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

AND

JOSEPH McKAY (PLAINTIFF)..... ...RESPONDENT.

1903

*Nov. 12, 13, 14.

*Dec. 1.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway company—Negligence—Rate of speed—Crowded districts—Fencing —50 & 51 V. c. 29 ss. 197, 259 (D)—55 & 56 V. c. 27, ss. 6 and 8 (D).

In passing through a thickly peopled portion of a city, town or village a railway train is not limited to the maximum speed of six miles an hour prescribed by 55 & 56 Vict. c. 27 sec. 8, so long as the railway fences on both sides of the track are maintained and turned into the cattle guards at highway crossings as provided by sec. 6 of said Act. Judgment of the Court of Appeal (5 Ont. L. R. 313) reversed, Girouard J. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario (1), maintaining the judgment entered on the verdict at the trial in favour of the plaintiff.

This was an action brought by the respondent against the appellants for damages sustained owing to the negligence of the appellants, causing the death of the wife and two children of the respondent, serious personal injury to the respondent, the killing of his horse and the destruction of his buggy.

The accident out of which these injuries arose occurred on the evening of the 9th day of October, 1901, at Main Street in the town of Forest, in the county of Lambton, at the point where the said street or highway is crossed by the appellants' railway.

PRESENT :- Sir Elzéar Taschereau C. J. and Sedgewick, Girouard, Davies and Killam JJ.

(1) 5 Ont. L. R. 313.

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

The statement of claim charged statutory negligence in running the trains faster than six miles an hour without proper fencing and common law negligence in proceeding at a reckless rate of speed without warning or precautions against injury to the public.

The action was tried before the Honourable Mr. Justice McMahon and a jury at Sarnia on the 2nd and 3rd days of April, 1902, when the learned trial judge submitted certain questions to the jury, which with the answers are as follows:

1st. Was the whistle blown before reaching the Main Street crossing, and if so, at what distance from the crossing was it first sounded?

Yes. At the whistling post.

2nd. If the bell was rung, where did it first commence to ring, and was it ringing continuously or at short intervals until the engine crossed the street where the accident happened?

Bell started to ring east of Main Street eight or ten rods, and rang continuously.

3rd. Is the Main Street crossing at Forest in a thickly peopled portion of the village?

Yes.

4th. At what rate of speed was the engine running at the time it crossed Main Street?

About twenty miles an hour.

5th. Was such a rate of speed, in your opinion, a dangerous rate of speed for such locality?

Yes.

6th. Was the death of Mrs. McKay and the injury to Joseph McKay caused in consequence of any neglect or omission of the company? If so, what was the neglect or omission, in your opinion, which caused the accident?

(*a*) Yes. (*b*) Neglect in running too fast and for the neglect of a flagman or gates.

6*a*. Was any warning given by Hallisey to Mrs. McKay of the approach of the engine?

Not sufficient.

7th. Could Joseph McKay, had he used ordinary care, have seen the engine in time to have avoided the collision?

No.

8th. Was the plaintiff, in your opinion, guilty of any want of ordinary care and diligence which contributed to the accident? If so, state in what respect?

No.

9th. If you find the plaintiff is entitled to recover, at what do you assess the damages?

(*a*) By reason of the death of his wife?

Eight hundred dollars.

(*b*) By reason of the injuries suffered by himself?

Four hundred dollars.

(*c*) For the horse and buggy?

One hundred dollars.

No negligence was attributed by the jury from failure to whistle or ring the bell so that nothing turned on the first two findings. Judgment was entered for the plaintiff for $1,300, which was maintained by the Court of Appeal. The company then appealed to this court.

Riddell K.C. and *Rose* for the appellants. The plaintiff was guilty of contributory negligence in not looking out for the train. The rule of "stop, look and listen" which prevails in the United States, *Pennsylvania Railroad Co.* v. *Weber* (1) should be adopted in Canada.

There is no common law obligation on a railway company to fence its road; *Grand Trunk Railway Co.* v. *James* (2); and the requirements of the Act having been complied with there was no restriction as to the rate of speed in this case.

(1) 76 Pa. St. 177.

(2) 31 Can. S. C. R. 420.

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Hellmuth K.C. and *Hanna* for the respondent. The negligence of the defendants was established to the satisfaction of the jury and contributory negligence on plaintiff's part negatived. A second Court of Appeal will not set these findings aside. *Dublin, Wicklow & Wexford Railway Co.* v. *Slattery* (1).

Even if defendants complied with the statutory requirements then common law obligation to exercise due care and caution remained. *Canadian Pacific Railway Co.* v. *Fleming* (2); *Lake Erie and Detroit River Railway Co.* v. *Barclay* (3).

The CHIEF JUSTICE.—I concur in my brother Davies' reasoning and agree that the appeal should be allowed and the respondent's action dismissed.

SEDGEWICK J.—The appellant company run a railway through the Town of Forest, in the County of Lambton, Ontario. Its line runs practically east and west, and at a certain point is crossed by Main Street, a public highway running north and south. To the east of this crossing the line is straight for several miles and a clear view can be had towards the east down the track for at least a mile from a distance north of the track of more than 60 feet.

At the point in question there are three lines of rails, the middle one being the main track, and it was upon this main track that the accident took place.

On the 9th of October, 1901, at about half past six o'clock in the evening, the plaintiff, with his wife and two children, were in a buggy driving southward on Main Street, towards the railway crossing. A collision took place between the buggy and a locomotive engine

(1) 3 App. Cas. 1155.
(2) 31 N. B. Rep. 318; 22 Can. S. C. R. 33.
(3) 30 Can. S. C. R. 360.

of the defendants going west drawing their regular train, the result of which was the death of his wife, some personal injury to the plaintiff himself and the killing of his horse and destruction of his buggy. Suit was brought and the trial came on before Mr. Justice McMahon and a jury at Sarnia on the 2nd April, 1902. Questions were submitted to the jury which, with the answers, are as follows:

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Sedgewick J.

1st. Was the whistle blown before reaching the Main Street crossing, and if so, at what distance from the crossing was it first sounded? A. Yes at the whistling post.

2nd. If the bell was rung, where did it first commence to ring, and was it ringing continuously or at short intervals until the engine crossed the street where the accident happened? A. Bell started to ring east of Main Street eight or ten rods and rang continuously.

3rd. Is the Main Street crossing at Forest in a thickly peopled portion of the village? A. Yes.

4th. At what rate of speed was the engine running at the time it crossed Main Street? A. About twenty miles an hour.

5th. Was such rate of speed, in your opinion, a dangerous rate of speed for such locality? A. Yes.

6th. Was the death of Mrs. McKay and the injury to Joseph McKay caused in consequence of any neglect or omission of the company? If so, what was the neglect or omission, in your opinion, which caused the accident? A. (*a*) Yes; (*b*) Neglect in running too fast and for the want of a flag-man or gates.

6*a*. Was any warning given by Hallisey to McKay of the approach of the engine? A. Not sufficient.

7th. Could Joseph McKay, had he used ordinary care, have seen the engine in time to have avoided the collision? A. No.

8th. Was the plaintiff, in your opinion, guilty of any want of ordinary care and diligence which contributed to the accident? If so, state in what respect? A. No.

9th. If you find the plaintiff is entitled to recover, at what do you assess the damages? (*a*) By reason of the death of his wife? A. Eight hundred dollars. (*b*) By reason of the injuries suffered by himself? A. Four hundred dollars. (*c*) For the horse and buggy? A. One hundred dollars.

In order to understand these questions and answers it may be mentioned that Hallisey, therein named, was not a servant of the company but was employed

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Sedgewick J.

by the corporation of Forest as a watchman, and was stationed at the crossing on the day in question. He saw the plaintiff coming and warned him of his danger but without effect.

Judgment was entered for the plaintiff upon the finding of the jury for $1,300, and an appeal from that judgment was dismissed by the Court of Appeal. Hence this appeal.

It will be observed that the first answer is not in favour of the company; that the second is against the company, but that is immaterial, as, assuming the answer to be correct, the failure in starting to ring the bell was not found to be the cause of, or to contribute to, the accident, and besides, the evidence, in my judgment, proves to a demonstration that the bell rang continuously from the time the train left Toronto until after the accident. It may also be stated that the railway all through the Town of Forest was properly fenced on both sides as required by the Railway Act; that there was no guard (*i. e.* a gate) at the crossing, and that the train was running on schedule time. The case therefore rests upon the consideration of the answers to the 3rd, 4th, 5th and 6th questions. This clearly raised two questions: First, as to whether the railway company is limited as to the speed of its trains, and, secondly, as to the necessity for fencing by gate or otherwise across the highway. As to the speed, in my view one of the chief objects of a railway system is to attain a high speed of travel; the interests of the public in saving time and the increase of productive power form reasons for holding as it has been held that railway companies are permitted to establish their undertakings for the express purpose of running trains at high speed along their lines, (*per* Halsbury, L. C. (1).)

(1) *Wakelin* v. *London & South Western Ry. Co.* 12 App. Cas. 41 *at page* 46.

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Sedgewick J.

The legislature has permitted railways to cross highways on the level provided

that no locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town or village, at a speed greater than six miles an hour unless the track is properly fenced in the manner prescribed by this Act,

and this plainly refers us to the Act itself as to the "manner prescribed." The provisions are to be found in sections 194 and 197. Section 194 deals with the case of a railway running through a township; section 197 is as follows:

At every public road crossing at rail level of the railway the fence on both sides of the crossing and on both sides of the track shall be turned into the cattle guards so as to allow the safe passage of trains.

This seems to me to make it plain that the fencing in the manner prescribed by the Act must be fencing as described in section 197. The Act also creates a tribunal which shall have the right to regulate the speed of the trains. By section 10 the Railway Committee may,

(*a*) Regulate and limit the rate of speed at which trains and locomotives may be run in any city, town or village, or in any class of cities, towns or villages described in any regulation; limiting, if the said Railway Committee thinks fit, the rate of speed within certain described portions of any city, town or village, and allowing another rate of speed in other portions thereof,—which rate of speed shall not in any case exceed six miles an hour, unless the track is properly fenced.

I am of opinion that the track should be properly fenced according to the regulations laid down in the Railway Act, which regulations are contained, so far as this case is concerned, in section 197, viz., fenced at the crossing at right angles to the railway fence prescribed by section 194.

In my view the right of a railway upon the highway itself depends entirely upon legislation. The position of a railway company in respect of a highway is quite different from its position as regards

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Sedgewick J.

other lands belonging to individuals, over which it passes. In the latter case the land may be expropriated, and is expropriated, and becomes the absolute property of the railway; but as regards the highway, the fee or right of ownership in any part of the highway is not required by the railway company, nor acquired by it, nor does the railway company ask or expect to acquire the exclusive right to use any part of it, but merely to use it in common with the public generally.

It is the right of all His Majesty's subjects to go upon any part of the highway, so long as it is not occupied by other passengers or occupants. While, of course, no person has the right to be along the line of the railway upon the highway during the time that the train of the railway company is passing, every person has a right upon such place at any other time, and every person has a right upon any other part of the highway at all times, except so much as is actually occupied by the passing train. No person has a right to prevent any other person from driving his horse or from himself going up to within a foot of a passing train; and certainly no one has the right to prevent any one going upon that part of the highway which is opposite to the unoccupied portion of the railway grounds. If the railway company without express statutory authority were to erect gates opposite to its side fences, and lower those gates at any time, any person prevented from driving or walking towards the line of rails by such gates would be interfered with in his legal common law rights. It must be apparent then, that there must be some authority given to a railway company before it can assume to erect gates upon a highway. This authority is to be found in the Railway Act, 51 Vict. c. 29, s. 187; and it will be seen that it was in the view of the Parliament of Canada

necessary to give express authority, when we look at the wording of the section:

> And the Railway Committee, if it appears to it expedient or necessary for the public safety, may, from time to time, with the sanction of the Governor in Council, *authorize* or require the company to which such railway belongs, within such time as the said committee directs, to protect such street or highway by a watchman or *by a watchman and gates or other protection.*

This is made apparent as well by looking at the English statute. In the year 1845 was passed the first of the Railway Clauses Consolidation Acts, and this is still in force, being 8 & 9 Vict. c. 20.

Section 47 provided as follows:

> If the railway cross any turnpike or road or public carriage road on a level, the company shall erect *and at all times maintain good and sufficient gates across such road, on each side of the railway* where the same shall communicate therewith and shall employ proper persons to open and shut such gates.

The legislature in passing the General Railway Act had before it not only the General Railway Acts previously passed but also the Imperial Railway Clauses Consolidation Act I have referred to, and I have no doubt that the different policy which has been adopted as to railways in this country was adopted in view of the different conditions of the two countries, and the consideration that if a gate watchman were required at every level crossing throughout the country it would impose altogether too heavy a burden on a young and only partially developed territory. This is more apparent when the previous legislation is considered because the language "unless the track is fenced in the manner prescribed by this Act" followed by way of amendment some opinions which indicated that it was necessary for a railway company to fence at each highway crossing. I think, therefore, there is no limitation to speed unless it is prescribed by the Railway Committee. The same

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Sedgewick J.

observations, I think, apply to a flagman. I think the legislature has fixed a tribunal to determine not only the rate of speed, but when and where watchmen shall be placed. I adopt the language of Allen J. in *Weber* v. *New York Central and Hudson River Railroad Co.* (1).

> A railroad company must so operate its trains and use and occupy its railway, in the enjoyment of the right of way which it has in common with the ordinary traveller, as not to injure others in the exercise of their right of way, provided the latter are guilty of no want of care on their part. But the rule which imposes the obligation of care and prudence upon a railway corporation, and measures its liability to others liable to receive injury from moving cars or locomotives, does not call for any act *outside of or disconnected with its actual operations and the use of the railway.* The duty of *posting flagmen* or having servants and agents, or placing gates or other obstructions, or of giving *special or personal notice to travellers at railway crossings,* can only be *imposed by the legislature.*

Railroads are authorized by statute to construct their road, and run their trains across streets and highways. The same statute provides that they shall give certain signals for the purpose ef warning travellers of their approach and presence; such signals being, in the judgment of the legislature, sufficient to protect the public from injury in the use of the crossings. Keeping a flagman at the crossings, or any of them, is not required by statute; nor does the statute require the company to give warning to travellers otherwise than as therein provided. The question is, whether the common law requires the company to warn travellers of approaching trains by other and more effective means than those the statute requires. The claim that it does is based on the maxim that every one must so use his own as not to injure another. In applying the maxim to the present case, it must be borne in mind that the traveller and railroad company have

(1) 58 N. Y. 451.

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Sedgewick J.

each an equal right of way in the crossings, derived from the same authority; the former for the purpose of travel, and the latter for running its trains. A collision is somewhat dangerous to the trains, but vastly more so to the traveller. The law imposes upon both the duty of observing care to avoid them. But the care imposed upon the company is in operating its trains; in so transacting its business, in the exercise of its right of way, as not to injure others in the exercise of their similar right, provided the latter exercise due care on their part. This relates to the mode of operating the trains, and all other things done by the company in the transaction of its business. It does not require the company to employ men to keep travellers off the track, nor to serve notices upon them that trains were approaching. Should the company do this, it would relieve the traveller from all necessity of exercising care in this respect; and it would, indeed, be safe for him to go upon the track, having received no express warning. If the exertions of the flagmen were, in any particular case inadequate to prevent injury to a traveller, upon the same principle it might be submitted to a jury whether ordinary prudence did not require gates to be closed at certain crossings. while trains were passing, or something else done to protect the traveller; and, if, in their judgment, it did, to instruct them that such omission was negligence.

Instead of the power of giving directions as to the management and running of the railway being in the hands of the Parliament of Canada or the Railway Committee of the Privy Council, it would be in the hands of a jury. The jury would have higher power in that regard than even the Provincial Legislatures.

Upon the powers even of a Provincial Legislature see *Madden* v. *Nelson and Fort Sheppard Railway Co.* (1).

(1) [1899] A. C. 626 at p. 628.

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Sedgewick J.

The Provincial Legislature have pointed out by their preamble that in their view, the Dominion Parliament has neglected proper precautions, and that they are going to supplement the provisions which, in the view of the Provincial Legislature, the Dominion Parliament ought to have made; and they thereupon proceed to do that which they recite the Dominion Parliament has omitted to do. It would have been impossible, as it appears to their Lordships, to maintain the authority of the Dominion Parliament if the Provincial Parliament were to be permitted to enter into such a field of legislation.

Compare *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours* (1).

The rules and decisions of the Railway Committee have the force of law and can be so enforced (The Railway Act, 1888, ss. 17, 25, 289). Is or can there be any other body which may override or differ from such decisions or orders, or give additional, supplementary, or perhaps contradictory orders?

It is to be observed that the speed was the usual schedule speed fixed by the company in its statutory powers, Railway Act, 1888 (2).

I am of opinion that the negligence found by the jury was conduct authorized by the statute in the lawful running of the company's trains, and the neglect of duties were duties which could only be imposed by the proper tribunal created by the statute. I refer to various sections which indicate that an examination of the Railway Act will show that it intended to deal with the whole subject of the management and operation of railways. Sections 10, 11, 173, 177, 189, 190, 194, 199, 214, 256, 260, 271, 274. These are merely cited as showing some of the matters dealt with by the legislature. In view of the opinion now expressed it is unnecessary to discuss the other positions advanced by Mr. Riddle and elaborated in

(1) [1899] A. C. 367, at pp. 372-373.

(2) ss. 214 *a* & *b*.

the voluminous and very able factum of the appellants.

The result is the appeal should be allowed, and the action dismissed, the whole with costs.

GIROUARD J (dissenting)—In my opinion this appeal involves a simple question. Sec. 259 of the Railway Act, as amended in 1892 by 55 & 56 Vict. c. 27, sec. 8, says :

> No locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town or village, at a speed greater than six miles an hour unless the track is fenced in the manner prescribed by this Act.

The respondent contends that the Railway Act nowhere requires that public highways should be fenced, and that consequently railway trains may be run at full speed "through any thickly peopled portion of any city, town or village," as Forest, an incorporated town, certainly was. I cannot accept this interpretation of sec. 259. If the alternative of fencing be impossible, if, in fact, the Act has no provision upon the matter, then the rule laid down in the first part of the clause as to slow speed must be enforced. But is it correct to say that the statute does not provide for the fencing of streets through these localities? "Fencing" here cannot have the meaning it has in clauses dealing with rural districts where the fencing or closing of the highways is not intended. Sec. 194. Sec. 259 provides for a special case, that of thickly populated towns or villages, and fencing, within the meaning of that clause, is something besides the fencing of the tracks outside of streets. It means the closing of the streets or highways also. This can be done under sec. 187. The Railway Committee may authorize the company

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Girouard J.

to protect such streets or highways by a watchman, or by a watchman and gates, or other protection, for instance a flagman, and no doubt the jury had this clause in view when, being asked whether the death of the wife of the respondent and the injury to his son were caused by any neglect or omission of the company, answered: "Yes, negligence in running too fast, and for the want of a flagman or gates."

The company did not deem it necessary to take advantage of this section and to provide for any protection in the Town of Forest; they made no application to the Railway Committee, and they continued to run their trains as if they were in townships, at a rate prohibited by the statute. They are therefore guilty of negligence and must take the consequences. This appeal should be dismissed with costs.

DAVIES J.—The questions for decision in this appeal are important involving the rights of the travelling public on the one hand and those of the Chartered Railway Companies of Canada on the other. They depend for their solution mainly, if not entirely, upon the proper construction to be given to the clauses of "The Railway Act," 1888, and its amendments.

The action was for negligence by the defendants in the operation of one of their trains while crossing over one of the streets of the Town of Forest on the evening of October 9th, 1901. The learned judge who delivered the judgment of the Court of Appeal for Ontario, now under consideration, states the material facts of the accident as follows:

On the evening in question, about 6 o'clock, the plaintiff, a farmer, with his wife and two very young children, were driving home from an agricultural fair at the Town of Forest which they had been attending. The evening was inclined to be wet and the plaintiff had in consequence put up the sides of the covered buggy in which he and his family were driving, which interfered to some extent with his seeing and hearing. He left the hotel on King Street, drove to Main

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Davies J.

Street, and then along Main Street to the crossing in question where the collision took place by which the plaintiff himself was severely injured, his wife and two children were killed, and his horse and buggy destroyed. The track crosses Main Street, a leading street in the town, on the level and is not protected by any gate or by a watchman; although on the day in question one Hallisey, employed by the town corporation, was stationed at this crossing as watchman owing to the number of people who would likely cross to attend the fair.

The jury found in answer to questions put to them that the whistle was sounded at the whistling post; that the bell commenced to ring eight or ten rods east of the crossing and rang continuously; that Main Street crossing is in a thickly peopled portion of the village; that the train was running at the rate of twenty miles an hour when it crossed Main Street; that such rate of speed was a dangerous rate for such locality; that the neglect or omission of the company which caused the accident was "*neglect in running too fast and for the want of a flagman or gates*"; that the warning given by Hallisey (the watchman stationed on that particular day at that crossing by the town authorities) was not sufficient; and that the plaintiff was not guilty of contributory negligence.

The question of contributory negligence on the plaintiff's part does not, in the view I take of the case, require consideration, and the finding as to the time when the bell began to ring, even if sustained by the evidence, which I do not stop to inquire, is not material as it is not found by the jury to have led or contributed to the accident. The negligence which did cause or lead to the accident was found by the jury to be the speed at which the train was running over the street crossing and the absence at such crossing of a flagman or gates.

The contention of the plaintiff is that the speed at which the train was running was a violation of the statutory provision of the Railway Act because it was

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Davies J.

of greater speed than six miles an hour through a thickly peopled portion of the town of Forest, the railway track at the crossing of the street not being fenced as he contended in the manner required by the Act. The plaintiff further says that even if the Act has been complied with as regards fencing, the rate of speed in the absence of gates or watchman at the crossing was a matter at common law open to the jury to pass upon, and if they found it, under the circumstances, a dangerous rate and a cause of the accident the defendant company would be liable.

The Court of Appeal reached the conclusion that the proper construction of the statutory provisions with regard to the fencing prescribed at the crossings and the rate of speed at which a train could run though a thickly peopled portion of any city, town or village, requires either a fencing across the highway at the crossing, so retaining the travelling public in a place of safety while the train is passing or the stationing of a watchman or the maintenance of a reasonable fence sufficient for the purpose, or the reduction of the speed of the train to the permitted maximum of six miles an hour. As the company had not adopted any of these precautions which the court decided were obligatory by statute they held it liable under the findings of the jury and dismissed the appeal.

A careful reading and consideration of the whole Railway Act and its general scheme and purpose has led me to the conclusion that the construction placed upon these sections by the Court of Appeal in this case was not the proper one and that the sections relied upon by that court in its judgment do not either require or authorize railway companies, without the previous order of the Railway Committee of the Privy Council, to fence highways or place gates across them where they are crossed at the level by the railway, or compel

them to place flagmen at these crossings to warn the public when trains are crossing.

In my judgment Parliament has by the 187th section of the Railway Act vested in the Railway Committee of the Privy Council the exclusive power and duty of determining the character and extent of the protection which should be given to the public at places where the railway track crosses a highway at rail level. The exercise of such important powers and duties requires the careful consideration of many possible conflicting interests and the fullest powers to enable this committee to bring all such interests before them and determine all necessary facts, are given by the Act in question. Similar powers to enable this tribunal effectively to enforce any order it may make in the premises are vested in the committee. It is quite open to any municipality through which a railway runs at any time it thinks proper, or to any interested person or corporation, or, indeed, to any one of the travelling public to invoke the exercise of this jurisdiction. The composition of the tribunal, the simplicity and ease with which its powers can be invoked, and the completeness with which it can carry out the intentions of Parliament and the scope and extent of its powers, all combine to convince me that Parliament designed to establish and has established a tribunal which while fairly guarding the interests of the railway corporations would at the same time provide the fullest necessary protection to the travelling public. I cannot think that these powers, so full, so complete, and so capable of being made effective, can if exercised be subject to review either as to their adequacy or otherwise by a jury, nor do I think that failure to invoke the exercise of the powers is of itself sufficient to take the matter away from the jurisdiction to which Parliament has committed it and vest it in a jury.

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Davies J.

If no such statutory powers had been given by Parliament a jury must *ex necessitate* determine in each case as a question of fact whether with regard to level foot crossings or highway crossings the proper precautions with regard to speed and warnings had been adopted and followed. In a thickly settled country like Great Britain, Parliament has thought fit explicitly to provide that wherever a railroad crosses a highway on a level it shall maintain good and sufficient gates across the road on each side of the railway and employ proper persons to open and shut them. In a country such as Canada such a provision would seriously impede railway development and Parliament instead of adopting it has provided instead that certain signals and warnings such as the blowing of whistles and the ringing of bells should be given before the trains cross the level highways, and has constituted a tribunal specially qualified and equipped for determining what additional safeguards shall be provided for the public protection and safety at these crossings. In some cases such protection is deemed to be sufficiently secured by a watchman alone, in others by a watchman and gates or other suitable protection deemed necessary by the tribunal, while in other cases the highway is required to be carried over or under the railway by means of a bridge or arch instead of crossing the same at rail level. The determination is to be reached after thorough inquiry, and ample powers are conferred upon the tribunal effectively to enforce its conclusions and orders

I think the proper construction to be placed upon these sections of the Act is that the powers therein given are exclusive and intended to vest in the tribunal selected plenary statutory powers the exercise of which, excepting as otherwise provided, is final. The exceptions embrace the power of reviewing its

own decisions from time to time by the tribunal as circumstances may change and the power of appeal to the Governor General in Council, as provided by section 21.

The main question decided by the Court of Appeal, namely, the meaning of the sections relating to fencing and speed at level crossings in or through any thickly peopled portion of any city, town or village, has yet to be considered. An elaborate factum giving the history of Canadian legislation on the subject was submitted to us by the defendants, but I do not think it necessary for me to do more than refer to the Consolidated Railway Act of 1888 and its amendments. The 197th section of that Act as amended by the Act of 1892, chapter 27, reads as follows:

> At every public road crossing at rail level of the railway the fence on both sides of the crossing and on both sides of the track shall be turned into the cattle guards so as to allow of the safe passage of trains.

Then the 259th section of the Act of 1888 as amended by the Act of 1892, reads as follows:

> No locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town or village at a speed greater than six miles an hour unless the track is fenced *in the manner prescribed by this Act.*

Whatever doubts there may have been as to the meaning of those two sections as they were originally framed in the Act of 1888 have been removed since their amendment by the Act of 1892 as I have set them out above. The manner of "fencing prescribed by the Act" is by turning in "the fences on both sides of the crossing and on both sides of the track to the cattle guards." Unless and until this is done the limitation upon the speed at which the trains are to cross the highway, namely, six miles an hour, prevails. When it is done the limitation no longer exists. As I

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Davies J.

have already said these sections neither authorize nor empower the railway to place fences or gates across the highway, and their object was not to provide for the protection of the public travelling along the highway, which was provided for by the 187th section of the Act, but for the "safe passage of trains" and to secure that safe passage as far as possible by the exclusion of animals from the track either by way of the highway or from the adjoining lands.

Then the 10th section of the Railway Act which authorizes the Railway Committee

> to regulate and limit the rate of speed at which trains may be run in any city, town or village

was invoked, and it was pointed out that this power given to the committee was clogged with a limitation that

> the rate of speed shall not in any case exceed six miles an hour unless the track is properly fenced.

But I again point out that this language cannot be held to cover or authorize the fencing of the highways but only the fencing of the track along the lands of the railway company. It is to be regretted that the language had not been changed by Parliament at the time the 259th section was amended and the words "properly fenced" changed to "fenced in the manner prescribed by this Act" as was done in that section. But the words as they stand can mean that and nothing more. They cannot, in my opinion, be construed to take away from the Railway Committee the power of sanctioning a greater speed than six miles an hour unless the track is fenced as a jury may think proper. The Act must be construed with the substituted sections 197 and 259 read into it and the phrase "unless the track is properly fenced" still retained

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Davies J.

:n the 10th section construed as meaning fenced as prescribed by the Act and especially by the 197th section, at the highway crossings. No negligence was found or proved with regard to the fencing and if my construction of the Act is correct there was none, it being admitted that on this construction the fences were all right. That being so the rate of speed at which the train could run across the level highway crossing was a matter solely for the determination of the Railway Committee, as was also the determination of the kind, character and extent of the protection which either by gates, watchman or otherwise, should be provided for the travelling public. As a matter of fact it was proved and found by the jury that the rate of speed of the train in question at this highway was considerably below the schedule rate.

Such being the law, as I construe it, I do not think the plaintiff entitled under the findings of the jury to have judgment entered for him.

We were pressed with the decision of this court in the case of *Lake Erie and Detroit River Ry. Co.* v. *Barclay* (1), but there is little analogy between the two cases. The learned judge who delivered the judgment of the court in that case expressly disclaimed any intention of deciding the broad questions which we have been called upon here to determine and the judgment went upon the special facts of that case. It by no means follows from the present judgment of this court that railway companies might not be properly adjudged guilty of actionable negligence in cases arising out of shunting cars across highway crossings apart altogether from questions relating to the speed of trains and the legality of their fencing at highway crossings. These cases must be dealt with on their merits as they arise.

(1) 30 Can. S. C. R. 360.

1903

GRAND TRUNK RWAY. CO. v. MCKAY.

Killam J.

The appeal should be allowed.

KILLAM J.—I concur in the above opinion of Mr. Justice Davies.

Appeal allowed with costs.

Solicitor for the appellants: *John Bell.*

Solicitors for the respondent: *Hanna & McCarthy.*

1903

*Oct. 16.

*Nov. 10.

L'HONORABLE SIMEON PAGNUELO (PLAINTIFF)..... } APPELLANT;

AND

HORMIDAS CHOQUETTE (DEFENDANT)..... } RESPONDENT;

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Vendor and purchaser—Misrepresentation—Fraud—Error—Rescission of contract—Sale or exchange—Dation en paiement—Improvements on property given in exchange—Option of party aggrieved—Action to rescind—Actio quantum minoris—Latent defects—Damages—Warranty—Agreement in writing—Formal deed.

An action will lie against the vendor to set aside the sale of real estate and to recover the purchase price on the ground of error and of latent defects, even in the absence of fraud.

In such a case, the purchaser alone has the option of returning the property and recovering the price or of retaining the property and recovering a portion of the price paid; he cannot be forced to content himself with the action *quamtum minoris* and damages merely, upon the pretext that the property might serve some of his purposes notwithstanding the latent defects.

Where the vendor has sold, with warranty, a building constructed by himself he must be presumed to have been aware of latent defects and, in that respect, to have acted in bad faith and fraudulently in making the sale.

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*PRESENT: Sir Elzéar Taschereau, C. J., and Girouard, Davies, Nesbitt and Killiam, J.J.