THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANT) ..... APPELLANT;

1900
*May 5.
*Oct. 8.

AND

JOSEPH THERRIEN (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT SITTING IN REVIEW AT QUEBEC.

Railways—Farm crossings—Servitude—Arts. 540-544 *C. C.—Right of way—Grand Trunk Railway of Canada—Interpretation of statute—"The Railway Act" of Canada, s.* 191—16 *V. c.* 37, *s.* 2—18 *V. c.* 33. *s.* 4—14 *& 15 V. c.* 51, *c.* 9, *s.* 16—*Constitutional law—Jurisdiction of provincial legislature.*

An owner whose lands adjoin a railway subject to "The Railway Act" of Canada, upon one side only, is not entitled to have a crossing over such railway under the provisions of that Act, and the special statutes in respect to the Grand Trunk Railway of Canada do not impose any greater liability in respect to crossings than "The Railway Act" of Canada. *The Midland Railway Co.* v. *Gribble* ([1895] 2 Ch. 827), and *The Canada Southern Railway Co.* v. *Clouse* (13 Can. S. C. R. 139) referred to.

The provincial legislatures in Canada have no jurisdiction to make regulations in respect to crossings or the structural condition of the roadbed of railways subject to the provisions of "The Railway Act" of Canada. *The Canadian Pacific Railway Co.* v. *The Corporation of the Parish of Notre-Dame de Bonsecours* ([1899] A. C. 367), followed.

APPEAL from the judgment of the Superior Court, sitting in review, at the City of Quebec, affirming the judgment of the Superior Court, District of Quebec, which maintained the plaintiff's action with costs.

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

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A statement of the case and of the questions at issue upon this appeal appears in the judgments reported.

Stuart Q.C. for the appellant. The plaintiff's land is not crossed by the railway, but merely adjoins the railway lands which form its southern boundary, therefore sec. 191 of "The Railway Act" of Canada does not apply.

The special acts in respect to the incorporation of the Grand Trunk Railway Company and its powers give no greater rights to crossings than the general Act of the Dominion Parliament, and even if the Provincial Act in Quebec can be said to be more favourable to the plaintiff's pretentions, it cannot affect questions in respect to the road-bed or construction of any railway subject to the Dominion Act.

This action is not based upon articles 540, 541 C. C., but claims, without offering indemnity, a right of a statutory nature, and we contend that no such right exists. We rely also upon our deed of the lands and the release therein by Ross, who was fully indemnified and made no reservations when the right of way was originally conveyed to the company.

We also cite the following cases: *The Grand Trunk Railway Co.* v. *Campbell* (1); *The Grand Trunk Railway Co.* v. *Vogel* (2), which has not been impugned on the point now in question; *The Grand Trunk Railway Co.* v. *Huard* (3); *The Canada Southern Railway Co.* v. *Clouse* (4); *Roy* v. *Beaulieu* (5); *Vézina* v. *The Queen* (6), and R. S. C. ch. 1, and sec. 7, sub-sec. 51.

Fitzpatrick Q.C., (Solicitor-General), and *L. A. Taschereau* for the respondent. The Railway Acts must be read as aided by Articles 540-544 C. C., and

(1) Q. R. 3 Q. B. 570.
(2) 11 Can. S. C. R. 612.
(3) Q. R. 1 Q. B. 501.
(4) 13 Can. S. C. R. 139.
(5) 9 Q. L. R. 97.
(6) 17 Can. S. C. R 1.

give respondent the necessary right of way from his lands across the railway as the only direct means of reaching the nearest and only public road which lies on the other side of the railway and runs parallel to it. This is his only exit to his only highway and refusal of the necessary servitude is a hardship for which both the general statutes and the Civil Code provide a remedy.

The appellant company is governed also by 16 Vict. ch 37, which by its second section incorporates the clauses of the Railway Clauses Consolidation Act (14 & 15 Vict. ch. 51), with respect to the first, second, third and fourth clauses thereof, and also with respect to interpretation, highways, bridges, fences and general provisions. Section 13 of that Act provides that "fences shall be erected and maintained on each side of the railway * * * with openings, or gates, or bars therein, and *farm crossings* on the road, for the use of the proprietors of the lands *adjoining* the railway." It is clear that crossings are to be provided and maintained not only for the use of the proprietors whose lands are cut or separated in two by the railway, but also for the use of all lands *adjoining* railways.

Art. 5171, clauses 1 and 2 of the Revised Statutes of Quebec, by similar provisions, requires farm crossings to be made and maintained by the company, upon the application of any proprietor of such land, *present or future*. This provision of the provincial statute is quite *intra vires*, and applicable notwithstanding that the Grand Trunk is a federal railway. See remarks by Mr. Justice Plamandon (1) in reference to the case of *Gagné* v. *The Grand Trunk Railway Co.*; Art. 6 C. C.; C. S. C. ch. 66, sec. 13; R. S. C. ch. 109, sec 54. In this instance the appellant is clearly

(1) *G. T. R. Co.* v. *Huard*, (Q. R. 1 Q. B.) at page 502.

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bound by its special Act to furnish the respondent with the required crossing. *The Grand Trunk Railway Co.* v. *Huard* (1), per Plamondon J. in the Superior Court, and Bossé J. in Appeal.

The respondent has priority by Art. 2085 C. C. over the conveyance and release by Ross to the company which, although executed in the year 1856, was not registered until 13th June, 1899, and the respondent had no notice of the deed or its contents when he obtained and registered his title.

TASCHEREAU J.—In 1856, the Grand Trunk Railway Company, present appellants, purchased from Arthur Ross the strip of land, many miles in length, required for their road across the Seigniory of Beaurivage, then in a state of wilderness, for the sum of two hundred and fifty pounds,

being in full for the price and value of the said piece or parcel of ground, as well as the amount of the compensation allowed to the said party of the first part for damages suffered by him by reason of the taking of the said piece or parcel of ground, *cutting his property*, and all other damages generally whatsoever.

The company then, or very soon after, built their line on the land they had so acquired.

Subsequently, Ross got his Seigniory surveyed and subdivided into concessions and lots; and in 1885, one O'Brien, whose title from Ross is not in evidence, sold two lots thereof, Nos. 74 and 75, in the first concession of the then newly erected Parish of St. Agapit, in the said Seigniory, containing three *arpents* each by thirty, bounded in front on the south by the said railway, to one Sifroid Therrien, who, soon thereafter, entered into possession and built a house on lot 74. A public road was then in existence parallel to the railway line, south of it, and immediately adjoining it,

(1) Q. R 1 Q. B. 501.

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the railway line thus separating the two lots in question from the said public road. The company, however, gave to Sifroid Therrien a crossing over their line on lot 74 to give him access to the road. Later, Sifroid Therrien assigned lot 74 to one of his sons, named Telesphore, and subsequently, in 1898, lot 75 to another one of his sons named Joseph, the present respondent, who by this action claims the right to have a crossing on the company's line so as to have access to the public road, as his brother has on lot 74. His claim is not for a right of way at common law (Art. 540 C. C.) but for a statutory crossing.

I do not see how his claim can be supported. The railway is not built across his land. He has no land on the south of the railway line. It is the railway property that is his boundary, and the statute which provides that every company shall make crossings for persons across whose land the railway is carried, has no application. 51 Vict. ch. 29, sec. 191. *The Canada Southern Railway Co.* v. *Clouse* (1). Then Ross has received compensation from the company for the severance of his property and all damages resulting from the construction of the railway. He sold this land without reserving a right of way across the company's road. Those who hold under him, as the respondent does, cannot have more rights than Ross would have under the same circumstances, were that lot 75 still in his hands.

Before the public road was located, the owner of this lot 75, having no land on the other side of the railway, had no right of exit across the railway line. I do not see that the location of the road has given him any rights that he did not have previously, any more than the building of a church, or of a store, or of a public building of any kind, would have done.

(1) 13 Can. S. C. R. 139.

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The respondent may or may not have the right at common law to get an access to the public road over the company's line at his own cost, but he certainly has not got the statutory right at the company's cost that he claims by his action.

The appeal must be allowed with costs and the action dismissed with costs.

SEDGEWICK J.—The plaintiff claims that he is entitled by law to a crossing over the railway of the defendant company, not because of any grant from the company to him or his predecessors in title, but on the ground that the statute imposes such an obligation on the company.

The plaintiff owns a parcel of land known as lot 75 on one side of and adjoining the strip of land used by the defendant company for its tracks and right of way, but he owns no land on the other side. If the rights of the parties are governed by the general railway law of Canada, the fact that the plaintiff owns land only on one side of the railway is fatal to his claim.

The company obtained title to this strip of land on which its railway is now constructed and operated, by a conveyance from one Arthur Ross, more than forty years ago. This conveyance recites that the company

> having followed and complied with all the provisions of the statutes in force in the Province of Canada relating to railways are entitled to take possession of the land described in the conveyance.

The plaintiff's father owned the land now in question, and other land, all adjoining the railway on the north side, and for some years before the grant to his son used a crossing of the railway tracks starting from the portion of his land which has not been conveyed to the plaintiff, thence across the railway tracks to a public highway. The portion conveyed to and

now owned by the son never had from it any crossing over the railway.

There is no evidence as to how the plaintiff's father got the right to use his crossing, and it is not material to the consideration of this case, because it is not argued that the plaintiff's right depends in any way upon the right of the father to cross the railway tracks at the old crossing; the plaintiff's right is admitted to depend on the liability of the railway company to make a farm crossing under some statute law.

The present general railway Act passed in 1888 enacts in section 191:

> Every company shall make crossings for persons across whose lands the railway is carried, convenient and proper for the crossing of the railway by farmers' implements, carts and other vehicles.

The plaintiff became the owner of the land in question on the 27th of September, 1898, subsequent to the passing of the Railway Act of 1888.

This enactment in the Railway Act declares the liability of the railway company to make crossings for *parties across whose land the railway is carried*, and therefore it does not apply to any one whose land is not crossed by the railway.

The English Railways Clauses Consolidation Act of 1845 contains a similar provision; the language is:

> The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of land adjoining the railway, that is to say, such * * * convenient gates * * * and passages over * * * the railway as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands *through which* the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof.

That this provision is intended to apply only to a person who owns parcels of land on opposite sides of and adjoining each side of the railway, is shown in

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the case of *The Midland Railway Co.* v. *Gribble* (1). In that case the judgment of the court was in effect that a crossing of a railway reserved for a person through those land the railway had been constructed was an *easement enjoyable only so long* as that person owned land on both sides of the railway, and goes so far as to declare that this easement would be lost as soon as he parted with his land on either side of the railway and would not be restored even if he should repurchase that parcel so as to become again an owner of land on both sides of the railway; in other words, it is confined to the person across whose land the railway is carried in the first place, and under certain circumstances to his heirs and assigns, and continues only so long as he or they own land on both sides of the railway.

There has been some argument on the part of the plaintiff based on the theory that the Provincial Act of the Province of Quebec governs the rights of the parties in this case. That theory is no longer arguable. In the case of *The Canadian Pacific Railway Co.* v. *The Corporation of the Parish of Notre-Dame de Bonsecours* (1), the Judicial Committee of the Privy Council, while deciding that a Dominion railway company might be under the jurisdiction of the provincial legislature so far as to require it to clean out the silt which accumulated in one of the existing ditches and which caused water to flow back upon the lands of adjoining owners, declared in effect that provincial legislation would be *ultra vires* if it directed the structural condition of the road bed or crossing of its tracks to be altered.

The plaintiff also argues that even if the "Railway Act" of Canada compelled a railway company to build crossings *only for the use of those* whose farms

(1) [1895], 2 Ch. D. 827.

(1) [1899] A. C. 367.

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are cut in two, still the Grand Trunk Railway Company is governed by a special Act which provides for this particular case and makes the general Act inapplicable.

This defendant company was incorporated by 16 Vict. ch. 37. Section 2 of that Act declares that the several clauses of the Railway Consolidation Act shall be incorporated in that Act of incorporation, and a later Act, namely, 18 Vict. ch. 33, in its fourth section declares that the Railway Clauses Consolidation Act shall extend and be applicable to the Grand Trunk Railway Company.

The Railway Clauses Consolidation Act, 14 & 15 Vict. ch. 51, deals with fences, etc, in its thirteenth clause, which enacts that fences should be erected and maintained on each side of the railway * * * with openings, or gates or bars *and* farm crossings of the road for the use of the proprietors of the lands adjoining the railway. In a subsequent Consolidated Railway Act, after Confederation, namely, 42 Vict. ch. 9, (D.) section 16 deals with this same subject enacting in effect that a railway company (if so required) should erect and maintain, on each side of the railway, fences of the strength and height of an ordinary division fence with sliding gates, commonly called hurdle gates, with proper fastenings *at* farm crossings of the road for the use of the proprietors of the land adjoining the railway.

It was held in *The Canada Southern Railway Co.* v. *Clouse* (1), that the substitution of the word "at" in the later Act was merely the correction of an error, and was made to render more apparent the meaning of The Railway Clauses Consolidation Act, and therefore it is to be now interpreted as if the railway company was liable to erect and maintain fences with

(1) 13 Can. S. C. R. 139.

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openings, or gates, or bars therein *at* farm crossings of the road without attempting to describe when, or where, or upon what occasion the railway company should be obliged to provide a farm crossing; consequently there is no statutory direction prescribing a liability of the railway company to make a farm crossing under the circumstance contended for now by the plaintiff; in other words, there is no difference in the effect of the statute known as "The Railway Clauses Consolidation Act" and the general Railway Act of 1888 now in force.

The result is that there is no statutory liability on the part of the appellant to supply such a crossing as the plaintiff desires, he having land only on one side of the railway.

It is not necessary in this case to discuss the question as to how far or under what circumstances the person whose land was originally crossed by the railway can transfer his rights to a third party.

KING and GIROUARD JJ. concurred in the judgment allowing the appeal and dismissing the action with costs.

THE CHIEF JUSTICE took no part in the judgment on account of illness.

Appeal allowed with costs.

Solicitors for the appellant: *Caron, Pentland & Stuart.*

Solicitors for the respondent: *Fitzpatrick, Parent, Taschereau & Roy.*