1928
*Oct. 29.
1929
*Feb. 5.

WINNIPEG, SELKIRK AND LAKE WINNIPEG RAILWAY COMPANY (DEFENDANT) ..... } APPELLANT;

AND

PAUL PRONEK (PLAINTIFF) ..... (RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Street railways—Negligence—Tramcar at night overtaking and striking sleigh on track—Degree of care required of railway company—Duty as to power of headlight.

Defendant operated a street railway between Winnipeg and Selkirk, its line running along the west side of a highway. Between the railway and the main travelled road there was a ditch. The ties and rails were above the ground level. There were built up crossings across the ditch and railway. Plaintiff was driving along the road after dark on January 2, 1926, when his horses ran away. They turned over one of said crossings on to the prairie, made a circuit and came back to the crossing and turned and ran along the railway where they were, further on, overtaken and struck by defendant's tramcar, the motorman, who was going at 30 miles an hour, not having seen them in time to stop before hitting them. Plaintiff sued for damages. The headlights used on defendant's cars were the standard equipment of similar cars on this continent. But the motorman testified that he had had trouble on his trip that evening from Winnipeg to Selkirk with dimness of the light; he had changed the carbon at Selkirk, but still had trouble with dimness on the trip back to Winnipeg, on which the accident happened; when the light was working with full efficiency he could see about seven "pole lengths" ahead; he had made emergency stops in about three pole lengths; he did not see plaintiff's outfit until he was about one pole length away. Evidence was given that after the accident the light was tested and found in good condition. An expert testified that in all arc lights there is a variation in brightness, due to automatic adjustment in the carbon, causing momentary dimness, and to the light being affected by line volt-

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ.

1929

WINNIPEG, SELKIRK & LAKE WINNIPEG RY. CO. v. PRONEK.

age. The jury found defendant negligent in "not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident"; but this finding being deemed unsatisfactory in view of the pleadings, the jury, after further directions, added: "as the evidence submitted shows the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident." Plaintiff recovered judgment, which was sustained by the Court of Appeal (37 Man. R. 320).

Held (Anglin C.J.C. and Lamont J. dissenting): The judgment below should be reversed, and the action dismissed.

Per Newcombe and Smith JJ.: Defendant had no obligation to keep a man on duty at Selkirk; moreover, plaintiff had not alleged failure to do so as a ground of negligence. As to the added clause, it did not, in view of the evidence and the judge's charge, imply a finding of excessive speed; nor did it imply that the headlight in question had some particular defect causing it to function less effectively than defendant's headlights ordinarily functioned—there was no evidence on which a jury could reasonably so find, and they had not found any such defect in terms; the only negligence found was failure in a duty which, in the jury's opinion, as indicated by their finding, was on defendant, to have a headlight sufficiently powerful to enable the motorman to see plaintiff in time to stop before hitting him; and defendant's duty in law did not go that far; it was bound to operate its cars with the care that a reasonably prudent person would exercise under the circumstances; in view of the position and construction of the railway it had no reason to anticipate that a person might be going along on the railway with his team; and it was not bound to use such a degree of care as to insure against accident under such extraordinary circumstances as had placed the plaintiff in such a situation. Its duty to use reasonable care required it to have a headlight of reasonable efficiency, having regard to the state of the art, and such duty was complied with.

Per Rinfret J.: The added clause indicated no intention of introducing a new and independent finding of negligence; it left the verdict as it stood formerly, except that it disclosed the reason for the original answer. It did not improve the unsatisfactory finding. But, looking upon it as a separate finding of negligence—if it meant that defendant was under the duty to have on its cars headlights of sufficient power to illuminate the track so as, under all circumstances, to avoid an accident, the verdict was without legal grounds to maintain it; if it meant that the headlight on this particular car was insufficient, the answer was twofold: (1) the uncontradicted evidence was that it was the best type of light to be found; (2) there was no evidence that the headlight was out of order. The dimness which, for some reason not explained, temporarily existed, and which was not common to the type nor due to any defect in the particular light, might have been a reason for finding the motorman at fault in driving at that rate of speed under the circumstances; but that was not the finding; moreover, the question of speed had been withdrawn from the jury. In view of the position and construction of the railway, defendant could not reasonably be held to have been bound to anticipate what occurred.

1929

WINNIPEG, SELKIRK & LAKE WINNIPEG RY. CO. v. PRONEK.

Per Anglin C.J.C. and Lamont J. (dissenting): The jury found, in effect, that, under the circumstances, defendant was negligent in not having on the car a headlight functioning with sufficient power to enable the motorman to see objects on the track in time to stop before hitting them. Whether defendant's common law duty to exercise "that care which a reasonably prudent man would exercise under the circumstances" was complied with, was a question of fact; and there was evidence to justify the jury in finding that it was not complied with; that the particular headlight in question was inadequate, considering the hour, place, and speed of the car. Plaintiff had a right to be on the track (having regard to the relevant statutes and the agreement between defendant and the municipalities through which its line ran), subject only to obligation to give right of way. Defendant had reason to anticipate that the public might go on its track. The supplying by defendant to its cars of headlights of such power, when at full efficiency, as it did supply, was most cogent evidence against it as to what a proper headlight should do, and this standard of care established by defendant itself might well have been taken by the jury to be that which a reasonably prudent man would have adopted under the circumstances. Also, the statutory requirement to "provide adequate equipment" for the "efficient working and operation of the railway" would include an effective headlight. The jury's finding that the headlight would not illuminate the track far enough ahead for safety, was sufficient, without a finding of any particular defect. Also, it could not be said that defendant discharged its full duty by equipping the car with a standard headlight, if that headlight, for some reason or other, did not function; its duty was to supply an adequately functioning headlight. (Anglin C.J.C. held also that, should the jury's finding be deemed insufficient to support a judgment for plaintiff, there should be a new trial, because of misdirection on the issue of excessive speed and insufficiency of a question put to the jury).

APPEAL by the defendant from the judgment of the Court of Appeal for Manitoba (1) dismissing its appeal from the judgment ordered by Curran J. to be entered, upon the verdict of a jury, for the plaintiff for the sum of $2,354.25 and costs. The action was for damages for personal injuries to the plaintiff and damage to his property caused by the defendant's street car colliding with the plaintiff's sleigh through, as alleged, the defendant's negligence.

The material facts of the case are sufficiently stated and discussed in the judgments now reported, particularly in the judgments delivered by Lamont J. and Smith J., and are indicated in the above headnote. The questions put to the jury and the answers thereto are set out in the judgment of Smith J. The defendant's appeal to this Court was

(1) 37 Man. R. 320; [1928] 1 W.W.R. 857.

allowed with costs here and in the Court of Appeal, and the action dismissed with costs. Anglin C.J.C. and Lamont J. dissented.

W. N. Tilley K.C. for the appellant.

D. Campbell K.C. for the respondent.

ANGLIN C.J.C. (dissenting).—I have had the advantage of reading the opinions prepared by my brothers Lamont and Smith. While fully concurring in the conclusions of the former and in the reasoning on which they are based, there are a few observations which it seems to me desirable that I should make.

The ditch alongside the tramway and the unlawful height of the tracks—six or eight inches above the highway level —were much relied on by the appellant as affording strong ground for supposing that there would not be vehicular traffic along the tramway rails. At other seasons that might be the case. But we are here in the presence of midwinter conditions (January 2nd), when, normally, the line of demarcation would almost disappear, and no serious obstacle would be presented to the driving of a team of horses and a sleigh on to, and along, the part of the highway on which the tramway is laid. This bears on the question whether there was any reason for the company to anticipate that there might be vehicular traffic on that part of the highway.

The jury's answer to the sixth question indicates their purpose to hold the motorman, McLeod, blameless. They probably accepted his statement that he was obliged to make schedule time and that this required him to run his car at thirty miles an hour or upwards. Otherwise they might well have found him at fault, notwithstanding the misdirection of the trial judge on that question, in driving at that rate of speed while his headlight was, for one reason or another, functioning so poorly that he could not distinguish objects on the track more than seventy feet ahead.

In the light of McLeod's evidence, the finding of the jury in answer to the second question means that, the motorman being required to maintain a speed of not less than thirty miles per hour, the duty of the company was to provide him with a headlight which would always enable

1929

WINNIPEG, SELKIRK & LAKE WINNIPEG RY. CO. v. PRONEK.

Anglin C.J.C.

him to discern objects on the track at least 420 feet ahead, that being the shortest distance within which his car running at that speed could be stopped; and that it was negligence to fail to furnish such a headlight—from whatever cause, whether inherent defect, loose connections, or lack of power, it failed so to function. The only alternative, on the evidence which the jury seems to have accepted, would be a finding of fault, amounting to recklessness, on the part of the motorman in maintaining, under the circumstances, the speed he did.

But if, for any reason, the jury's finding in answer to the second question should be deemed insufficient to support a judgment for the plaintiff, a new trial would, I fear, be inevitable, because of misdirection on the issue of excessive speed and also because of the insufficiency of the sixth question and of the direction in regard to it. That question should have read as follows:—

> Might the defendant's servants, after the position of the plaintiff became apparent (or should have been apparent to the motorman), by the exercise of reasonable care have prevented the accident?

The part in brackets was omitted, and the charge of the learned trial judge did not remedy the deficiency. No doubt the motorman, as the jury found, did all he could after the position of the plaintiff was apparent, i.e., when he was about sixty feet ahead; but it was then too late. Had the part of the question (as above stated) in brackets been included, who can say that the jury, properly instructed, would not have found that the motorman should have seen the plaintiff's danger when he was over 500 feet away, and should in that case have stopped his car in time to avoid running him down? Such a finding would entail liability of the defendants; and the jury were not given the opportunity to make it.

Finally, the case of *Brenner* v. *Toronto Railway Co.* (1), referred to by my brother Smith, and part of the judgment of the Divisional Court in which was approved by the Judicial Committee in *British Columbia Electric Ry. Co. Ltd.* v. *Loach* (2), was alluded to in the course of the argument only because the judgment in the Divisional Court had followed an earlier decision in *Preston* v. *Toronto Ry. Co.* (3), where it was held that a rule (or

(1) (1907) 13 Ont. L.R. 423.
(2) [1916] A.C. 719.
(3) (1905) 11 Ont. L.R. 56, at p. 59; 13 Ont. L.R. 369.

practice) of the railway company concerning the safety of persons using the streets affords evidence, as against the company, of a standard of reasonableness in regard to the subject covered by it upon which a jury may act. The *Brenner* case (1) has no other bearing upon the matter now before us.

I am unable to understand why, having regard to the conditions under which the appellant's tramcars are operated, a headlight functioning effectively should not be deemed part of the "adequate equipment" which "every railway company" is required by the *Manitoba Railway Act* (s. 40) "at all times" to provide "for the efficient working and operation of the railway." If it is, there was here a breach of statutory duty by the defendants which the jury has found to have been negligence causing the injuries of which the plaintiff complains. If not, then to cause a heavy tramcar to rush along a dark highway, where it has not an exclusive, but merely a preferential, right-of-way, at 30 miles per hour, with a headlight functioning so ineffectively that it only enables the motorman to see objects 60 or 70 feet ahead, instead of at a distance of 800-1,000 feet, as a headlight functioning at full efficiency would enable him to do, imports a reckless indifference to the rights of others and a criminal disregard of the safety of those who may be on such highway utterly inconsistent with the duty "to operate their cars with the care that a reasonably prudent person would exercise under the circumstances," which, it is common ground, the common law imposed upon the defendants.

In setting up, in explanation of their failure to have an adequate headlight, the improbability of there being any vehicular traffic on the tramway tracks because of their excessive height above the highway, the defendants are, in effect, invoking a consequence of their own illegality to excuse the non-observance of what would otherwise have been their plain duty.

NEWCOMBE J. concurs with Smith J.

RINFRET J.—I do not think the verdict can stand.

The first answer of the jury was that the company was at fault for "not having any man on duty at Selkirk cap-

(1) (1907) 13 Ont. L.R. 423.

1929

WINNIPEG, SELKIRK & LAKE WINNIPEG RY. CO. v. PRONEK.

Rinfret J.

able of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident." This was considered unsatisfactory by the trial judge and counsel on both sides. All seemed to agree that, more particularly in view of the pleadings and the course of the trial, no judgment could be entered on such ground. The jury were accordingly requested to reconsider their answer. They did not change it; they only added to it the following words: "as the evidence submitted shows the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident." The wording of this additional answer indicated, on the part of the jury, no intention of introducing a new and independent finding of negligence against the company. It left the verdict as it stood formerly, except that it disclosed the reason for the original answer. It did not improve the unsatisfactory finding.

Should we, however, look upon the additional answer as a separate finding of negligence, the difficulty is to understand its true meaning. If the meaning be that the railway company was under the duty to have on its cars headlights of sufficient power to illuminate the track so as, under all circumstances, to avoid an accident, I do not see upon what legal grounds such verdict can be maintained.

If the meaning be that the headlight on this particular car was insufficient, the answer is two-fold:—

1. The uncontradicted evidence is that it is the best type of light that can be found. It is in use on 90% of the lines on the North American continent. At full efficiency, it will show an object about 700 feet ahead, which is far more than what would be required to meet the duty of the company, even if we should accept the standard laid down by the jury according to the widest interpretation that can be given to its verdict.

2. There is no evidence that the headlight was out of order. During the previous trip from Selkirk to Winnipeg, the dimmer was used and gave no trouble. Coming back from Winnipeg to Selkirk, "the bull's eye * * * was working good." Tests were made daily. One was made on this particular headlight before it was put on the car. After the accident, the headlight was again tested, when it was brought back to Selkirk, and found in good condition.

So that the charge of negligence against the company:

> 5b. In failing to supply and maintain sufficient and adequate lights to enable the motorman to see the plaintiff in time to stop.

was without foundation.

The headlight which the company supplied and maintained was sufficiently powerful to meet the exigencies of the jury, even if such duty was cast upon the company.

True it is that, in the course of operation, for some time previous to the accident, and for some reason not satisfactorily explained, the lamp flickered and the light became dim. That was not common to that type of headlight, nor due to any defect in the particular light then in use. It was a temporary condition unknown to any official, agent or employee of the company, outside of the motorman. It might have been a reason for the jury to find the motorman at fault in driving at that rate of speed under the circumstances. But that is not what the jury found. On that point, moreover, it should not be overlooked that the question of speed had been withdrawn from them by the trial judge, who told them that they should disregard it altogether.

That the motorman was held blameless is not inconsistent with the view that he could not anticipate such an unusual occurrence as the finding of a team and sleigh on this railway, constructed as it was with ties and rails above the ground level, and separated from the travelled highway by a " wide road ditch."

It may be that the special Act of incorporation of the company did not authorize the railway to be so constructed. But the jury were faced with the conditions as they were. The trial judge, in his address, had said to them:

> There is no doubt about it that the railway was properly and legally constructed.

It seems evident that, wrongly or rightly, the company had taken unto itself the exclusive use of its right of way. The wide ditch and the other circumstances favoured this course of action. The public appears to have assented to it. It did not, in fact, travel upon the right of way. Any vehicular traffic over it was out of the question, on account of the lay-out, of the ties and of the protruding rails. The railway had been thus in operation for a good many years. The plaintiff himself did not contend that, at the time of the accident, he happened to be on the right of way in the

1929

WINNIPEG, SELKIRK & LAKE WINNIPEG RY. CO. v. PRONEK.

Rinfret J.

exercise of a right. He took pains to explain that he was driven there through a course of events absolutely beyond his control. No doubt he was found guilty of no contributory negligence; but the evidence was that the horses became unmanageable and that fact would be a sufficient explanation of that part of the verdict.

In my view of the case, that point is not concluded by the statutes and the Act of incorporation. It has to be considered in the light of the actual facts and the existing conditions and that was a matter essentially for the jury. I do not think, upon the answers, the plaintiff was entitled to a judgment in his favour.

I would allow the appeal and would concur in the dismissal of the action.

LAMONT J. (dissenting).—In this case the facts are as follows:—

On January 2, 1926, the respondent (plaintiff) who is a farmer, left Winnipeg for his home, about sixteen miles north, with a team and sleigh. He had proceeded along the highway some twelve miles when he met a large covered truck, the canvas of which was flapping in the wind. This so frightened his horses that they got beyond control and ran away. They ran north a short distance, then turned to the left, crossed the appellant's line of railway and entered a field adjoining the railway track to the west. While endeavouring to check the speed of his horses, the respondent dropped the left rein. He continued to pull on the right rein, which had the effect of bringing the horses around in a circle. When they got back to the appellant's track the horses, instead of crossing the track to the east, ran south along it towards Winnipeg. One horse ran between the rails and the other just outside of the west rail. When they had gone at full gallop for half a mile they were overtaken and run down by the appellant's electric car, which smashed the sleigh, severely injured the respondent, killed one horse and injured the other. To recover damages for his injuries and the loss he sustained the respondent brought this action, in which he claims that his injuries and loss were occasioned solely by the negligence of the appellant, its servants and agents. Among other acts of negligence alleged was the following:

(b) In failing to supply and maintain sufficient and adequate lights to enable the motorman to see the plaintiff in time to stop.

The appellant denied negligence on its part or that of its servants; pleaded the statute authorizing its incorporation and operation; and alleged that the accident was due to negligence on the part of the respondent.

The evidence shews that the appellant operates an electric railway between Winnipeg and Selkirk. The car line is located on the highway, occupying the most westerly part thereof. The car which ran down the respondent was in charge of Motorman W. H. McLeod and Conductor Johnston. McLeod testified that his car was equipped with a headlight which, when in good condition, i.e., at full efficiency, would illuminate the track six or seven pole lengths ahead of the car, and that he could then distinguish a person at five pole lengths. According to him a pole length varied from 125 to 150 feet; but Hawes, the appellant's superintendent, fixed it at about 140 feet.

McLeod left Winnipeg for Selkirk at 5.30 p.m., and arrived at Selkirk at 6.20 p.m. He testified that he had trouble with the headlight on his way up. The light flickered and was very dim. He thought the trouble was with the carbon, so, on reaching Selkirk, he got a new carbon and put it in the headlight. At 6.30 p.m. he left Selkirk for Winnipeg. The new carbon did not effect any improvement in the light. Instead of the track being illuminated, as it should have been, for six or seven pole lengths, the light was shewing ahead for only one pole length, and he could not distinguish objects on the track until they were within 70 or 75 feet of the car. The result was that, running on schedule time (30 miles per hour), which McLeod said he was supposed to do, he could not see the stations where intending passengers were waiting, in sufficient time to stop before going by them. This actually happened at least twice between Selkirk and the place of the accident. As the new carbon gave no better light than the former one, McLeod concluded that the trouble was not with the carbon. Twice between Selkirk and the place of the accident he got out and examined the headlight and he noticed that the felt around the door was worn away, letting the wind blow in. He thought this might be the cause of the flickering. The second examination was at McLennan. Two miles farther on the accident happened.

1929

WINNIPEG, SELKIRK & LAKE WINNIPEG RY. CO. v. PRONEK.

Lamont J.

The track at the place where the accident happened was straight and level for a mile each way.

The jury found that the appellant had been guilty of negligence which caused the respondent's injuries and that the respondent had not been guilty of any negligence. In answering the question: In what did the defendant's negligence consist? The jury said:

> Not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident, as the evidence submitted shows the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident.

To understand that answer, further reference to the evidence is necessary. The testimony shews that the appellant kept at Selkirk a barn foreman whose duty it was to superintend the equipment, including the headlights, and keep it all in good working order. He, however, left the barn each day at 6 p.m., after which time the appellant had no one at the barn except the night watchman, who knew nothing whatever about repairing headlights, and had no duties in connection therewith. When, therefore, McLeod brought his car with the headlight which he thought defective to Selkirk at 6.20 p.m., there was no one there who could repair it. In view of these facts, which were undisputed, and the fact that the appellant's car was running on the unlighted highway at a rate of speed of at least 30 miles an hour, the answer of the jury in my opinion, amounts to a finding that, under the circumstances, the appellant was negligent in not having on this car a headlight functioning with sufficient power to enable the motorman to see objects on the track in time to avoid running over them. The first part of the answer suggests that had the appellant had a man at Selkirk on the night of the accident who could have remedied any defect in the headlight, the track, on the return trip, would have been illuminated ahead for six or seven pole lengths and, as McLeod could stop his car in three pole lengths, the accident would not have happened. The jury having found that the accident resulted from the use of an insufficient headlight, the next question is, was the appellant under any obligation to supply the car with a headlight functioning adequately having regard to the speed at which it was necessary to operate the car to maintain schedule time.

In the first place it is to be noted that the respondent was injured on the highway where he had a right to be unless there was some statutory provision limiting his right.

The statutes applicable are: c. 78, Statutes of Manitoba, 1900 (the appellant's special Act of Incorporation), as amended by c. 90 of the Statutes of 1904 (Private); and the *Manitoba Railway Act* which is incorporated therein.

The material provisions are sections 38 and 40 of the Railway Act; section 13 of c. 78, and clause (*d*) of the agreement entered into between the appellant and the various municipalities through which the appellant's line ran. In part they read as follows:

38. No person other than those connected with or employed by the railway company shall walk along the track thereof, except where the same is laid across or along a highway, and not even then if the track be laid on a separate and distinct part of such highway and it be so expressed or understood between the company and the municipal council in whose territory such highway is comprised * * *.

40. Every railway company shall at all times provide adequate equipment and motive power for the efficient working and operation of the railway.

13. The rails of the railway, when the railway is constructed along the street or highway as aforesaid, shall be laid flush (as nearly as practicable) with such street or highway and the railway track shall conform to the grades of the same, so as to offer the least possible impediment to the ordinary traffic of the said streets and highways, consistent with the proper working of said railway.

(*d*) All cars and trains shall have the right-of-way on the said tracks and highways, and any vehicle, horseman or foot passenger on said track shall, on the approach of any car, give such car right-of-way.

There is nothing in these sections which interferes with the respondent's right to use the highway. Had the municipalities, in their agreements with the appellant, consented to have the public excluded from walking on that part of the highway covered by the appellant's track, s. 38 of the Railway Act, in the absence of s. 13 of c. 78, would be operative, and walking on the track prohibited. For two reasons, however, I am of opinion that no such prohibition existed. In the first place, the municipalities did not, either expressly or impliedly, consent thereto. On the contrary, clause (*d*) above quoted recognizes the right of pedestrian or vehicular traffic to use the portion of the highway covered by the track, subject only to giving a right of way to the appellant's cars. In the second place, s. 13 is impliedly inconsistent with the existence of any restriction on

1929

WINNIPEG, SELKIRK & LAKE WINNIPEG RY. CO. v. PRONEK.

Lamont J.

the right of the public to use every part of the highway. Section 13 requires the rails to be laid as nearly as practicable flush with the highway, "so as to offer the least possible impediment to the ordinary traffic" on the highway. This clearly contemplates that traffic may be carried on along that part of the highway on which the rails are laid. Section 13 is part of a special Act into which the provisions of the Railway Act—which is a general Act—have been incorporated. In Maxwell on the Interpretation of Statutes, 6th ed., page 328, the learned author says:—

> When a general Act is incorporated into a special one, the provisions of the latter would prevail over any of the former with which they were inconsistent.

As section 13 impliedly leaves the whole of the highway open for use by the public, it would prevail over any restriction on that use provided for by s. 38 of the Railway Act. The respondent had, therefore, a right to be upon that part of the highway occupied by the appellant's tracks, but, on the approach of the appellant's car, he was under obligation to give it the right of way. This obligation implies that he would be made aware of the approach of the car in time to get off the track. He was not made aware of its approach until it was impossible for him to leave the track and, under the circumstances, he probably would not have been able to vacate the track even had he been aware of the car's proximity.

For the appellant it was contended that neither the statute nor the agreement it made with the municipalities requires the appellant to equip its cars with a headlight of any particular intensity or, indeed, with any headlight at all, and that, having complied with all the statutory requirements, it owed no duty to the respondent other than not to wilfully injure him. It is, no doubt, true that the statute does not in terms prescribe that a headlight shall form part of the necessary equipment, but it does require the appellant at all times to provide adequate equipment for the efficient operation of its railway. Such adequate equipment in the case of a tram car driven at high speed along a dark highway at night, in my opinion, certainly includes an effective headlight. But even if headlights should not be included in the term "adequate equipment," it is well established law that although a railway company has not violated any statutory provision, yet it may be

found guilty of negligence by reason of its failure to perform an obligation imposed upon it by common law. This is made clear by the language of the Privy Council in *Rex* v. *Broad* (1), where their Lordships say:

> The making of general regulations and the particular compliance with them still left those in charge of the working of the traffic bound to exercise whatever measure of care might in law be their appropriate duty upon the occasion in question.

It is also well established law that statutory authority to operate a railway does not authorize its operation in a negligent manner or in a manner which unnecessarily causes damage to others. *C.P.R.* v. *Roy* (2).

Apart, therefore, from any statutory requirement, as the respondent had a right to be on the highway, there was a duty imposed upon the appellant at common law to exercise such care as the law calls for to prevent injury to him, since without negligence on his own part, he found himself upon the railway track and unable for the moment to get out of the way of the approaching car. The degree of care which the law calls for is "that care which a reasonably prudent man would exercise under the circumstances." Whether or not the appellant's motorman, under the circumstances as known to him, acted as a reasonably prudent man in running his car on schedule time without a better light than he had, is a question of fact as to which no legal rules can be laid down. The jury had before it two pieces of evidence from which an inference could be drawn that he did not. The first of these is that the appellant anticipated that the public might frequent its tracks. This is shewn by its having inserted in the agreement a clause requiring that "any vehicle, horseman or foot passenger on said track shall, on the approach of any car give such car right of way." The second is that the appellant, by itself furnishing a headlight, which, when at full efficiency, would illuminate the track for six or seven pole lengths, had shewn what in its opinion was an adequate headlight for the efficient operation of its cars and the safety of the public. The supplying of such a headlight to its cars was most cogent evidence against the appellant as to what a proper headlight should do, and this standard of care established by the appellant itself may well have been taken by the

(1) [1915] A.C. 1110, at p. 1114. (2) [1902] A.C. 220.

1929

WINNIPEG, SELKIRK & LAKE WINNIPEG RY. CO. v. PRONEK.

Lamont J.

jury to be that which a reasonably prudent man would have adopted under the circumstances.

I am therefore of opinion that there was evidence to justify the jury in finding that a headlight, which illuminated the track for one pole length only, was totally inadequate where the car was being driven at night on the country highway at a speed of thirty miles per hour.

We were not referred to any Canadian or English case similar to the one before us, but the American case of *Gilmore* v. *Federal Street & Pleasant Valley Passenger Ry. Co.* (1), seems in point. At page 33 of the report the court says:—

> The degree of care to be exercised must necessarily vary with the circumstances, and therefore no unbending rule can be laid down, but there is no difficulty in saying that it is negligence to run a car along a narrow and unlighted alley in a dark night at a rate of speed that will not permit its stoppage within the distance covered by its own headlight.

On the argument a number of cases were cited in which individuals had been injured by steam railways. There can be no analogy between the duty owed to a person on its track by a railway company, the cars of which are run over the company's own private property where the public, generally speaking, have no right to be, and where the company is not called upon to anticipate their presence, and the duty owed by the appellant to the respondent in this case, where the cars were run upon the highway, from no part of which the public were excluded and where the appellant had reason to anticipate some persons might be.

Counsel for the appellant contended that the verdict could not stand because the jury had not found the particular defect in the headlight which caused its dimness. In my opinion this contention cannot be supported. The jury found that the headlight on that car would not illuminate the track far enough ahead for safety. Why it would not do so was a matter into which they did not inquire; nor were they called upon to do so. Whether it arose from the wind getting into the headlight, as McLeod seemed to think, or because the connection between the headlight and the electric wire became deranged, or because the voltage was lowered by overloading the line, as the appellant's superintendent suggested, is immaterial; the duty was upon the appellant to keep its car equipped with a headlight

(1) (1893) 153 Penn. St. R. 31.

which would properly illuminate the track, and if any of these suggested causes interfered to prevent adequate illumination, the appellant should have removed the interfering cause. To rush along an unlighted highway at 30 miles an hour with the headlight as it was amounts, in my opinion, to sheer recklessness; and the jury has in effect so found.

It was also suggested that the appellant had done its whole duty as far as the headlight was concerned, when it equipped the car with a standard type of headlight which was largely used in Canada and the United States. Surely it is idle to contend that the appellant discharged its full duty by equipping the car with a standard headlight, if that headlight, for some reason or other, did not function. It is an adequately functioning headlight that it is the appellant's duty to supply.

Counsel for the appellant further contended that the finding of the jury, carried to its logical conclusion, "would impose upon the defendant the duty of operating its cars and trains at such a speed that if any object is on the track the car could be brought to a stop without colliding with the object, and under all circumstances, such as fog, rain, sleet, snow, wind and snow and track curves," etc. This, in my opinion, is entirely beside the question. The jury were not dealing with conditions of fog, sleet, track curves, etc.; what they held, and all that they held, was, that, given the hour, place and speed at which the car was being driven at the time of the accident, it was negligence so to run that car with a headlight which did not permit the motorman to see objects within the distance in which it could be stopped. I agree that the appellant is not an insurer of the public. Its duty is to have its cars operated with due care for the public safety. But how it can be said that to drive a car, at night along a dark highway which the public have a right to frequent, at thirty miles an hour with a light which reflects only 140 feet ahead, and enables the motorman to distinguish objects only at 70 feet ahead, when the car cannot be stopped in less than 420 feet, was taking that reasonable care for the safety of the public which it is common ground it was the duty of the appellant to take, passes my comprehension. If the appellant had blindfolded its motorman at Selkirk and told him to drive to Winni-

1929

WINNIPEG, SELKIRK & LAKE WINNIPEG RY. CO. v. PRONEK.

Lamont J.

peg at thirty miles an hour and a person on the track was injured, could it be contended that the appellant was not negligent if the accident occurred by reason of the inability of the motorman to see in front of him? Yet to my mind that is practically the situation existing here. The motorman was not blindfolded, but he was given a car with a headlight which did not enable him to distinguish objects beyond 70 feet, although required to run at a schedule rate such that he could not stop the car in less than 420 feet, and the accident occurred because he could not see far enough ahead to stop his car before running over the respondent.

In my opinion the judgment of the Manitoba Court of Appeal was right and should be affirmed. I would dismiss the appeal with costs.

SMITH J.—The respondent (plaintiff) at the trial by jury recovered judgment against the appellant (defendant) for damages sustained through being struck by one of the appellant's cars. An appeal to the Court of Appeal for Manitoba was dismissed, and the appellant now appeals to this Court.

From Winnipeg north to Selkirk, a distance of nineteen miles, there is a highway called Main street, 132 feet wide, on the westerly side of which is located the appellant's line of railway. Between the railway and the main travelled highway there is a ditch, the depth and width of which are not described in the evidence, but which is marked on the plan as being on the space about 35 feet wide, extending from the easterly side of the railway to the westerly side of the main travelled road. There is another ditch along the east side of the main travelled road, and then a dirt road east of the latter ditch. The appellant's railway is located where it is under statutory authority and agreement with the municipalities, and is constructed like an ordinary railway line, having ties laid on the surface with ballast between, the rails on top projecting upwards their full depth above the ties and ballast, so that both ties and rails are above the ground level. Built-up crossings were therefore necessary, to enable traffic to cross both ditch and railway, and were provided where required.

The respondent was driving in his sleigh with a team of horses from Winnipeg northerly along the main travelled

road referred to, after dark on the evening of the second day of January, 1926, and, at a point about ten miles north of Winnipeg, met a motor truck, at which his horses became frightened, and ran away. They turned to the left over one of the crossings of the railway which led on to the prairie at the west. Here respondent says he lost one of the reins, and, pulling on the other, caused the horses to make a circuit, which brought them back on to the crossing, from which they turned south along appellant's railway line. About half a mile south of the crossing, the horses, still running along the track, one on each side of the westerly rail, were overtaken by defendant's car, which struck with force respondent's outfit, smashing it, killing one of the horses, and injuring the other and the respondent himself.

The following are the questions submitted to the jury, and the answers:—

1. Were the defendants guilty of negligence? Yes.

2. If so, in what did this negligence consist? Not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident.

3. If the defendants were negligent, was the injury to the plaintiff caused by their negligence? Yes.

4. Was the plaintiff guilty of contributory negligence? No.

5. If so, in what does such negligence consist? None.

6. Might the defendant's servants, after the position of the plaintiff became apparent, by the exercise of reasonable care have prevented the accident? No, none from the evidence submitted. The motorman did all in his power to avoid the accident.

7. At what sum do you assess the plaintiff's damages? Special $354.25. General damages $2,000.

Plaintiff's counsel requested the Judge to direct the jury to make a more explicit finding in regard to question no. 2. After argument, His Lordship again addressed the jury, and referred to questions 1 and 2, and proceeded:—

I merely point out to you that in enumerating the particulars of negligence or negligent acts charged in the pleading against the defendant, the answer that you have given was not one of these particulars. There is no allegation in the statement of claim that the defendants were negligent in not having a man on duty at Selkirk capable of making adjustments to the lights and so on. The allegation was that the light, that the system itself, was defective. The allegation was——

Mr. GUY: My Lord, I don't think your Lordship should suggest what the answer might be to the question. They heard all this before.

After some discussion, His Lordship proceeded:—

The allegation of negligence with regard to lights is this: In failing to supply and maintain sufficient and adequate lights to enable the motor-

1929

WINNIPEG, SELKIRK & LAKE WINNIPEG RY. CO. v. PRONEK.

Smith J.

man to see the plaintiff in time to stop. Now, that is the allegation of negligence that the plaintiff makes against the defendant. Have you any finding in respect to that. They don't say in their particulars that the defendant was negligent because he did not have a capable man at Selkirk barn and so on. They don't say that at all. They say they were negligent in failing to supply ample and sufficient and adequate lights to enable the motorman to see the plaintiff in time to have stopped. So I would be quite willing to give to you an opportunity to reconsider or more fully consider that question and the answer in the light of what I have read to you as containing what the plaintiff complains of.

The jury retired, and defendants' counsel renewed an objection that he had previously made, that the allegation just read to the jury as constituting negligence was not in point of law negligence, but His Lordship replied that he had explained the law to the jury the best he was able.

The jury returned and said they had added to their former answer to question no. 2, so as to now make it read as follows:—

Answer: Not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident, as the evidence submitted shows the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident.

The learned judge's exposition of the law to the jury that he referred to in answer to Mr. Guy's objection was in general terms, namely, that to create liability there must be a duty on the defendant to protect the plaintiff, a breach of that duty, and damage to the plaintiff resulting from that breach through a natural and continuous sequence of events uninterruptedly connecting the breach of duty with the damage. This, of course, did not enlighten the jury as to whether, as a matter of law, it was the duty of the defendant to have a headlight sufficiently powerful to enable the motorman to see the plaintiff in time to stop. The jurymen were left to decide the point for themselves, and found that there was such duty, and also a duty to have had a man at Selkirk on the night of the accident capable of making adjustments to the lights and other equipment to the car before it left Selkirk, and a breach of both these duties.

As to the neglect to have a man on duty at Selkirk, it seems clear that there was no such obligation on the defendants. Their duty to the public as to the condition and equipment of the car was in operating it, to have it in a

condition to be operated without undue danger to the public, and, whether or not they had a man on duty capable of putting it in such condition would make no difference. This ground of negligence was not alleged or attempted to be proved, and counsel for plaintiff urged the trial judge to point this out to the jury, as he did. The plaintiff's case therefore rests entirely on the finding that defendants were under a duty to have on the car a headlight sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident. An attempt has been made to read into the answer some other meaning. One of the learned judges in the court below reads it as a finding of too great speed, which he gives as thirty to thirty-five miles per hour. The only evidence as to speed was by plaintiff's witness, the motorman, who said: "I was going possibly thirty miles an hour." The learned judge, in the course of the trial, remarked that to say this rate was negligence was absurd, and in his charge told the jury that they might disregard this element, which they did, inasmuch as they have not said a word about speed. It has also been urged that this answer implies a finding that the particular lamp on this car was out of order at the time of the accident. The answer, to my mind, plainly indicates that in the opinion of the jury it was the duty of the defendants to have a headlight of the brilliancy they mention, regardless of whether it was functioning properly or not. An attempt was made to prove that this particular light was out of order, but the evidence to that effect, if it could be considered as evidence, of a defect that caused the dimness of the light, was of the most vague and feeble character. The motorman said the light was dim, and he thought the carbon was bad. He got a new carbon, and found he was mistaken, as the new carbon made no improvement. He then makes another guess, and says the felt against which the door of the lamp shuts was worn, which allowed the wind to get in and make the lamp flicker. He says he does not know anything about electricity, and would not know how to adjust one of these lamps.

The expert witness for the defendants says that a certain amount of flickering is inherent in all arc lights, by reason of the way the carbon burns, the arc gradually moving round the outer edge of the carbon, and that there is a variation in

1929

WINNIPEG, SELKIRK & LAKE WINNIPEG RY. CO. v. PRONEK.

Smith J.

the brightness in any particular direction; firstly, because brightness in that direction depends on whether the arc is at the front, the side or the back of the carbon; secondly, because the voltage on the power line of a railway varies with the varying load it is called on to carry. Again, he says that when the carbon is automatically adjusting itself, the light will almost go out for a moment. He further shows, by production of the lamp, that the outer casing projects back beyond the felt referred to, so as to carry the current of air back beyond this felt, and that, in any case, air entering there would not cause the light to flicker.

The motorman says that, leaving Winnipeg for Selkirk at 5.30 that evening, this light "was working good," but says it became dim, and he changed the carbon at Selkirk, and had trouble with dimness on the trip back to Winnipeg, on which the accident happened. He does not, however, confine his complaint at all to this particular headlight, but says all the headlights were bad. He says: "I have never had satisfaction with these headlights." "Well, the headlight, I am speaking generally, the whole bunch of headlights, they are never satisfactory to my way." "The headlights are all bad."

A boy named Parchinko testified that he was proceeding north along the highway and was standing up in his sleigh, and heard the crash of the collision right across on his left, looked round, and then saw the car lighted up inside, but had not seen any lights or the car till attracted by the crash. The headlight, the motorman says, was lit all the time, and illuminating the track for 150 feet ahead, and the car was lit up inside, and this boy, facing it as it approached on a parallel course 35 or 40 feet away never even became aware of its presence till attracted by the crash at his left hand. He had some power of vision, because he says after the crash he saw the car and lights inside. If he states the truth, the only explanation is that he was not looking in the direction of the car, and, never having seen the headlight at all, he could tell nothing about its brightness.

I think there was no evidence on which a jury could reasonably find that there was in the headlight in question some particular defect that caused it to function less effectively than it and the other similar headlights used by

defendants ordinarily function. The only evidence as to the condition of the headlight after the accident is that it was in good condition and has been in use as usual ever since. It had gone out because the collision had pulled the plug of the cord from its socket, thus severing the connection and cutting off the current. The jury has not found any such defect in terms, and I do not think we can read such a finding by implication into the answer. If such had been the intention of the jury, it would have been easy to say so in direct and simple language. The jury was urged, at request of plaintiff's counsel, to say whether or not the defendants were negligent by failing in their duty to have a light sufficiently powerful to enable the motorman to see an object on the track sufficiently far off to enable him to stop before hitting it, and, in my opinion, that and nothing else is the negligence found by the added clause.

The whole question, therefore, is whether or not the defendants were under legal obligation to carry a headlight of the power mentioned. If not, then the negligence found was failure to do what there was no legal obligation to do, which, of course, would not support the verdict.

No case has been cited that goes the length contended for here. We must simply apply the general rule that defendants had a duty towards the plaintiff to operate their cars with the care that a reasonably prudent person would exercise under the circumstances. Plaintiff was carried on to the railway by his runaway team, and the jury has found that he was not guilty of negligence in being there, or when there. The defendants, however, had no reason to anticipate such an unusual occurrence. The construction of the railway, as described, was such that nobody would voluntarily attempt to drive a team and sleigh along it, and in addition it was separated from the travelled highway by a ditch.

The Railway Act requires a railway line on a highway to be on a level with the road, with the top of the rails not more than one inch higher, and it is not shown why this was departed from in this instance. It is, however, not important here whether or not defendants were legally entitled to construct their railway above the road surface level as they did, because the condition actually existed,

1929

WINNIPEG, SELKIRK & LAKE WINNIPEG RY. CO. v. PRONEK.

Smith J.

so that it would be quite out of reason to say that it might have been anticipated that some one might be driving his team along the railway. Under these circumstances, I think it cannot be said that defendants were bound to use such a degree of care as would insure against such an unusual and unforeseen occurrence. The possibility of a person walking on the track might, perhaps, be anticipated, but in that case he would also be required to take reasonable care, and the light, even if as dim as the motorman claims, could be seen far enough away to enable him, if keeping a reasonable lookout, to step out of the way. This would also apply to animals on the track, because the owner would also be required to take reasonable care. We are dealing here with a special and unusual case, where the plaintiff was, by no fault of his own or defendants, deprived of the power of exercising the care that would be exercised under ordinary circumstances. Were, then, the defendants bound, as a matter of law, to provide means of insuring against accident under such extraordinary circumstances? The Court of Appeal holds that they were. Fullerton J.A., speaking of defendants' duty to take reasonable care, says,

> that a company operating cars at night could not possibly discharge this duty without being able to stop on the appearance of danger.

Trueman J.A., says,

> that at night the speed of the car shall be governed by the power of the headlight, so that when an object on the track is seen, the car can be stopped in time. A lookout, to be worth the name, must be subject to this condition.

One of the passengers testifies that it was snowing and stormy at the time of the accident, but respondent says it was a nice, clear night.

These judgments, however, go the full length of obliging defendants to insure the public against damage by any collision, quite regardless of conditions. If there is a curve in the track, a heavy snow storm or a fog, the speed must be regulated accordingly. If the conformation of the ground along the track, trees, buildings or other objects, obstruct the view, even in the daytime, speed would have to be regulated in the same way.

I am not in accord with these views. I think the obligation on defendants to use reasonable care would require them to have a headlight of reasonable efficiency, having regard to the state of the art of artificial lighting at night

of cars operating as defendants' cars do. They were, perhaps, not under obligation to have the very latest and most efficient headlights made, but according to the evidence they had, in fact, the very best lights in use for the purpose. These lights are the standard equipment of similar cars all over this continent, according to the only evidence offered. Plaintiff's witness, the motorman, thinks they are not bright enough, but neither he nor any other witness says that any brighter or better lights are available. There is, in my opinion, as I have stated, no finding that the particular light in use on this occasion was ineffective by reason of being out of order. I am therefore of opinion that the defendants in having on the car a headlight of the power and efficiency in general use for the purpose on this continent according to the uncontradicted evidence in the case, discharged their duty to have a headlight of reasonable efficiency under the circumstances.

The numerous cases cited in respondent's factum as to the respective functions of judge and jury, and as to interfering with the finding of fact by a jury, seem to me to have no application, because the jury's finding that is questioned is not as to the fact that the headlight was not sufficiently powerful to enable the motorman to see plaintiff in time to stop. It is their finding, or assumption, that as a matter of law defendants had a duty to have a light of this efficiency. It is conceded that if there was such a duty, the finding of fact as to its breach cannot be questioned. If the jury's finding of negligence is based on the assumption that defendants had a legal duty to supply a light of the efficiency they mention, the verdict cannot stand if, as a matter of law, the defendants had not a legal duty to take such a degree of care. Many authorities are cited in the appellant's factum that support the view I have indicated above as to the degree of care respecting headlights that it was defendant's duty to take (1). Beven on Negligence, 3rd ed., p. 614:

> The unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business.

(1) *Reporter's Note*:—The authorities cited on the point included: Beven on Negligence, 3rd ed., p. 614; *Zuvelt* v. *C.P.R.*, 23 Ont. L.R. 602, at pp. 606, 610; *Higgins* v. *Comox Logging & Ry. Co.* [1927] S.C.R. 359; [1927] 2 D.L.R. 682; *Elliott* v. *Toronto Transportation Commission*, 59 Ont. L.R. 609; 32 Can. Rly. Cas. 200; *Carnot* v. *Matthews* [1921] 2 W.W.R. 218.

1929

WINNIPEG, SELKIRK & LAKE WINNIPEG RY. CO. v. PRONEK.

Smith J.

All the evidence in this case shows that defendants fully complied with the ordinary usage of the business as to headlights, taking it, as I do, that there is no finding of a special defect in the condition of the particular light: *Zuvelt* v. *C.P.R.* (1), is much in point as to the principles involved here.

An interesting point is raised in the appellant's factum as to the effect of section 21 of the *Public Utilities Act*, R.S.M. (1913), c. 166, which places in the hands of a Commission the power to make orders regarding equipment, appliances and safety devices in carrying out a franchise involving the use of public property.

Mallory v. *Winnipeg Joint Terminals* (2), decided under the statute, is referred to. In view of what I have said above, I think it is not necessary to deal with this point.

The King v. *Broad* (3), was referred to as discussing the principle, but as it deals with a case of accident at a highway and railway intersection, where people were expected to be crossing, I think nothing can be gathered from it applicable to this case.

Brenner v. *Toronto Ry. Co.* (4), deals with ultimate negligence where the defendant's servant, by anterior negligence, deprived himself of the power to avoid the consequences of plaintiff's negligence, which he otherwise would have had. Here plaintiff was found not to have been negligent, and it does not seem to me that this case helps.

It has been suggested that the answers of the jury are unsatisfactory, and that therefore there should be a new trial. The plaintiff in his statement of claim alleges negligence, as follows:

(*a*) A dangerous rate of speed.

(*b*) "In failing to supply and maintain sufficient and adequate lights to enable the motorman to see the plaintiff in time to stop."

(*c*) Defective brakes, and failure to apply the brakes and slow down in time.

As I have pointed out, there is no finding of excessive speed under (*a*), and there was no real attempt by plain-

(1) (1911) 23 Ont. L.R. 602, at p. 606.

(2) (1915) 25 Man. R. 456; 53 Can. S.C.R. 325.

(3) [1915] A.C. 1110.

(4) (1907) 13 Ont. L.R. 423.

tiff to prove excessive speed. I have referred above to the only evidence as to speed and to the judge's charge regarding it. There was no objection to this, though, after the jury had first brought in their answers, plaintiff's counsel in a long argument asked the trial judge to give further directions to the jury. Further directions were given along the lines requested, but there was no request for a change of directions on this particular point, nor for a direction to the jury to make a finding with reference to it.

As to (*c*), the plaintiff proceeded at the trial to show, by his evidence, that the brakes were not defective, and that there was no negligence on the part of the motorman. There is no finding of defective brakes, the only evidence on the point being that of plaintiff's witness, that they were not defective; and there is a finding, in accordance with the evidence of plaintiff's witness, that defendants' servants were not negligent.

The plaintiff therefore, at the trial, grounded his whole case on the proposition of law that there rested on defendants a duty toward plaintiff to the extent set out in (*b*), and the judgment appealed from is grounded on that proposition of law, which, as I have stated, is, in my opinion, unsound. If I am correct in that view, then plaintiff at another trial would have to try some new ground. He has had one chance before a jury on the question of excessive speed, and has failed to get such a finding. He practically acquiesced in withdrawing that ground of complaint from the jury, and I can see no reason for submitting that question to another jury. In fact, I agree with the trial judge that it would be absurd to call 30 miles an hour on a track where there was no reason to expect any person to be travelling, excessive.

It would, I think, be unreasonable to allow plaintiff a new trial to prove that the brakes were defective, or that the motorman was negligent, after having proved at the former trial that the brakes were not defective and the motorman was not negligent. The only other point would be as to a defect in the particular headlight in use at the time of the accident. No such express ground of negligence was alleged in the pleadings, the allegation being that the light was insufficient, not because the particular light was defective, but regardless of whether it was defective or not.

1929

WINNIPEG, SELKIRK & LAKE WINNIPEG RY. CO. v. PRONEK.

Smith J.

There was no request to have the jury make a finding as to whether or not there was a defect in this particular light. All the evidence that plaintiff can possibly get on this point was offered at the trial, and amounted to a statement by a witness that it was one of a bad lot in use by defendants. He, however, admitted that he had no knowledge of electricity, and was incompetent to explain defects in such lamps or to adjust them, and that the guess he made as to the carbon being defective was all wrong.

On the question of the strength of the light, he says he saw plaintiff a pole length in front, which would be 125 or 150 feet. There is nothing to indicate that the jury believed that he could not see further than 150 feet, and it is quite possible that they did not believe it. The same witness stated that it required about three pole lengths, about 450 feet, to come to a stop from a speed of 30 miles per hour, and all that the answer of the jury implies is that the light was not strong enough to enable the motorman to see that far. If it was a bright night, as plaintiff says, were the jury likely to believe that a large dark object like plaintiff's team and sleigh with a big box could not be seen on the snow more than 150 feet away, even if there had been no light? The jury had all the evidence before them on this point that can be offered now, and did not see fit to say that the particular light had any defect or was out of condition, nor did plaintiff's counsel ask the trial judge in his second charge to direct the jury to make a finding on that point. I think, therefore, that plaintiff is not entitled to another chance with another jury of getting a finding of a defect in the particular light.

The appeal should be allowed, and the action dismissed, with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Anderson, Guy, Chappell & Turner.*

Solicitors for the respondent: *Lamont & Bastin.*