THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS)... } APPELLANTS;

AND

S. J. CHALIFOUX (PLAINTIFF).....RESPONDENT.

1887
*Mar 3, 7.

1888
*June 14.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Railway Companies—Carriers of passengers—Breaking of rail—Injury to passengers—Latent defects—Arts. 1053, 1673, 1675, *C. C. (P. Q.)*

Held, reversing the judgments of the Superior Court and Court of Queen's Bench for Lower Canada (appeal side), that where the breaking of a rail is shown to be due to the severity of the climate, and the suddenly great variation of the degrees of temperature and not to any want of care or skill upon the part of the railway company in the selection, testing, laying and use of such rail, the company is not liable in damages to a passenger injured by the derailment of a train through the breaking of such rail.

Fournier J. dissented, and was of opinion that the accident was caused by a latent defect in the rail, and that a railway company is responsible under the Civil Code, for injuries resulting from such a defect.

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*PRESENT:—Sir W. J. Ritchie C.J. and Strong, Fournier, and Gwynne JJ. [Henry J. was present at the argument but died before judgment was delivered.]

[This case the reporters were unable to publish when decided.]

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APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) confirming the judgment of the Superior Court (2) by which the appellants were condemned to pay four hundred dollars damages for injuries resulting to the respondent caused by the derailment of a train on the appellants' railway through the breaking of a rail.

In January 1884 the respondent was a passenger on a regular passenger train of the Canadian Pacific Railway running between Ottawa and Montreal, and when the train was approaching Calumet Station the train through the breaking of a rail was wrecked and the respondent was seriously injured.

The action was for damages in consequence of the injuries received by the respondent through the appellants' fault and negligence. The appellants pleaded that the accident was caused by the breaking of a rail, which formed part of a consignment of steel rails of the best procurable description, purchased from competent manufacturers by the Government of the Province of Québec which was, at the time of the purchase, the proprietor of the line of railway; that the rails were made specially for the purposes for which they were required, in accordance with specifications made by a skilled engineer then in the employ of the Government who was specially entrusted with the preparing of the specifications; that all due skill and care were used by the agents of the Government in the selection, inspection and testing of the whole of the consignment of rails; that at the time of the accident the roadway and rails were in good order and condition; that in accordance with the practice of railway companies generally the same had always been kept under regular and careful supervision, and proper and

(1) M. L. R. 3 Q. B. 324.

(2) M. L. R. 2 S. C. 171; 14 R. L. 149.

careful examination had been made of the roadway and rails immediately previous to the accident; that the rail in question appeared to be strong enough for the purpose for which it was required, and that its breaking was unavoidable, and was due to no defect either in the manufacture, purchase, or use of the rails; and that the accident in question was not caused by any want of care or diligence on the part of the appellants.

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At the trial it was proved that on the days preceding the accident the weather had been very cold but that the day on which the accident happened there had been a sudden change of temperature and it was much warmer; that the insufficiency of the rail was not manifested by any exterior sign, and that it presented all the appearances of good manufacture having formed part of a consignment of rails ordered by the Quebec Government Railways and had been accepted and used by the Company after the ordinary tests and it was also proved that the portion of the road in question had been inspected carefully previous to the accident; and that in fact Muldoon, the section-foreman had passed over the very spot where the accident occurred twenty minutes before, and found the rails and roadbed in perfect order.

The broken rail, although examined by two or three employees of the company immediately after the accident, was not produced at the trial.

H. Abbott Q. C. for the appellants:

The principal question which arises on this appeal is whether or not a railway company is responsible for damages caused to a passenger through the breaking of a rail without fault on its part, and this question depends upon the interpretation to be placed upon articles 1053 and 1675 of the Civil Code. We contend that the appellants, as carriers of passengers, are only

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liable for damages caused by their fault or neglect, while the respondent, whose contention was maintained by the judgment of the courts below, contends that they are absolutely liable, at all events under the latter article, unless they prove that the damage was caused by a fortuitous event or irresistible force. In other words, that railway companies are responsible as carriers of passengers in the same degree that they are responsible as carriers of goods.

The evidence conclusively shows that the accident has been the result of a sudden change in the temperature and that there has been no fault or negligence shown against the appellants.

We submit therefore on behalf of the appellants that not only is there no fault or negligence shown against them but, on the contrary, it is affirmatively proved that there was none and that in fact every possible care and skill was used in the manufacture, selection, testing and laying of these rails, and all possible care and diligence in their inspection. That under such circumstances the company was not liable see the following authorities: Bédarride des chemins de fer (1); Sourdat, De la Responsabilité (2); *Readhead* v. *Midland Railway Co.* (3); *Wright* v. *Midland Railway Co.* (4); *Stokes* v. *Eastern Counties Railway Co.* (5); *Christie* v. *Griggs* (6); Taylor on Evidence (7); *Quarez chemin du Nord* (8); *Huston* v. *Grand Trunk Railway* (9); Dalloz (10).

A. Dorion for the respondent:

I admit the law of England is contrary to the decision of the courts below but this case must be decided by the civil law of the province of Quebec.

(1) Vol. 2. nos. 437, 440.
(2) Vol. 1. nos. 587, 645, s. 50.
(3) L. R. 2 Q.B. 412; 4 Q.B. 379.
(4) L. R. 8 Ex. 140.
(5) 2. F. & F. 691.
(6) 2 Camp. 79.
(7) Vol. 2. § 1172.
(8) S. V. 67, 2, 320.
(9) 3 L. C. Jur. 269.
(10) 82, 2, 163.

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Under our civil law carriers of passengers are virtually insurers of life except if the accident is caused by fortuitous event or irresistible force as provided in art. 1675 C. C. All the French cases decided and the opinion of French authors warrant the conclusion I contend for, that the liability is the same whether for carriage of goods or passengers.

The following cases and authorities were cited and relied on: *Chemin de fer du midi* v. *Chambrelent* (1); *Veuve Raymond* v. *Burnet* (2); Demolombe (3); *Grand Trunk Railway Co.* v. *Meegan* (4).

The case in Dalloz 82-2-163 cited by appelants is not applicable; the author in a note says the law on this point in France is regulated by another law.

But even if the liability should depend upon the question of fact whether there has or has not been negligence on the part of the company, I contend that the *primâ facie* evidence of negligence by the fact of the accident having occurred has not been satisfactorily rebutted. In this case the rail was not produced at the trial and it was impossible to ascertain whether it had or had not any defect which ordinary skill, care or foresight could have detected. Under art. 1053 C. C. the respondent is entitled to succeed.

Sir W. J. RITCHIE C.J.—In this case it seems to me that the utmost care and skill were exercised which prudent men are accustomed to use under similar circumstances. The road was examined by a proper person from time to time and within twenty minutes of the time of the accident, and found to be in good order, and more than this I do not think the law exacts from carriers of passengers for hire. I think this was a pure accident against which the railway could not have

(1) S. V. 60-2-42.
(2) Dalloz 55-2-86.
(3) Vol. 31, nos. 484, 638.
(4) 4 Dor. Q. B. 228.

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provided and a risk incident to the mode of travel which passengers take.

In *Readhead* v. *Midland Railway Co.* (1) it was distinctly decided that the defendants were not liable for an accident owing to a latent defect in the tire not attributable to any fault on the part of the manufacturer and which could not be detected previously to the breaking, and that there was no contract either of general warranty or insurance (such as in the case of a common carrier of goods) or of limited warranty or insurance (as to the vehicle being sufficient) entered into by the carriers of passengers, and that the contract of such a carrier, and the obligation undertaken by him, are to take due care (including in that term the use of skill and foresight) to carry passengers safely. I do not at all wish to be understood as impugning the position that in every contract for the conveyance of passengers by rail there is an implied undertaking for the safe condition of the road as well as the vehicle, so far as the carrier can insure it by the utmost care and diligence. The servants of the company must examine it and make sure that the rails are in good order and properly secured. But no recovery is allowed for damage done by a defective rail or rotten bridge where negligence is not proved. In *McPadden* v. *New York Central Railway Co.* (2) reversing the decision of the general term of the Supreme Court, (3) Earl C. said:

> There is a certain amount of risk incident to railroad travel, which the traveller knowingly assumes; and public policy is fully satisfied when railroad companies are held to the most rigid responsibility for the utmost care and vigilance for the safety of travellers.
>
> If, therefore, the jury had found that the rail was broken by the eastward bound train, it would still have been a case of mere accident, caused without any want of proper care and vigilance on the part of the defendant, and the defendant would not have been liable.

(1) L. R. 2 Q. B. 412; 4 Q. B. 379.

(2) 44 N. Y. 478.

(3) 47 Barb. 247.

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It was shown by undisputed evidence, of witnesses competent to judge, that the rail in question was, previous to its being broken, a sound rail of the usual and a good size and of good, sound and solid iron, and that the breaks were new and perfectly bright, and no fracture or crack was discovered in the pieces that were broken off, that the end of the rail made a good joint, was perfect, not battered down, and in good order, that the chair was good, that the ties were good, sufficiently thick to support the rail, that there was a sufficient number of them, that they were sufficiently close together to give a good bearing for the rail, that the road was well ballasted with gravel around the ties.

This accident occurred early on the morning of the 5th day of January, 1864, about half a mile west of Brockport, and it was shown that the morning was very cold, that good and perfectly sound rails will break in cold weather when the track is in perfect order, and it was testified, by several witnesses having experience as engineers on railroads, that they knew of no way of preventing it.

The night watchman on that section of the road testified, that he had, on the morning of the accident, left the depot at the Brockport station and went west about three o'clock, that a train followed him west about four o'clock, that he went three miles west and came back over the place of the accident a little before six o'clock; that he went over the track, carrying a lamp with him, to see if everything was clear and to see if any rails were broken or misplaced; that he walked in the middle of the track, looking at both tracks, examined the rails and found the track all right.

* * * * *

No testimony was introduced to contradict or impeach the evidence to which I referred, and after the testimony was given, the case states that thereupon the counsel for the defendant moved for a nonsuit.

Leonard C. :—

There was no defect in the iron of the track in the case under consideration. There was no dispute on this point. The iron was good, and no crack or flaw appeared. The break was caused by the exceeding cold weather. This was the result of a *vis major*, against which no prudence could have guarded.

* * * * *

In the present case no defect existed, or if it did exist for a few minutes no human diligence or foresight could have discovered or prevented it. An impossibility is not demanded by the law. * * *

The carrier is not liable for an injury to a passenger by the action of the elements, where no care or foresight, skill or science, could have guarded against the accident which occasioned it.

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And in *Pittsburg, &c., Railway Co.* v. *Thompson* (1). Chief Justice Lawrence delivered the opinion of the court as follows:

The instruction, in its strict sense, is open to this objection, the true rule being, as said by this court *Tuller* v. *Talbott* (2), that the carrier shall do all that human care, vigilance and foresight can reasonably do, consistently with the mode of conveyance and the practical operation of the road. A company cannot be required, for the sake of making travel upon their road absolutely free from peril, to incur a degree of expense which would render the operation of the road impracticable. It would be unreasonable, for example, to hold that a road bed should be laid with ties of iron or cut stone, because in that way the danger arising from wooden ties subject to decay would be avoided, but on the other hand, it is by no means unreasonable to hold that although a railway company may use ties of wood, such ties shall be absolutely sound and road-worthy.

Heazle v. *Indianapolis, &c., Railway Co.* (3).

Mr. Justice Scott, delivering the opinion of the court, said:

On the night of the 20th February, 1872, the passengers cars on defendant's road were thrown from the track, at a point a short distance from east of Mahomet station, by which plaintiff was severely injured. The accident was caused by a broken rail.

The proof is: the track was in good repair. No negligence in this regard is shown. On the contrary, it is proven the track inspector or walker had just been over the road. It was found to be all in order and the track safe, so far as anything could be discovered,

Although plaintiff has suffered very great injury we see no ground on which to base a recovery. It was through no fault of defendant, or its agents or servants. They omitted no duty imposed upon them by law, or by a due regard for the safety of passengers. Everything connected with the train was in good order, and it was managed by skilful and prudent operatives. The track had been constructed with skill and care, and, in the opinion of a competent engineer, the road was as safe as it could reasonably be constructed. It was patrolled, at frequent intervals, by a careful inspector, and found to be in order, with no defects discoverable. The injury to plaintiff must, therefore, be attributed, if not to his own want of care for his personal safety, to one of those accidents that sometimes occur in extremely cold weather,

(1) 56 Ill. 142. (2) 23 Ill. 357.
(3) 76 Ill. 502.

which no engineering, however skilful, and no management, however observant, could foresee or guard against.

Ingalls v. *Bills & others* (1).

Hubbard J. says:

The result to which we have arrived, from the examination of the case before us, is this; that carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient and suitable coaches, harnesses, horses and coachman, in order to prevent those injuries which human care and foresight can guard against; and that if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense.

Negligence is the ground of liability on the part of a carrier of passengers. In the breaking of this rail by the action of frost or a changing temperature I can discover no want of the utmost care and attention by the exercise of which the accident could have been avoided.

The court of first instance found "that this breaking of the rail appeared to have been caused by the sudden change of the temperature, the days preceding the accident being very cold, and the day of the accident being more soft (*doux*)" and the evidence amply supports that finding. To hold, as the court below did, that the defendants could and ought to foresee this change of temperature and were bound to procure rails sufficient to resist the action of the climate, is to require the defendants to do what it is clear is practically impossible.

(1) 9 Met. 15.

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No doubt if an accident happens to a passenger in a carriage on a line of railway either by the carriage breaking down or running off the rails, that is *primâ facie* evidence from which the jury may infer negligence on the part of the railway company and must be rebutted by evidence on the part of the defendants. On this point see Pollock C. B. in the case of *Dawson* v. *Manchester, &c. Railway Co.* (1). To exact all that plaintiff's counsel claims should have been done in this case would simply make railway transportation impracticable. Assuming the rule does require that the highest degree of practical care and diligence consistent with the mode of transportation should be used, was it not shown in this case that such was adopted? For as said by C. J. Cockburn in *Pym* v. *Great Northern Railway Co* (2): "Railway Companies are not insurers of the passenger's lives. They are only bound to use care and caution which may be reasonably expected by reasonable men."

In conclusion, on the facts and the law of this case, I will merely add: Was not the accident occasioned not by a latent defect in the railway, that no care or skill on the part of the defendants could detect, but by reason of atmospheric changes which could not be foreseen, and against which no care or skill on the part of the railway could provide? The carrier of passengers is not an insurer and there was no contract of general warranty or insurance as in the case of a common carrier of goods.

For these reasons I am of opinion the appeal should be allowed.

STRONG J.—I am of the same opinion. It is clear that there was no proof of negligence. The judgment of the court below proceeded upon the ground that the responsibility of railway companies as carriers

(1) 5 L. T. N. S. 682. (2) 2 F. & F. 621.

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of passengers is, under the law of the Province of Quebec, co-extensive with their liability as carriers of goods, which, subject to certain well-known exceptions, makes them liable as insurers of property entrusted to them for carriage. In other words, the Court of Queen's Bench applies to the carriage of passengers the liability of common carriers of goods under article 1675 C. C. I do not think that article applies to passengers at all; it is confined to the carriage of goods. The liability of carriers of passengers for hire depends entirely, in my opinion, on article 1053 C. C., and therefore proof of negligence is required as in the English law. This appears to be the modern French law also. The arrêt reported in Dalloz in 83, 2, 164, shews that the article of the French Code 1784, corresponding to article 1675 C. C., Quebec, does not apply to carriers of passengers, but that the responsibility of a railway company in such cases depends upon the general law embodied in article 1382 C. N., corresponding to article 1053 C. C. of the Province of Quebec. The law of England is now the same, though it does not seem to have been finally so settled until the decision of *Readhead* v. *The Midland Railway Company*. (1) That case was carried to appeal, (2) and the decision of the Exchequer Chamber distinctly settled the law as it now stands, viz: that, as carriers of passengers, railway companies are only responsible for negligence or breach of duty. The only authority which throws the least shadow of doubt upon the point is the decision of the Privy Council in an appeal from Upper Canada. (3). Some of the language there used seems to imply that there is liability apart from negligence, and that a railway company is to some extent to be considered a guarantor to pas-

(1) L. R. 2 Q. B. 412.
(2) L. R. 4 Q. B. 379.
(3) Great Western Railway Co. *v.* Braid 1 Moo. P.C. N.S. 101.

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sengers carried by it of the safety of its roadway, rolling stock and appliances used in their transportation. But the language of the judgment does not clearly show that it was intended so to decide, and the decision can be supported on other grounds and is probably to be referred to the rule of evidence relating to the *onus probandi;* but be this as it may, the later authorities are so clear that there can be no doubt now that the case of *Readhead* v. *The Midland Railway Company* (1) contains a correct exposition of the law, and it has been followed without question. In a case in the New York Court of Appeals, *McPadden* v. *The New York Central* (2) the facts of which resembled those of the present case, the court held the law to be precisely the same as in England. The case of *Meier* v. *The Pennsylvania Railroad Company*, (3) where the decision was to the same effect, may also be mentioned. There being no evidence to show, or from which it could be inferred, that the accident in this case was the result of any want of care upon the part of the defendant company I am of opinion that we must reverse the decision of the Court of Queen's Bench and allow the appeal.

FOURNIER, J.—L'appelante allègue qu'elle a agi avec toute la diligence et le soin possibles, et que l'accident dont a souffert l'intimé n'est arrivé que par suite de la rupture d'un rail, causé par un vice caché.

L'honorable juge Mathieu, dont le jugement a été confirmé en appel, s'est appuyé, pour la décision de cette cause, sur le principe incontestable du droit français qui, en cela, est conforme au nôtre, que les compagnies de chemins de fer sont responsables des vices de leur matériel, qu'elles le connaissent ou non.

Après avoir plaidé que l'accident était dû à un vice caché qui avait causé la rupture du rail, l'appelante a

(1) L. R. 4 Q. B. 379. (2) 44 N. Y. 478.
(3) 64 Penn. 225.

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essayé de changer sa position en faisant motion (art. 320 C. P. C.) pour faire coïncider sa défense avec les faits prouvés, en retranchant son admission que l'accident était dû à un vice caché, et en invoquant comme excuse le changement subit de température et son effet sur les rails.

Quelle que soit la cause de la rupture du rail, la compagnie appelante est responsable de la suffisance de son matériel, à moins qu'elle ne prouve que l'accident est arrivé par cas fortuit ou force majeure.

L'article du code qui règle la responsabilité des voituriers, n'est pas l'article 1053, mais bien l'article 1675. Le premier est d'une application générale à quiconque cause du dommage par sa faute, soit par son fait, soit par imprudence, négligence ou autrement. Le second ne s'applique qu'aux voituriers qui ne sont exempts de responsabilité que par le cas fortuit et la force majeure.

Nul doute que dans les cas qui s'élèvent au sujet de l'article 1053, c'est à la partie qui se plaint à prouver la faute ou négligence ou inhabilité de celui qui a causé le dommage. Il en est autrement pour les voituriers, et c'est l'article 1675 dont la Cour du Banc de la Reine a fait application dans le cas actuel. Cet article se lit comme suit :

"Ils sont," dit cet article, " responsables de la perte et des avaries des choses qui leur sont confiées, à moins qu'ils ne prouvent que la perte ou les avaries ont été causées par cas fortuit ou force majeure, ou proviennent des défauts de la chose même."

L'appelante a prétendu que cet article ne s'applique pas aux passagers, et que son effet doit être restreint au transport des marchandises. Mais cette prétention est insoutenable en présence de l'article 1673, déclarant que :

Ils sont tenus de recevoir et transporter, aux temps marqués dans les avis publics, toute personne qui demande passage, si le transport des voyageurs fait partie de leur trafic accoutumé, à moins que dans l'un ou l'autre cas il n'y ait cause raisonnable et suffisante de refus.

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L'article 1676, concernant les avis des voituriers, limitant leur responsabilité, fait aussi voir que toute la section III sur les voituriers s'applique aussi bien aux personnes qu'aux marchandises. La responsabilité des voituriers est donc définie par cette section, et la preuve de négligence pour les rendre responsables n'est pas nécessaire :

> Ils répondent de la perte, à moins qu'ils ne prouvent qu'elle a été causée par cas fortuit ou force majeure.

Le 28 février 1865, un train partant de Paris pour la Belgique a éprouvé un grave accident. Le bandage d'une roue s'étant rompu, puis les chaînes qui reliaient aux autres wagons le wagon traîné sur la voie se sont brisées au bout d'un certain temps, amenant la dislocation du train en deux parties et un déraillement qui ont fait appeler la compagnie du Nord devant le tribunal de la Seine, Cotelle, Législation des chemins de fer. (1)

Quatre voyageurs blessés ont formé des demandes en dommages et intérêts. Quatre jugements rendus contre eux et la compagnie ont été réformés sur leur appel par la Cour Impériale de Paris.

En première instance il avait été jugé que l'accident n'était pas le résultat d'une faute quelconque dont la compagnie du chemin de fer du Nord devait être tenue responsable. Deux faits ont été discutés : la rupture du bandage d'une roue, et l'absence d'une corde de communication qui doit réunir la voiture de queue avec le sifflet de la machine.

Le principe d'où partait le tribunal consistait à admettre que les demandeurs avaient à établir une faute de la compagnie pour la rendre responsable.

Il y avait une défectuosité dans la fabrication du fer de ce bandage ; mais il était certain que cette défectuosité n'était pas visible extérieurement, ce qui excluait

(1) 2 vol. p. 135, et séq.

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le reproche possible d'un défaut d'attention et de précaution lors de la ruption et dans l'emploi de ce matériel.

Il ne fut attaché aucune importance à l'absence de la corde de communication.

En résultat, l'accident ne pouvait être considéré que comme un cas de force majeure, dont la compagnie n'était pas responsable.

Sur l'appel, la cour a complètement changé le point de départ de l'application des faits de la cause.

En principe, suivant elle, le voiturier répond de l'avarie des choses à lui confiées, à moins qu'elles ne prouvent qu'elles ne sont arrivées par cas fortuit ou force majeure. *Ce principe*, dit la cour, *s'applique à plus forte raison au transport de personnes et protège la sécurité des voyageurs.* Mais c'est à la compagnie qu'incombe l'obligation de prouver les faits qui la déchargerait de sa responsabilité.

Maintenant, le déraillement du 18 février a été causé par la rupture du bandage d'une roue ; et cette rupture a été occasionnée par une défectuosité dans la fabrication du fer de ce bandage. Or, il résulte des documents produits par la compagnie que les spires dont ce bandage était formé n'avait pas intérieurement toute l'adhérence nécessaire, que leur soudure n'était qu'à la surface et masquait le vice intérieur de la pièce ; l'accident a donc eu pour cause un vice du matériel dont le voiturier devenait responsable. En effet, bien que cette défectuosité ne fut manifestée par aucun signe extérieur, bien que le bandage, présentant toutes les apparences d'une bonne fabrication, eût été reçu à la suite des épreuves d'usage ; les circonstances ne constituent ni cas fortuit, ni cas de force majeure : c'est un simple vice du matériel à la charge du voiturier. L'absence du cordeau reliant la dernière voiture à la machine fut considérée comme une importante infraction au règle-

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ment. Il a en conséquence été jugé que la compagnie était responsable envers les appelants, non seulement de la confection vicieuse de son appareil, mais, en outre, d'une faute résultant de l'inobservation du règlement.

Voici les motifs qu'invoquait la cour de Paris dans son arrêt du 27 novembre 1866 :

Considérant que le voiturier répond de l'avarie des choses à lui confiées, à moins qu'il ne prouve qu'elles ont été avariées par cas fortuit ou force majeure ;

Considérant que ce principe s'applique à plus forte raison au transport des personnes et protège la sécurité des voyageurs ; qu'ainsi dans l'espèce le voyageur blessé n'est pas tenu de prouver la faute de la compagnie du chemin de fer ; que c'est au contraire à la compagnie qu'incombe l'obligation de prouver les faits qui la déchargent de sa responsabilité.

Tous les considérants de ce jugement sont cités au long dans le rapport de cette cause au 14ème volume de la Revue légale, dans les notes, p. 151.

Ainsi qu'on le voit, le principe de la responsabilité des voituriers, d'après l'article du code Napoléon, n° 1784, correspondant à l'article 1675 de notre code, rend les voituriers responsables de l'avarie ou de la perte des objets qu'ils transportent, à moins qu'ils ne prouvent le cas fortuit ou la force majeure ; ce principe s'applique au transport des marchandises tout aussi bien qu'aux personnes, si le transport des voyageurs fait partie de leur trafic accoutumé, comme dit l'article 1673. L'appelante fait évidemment ce trafic et le principe doit s'appliquer à elle pour le transport des personnes.

L'appelante, comme on l'a vu plus haut, a essayé de modifier son admission au sujet du vice caché du rail et cherché a prouver que le rail qui avait causé l'accident s'était rompu à raison du changement de température.

Feu l'honorable Sir A. A. Dorion, juge en chef, fait au sujet de cette preuve les observations suivantes :

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Les témoins de la compagnie disent qu'il avait fait très froid quelques jours avant l'accident, mais que le jour de l'accident la température était plus douce, et ils attribuent à ce changement la rupture du rail. Si c'est là la cause de l'accident, il est évident que le rail avait dû être cassé depuis plusieurs jours, puisque le fer se casse en se refroidissant et non en s'échauffant, et la compagnie a commis une négligence en ne remplaçant pas de suite ce rail. Si ce n'est pas la gelée qui a fait casser ce rail, c'est qu'il était défectueux, et la compagnie était également en faute.

L'honorable juge en chef a considéré cette preuve comme insuffisante pour établir qu'il y avait eu force majeure. Car si c'est le froid qui a causé l'accident, il est évident, d'après lui, que le rail avait dû être cassé depuis quelques jours, et que la compagnie avait commis une négligence en ne remplaçant pas ce rail. Cette négligence la rend responsable.

Au sujet de la force majeure,—

La loi, dit Laurent, (1) ne définit pas la force majeure, ni le cas fortuit. De là les difficultés dans l'application du principe. La jurisprudence s'en tient à la définition des lois Romaines : un événement que l'on ne peut prévoir et auquel on ne saurait résister, quand même il serait prévu. Il nous semble que mieux vaut s'en rapporter à la prudence du juge. L'article 1147 lui donne une règle, c'est que le débiteur n'est déchargé de la responsabilité qui lui incombe que s'il justifie que l'inexécution de l'obligation provient d'une cause étrangère qui ne peut lui être imputée. Tout dépend donc du point de savoir si l'événement allégué par le débiteur a ou n'a pas eu pour effet de détruire l'imputabilité, ce qui est une question de fait. La jurisprudence se montre très sévère dans l'appréciation des faits.

La preuve ne constate pas qu'il ait fait un froid excessif la veille ni dans la nuit précédente. Le jour de l'accident le temps s'était considérablement adouci. L'inspecteur de section Muldoon prétend avoir inspecté les rails vingt minutes avant l'accident et ils étaient en bon ordre. Bien que le temps était doux alors, ce n'est donc pas le froid qui a causé l'accident, mais plutôt la qualité cassante du fer de cette espèce de rails. Muldoon dit que les rails E. V. sont plus cassants que

(1) T. 16 n° 264, p. 325.

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les autres espèces. La compagnie serait alors responsable de la défectuosité de son matériel.

Il n'y a pas eu une preuve complète de l'inspection des rails, et ceux qui ont donné lieu à l'accident en question n'ont jamais été produits. Il était du plus simple devoir de la compagnie d'appeler la partie intéressée à un examen contradictoire de ces rails. Au lieu de cela, elle a préféré, dans son intérêt, sans doute, d'en faire faire un examen *ex parte* par ses employés, dont elle a tiré un témoignage qui, toutefois, ne la justifie pas de l'inexécution de son obligation. La preuve n'a nullement établi le cas de force majeure. L'accident, au contraire, est dû à l'insuffisance du matériel de la compagnie et elle doit en porter la responsabilité. Cette cause doit être décidée non d'après le droit anglais, mais d'après notre droit qui en diffère sous ce rapport.

Je suis d'avis de confirmer le jugement de la Cour du Banc de la Reine.

GWYNNE, J.—I am of opinion that this appeal must be allowed. The accident which has unfortunately caused so much damage to the plaintiff appears to have been due rather to the severity of our climate and the sudden and great variations in the degrees of temperature in winter than to any want of care upon the part of the defendants.

The damage to the rail which caused the train to leave the track cannot upon the evidence be said to have been something which the defendants should have foreseen, and their not having foreseen and provided against it cannot be imputed to them as negligence; the evidence failed to shew any negligence in the defendants, and in the absence of negligence the action cannot be sustained.

Appeal allowed with costs.

Solicitors for appellants: *Abbotts & Campbell.*

Solicitors for respondent: *Geoffrion, Rinfret & Dorion.*