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*Mar. 12, 13.
*April 22.

LAURA LITTLEY AND STANLEY LITTLEY, AN INFANT BY HIS NEXT FRIEND, LAURA LITTLEY (PLAINTIFFS) ..... APPELLANTS;

AND

MANSFORD BROOKS AND CANADIAN NATIONAL RAILWAY COMPANY (DEFENDANTS) ..... RESPONDENTS.

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

Negligence—Railways—Action against railway company for damages from accident at railway crossing—Sufficiency of evidence as to negligence —Admissibility of evidence—Wrongful withdrawal of case from jury —New trial—Railway line formerly under provincial jurisdiction, but, prior to accident, coming under federal jurisdiction—Admissibility in evidence of order made by provincial railway board during its period of jurisdiction.

Plaintiffs sued under the *Fatal Accidents Act*, Ont., for damages for the deaths of occupants of an automobile through its collision with defendant company's electric train at a crossing near Lambton, Ontario. At conclusion of the evidence for plaintiffs, the trial judge withdrew the case from the jury and dismissed the action. An appeal to the Appellate Division, Ont., was dismissed, on equal division (36 Ont. W.N. 268). On appeal to this Court:

Held: There were facts in evidence from which negligence of defendants *might be* reasonably inferred by a jury; it was for the jurors to say whether from those facts negligence *ought to be* inferred (*Metropoli-*

tan Ry. Co. v. *Jackson*, 3 App. Cas., 193, at p. 197). Therefore the case should not have been withdrawn from the jury, and there must be a new trial.

The railway line had formerly been operated by a provincial company. By 9-10 Geo. V, c. 13 (Dom.), the line was declared (as the work of a "constituent and subsidiary company comprised in the Canadian Northern System") to be a work for the general advantage of Canada. At the trial there was tendered as evidence for plaintiffs, and rejected as inadmissible, an order of the Ontario Railway and Municipal Board, made in 1917, when the line was under provincial jurisdiction, and made under s. 123 of the *Ontario Railway Act*, R.S.O., 1914, c. 185. The order was expressed to be made "for the protection of the public," after the Board had "inspected" the crossing and had instructed its engineer to inspect it and report and he had done so. It provided a rule concerning the safety of persons using the crossing.

Held: The order had no continuing effect, once the line became (under the declaration aforesaid) a Dominion railway. Secs. 7 and 2 (28) of the Dominion *Railway Act, 1919*, (9-10 Geo. V, c. 68) were especially discussed in this regard. The question of precautions at highway crossings was one specially dealt with by ss. 308, 309 and 310 of that Act, to which, by the declaration, the line immediately became subject; these sections applied to the exclusion of any provincial statute and, *a fortiori*, of any provincial regulation; they were inconsistent with the order in question.

Held, further, however, that, while the order was not admissible as a rule enforceable against the defendant company, it was (subject to the qualification *infra*) admissible as affording evidence of an adjudication by a competent tribunal upon the dangerous character of the crossing—a matter of public concern—at the time the order was pronounced, and presenting a standard of reasonableness upon which a jury might act (*Pim* v. *Curell*, 6 M. & W., 234, at p. 266; *Neill* v. *Duke of Devonshire*, 8 App. Cas., 135, at p. 147; *Sturla* v. *Freccia*, 5 App. Cas., 623; Phipson on Evidence, 6th ed., p. 355; Taylor on Evidence, 10th ed., pp. 442-3, 1213). But, in such cases, if, as a result of a subsequent enquiry made by the same or a similarly competent public authority, such an order were set aside or superseded, it would cease to have any evidentiary value; that would be the case here should it be established at the trial that, since the railway came under federal control, the Board of Railway Commissioners made an enquiry of its own and concluded that, by providing for other and different means of safety, or simply by following the general railway law, the crossing was protected to its satisfaction. It would also be open to defendants to shew that, since the order in question was made, the conditions at the crossing had ceased to be substantially the same as at that time.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Ontario (1), dismissing (on equal division of the court) the plaintiffs'

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appeal from the judgment of Wright J. (sitting with a jury) who at the close of the plaintiffs' case granted the defendants' motion for a non-suit and dismissed the action. The action was brought under the Ontario *Fatal Accidents Act* to recover damages for the deaths of certain persons, occupants of an automobile, resulting from a collision between an electric train of the defendant company and the said automobile, which collision the plaintiffs alleged was caused by the negligence of the defendant company, its servants or agents, and of the defendant Brooks, who was the motorman of the train. The non-suit was granted on the ground that there was no evidence upon which the jury could reasonably find a verdict against the defendants. The material facts of the case and the issues in question, so far as was necessary for the disposition of the present appeal, are sufficiently stated in the judgment now reported. The appeal was allowed, with costs in this Court and in the Appellate Division, and a new trial ordered, the costs of the abortive trial to abide the event of the new trial.

J. R. Robinson and *J. L. Kemp* for the appellants.

R. E. Laidlaw for the respondents.

The judgment of Anglin C.J.C., and Rinfret, Lamont and Smith JJ., was delivered by

RINFRET J.—Walter Littley and three of his children were killed on the 18th day of June, 1928, in a collision between his automobile and an electric train operated by the respondent, Canadian National Railway Company, on which the respondent, Mansford Brooks, was the motorman.

The accident occurred on a level crossing, where the electric railway line intersects Dundas street, on the hill above Lambton, in the province of Ontario.

The appellants are the widow and an infant son of Walter Littley. They brought an action against the company and the motorman, under the provisions of *The Fatal Accidents Act* (ch. 183 of the Revised Statutes of Ontario, 1927). At the trial, after the appellants had concluded their evidence, the case was withdrawn from the jury and the presiding judge dismissed the action. Upon appeal, a motion to set

aside the judgment and for a new trial was dismissed on an equal division in the judges of the Appellate Division (1).

The judgment of the trial judge complained of had held that the evidence of negligence in the record was not sufficient to be submitted to the jury. So far as at least concerned the company, this judgment was sustained by all the judges of appeal; but two of them were of the opinion that the result at the trial was " due, in part at least, to the rejection of evidence by the learned trial judge, with whose ruling (they were) not in accord "; and they would have directed a new trial.

We propose to discuss, first, the sufficiency of the evidence actually put in by the plaintiffs and, then, the admissibility of what was rejected by the trial judge.

One of the allegations of negligence against the defendants was the " failure to give an adequate warning by sounding whistle, horn or bell, of the approach of the electric train."

The railway is subject to federal legislation and, under the *Railway Act* (R.S.C., 1927, c. 170), when the train was approaching the highway crossing at rail level, the engine whistle had to " be sounded at least eighty rods before reaching such crossing " (s. 308). In addition to that—and that might indicate the peculiar danger of Dundas street crossing—evidence was given that the company had placed a whistle post on the right of way alongside the railway track, at a distance of 331 feet from the travelled portion or pavement of Dundas street, and that, in this particular instance, it was the duty of Mansford Brooks, the motorman, to sound the whistle at that post.

Now, the evidence of one Gordon Worgan was given on behalf of the plaintiffs. Worgan lived on Church street, south of Dundas street. His house was 300 yards south of the whistle post. From there he could see the tracks of the electric railway. At the time of the accident, he was standing on his verandah, facing the right of way and talking with a man who had come to see him on some business. Worgan testified as follows:

Q. What signals did it give as it approached the crossing?—A. I heard it whistle.

Q. Whereabouts was it when it whistled?—A. It whistled at the crossing, I cannot say how near but it seemed to be at the crossing.

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Q. Was the locomotive in sight at the time it whistled?—A. It was a loud whistle.

Q. Was the locomotive in your line of vision when it whistled?—A. No.

Q. What kind of whistle was it?—A. It was a loud whistle, then I heard the crash.

Q. Were there any other signals given?—A. No, not that I heard.

Q. How long after the whistle stopped did you hear the crash?—A. The two seemed to be together, for it kind of startled me; I said to Mr. Chambers—

HIS LORDSHIP: Never mind what you said.

Mr. ROBINSON: Where was the train in reference to the whistle post when you heard the whistle?—A. I could not say that.

HIS LORDSHIP: You could say then had it passed the whistle post at that time?—A. I could not see from where I was, whether it had or not; I heard it whistle at the crossing an extra loud whistle it seemed to me.

Q. When you heard the loud whistle the train was near the crossing then?—A. Yes.

Q. It would have passed the whistle post then when you heard the loud whistle?—A. Yes.

Mr. ROBINSON: Can you indicate on this plan where your line of vision stops on the railway from the point where you were standing there? —A. Which is the whistle post?

Q. Here; that is the Hydro tower at the corner, here is the orchard in here?—A. I could see it through here all right, to the end of this (indicating).

Q. When you are looking across the fields you could see, as you say, 300 yards down the track, from the crossing, how close to the crossing can you see?

HIS LORDSHIP: He said before about 50 yards are obscured?—A. Yes.

Mr. ROBINSON: Did you hear any other signal besides the whistle?— A. No, sir.

That he did not hear the sound of the whistle is, as a general rule, the most any witness can say as to whether the particular signal was or was not given. No doubt, his evidence will not be relevant or material, if, at the time, the witness was not in a position to hear or was shown not to have been paying any attention whatever. But, in a later part of his testimony, Worgan said that "what first attracted (his) attention to the train" was "the sound of it going along the line." He could "hear the rumble of this train for a distance of 300 yards." If he could hear the train, it would not be unreasonable to assume that had the whistle been sounded, he could also have heard it. And if, under the circumstances he described, Worgan did not hear it, a fair and even logical inference may be that the whistle was not sounded either at eighty rods from the crossing or at the whistle post.

That evidence, if believed by the jury, would establish the fact of non-performance by the motorman of a specific positive duty laid on him by the statute or imposed as a precautionary measure by the company itself; and if, in the opinion of the jury, the omission caused or contributed to the accident, it would entail the responsibility of both the motorman and the company.

That would bring this case within the rule laid down by Lord Cairns in *Metropolitan Railway Company* v. *Jackson* (1):

> The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the Jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever.

In the passage quoted from Worgan's testimony, we think there was "evidence—more than a mere scintilla—from which negligence *may be* reasonably inferred"; and it was for "the jurors to say whether, from those facts, when submitted to them, negligence *ought to be* inferred." Accordingly the case should not have been withdrawn from the jury, and there must be a new trial as against both respondents.

Following our practice when a new trial is directed, we refrain from expressing any opinion on the evidence as a whole beyond what is necessary to warrant the conclusion we have reached. Having found a state of facts on which, in our opinion, the jurors would be entitled to hold that negligence might be inferred, that is sufficient for the purposes of disposing of the appeal. We go no further. We do not say that there is not, in the record, other evidence of the same character as that of Worgan and in respect of which a similar comment might be made. Nor do we say that Worgan's evidence is strong or ought to be believed.

(1) (1877) 3 App. Cas. 193, at 197.

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We appreciate that the trains go past Worgan's house quite frequently, that "this was not anything out of the ordinary" and that, moreover, at the time of the accident, Worgan was talking to another man. Those were circumstances to be drawn to the attention of the jurors and to be weighed by them.

We would add, however, that as regards the motorman Brooks alone, there were certain statements put in from his examination on discovery which, though not evidence against the company, would have warranted the trial judge in submitting to the jury at least the issue between the appellants and that respondent. But it is advisable not to say anything further, since the case must be retried.

There remains to be discussed the alleged improper rejection of evidence.

An order of the Ontario Railway and Municipal Board, bearing no. P.F. 4478 and dated September 20, 1917, was tendered as an exhibit on behalf of the plaintiffs and was refused at the trial, when the following discussion took place:

Mr. ROBINSON: I propose to file an order of the Ontario Railway and Municipal Board.

HIS LORDSHIP: What have they to do with this case?

Mr. ROBINSON: There is an order of the Railway Board.

HIS LORDSHIP: They have no jurisdiction over this railway.

Mr. ROBINSON: They have jurisdiction over it until it is superseded.

HIS LORDSHIP: They have no jurisdiction over a Dominion railway.

Mr. ROBINSON: At the time this order was made they had jurisdiction.

HIS LORDSHIP: That would not make any difference. You allege in your pleadings that this is a railway incorporated under the Revised Statutes of Canada; the Ontario Railway and Municipal Board has no jurisdiction over a railway so incorporated.

Mr. ROBINSON: I am suing the Canadian National Railway and at the time this order was made—

HIS LORDSHIP: That does not make a particle of difference, and I am not going to admit the evidence because you allege that this is a Dominion railway and no order of the Ontario Board has any effect over a Dominion railway. I refuse the evidence. You have tendered it and—

Mr. ROBINSON: I might be permitted to speak in support of my application?

HIS LORDSHIP: What have you to say in support?

Mr. ROBINSON: At the time this order was made there was jurisdiction in the Ontario Railway and Municipal Board to make it: that order has never been superseded.

HIS LORDSHIP: It does not need to be because when it becomes a Dominion railway it goes out; and that is my ruling.

Mr. ROBINSON: I would like a note made that this evidence is tendered, my Lord, and I further tender it on this point as proving that it is a dangerous crossing.

HIS LORDSHIP: That cannot declare it is a dangerous crossing—no jurisdiction at all.

Mr. ROBINSON: It is tendered on that point as well.

Mr. LAIDLAW: I think my friend should not have made that statement before the jury.

HIS LORDSHIP: Well, I will correct it.

Mr. ROBINSON: I have to tender that on that point, and I do not know any other way I could have put it.

HIS LORDSHIP: It would be unheard of if that were so, a railway under the jurisdiction of two railway boards, who make conflicting orders.

Mr. ROBINSON: Two have.

HIS LORDSHIP: Well, I have ruled, that is the end. I don't want to hear any more.

The circumstances are these:

The order is addressed to The Toronto Suburban Railway Company, a provincial company operating the electric railway at the time the order was made. By an Act to incorporate Canadian National Railway Company and respecting Canadian National Railways (ch. 13 of Statutes of Canada, 9-10 George V), The Toronto Suburban Railway Company was stated, in the first schedule, to be a "constituent and subsidiary company comprised in the Canadian Northern system" and, as such, by the 18th section of the Act, it was declared to be a work for the general advantage of Canada.

The question is whether the regulations made by the provincial railway board still continued to apply as such to that railway.

We agree with those of the learned judges below who held that they did not.

The effect of the declaration, by force of section 7 of *The Railway Act, 1919* (ch. 68 of 9-10 George V), was to subject the railway to federal legislation and control, "to the exclusion of such of the provisions of (its) Special Act as (were) inconsistent with the (said Railway) Act, and in lieu of any general railway Act of the province."

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The Special Act, when used with reference to a railway, is defined in the *Railway Act* (subsection 28 of section 2 of c. 68, 9-10 George V) as meaning

> any Act under which the company has authority to construct or operate a railway, or which is enacted with special reference to such railway, whether heretofore or hereafter passed, and includes,—
>
> (*a*) all such Acts,
>
> (*b*) [refers to Grand Trunk Pacific Railway],
>
> (*c*) any letters patent, constituting a company's authority to construct or operate a railway, granted under any Act, and the Act under which such letters patent were granted or confirmed.

Such only, therefore, of the provisions of the Special Act so defined as were not inconsistent with the federal *Railway Act, 1919,* continued to apply to the respondent company's railway. Otherwise, the railway was withdrawn from the authority of the provincial laws and of the regulations adopted by the provincial boards. For, as said by Middleton J.A., (with whom Mulock C.J.A., concurred), these regulations could "have no greater authority or validity than if they were found in The Ontario Railway Act," and we would add: or in the Special Act enacted with reference to the railway.

The question of precautions at highway crossings is one specially dealt with by sections 308, 309 and 310 of the federal *Railway Act* to which, by the declaration, the railway immediately became subject. These sections applied to the exclusion of any provincial statute and, *a fortiori,* of any provincial regulation. They were inconsistent with the Order of the Ontario Railway and Municipal Board tendered in evidence by the plaintiffs.

The Board of Railway Commissioners for Canada, under whose jurisdiction the railway was placed, was immediately vested with full and exclusive authority to make orders in respect of Dundas street crossing. This authority was to be exercised unhampered by any pre-existing regulation or order of the provincial board, which could not be done unless the effect of section 7 is to exclude all such regulations, for the Dominion Railway Act contains no provision empowering the Board of Railway Commissioners to rescind or cancel a provincial regulation or order. We think, therefore, the latter had no continuing effect once the road became a Dominion Railway. But, contrary to what was urged before us, this does not make for a period of lawless-

ness, for the federal legislation must be presumed to be adequate to fully cover the situation and there is nothing to prevent The Board of Railway Commissioners from immediately adopting any measures required in special cases. Moreover, the Act of the Parliament of Canada declaring the railway to be a work for the general advantage of Canada might, if thought necessary or desirable, well contain a provision continuing in force provincial orders and regulations unless and until reconsidered by the Dominion Board.

The learned trial judge was therefore right in ruling that the Order of the 20th day of September, 1917, was no longer in force as an order binding on the respondent railway company.

But the Order was made by the Ontario Railway and Municipal Board " in the matter of section 123 of The Ontario Railway Act," being then chapter 185 of the Revised Statutes of Ontario, 1914. Section 123 of that Act provided that

> where a railway is already constructed upon, along or across any highway the Board may, upon its own motion, or upon complaint or application by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board, within a specified time, a plan and profile of such portion of the railway and may cause inspection of such portion and may inquire into and determine all matters and things in respect of such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it deems expedient * * * and that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction, in the opinion of the Board, arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected.

The Order was made while the Ontario Board had jurisdiction over the Dundas street crossing. It is expressly stated to have been made " for the protection of the public," after the Board had " inspected " the crossing and had " instructed its Engineer to inspect and report on the said crossings, and the said Engineer having completed his inspection and filed his Report." It provided a rule concerning the safety of persons using the crossing.

The plaintiffs alleged that the train was being operated at an excessive and immoderate rate of speed considering the dangers of the crossing. While the Order was rightly rejected as a rule binding on the company, it was further tendered as affording evidence that Dundas street crossing

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was dangerous, and that it was not unreasonable to require that some precaution be taken there such as it prescribes. Documents such as these will be received in evidence when they contain the results of inquiries made, as here, under competent public authority in the exercise of a judicial or quasi-judicial duty and concerning matters in which the public are interested. (See speech of Lord Blackburn in *Sturla* v. *Freccia* (1); see also Phipson, Law of Evidence, 6th ed., p. 355). Lord Abinger's words in *Pim* v. *Curell* (2) are apposite:

> In the cases where reputation is evidence, that is, cases involving a general right, in which all the Queen's subjects are concerned, a verdict or a judgment upon the matter directly in issue between the parties (although between other parties) is also evidence; not, however, that it is evidence of any specific fact existing at the time, but that *it is evidence of the most solemn kind, of an adjudication of a competent tribunal upon the state of facts, and the question of usage at that time.*

These words are quoted with approval by Lord Selborne L.C., in *Neill* v. *Duke of Devonshire* (3) who adds:

> Such evidence * * * is not itself, in any proper sense, evidence of reputation. It really stands upon a higher and a larger principle.

We think, therefore, that the Order was admissible not as a rule that could be enforced against the railway company, but as affording evidence of an adjudication by a competent tribunal upon the dangerous character of the crossing—a matter of public concern,—at the time the Order was pronounced, (Taylor, on Evidence, 10th ed., pp. 442-443 and 1213) and presenting a standard of reasonableness upon which a jury might act.

We must qualify what we have just said by adding that if, as a result of a subsequent inquiry made by the same or a similarly competent public authority, the regulation, order, rule or decree was set aside or superseded, it would, of course, cease to have any evidentiary value. That will be the case, should it be established at the new trial that, since the railway came under federal control, the Board of Railway Commissioners proceeded to make an inquiry of its own and came to the conclusion that, by providing for other and different means of safety, or simply by following the general railway law, " the said crossing is protected

(1) (1880) 5 App. Cas., 623.

(2) (1840) 6 M. & W. 234, at p. 266.

(3) (1882) 8 App. Cas. 135, at p. 147.

to the satisfaction of the Board." It may be—although we express no opinion on this point—that this will be shown to be the actual condition, as a result of Order No. 39895 of the Board of Railway Commissioners, dated the 19th day of November, 1927. This Order was tendered as exhibit, but was refused because it did not bear the certificate required by section 68 of the *Railway Act* (R.S.C., 1927, ch. 170). No doubt, at the new trial, the copy of the Order will have been properly certified and its admissibility on that ground at least will be no longer in dispute.

For the reasons stated, we direct a new trial, with costs here and in the Court of Appeal; the costs of the abortive trial to abide the result. We further hold that the Order of the Ontario Railway and Municipal Board dated the 20th day of September, 1917, may be received in evidence for the limited purpose we have indicated, unless it is shown to have been superseded by a subsequent order of the same Board made while it was still in control or of the Board of Railway Commissioners for Canada, and subject, of course, to the right of the defendants to shew that, since the Order, the conditions at or about the Dundas street crossing have ceased to be substantially the same as when the Order in question was made.

DUFF J. concurred in the result.

Appeal allowed with costs, and new trial ordered.

Solicitor for the appellants: *Church & Robinson.*

Solicitor for the respondents: *R. E. Laidlaw.*

*PRESENT:—Duff, Newcombe, Rinfret, Smith and Cannon JJ.