Mr. Justice King.

McCarthy Q. C., for the appellant, contended that there was no evidence of negligence chargeable against the defendant company and cited *Metropolitan Railway Co.* v. *Jackson* (3).

Smyth for the respondent referred to *Millward* v. *Midland Railway Co.*, (4); *Smith* v. *Baker* (5).

FOURNIER and TASCHEREAU JJ. were of opinion that the appeal should be dismissed.

GWYNNE J.—In this case I concur in the judgment of Chief Justice Hagarty, namely, that we cannot interfere with, however difficult we find it to be to concur in, the finding of the jury upon the evidence. In other words, a successful appeal from the verdict of a jury in matters of this nature is a task so difficult of achievement as to be, practically, almost impossible.

SEDGEWICK J.—I am also of opinion that this appeal should be dismissed.

KING J.—This action is brought under the Workman's Compensation Act for injuries sustained by plaintiff, a servant in defendant's employ, through the alleged negligence of one Garland, a person in defendant's service, to whose orders the plaintiff was

(1) 20 Ont. App. R. 528.
(2) 23 O. R. 436.
(3) 3 App. Cas. 193.
(4) 14 Q.B.D. 68.
(5) [1891] A.C. 325.

1894

THE GRAND TRUNK RAILWAY COMPANY v. WEEGAR.

King J.

bound (as alleged) to conform, and to whose orders he was conforming when the injury was sustained.

The plaintiff was a yardman whose duty it was (among other things) to couple cars in the Toronto yard of the Grand Trunk Railway. One Garland was also employed in the yard, and had under his control and direction an engine with its driver, the plaintiff and another. On the day of the accident several uncoupled cars were standing upon the west elevator siding. The engine was on another set of rails, and Garland directed the driver of the engine to go on to the west elevator siding. After giving this order Garland crossed over from the one track to the other in company (as plaintiff says) with the plaintiff, and the two were at the cars on the west elevator siding before the engine backed through the switch. According to the plaintiff the two were standing nearly opposite the ends of the second and third cars when Garland told him to shift the link between these cars, and (according to him) gave precise directions as to the manner of doing this.

In the end of each car there is an iron projection for connecting the cars called a draw-bar, with an opening in the end for the admission of an iron link, and a hole above and below through which a pin is passed to hold the link in place. The link is of about one and a half inch iron and about twelve inches in length. When two cars are stationary upon a siding and it is intended to couple them, the link is ordinarily made fast in the draw-bar of the forward car. Then when this car is moved back the free end of the link enters the draw-bar of the rear car and is made fast thereto. If the draw-bars are of the same height and if the link is presented horizontally the entry is readily made, but otherwise it may need to be directed by hand. The pin is sometimes dropped in by the

yardman, but frequently he sets the pin beforehand at an angle in the hole of the draw-bar and the concussion causes it to fall into its place, or "make" as it is termed.

In the case before us the link was fastened in the forward draw-bar and the cars were standing so close that the free end of the link was entered into the other draw-bar, but in such a way that the pin could not enter. There was, moreover, a difference in the two pins. That in the forward car was of the more usual pattern and had a sharp or tapered point. The other, known as a "mogul pin" was blunt at the point, and according to plaintiff the chance was that the coupling could not readily be made unless the mogul pin was first put in. In order to do this it became necessary to shift the link, i.e., to make the link fast in the draw-bar of the rear car by use of the mogul pin, leaving the forward end of it free. The distance between the two draw-bars was but four inches, and the shifting of the link required that the pins be taken out and the link moved along further into the draw-bar of the rear car.

The plaintiff says that Garland and he, standing at the side of the cars, saw the condition of things, and that Garland gave him instructions to go in and shift the link from draw-bar to draw-bar.

He says "you go in and change that link from draw-bar to draw-bar and after you change it, drop the big mogul pin in and place the little sharp pointed pin on top of the draw-bar from which you take the link, so that when the engine is coupled on it will make itself."

In answer to a question on cross-examination the plaintiff stated that the proper way was to have coupled the engine to the forward car, and move ahead slightly, when, the cars being further apart, the link could have been taken out of the forward and placed in the rear draw-bar, and the coupling then effected

1894

THE GRAND TRUNK RAILWAY COMPANY v. WEEGAR.

King J.

by backing the forward car down again; and he further stated that he supposed the particular direction was with the object of saving time. He admits that he was skilled in the work of coupling cars, and that he was not accustomed to get directions as to the mode of doing it, and that Garland had never before given him directions as to the way of doing his work. At the time that the directions were given he saw the engine backing up, and when he stepped between the cars the engine was not over eight or ten feet from the forward car, and moving so slow that she was just about at a stand still, and he says that he expected that Garland would stop the engine. As plaintiff stepped between the cars, Garland went off towards the engine.

The evidence of plaintiff was contradicted. Garland denied giving any directions whatever, and two other witnesses corroborated his statement that he was at the forward end of the front car instead of where plaintiff said he was. The jury has, however, in effect adopted plaintiff's account.

As to what took place when plaintiff went between the cars, he was asked:

> Having got these instructions what did you do? A. When I first entered between the two cars I pulled this little pin out and laid it on top of the draw-bar. Then I put my hand down between the two draw-bars, placed my hand straddle of the link, and commenced to work that link from one draw-bar into the other. Q. And it was while you were doing that that the two draw-bars came together and your hand was crushed? A. Yes.

The defendants sought to shew that plaintiff ought not to have used his fingers, but should have shifted the link by moving it along one of the pins. The plaintiff on the other hand says that

> The only thing you could do was to put your fingers down between the two draw-bars and shift it from one draw-bar to the other.

One can see, however, that the mode to be adopted may depend upon whether or not the workman has reason to believe that the cars will not be struck by the engine during the operation. If he has reason to believe that the engine will not strike the cars, clearly he might well proceed in the simplest and most expeditious way, i.e., by the use of the fingers. Of course if plaintiff had known that the engine was to be backed up against the cars he should have kept his fingers away. But his case is that he had reason to suppose that Garland would have prevented the engine from striking the car. Garland clearly had the control of the movements of the engine. This abundantly appears from the evidence of the driver and others. The case, then, is in the same position as if Garland was in fact upon the engine moving it backwards. The first question is: Did Garland direct plaintiff to go in and shift the link as stated by plaintiff? There is evidence on both sides; and the jury having found that the direction was given the finding is to be accepted by us as it has been by the courts below.

Next; was it impliedly involved in the direction that plaintiff might use his fingers? Mr. Justice Burton grounds his dissent upon this that Garland did not direct plaintiff to move the link with his fingers. I think, however, that in the absence of specific direction the general direction authorizes the doing of the thing in the way reasonably proper for the doing of it; and providing that the engine was not to be moved against the car who can say that it was not proper enough to use the fingers? The doing of the act by the use of a pin would be tedious and I would think almost impracticably so.

Next: Was Garland empowered to give such instructions? I think that it was within the scope of

1894

THE GRAND TRUNK RAILWAY COMPANY v. WEEGAR.

King J.

his authority. If (as stated by plaintiff) the coupling of the cars in a certain way would save time he clearly could direct it to be done in that way. All powers reasonably incidental to the exercise of the general power are to be implied. The case, then, is within *Wyld* v. *Waygood* (1) where it was held that liability under the similar provisions of "The Employers Act" is not limited to an injury resulting from an order which is negligent in itself. The injury here (as in that case) resulted from the plaintiff having conformed to an order when he was told to go to a place which was, and must have been known to be, a dangerous place if the person who told him to go was guilty of negligence.

In my opinion the appeal should be dismissed and for the reasons given by the majority of the learned judges in the Court of Appeal.

Appeal dismissed with costs.

Solicitor for appellant: *John Bell.*

Solicitors for respondent: *Best & Smyth.*

(1) [1892] 1 Q. B. 783.