JOSEPH BELANGER (SUPPLIANT)...APPELLANT;

AND

HIS MAJESTY THE KING (RESPONDENT) ..... } RESPONDENT.

1916

*Nov. 3.
*Dec. 11.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Government railways—Construction and maintenance—Level crossings—Regulations by Governor in Council—Construction of statute—"Government Railways Act," R.S.C., 1906, c. 36, ss. 16, 49, 54—Negligence—Act of third person—Liability of Crown for damages.

The right to construct Government railways across highways conferred by section 16 of the "Government Railways Act," R.S.C., 1906, ch. 36, is subject to the continuing duty imposed upon the Government railway authorities that, in regard to the relative levels of the railway tracks and the highways, so long as any such crossings are maintained on the level of the roads the railway tracks shall not rise or sink more than one inch above or below the surface of the highways.

Regulations made by the Governor in Council under the provisions of section 49 and falling within section 54 of the "Government Railways Act," R.S.C., 1906, ch. 36, must not conflict with specific enactments of the statute; a regulation which may be the cause of conditions existing which are inconsistent with explicit requirements of the statute must be construed as subordinate to an implied proviso that nothing therein shall sanction a departure from any special requirement of the statute: *Institute of Patent Agents* v. *Lockwood* ((1894) A.C. 347) and *Booth* v. *The King* (51 Can. S.C.R. 20) referred to.

A level crossing of the Intercolonial Railway had planking between the rails which raised the roadbed so that the tracks did not rise more than an inch above the surface of the highway. Under a regulation for the guidance of trackmasters and trackmen, made by the railway authorities, the planks were removed during the winter season to permit safe operation of snowploughs and flangers, during this season the space occupied by the planking being filled by snow and ice. In April, before the use of snowploughs and flangers had been discontinued, the ice and snow melted and left

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

1916

BELANGER v. THE KING.

the tracks about six inches above the roadbed. After the usual inspection by the trackmen, some unknown person placed a fence-rail against one of the tracks to assist sleighs over the obstruction and, later in the day, suppliant in driving his sleigh along the highway had his foot crushed between the fence-rail and the track and sought damages from the Crown for the injuries sustained:—

Held, that the condition of the crossing constituted negligence of officers and servants of the Crown while acting within the scope of their duties and employment in the construction and maintenance of the railway in consequence of which the Crown was liable in damages notwithstanding that the resulting injury might not have occurred but for the intervening act of some unknown third person: *Latham* v. *R. Johnson & Nephew* ((1913), 1 K.B. 398), referred to.

APPEAL from the judgment of the Exchequer Court of Canada, by which the suppliant's petition of right was dismissed with costs.

The circumstances of the case are stated in the head-note.

Lane K.C. and *S. C. Riou K.C.* for the appellant.

R. V. Sinclair K.C. and *Léo Bérubé* for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be allowed.

The learned judge of the Exchequer Court in his notes of judgment says:—

It is true that section 16 of the "Government Railways Act" provides that no part of the railway which crosses any highway shall rise or sink below the level of the highway more than one inch; but assuming that the track at the place in question did not absolutely comply with such requirement, it cannot be contended that it was the cause of the accident. Obviously the proximate, determining and effective cause of the accident was the encounter by the suppliant of the post upon the track and which is conceded by the pleadings to have been placed there by persons unknown. Had there been no post on the track there would have been no accident. The officers or servants of the Crown are not charged with having placed the *pieu* on the track, and no evidence whatsoever has been adduced to trace any negligent act on their part in that respect. The employees declare that if it had been there when they passed over the section in the morning they would have seen and removed it, and that is readily understood and believed. There might

have been negligence on behalf of the employees if the evidence had established that the post had negligently remained on the track for several days or an unreasonable time.

It is quite certain, in fact it is practically admitted, that the rails at the highway crossing were laid in contravention of the statute, section 16, ch. 36, "Government Railways Act," which provides that

> no part of the railway which crosses any highway, unless carried over by a bridge, or under by a tunnel, shall rise above or sink below the level of the highway more than one inch; and the railway may be carried across or above any highway subject to the provisions aforesaid,

and were so laid as to create a nuisance.

Not only did the Crown owe a duty to the suppliant to construct its line at the highway crossing in accordance with the provisions of the statute, but there was a clear breach of that duty for the consequences of which the Crown is liable unless the intervening act of some unknown third party in placing the round stick between the rails is, as the learned judge finds, a reason for saying that the plaintiff's injuries were not the result of the Crown's breach of duty. As was said in *Crane* v. *South Suburban Gas Co.*(1), at pages 37-8:—

> The intervention of a third party may break a link in the chain which connects the wrong and the injury resulting from the wrong if the intervention is the near cause of the injury, that is, if the original wrongdoer had no reason to contemplate the possibility of the intervention.

But it is part of the Crown's case that by reason of the height at which the rails were left above the level of the highway the practice had grown up of placing such round sticks between the rails. The learned judge says:—

> Some of the witnesses say there were often people travelling over the rails who would place round sticks of wood to enable them to cross

(1) [1916] 1 K.B. 33.

1916

BELANGER v. THE KING.

The Chief Justice.

easier, that they did it themselves, but that they usually removed those sticks of wood after passing.

As was said recently, people who create a dangerous nuisance on a highway will not save themselves by trying to divert the argument into refined discussion about negligence and intervening acts of third persons. This dangerous pactice should not have been tolerated and we cannot sanction the suggestion that as a result the Crown must escape liability.

Reference was made to the "Rules and Regulations" for the guidance of trackmasters and trackmen. But regulations cannot operate as amendments of the statute by virtue of which the crossing of a highway at rail level is permitted. A regulation may provide for something to be done consistent with the requirements of the statute, but it is not permitted, under guise of regulating the management and proper use and protection of Government Railways (sec. 46), to amend the statute which determines the conditions subject to which the railway may be carried across a highway at rail level.

IDINGTON J.—There is no dispute as to the fact that appellant was seriously injured by reason of the road crossing the Intercolonial Railway being left in such a condition that someone, in order to get across the railway track, had resorted to the expedient of placing a stake between the rails in order that it would raise his sleigh above the rails and thus facilitate his crossing, and that stake being left there when appellant's team reached the same place rolled underneath the runners of his sleigh till it squeezed appellant's foot between it and the iron rail.

The learned trial judge holds that this does not furnish a cause of action. I cannot agree with such

holding. I think the condition of things at the time and place in question must be looked at as a whole and the causes thereof inquired into and the crucial question asked, if in truth the violation of the statute which fixed the kind of crossing to be made and kept there by respondent was not the true cause of that whole condition of things and the only answer to be made to the question so put.

The "Government Railways Act," by section 16, provides as follows:—

16. No part of the railway which crosses any highway, unless carried over by a bridge, or under by a tunnel, shall rise above or sink below the level of the highway more than one inch; and the railway may be carried across or above any highway subject to the provisions aforesaid.

The railway in question at the time of the accident shewed the rails exposed five inches instead of one inch above the level of the highway, and thereby rendered it almost if not altogether impossible for loaded sleighs to cross such a barrier without those in charge thereof resorting to some such expedient as someone evidently had resorted to in placing a stake or other like material to help in crossing the iron rails.

This condition of things was so well known that counsel for respondent sets forth in his factum herein the fact and alleges it was well known to appellant.

He seeks to justify this by some regulations which I hold cannot override the statute. Indeed, so far as I can see, there is nothing in the statute authorising the making of regulations which can in any way support or justify any regulation tending to suggest such an interference with the highway and violation of the statute.

The apparently notorious fact of teamsters being compelled to resort to such an expedient and habitually leaving the material so used on the railway track and

1916

BELANGER v. THE KING.

Idington J.

highway renders the answer made of want of notice futile. A municipality if responsible for the continuation of such a state of things could not plead want of notice.

The allegation that the railway sectionmen removed such things when found by them, and that the track was clear or made clear when they came to work in the morning and that it was cleared on the morning in question, cannot avail much when it is quite clear that there was good sleighing on the highway on either side of the track but none over it on the 3rd April, the day of the accident.

Indeed at that time of the year, as any and every foreman must have known, the likelihood of someone adopting the only and well-known expedient in question in the course of a few hours ought to have induced him to restore the track to a travellable condition.

The plan of throwing a few shovels full of snow on the track in early morning to be melted away long before noon at that season of the year, seems but an idle trifling with the travellers on the highway who had a right to see the statute observed and whether observed or not to enjoy an easy and safe way to cross the railway provided by respondent.

The accident took place between twelve and one o'clock in the day time. What might have happened in the course of the night in such a case is not pleasant to contemplate.

Those who act in such a way as the servants of respondent did in regard to this crossing cannot be held to have discharged their duty.

Their conduct in this case was just such negligence within the scope of their duty as caused the injury to the appellant of which he complains, and for which the statute provides the remedy invoked herein.

The suggestion made in the respondent's factum that the appellant well knew the conditions with which he was confronted, and ought to have waited till an approaching train had passed and then picked up this wood off the track and avoided the possible accident, and that his failure to do so should be held contributory negligence, comes with rather a bad grace from respondent.

That phase of the case is not dealt with by the learned trial judge beyond saying appellant might have waited.

Experience teaches us that a team of horses is much easier managed when across the track than facing it to see a passing train, and the fair inference is that appellant in crossing was exercising due caution.

The damages are not assessed and in my view that the appeal should be allowed with costs throughout the case must go back to the learned trial judge for the assessment of damages unless the parties can as they ought to agree upon the amount.

DUFF J.—There are two questions for decision on this appeal. First: Has the suppliant proved that the injury suffered by him was "caused by the negligence of" some

> officer or servant of the Crown while acting within the scope of his duties or employed upon, in or about the construction, maintenance or operation of the Intercolonial Railway

(sub-sec. f, sec. 20, Exchequer Court Act as amended by 9 & 10 Edw. VII. ch. 19)? Secondly, assuming the injuries were so caused in the sense that some such negligence was a *causa sine quâ non*, is it the proper conclusion that such negligence was not a juridicial cause in view of the circumstance that the suppliant would probably have escaped injury had it not been

1916
BELANGER
v.
THE KING.
Duff J.

for the intervening act of some other person or persons for whose conduct the Government is in no way responsible?

The Intercolonial Railway crosses a public road, near Cacouna Station, and on the day on which the appellant suffered the injury in respect of which he claims reparation (3rd April, 1913), the highway at the crossing being bare of snow and ice, the railway rose above the level of the highway to the extent of about five inches, thus constituting a considerable obstruction. Somebody had placed a post between the rails with the object, it may be assumed, of reducing the inconvenience due to the obstruction and facilitating the use of the crossing for the passage of sleighs. The appellant, walking beside his sleigh loaded with deals which his son was driving over the tracks, had his foot caught between this post and one of the rails and severely crushed by the pressure of the sleigh.

There is sufficient evidence of negligence on the part of some "officer or servant" of the Crown "acting in the scope of some duty or employment" in connection with the Intercolonial Railway in the fact itself that at this place the railway rose above the surface of the highway to the extent mentioned. This conclusion rests upon section 16 of the "Government Railways Act," ch. 36, R.S.C., 1906, which is in these words:—

> Sec. 16. No part of the railway which crosses any highway unless carried over by a bridge, or under by a tunnel, shall rise above or sink below the level of the highway more than one inch; and the railway may be carried across or above any highway subject to the provisions aforesaid: R.S. ch. 38, sec. 11.

The effect of this section appears to be that the Government authority having charge of the Government railways may rightfully carry the railway across a highway, but to this right, if the railway passes over

by means of a level crossing, is attached the correlative duty to see that the railway does not rise above the level of the highway more than one inch; and this duty, I think, is a continuing duty resting upon the railway authority so long as the railway is maintained there. It was not, I think, incumbent upon the appellant, as suppliant, to name the particular servant or officer of the Crown alleged to be charged with the performance of this duty; it was enough, I think, to shew that the duty was undischarged. It may be presumed, if that be necessary to support the suppliant's case, that all necessary appointments had been made for carrying out the law.

All of which would appear to be sufficiently plain; but it is proper to notice an argument addressed to us on behalf of the Crown, which is that certain rules purporting to be made under section 49 of the "Government Railways Act," require and sanction a practice which to some extent, it is said, modifies the rigour of section 16 and defines the duties of those responsible for the condition of highway crossings. Under this practice, at such crossings the rails are laid in such a way as to leave a difference in level between the natural surface of the highway and the top of the rails considerably greater than one inch. During the seasons in which the roads are free from ice and snow, this difference in level is reduced by raising the highway level by means of planks; in winter these planks are removed, the natural filling of snow or ice serving the same office. This is pursuant to No. 48 of certain "Rules for the guidance of Trackmasters and Trackmen" made professedly under the authority of section 49 of the "Government Railways Act" which is in these words:—

En la saison propice, le chef d'equipe devra donner instructions a ses contre-maîtres de faire enlever des madriers près des rails aux

1916

BELANGER v. THE KING.

Duff J.

traverses de chemin pour permetter facilement les operations du "flanger."

The "flanger" commonly used cannot be operated, it is said, while the highway and the rails are maintained at the relative levels prescribed by section 16; and, consequently, while the "flanger" is in operation it is not practicable to employ such means for reducing the inequality of levels. In the regulations placed before the learned trial judge, the rules of 1906, there is no specific provision requiring the highway to be planked; but the rules of 1893 contained this section:

Sec. 32. All public road-crossings must be either planked and securely spiked or paved with blocks or other suitable materials.

The argument based upon these rules is that, under the practice observed at the date of the accident, the "flanger" being still in operation it was the duty of those charged with the care of the track at the place named to keep the track clear and consequently, the existence of a state of things forbidden by section 16 cannot be imputed to them or any other officer or servant of the Crown for negligence—the rules and regulations enacted and promulgated for their guidance by the Governor in Council having, it is affirmed, been observed not only in the letter but in the only way which was practicable, due regard being paid to the necessities of railway operation.

There is, however, it may be noted, no evidence that the only practicable method of clearing the track of snow is by the use of a "flanger" of such construction as to necessitate the removal of the planks during the operation of it; nor is there any evidence shewing it to be impracticable to retain the planks in place so long as the flanger is not actually passing over the highway.

In dealing with this argument it is necessary to consider the status of the rules in question relatively to

section 16. Sections 49 and 50 are the provisions we have to apply. They are in these words:—

Sec. 49. The Governor in Council may, from time to time, make such regulations as he deems necessary,—

(*a*) for the management, proper use and protection of all or any of the Government railways, including station houses, yards and other property in connection therewith;

(*b*) for the ascertaining and collection of the tolls, dues and revenues thereon;

(*c*) to be observed by the conductors, engine-drivers and other officers and servants of the Minister, and by all companies and persons using such railways;

(*d*) relating to the construction of the carriages and other vehicles to be used in the trains on such railways: R.S., ch. 38, sec. 43.

Sec. 54. All such regulations made under this Act shall be taken and read as part of this Act: R.S., ch. 38, sec. 44.

The rules put before us would *primâ facie* fall within the authority of either sub-section *a* or sub-section *c* of section 49. It may well be doubted, I think, whether it is the proper construction of these general provisions to hold that under them any regulation dealing with any matter falling strictly within the specific enactment of section 16 is not beyond the scope of these sub-sections. The language of the last clause of section 16 is emphatic, the authority to carry the railway across the highway being given subject to the proviso that the railway and the highway shall be maintained at the relative levels therein provided for: *Grand Trunk Pacific Rway. Co.* v. *Fort William Land Investment Co.* (1).

It is not, however, necessary to pass upon that question.

For the purposes of this judgment I assume the effect of section 54 to be that regulations made by the Governor in Council which are of such a nature as to fall within the ambit of section 49 when that section is read

(1) [1912] A.C. 224.

1916

BELANGER v. THE KING.

Duff J.

and construed without reference to other sections of the Act are, when passed, to be "taken and read" as part of the Act and that the authority of the Governor in Council to pass such regulations is incapable of being called judicially in question. I assume, in other words, that these regulations are to be treated as the House of Lords treated the rule which was in question in the *Institute of Patent Agents* v. *Lockwood*(1), at page 360. On that assumption it necessarily follows that if there is a conflict between one of the provisions of the Act and one of the regulations passed under section 49 the question devolving for decision upon the court having the duty of applying the regulation is first: Which is the governing enactment, the section or the regulation? Lord Herschell in his judgment in the case just mentioned says (at page 360) that where such a conflict arises the enactment itself would probably be treated as supplying the governing consideration and the regulation subordinate to it. In view of the last clause of section 16 to which I have just alluded I see no difficulty in holding that in this case the regulation, in so far as it is inconsistent with section 16, must give way; or, as it is perhaps better to put it, the regulation must be read as subject to an implied proviso that nothing in it shall be considered to sanction a departure from section 16.

It follows that there was neglect of duty within the Exchequer Court Act, section 20, sub-section *f*.

But was this neglect of duty the "*cause*" of the suppliant's injury in the sense that the Crown is responsible for the consequences of it within the meaning of that Act? The rails, in the condition in which they were, constituted, as I have said, a not incon-

(1) [1894] A.C. 347.

siderable obstruction to traffic upon the highway. The natural consequence of the physical condition of the crossing—and the consequence to be expected in view of the fact that upon this road there was the ordinary amount of travel—was the very thing which happened, namely that somebody would endeavour to facilitate the passage of sleighs by some such device as that which was actually resorted to. This being so, the connection between the breach of the duty arising under section 16 and the appellant's injury is complete; the intervening act of the person who placed the post in the road does not interrupt the chain of causality. As Lord Justice Hamilton said in *Latham* v. *R. Johnson & Nephew*(1), at page 413, a person who in violation of duty leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for a further intervening act of a third person that injury would not have occurred. The conditions of responsibility under section 20 of the "Exchequer Court Act" are therefore fulfilled and the suppliant is entitled to redress. I agree that the more convenient course is to refer the proceedings back to the Exchequer Court for the assessment of the damages.

ANGLIN J.—The plaintiff was injured at a highway level crossing of the Intercolonial Railway on the 3rd of April, 1913. The planking usually placed between and immediately outside the rails at such crossings had been removed for the winter season and had not yet been replaced. The snow and ice, which during the greater part of the winter fill up the space

(1) [1913] 1 K.B. 398.

1916
BELANGER
v.
THE KING.
Anglin J.

or depression left by the removal of the planking, between and outside the rails, had been thawed by the heat of the Spring sun, thus leaving the rails projecting some six or seven inches, it is said, above the level of the highway. No doubt to facilitate driving across the railway, some person had, earlier in the day, placed a log or fence rail between the tracks and had left it there. The plaintiff, when taking his heavily laden sleigh across, walked beside it. The runners of the sleigh instead of mounting the log or fence rail pushed it forward and the plaintiff's foot was caught between it and the projecting rail, thus causing the somewhat serious injury of which he complains.

The obligation imposed by section 16 of the "Government Railways Act," R.S.C., ch. 36, that:—

> No part of the railway which crosses any highway unless carried over by a bridge, or under by a tunnel, shall rise above or sink below the level of the highway more than one inch,

is absolute and unqualified. The carrying of the railway across the highway is made subject to this condition. It appears from the judgment of Mr. Justice Audette that section 22 of the rules and regulations for the guidance of trackmasters and trackmen passed in 1893, which, however, I do not find in the case before us, provided that

> All public road crossings must be either planked and securely spiked or paved with blocks or other suitable material.

This regulation was presumably made in compliance with the obligation imposed by section 16 of the statute. No such provision is found in the rules and regulations for employees of Government railways, of 1906, put in at the trial, which, however, by Rule No. 20, require that section-foremen shall see that crossings of public roads are kept in good condition and are not obstructed. Rule No. 48 directs that the

chief of equipment shall at the proper season give instructions to his foremen to cause the planking next to the rails on highway crossings to be removed in order to permit flangers to operate easily. The book of rules and regulations put in, as exhibit A., does not shew upon its face, not do I find in the record any evidence, that the rules and regulations which it contains were made under section 49 of the "Government Railways Act," which empowers the Governor in Council to make regulations:—

(*a*) for the management, proper use and protection of all or any of the Government railways including station houses, yards and other property in connection therewith,

and

(*c*) to be observed by the conductors, engine drivers and servants of the Minister and by all companies and persons using such railways.

In dealing with this case, however, I shall treat Rule No. 48 as within section 54 of the statute which enacts that

All such regulations made under this Act shall be taken and read as part of this Act.

Under sections 73 and 74 of the statute the contravention of rules so authorized is penalized.

That the rails on the crossing projected several inches above the level of the highway when the plaintiff was injured was conceded and counsel for the Crown sought to justify the existence of this state of affairs by invoking Rule No. 48, to which I have referred. He also relied upon evidence to the effect that the use of snowploughs carrying an apron in front required the removal of the planking at such crossings midway between the rails as well as immediately next to them. A flanger had been used upon the crossing as recently as the 28th of March and there is evidence that its use was sometimes required in the month of

1916
BELANGER
v.
THE KING.
Anglin J.

April. Under these circumstances, if regulation No. 48 justified the planking being kept up until the season had so far advanced that the use of flangers and snow-ploughs was not likely to be further required, I would be disposed to agree with the contention of the respondent that failure to replace the planking before the 3rd of April could not be regarded as negligence. But no regulation, although passed by the Governor in Council under section 49, can be allowed to override the explicit requirement of section 16 of the statute. If no construction can be placed upon regulation No. 48 which will bring it into harmony with that section, it cannot be regarded as having been made within the authority conferred by section 49, or, if so made, it must be treated as subordinate to the precise and definite prohibition of section 16. On the other hand it must if possible be given a construction which will not conflict with the statute: *Booth* v. *The King*(1); *Institute of Patent Agents* v. *Lockwood*(2), at page 360. So, dealing with regulation No. 48, I would be inclined to construe it as authorizing the section foremen to keep highway crossings without planks next to and between the rails only at such times and during such periods as the spaces which the planks ordinarily occupy are actually filled up by other material (snow and ice, or gravel) in such manner that at no time shall the rails project above the highway more than one inch. As already stated the obligation imposed by section 16 is absolute and unqualified, and the duty which it imposes is paramount. To a charge of a breach of that duty the regulation invoked does not afford an answer.

I entertain no doubt that the omission to per-

(1) 51 Can. S.C.R., 20. (2) (1894) A.C. 347.

form such a duty is negligence in law. Negligence on the part of an officer or servant of the Crown while acting within the scope of his employment upon, in or about the construction, maintenance or operation of the Intercolonial Railway, causing death or injury or loss to the person or property, is actionable under section 20 (*f*) of the "Exchequer Court Act" (9 & 10 Edw. VII. ch. 19).

There remains the inquiry whether the negligence thus established was the cause of the injury sustained by the plaintiff. The learned assistant judge of the Exchequer Court reached the conclusion that it was not—that that injury was rather attributable to the act of the person who had placed and left the log or fence-rail between the rails. But it is obvious that if there had not been the space or depression between the rails it would not have been necessary to place the log there to facilitate crossing, and that, if so placed, it would not have caused the jamming of the plaintiff's foot between it and the rails. It was because the rail projected as it did several inches above the highway, quite as much as because the log or post had been placed where it was, that the plaintiff's foot was caught and jammed between the two. The placing of the log between the rails was no doubt a contributory cause of the accident; but certainly no more so, and probably not as much so, as the unlawful projection of the rails above the level of the highway. It follows that the negligence of its servant who was responsible for leaving the crossing in the condition in which it was renders the Crown liable: *City of Toronto* v. *Lambert*(1).

Although there was a suggestion that the plaintiff was himself guilty of negligence which contributed to

(1) 54 Can. S.C.R. 200.

1916

BELANGER v. THE KING.

Anglin J.

his injury, there has been no finding to that effect in the Exchequer Court and the evidence in my opinion does not warrant our making such a finding.

The appeal should be allowed with costs in this Court and in the Exchequer Court. As there has been no assessment of plaintiff's damages and it would not be satisfactory that we should attempt to make that assessment upon the evidence in the record, unless the parties can come to an agreement as to the amount proper to be allowed the case should be remitted to the Exchequer Court in order that the damages may be fixed. The learned assistant judge of that court saw the plaintiff and the witnesses and he is in a much better position than we are to determine either upon the evidence already taken, or upon additional evidence if he should deem it necessary, the amount the plaintiff should recover.

BRODEUR J.—En vertu de la loi des chemins de fer de l'Etat, S.R.C. ch. 36, sec. 16, il est décrété qu'aux traverses à niveau des grandes routes le chemin de fer ne doit pas s'élever au-dessus ni s'abaisser au-dessous du niveau de cette route de plus d'un pouce.

Pour remplir les exigences de cette disposition statutaire on met sur l'Intercolonial des madriers entre les rails afin que les voitures puissent facilement traverser la voie.

Mais, par contre, on avait l'habitude en hiver, à Cacouna, où l'accident en question dans cette cause a eu lieu, d'enlever ces madriers et de laisser une cavité de quatre à cinq pouces de profondeur. Tant que la neige subsistait il n'en résultait aucun inconvénient mais au printemps, lorsque la neige était fondue, les voitures d'hiver qui circulaient sur la route éprouvaient les plus grandes difficultés et des particuliers parfois

jetaient entre les rails des pieux pour faciliter le passage des traineaux.

L'appelant le 3 avril, 1913, arriva pour traverser la voie à Cacouna et il y avait un pieux qui avait été placé là par des mains inconnues. Sa voiture était chargée et il eut beaucoup de difficulté à pouvoir traverser la voie. Le pieu qui se trouvait avoir été ainsi mis sur la voie a été entrainé par la voiture et lui écrasa le pied. De là pétition de droit réclamant des dommages résultant de cet accident.

Il n'y a pas de doute que si la voie avait été tenue conformément à la loi, si on avait maintenu cette dernière de manière à ce qu'elle ne fût pas plus basse que d'un pouce du niveau du chemin public, l'accident ne serait pas arrivé.

On allègue à l'appui de la défense que des règlements on été adoptés par le gouverneur en conseil pour autoriser l'enlèvement de ces madriers durant l'hiver.

Il est possible que ce règlement soit légal. Mais, d'un autre côté, le gouvernement est toujours tenu d'observer la loi et de voir à ce que la voie ne soit jamais plus basse que le niveau du chemin public. Si les règlements que l'on invoque ne peuvent pas être observés sans violer cette disposition de la loi, alors je considère qu'ils sont illégaux; car l'autorité exécutive n'a jamais le droit, en faisant des règlements, de déroger aux dispositions formelles du statut.

Mais il y a plus. Le règlement lui-même que l'on invoque n'a pas été observé car il exigeait de laisser au milieu de la voie un certain nombre de madriers et malheureusement cela n'a pas été fait.

Je dois ajouter, de plus, que depuis l'accident en question on n'enlève plus ces madriers mais on laisse la voie telle qu'elle était.

1916

BELANGER
v.
THE KING.

Brodeur J.

La cause première de l'accident est donc la violation du statut et du règlement. Il est bien vrai que le pieu qui avait été déposé sur la voie par une main inconnue a contribué à l'accident. Mais les autorités du chemin de fer savaient que les gens étaient obligés d'avoir recours à ces moyens pour pouvoir traverser la voie; et, de fait, l'un des employés de l'Intercolonial nous apprend dans son témoignage que tous les matins on avait l'habitude d'enlever ces pieux et que celui qui a été trouvé sur la voie lorsque l'appelant l'a traversée y avait été évidemment mis dans la journée.

Encore une fois, si on avait observé les dispositions de la loi l'accident ne serait pas arrivé. Et d'ailleurs, je considère que l'intimé est responsable malgré le fait que l'une des causes de l'accident fût l'acte d'un tiers qui aurait jeté sur la voie ce pieu. Il n'est pas permis à une personne qui a été la cause effective du dommage de dire qu'il y a eu également d'autres causes: *Clark* v. *Chambers*(1).

Je suis donc d'opinion que le jugement *a quo* qui a renvoyé la pétition de l'appelant, est mal fondé et doit être renversé.

Quant au montant des dommages les parties devront tâcher de s'entendre et si elles ne peuvent en venir à cela alors le dossier devra être renvoyé en Cour d'Echiquier qui en déterminera le montant.

L'appel est donc maintenu avec dépens.

Appeal allowed with costs.

Solicitor for the appellant: *S. C. Riou.*
Solicitor for the respondent: *Léo Bérubé.*

(1) 3 Q.B.D. 327.