CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

COLUMBIA BITHULITIC LIMITED (PLAINTIFF) ..... APPELLANT;

AND

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY (DEFENDANT) ..... RESPONDENT.

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*Feb. 6, 7.
*March 26.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Damages—Negligence — Contributory negligence—Statutory powers —Collision—Railway crossing—Defective brakes—Electric street railway—Speed.

The principle, that the contributory negligence of a plaintiff will not disentitle him to recover damages, if the defendants, by the exercise of care, might have avoided the result of that negligence, applies where the defendant, although not committing any negligent act subsequently to the plaintiff's negligence, has incapacitated himself by his previous negligence from exercising such care as would have avoided the result of the plaintiff's negligence: British Columbia Electric Rly. Co. v. Loach [1916] 1 A.C. 719, followed.

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

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The act of the respondent in coming out with defective brakes, though antecedent to the appellant's negligence really prevented him from stopping his car in time to avoid the collision.

It is unlawful for the driver of a car on a tram-line operated under the Dominion Railway Act to approach an unprotected highway level crossing at such speed that his car is not under reasonable control.

Judgment of the Court of Appeal (23 B.C. Rep. 160), reversed.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing the judgment of Murphy J. at the trial, by which the plaintiff's action was maintained with costs.

The appellant's servant (one Hall) was driving a team of horses and a wagon, the property of the appellant, along a road, known as Townsend Road, which was crossed by the company respondent. On the way, one Sands got up from the road and sat beside the driver. On nearing the track, which was approached by an up grade, the two men were engaged in conversation and took no precautions. When the horses were partially across the track, they were struck by a tramcar of the company respondent. Sands and the two horses were killed, Hall was thrown from the wagon and the wagon was damaged. The tramcar at the time was coming down grade at about 40 miles an hour. There was evidence that the brakes on the tramcar were defective.

The issues raised on the present appeal are stated in the judgments now reported.

Armour K.C. for the appellant.
Tilley K.C. for the respondent.

(1) 23 B.C. Rep. 160.

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THE CHIEF JUSTICE.—I agree with Mr. Justice Anglin with this addition.

The general proposition that "statutory powers may not be exercised with reckless disregard for the common law rights of others" cannot be open to objection. A statement of the contrary would seem sufficient to refute it. Adopting the language of Lord Sumner in *Great Central Railway Co.* v. *Hewlett* (1), I would say that however general the terms used by the legislature in authorizing for the company's benefit what would otherwise be a nuisance the authority conferred must be exercised with reasonable care and not without it.

The application of the rule to the particular case, however, presents some difficulty. It is not suggested that railway trains can never pass over a public crossing except at such speed that in case of necessity they can be stopped before reaching it. If it were, that would seem to be a proposition that one might have much hesitation in accepting although at first sight it seems reasonable.

In *British Columbia Electric Railway Co.* v. *Loach* (2), the Privy Council held that it was the negligence of the respondent in coming out with defective brakes which though antecedent to the appellant's negligence did not come into effect until afterwards and therefore was the cause of the accident. It may perhaps be suggested that the point of the decision was a fine one and that if the respondent had previously tied its hands so that it could not help coming too fast the appellant had also previ-

(1) [1916] 2 A.C. 511, at pp. 523-524. (2) [1916] 1 A.C. 719.

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ously tied his hands so that he arrived at the crossing too slow to be able to clear.

However, the judgment of the Privy Council must be accepted as the law not only as to the abstract principle which is clear but as applicable to this particular case; and as Mr. Justice Archer Martin said in the Court of Appeal,

> on the inferences to be drawn from facts about which there is no real dispute * * * the accident could * * * have been avoided if the brake had been in good order.

This conclusion clearly brings the case within the decision of the Privy Council in *Loach* v. *British Columbia Electric Railway Co.*(1), and the appeal must be allowed with costs here and in the Court of Appeal and the judgment of the trial judge must be restored.

DAVIES J.—The case between the *British Columbia Electric Rly. Co.* v. *Loach,* reported(1), was one arising out of the same accident and on the same facts and circumstances as this action was brought on. The only difference is in the person who brought the action; but it is contended there exists a difference between the findings of the jury in the former case and the findings of facts or inferences from the evidence made by the learned trial judge in the present action. The record of the *Loach* case is not before us and it may be that some of the evidence in that case as to the power of the motorman to have stopped the car before reaching the team crossing the track at the rate of speed the car was running with a defective brake, such as there was on the car, was not precisely the same as in this case. However, in the *Loach* case

(1) [1916] 1 A.C. 719, 23 D.L.R. 4.

their Lordships cite the finding of the jury that while both parties were guilty of negligence, nevertheless

> the motorman could have stopped the car if the brake had been in an effective condition;

and Lord Sumner, who delivered the judgment, says:—

> If the brake had been in good order, it should have stopped the car in 300 feet.

In so far as the general principle is concerned I take it we are bound by the law laid down in the *Loach* case by the Judicial Committee.

In the headnote to that case it is stated that their Lordships held:—

> The principle that the contributory negligence of a plaintiff will not disentitle him to recover damages if the defendant, by the exercise of care, might have avoided the result of that negligence, applies where the defendant, although not committing any negligent act subsequently to the plaintiff's negligence, has incapacitated himself by his previous negligence from exercising such care as would have avoided the result of the plaintiff's negligence.

Several questions were raised and argued at bar as to whether the rate of speed at which the car was running when the motorman first saw the plaintiff's servant man driving his team and cart to cross the car track, was not in itself negligence, and whether the provisions of the "Railway Act" on the subject of the rate at which cars might run, extend to electric cars. In the view I take of the facts I think the appeal must be decided by determining whether there was evidence from which the proper inference should be drawn that if the car had been equipped with an adequate and efficient brake instead of an admittedly defective and inefficient one, it could, if promptly applied at the proper moment by the motorman, have

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stopped the car and avoided the accident. If such an inference is the proper one to draw, the defendants (respondents) under the authority of the *Loach* case must be held liable. The learned trial judge thought himself bound by the decision of the Judicial Committee in the *Loach* case, and his finding on the fact whether efficient brakes would, if applied, have stopped the car in time, is as follows:—

> The plaintiffs desire me to find that had the brakes been efficient and applied as soon as the motorman saw the team, the car would have been slowed down sufficiently to allow time enough for the team to have cleared the tracks. It is possible the horses might have got over, but I do not think I can hold it proven that the wagon would also be across, and if not the horses would probably have been killed and certainly the wagon would have been damaged.

After careful consideration of the evidence, I am of opinion that the proper inference to be drawn from it is that had the car been equipped with proper and efficient brakes the motorman would have stopped it when he applied the brakes in time to have avoided the accident.

The evidence of Andrews is not as clear and satisfactory on the point as one could desire; but in answer to the learned judge who said to him: "Well if you are going 40 miles, you couldn't get down to 10 miles in a hundred feet?" he answered: "Oh! no Sir, about 200 feet in 40 miles an hour."

That 200 feet was 100 feet less than in the *Loach* case Lord Sumner thought it could be stopped altogether and would bring the car running at the reduced rate of 10 miles an hour within 200 feet of the horses and truck crossing the track and still allow 200 within which the car might have been stopped altogether before it reached the team.

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I would therefore allow the appeal and restore the judgment of the trial judge with costs here and in the Court of Appeal.

IDINGTON J.—I do not see enough in the facts presented herein whereby it is fairly possible to distinguish this case from that of the *British Columbia Electric Railway Co.* v. *Loach* (1), arising out of same accident as in question herein, and am therefore of the opinion that the appeal should be allowed with costs throughout and the judgment of the learned trial judge be restored.

DUFF J.—The accident out of which the litigation arose occurred in Townsend Avenue in the municipality of Point Grey, a suburb of Vancouver, where that street is crossed by the Vancouver and Lulu Island Railway the appellant company's horses and wagon being run down by a car of the respondent company.

Pursuant to a contract with the Vancouver and Lulu Island Railway Company and the Canadian Pacific Railway Company, the lessee of the railway, the respondent company, some years ago, equipped the railway as an electric railway and were working it under the terms of the contract by authority of an Act of the Parliament of Canada (ch. 66, 6 & 7 Edw. VII.). The agreement requires the respondent company to provide an "electric car service" between Granville Street in the City of Vancouver and Steveston on the Fraser Delta (a distance of about 15 miles) in part over the Vancouver and Lulu Island

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Railway and in part over a track owned by the Canadian Pacific Railway Company which, it may be assumed, was constructed under statutory authority as part of that company's system. The Vancouver and Lulu Island Railway though originally constructed under the authority of Provincial legislation was afterwards declared to be a work "for the general advantage of Canada" and thereupon became and is a Dominion Railway. The respondent company was incorporated under the "English Companies' Act," acquired the property and rights of the Consolidated Railway Company, a British Columbia corporation, and own and operate lines of electric railway and other works in Vancouver and the suburbs of Vancouver and in other places in British Columbia under the authority of the Consolidated Company's special Act (B.C. Statutes, 1896, ch. 55), all these works being local works under the exclusive jurisdiction of the Provincial Legislature. It may be a question whether the intention of the legislation authorizing the agreement above mentioned (ch. 66, 6 & 7 Edw. VII.) was to give the respondent company the status of a Dominion Railway Company *vis à vis* the enactments of the "Dominion Railway Act," or whether the company is merely authorized to exercise, as contractor with the Canadian Pacific Railway Company and the Vancouver and Lulu Island Railway Company, powers which are directly conferred upon and are the powers of the last mentioned companies which they are permitted to execute by the respondent company as their instrumentality. The point is not material to any question arising now and I mention it to make it clear that nothing said in relation to this appeal

should be treated as affecting any question which may hereafter arise concerning the status of the respondent company or the responsibility of either of the railway companies mentioned.

The line operated by the respondent company for the Canadian Pacific Railway Company and the Vancouver and Lulu Island Railway Company crosses numerous streets within the territorial boundaries of Vancouver which occur at the usual intervals and after passing the southern limit of the municipality (about a mile from the Granville Street terminus) in the municipality of Point Grey until the north arm of the Fraser is reached.

The respondent company contends that it is not judicially amenable in respect of harm caused to persons and things lawfully passing on a public highway across the line it operates by reason merely of the fact that such harm is ascribable to the unusual and dangerous speed of the car causing it; in short operating the railway, as it contends under the provisions of the "Dominion Railway Act" the matter of the speed of its cars (it is argued) rests in its own uncontrolled discretion, save in cases in which that discretion is affected by the express provisions of the "Railway Act" or by some regulation on the subject by the Board of Railway Commissioners.

It has often been laid down as a general proposition that the grantee of statutory powers is not in general responsible for harm resulting from that which the legislature has authorized provided it is done in the manner authorized and without negligence; but that an obligation rests upon persons exercising such powers not only to exercise them with

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reasonable care but in such a manner as to avoid unnecessary harm to the persons or property of others: *Geddis* v. *Bann Reservoir*(1), at p. 438; *Canadian Pacific Railway Co.* v. *Roy*(2), at p. 231; *East Fremantle* v. *Annois*(3), at p. 218; *Hewlett* v. *Grand Central*(4). The principle has often been applied and has been always considered to impose upon street railway companies an obligation to regulate the speed of their cars in and upon the public streets in such a way as not unduly to endanger the safety of the public.

All such general rules and principles are, however, in the last analysis rules of construction, and must give way to an express or implied contrary intention. "Obviously," said Bowen L.J., in *Truman* v. *London Brighton and South Coast Railway Company*(5), at p. 108, "the question in each case turns on the construction of the Act of Parliament."

In *East Fremantle* v. *Annois*(3), at p. 217, referring to a remark of Abbott C.J., in *Boulton* v. *Crowther*(6), at p. 707, that if the donee of a statutory power act "arbitrarily, carelessly or oppressively" the law has provided a remedy. Lord Macnaghten observed that such expressions, although as applied to the circumstances of a particular case they probably create no difficulty, are nevertheless when used generally and at large neither precise nor exact as to scope or meaning. In a word, his Lordship said "the only question is, has the power been exceeded? Abuse is only another form of excess." "There is,"

(1) 3 App. Cas. 430.
(2) [1902] A.C. 220.
(3) [1902] A.C. 213.
(4) [1916] 2 A.C. 511.
(5) 29 Ch.D. 89.
(6) 2 B. & C. 703.

said Lord Selburne in *Truman* v. *London, Brighton and Coast Railway Company*(1), at p. 53,

> no cause of action on the ground of negligence in the manner of doing what is authorized if that * * * is in fact authorized;

that is to say has been declared to be lawful. If the particular thing

> complained of is done in the place and by the means contemplated by the legislation

it is not an actionable wrong: *Canadian Pacific Railway Co.* v. *Roy*(2), at p. 227; *Hamilton St. Rly.* v. *Weir*(3), at p. 506; *Hewlett* v. *Grand Central*(4). An electric railway company having authority by statute to place its transmission wires above the streets on poles or under ground was held not to be answerable in negligence for the consequences of not adopting the plan less dangerous to the public; the exercise of this discretion vested in the company was not reviewable by a jury: *Dumphy* v. *Montreal Light, Heat and Power Co.*(5).

The question whether a railway company whose railway is being worked under the authority of the "Dominion Railway Act" is answerable in negligence for running its trains over a highway crossing at a speed which makes it impossible for the locomotive engineer with the appliances at his command, or with due regard to the safety of his passengers to exercise any effective control over the train with a view to the safety of persons crossing the track on the highway is therefore reducible to the question: Is such man-

(1) 11 App. Cas. 45.
(2) [1902] A.C. 220.
(3) 51 Can. S.C.R. 506, 25 D.L.R. 346.
(4) [1916] 2 A.C. 511.
(5) [1907] A.C. 454.

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agement of the trains legalized? And the answer to the question must, to repeat the remark of Bowen L.J., turn upon the construction of the enactments from which the authority to work the railway is derived.

The difficulty of holding railway companies to be under the duty generally to regulate the speed of their trains at highway crossings in accordance with some standard of reasonableness to be determined and applied by a jury is obvious. Decisions upon questions of speed, it may be assumed, affect more radically the management of a railway line than decisions upon questions of what may be called collateral precautions, in providing, for example, signalling devices or gates and watchmen at highway crossings. Reasonableness means, of course, reasonableness in all the circumstances. Is it for a jury to say whether a fast service between Montreal and Toronto or Montreal and Ottawa, for example, necessitating the passing of numbers of highway crossings at a rate of speed precluding the possibility of exercising in most cases control over the trains sufficient in itself to afford any safeguard for persons using the highway—is the reasonableness of such a service entailing such consequences to be left to a jury to determine? Is the fetter upon the railway company's discretion involved in such a rule within the contemplation of the "Railway Act?" I think the decision of this court in *Grand Trunk Railway Co.* v. *McKay* (1), may be taken broadly to establish the proposition that the discretion of the railway company exercised *bonâ fide* with regard to the speed of trains on a Dominion rail-

(1) 34 Can. S.C.R. 81.

way worked in the usual way by steam is not as a general rule amenable to judicial review with reference to some standard of reasonableness to be determined by a judicial tribunal.

It does not follow that in no circumstances does a legal obligation rest upon a company operating a railway under the "Dominion Railway Act" in relation to the speed of its trains in approaching or crossing a highway. For example, the Act provides for certain precautions with the object of warning the public of the approach of trains and the enactments prescribing these precautions presuppose that railway trains are not run at a speed which makes these warnings useless; and I am not prepared to say that for harm caused by a train running across a highway at such a speed as to nullify the utility of the prescribed statutory signals, other efficacious signals not being provided, the railway company could not be made answerable as for negligence. And the circumstances of a particular emergency may obviously cast a duty upon the servants in charge of the train to moderate its speed or bring it to a stop; so also the permanent conditions of a particular crossing or the practice of the railway in relation to it (a point to which I must again advert) may give rise to a duty to take extraordinary measures there for the protection of the public by controlling train speed where other effective measures are impossible or neglected: *Rex* v. *Broad*(1).

In addition to the general considerations above alluded to there is another consideration which applies with some force to railway works under the

(1) [1915] A.C. 1110 at pages 1113, 1114; 33 N.Z.L.R. 1275 at pages 1291, 1299.

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"Dominion Railway Act." The jurisdiction of the Dominion with regard to railways is limited to what may be called through railways, that is to say, railways passing beyond the limits of a province or connecting two provinces, and local railways declared by the Dominion Parliament to be works for the general advantage of Canada. Down to the time when the "Railway Act" received its present general form in the year 1888, the practice of making such declarations on grounds and for reasons having no kind of relevancy to the substance of the declaration itself had not come into vogue. Generally speaking such declarations were reserved for undertakings connected organically with through railways. The responsibilities of the Dominion railway companies with regard to through traffic should not be lost sight of in considering the effect of the "Dominion Railway Act" in this regard.

The considerations, however, ordinarily relevant where the question concerns the management of a Dominion railway worked by steam, are largely without application to the undertakings operated by the respondent company under the authority of 6 & 7 Edw. VII. ch. 66. To make this clear it is necessary to refer to the specific provisions of the agreement of 1905 between the Canadian Pacific Railway Company and the Vancouver and Lulu Island Railway Company and the British Columbia Electric Company ratified by that statute.

The agreement requires the respondent company to maintain a

> good, proper and efficient electric car service equipped with modern cars and supplied with the latest appliances;

and it prescribes that the service

shall be equal in every respect to the service now in effect on the lines owned and operated by the party of the second part between Vancouver and New Westminster.

By section 16 of the agreement it is stipulated that the respondent company shall protect and indemnify the Canadian Pacific Railway Company against all loss, damage or claims which may arise in consequence of the working of the railway under the agreement and

will bear and pay all expenses incurred in doing all acts, matters and things as they are now or may hereafter be required for the maintenance and operation of the said railway in conformity with the laws of the Dominion of Canada

—meaning of course the Dominion law as affecting the undertaking in question. By another clause, inspection by the Superintendent of the Pacific Division of the Canadian Pacific Railway Company is provided for and the respondent company undertakes to remedy any defects in the service of equipment of the railway to the satisfaction of the superintendent or any official appointed by him to make such inspection. It is quite evident that all the parties to these agreements have assumed—and carried the assumption into effect in practice—that important provisions of the "Dominion Railway Act" enacted for the protection of the public at highway crossings had no application to the railway when worked under the provisions of this agreement. The cars in use are of a type familiar in this country as the interurban trolley car worked by electric motor, equipped with compressed air whistle and foot gong, brakes and reversing apparatus, having neither steam whistle nor bell weighing "at least 30 pounds" as prescribed for "engines" or "locomotives" by the "Dominion Railway Act." The photographs in evidence indicate, and we may assume cor-

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rectly, that at Townsend Avenue the sign "Railway Crossing" prescribed by that statute does not appear.

In this, no doubt, the purpose of the agreement as touching the character of the cars was faithfully carried out. The cars contemplated by the agreement are certainly not "locomotives" or "engines" within the meaning of the "Dominion Railway Act." The intention of the parties was to establish a service which should be remunerative, and within the city limits, at all events, the agreement must be taken to have contemplated stopping at street intersections as in the working of a street railway service, for taking up and setting down passengers, and this would necessarily involve the use of such cars and appliances as would enable the cars to be easily started and readily brought to a stop. With such cars the working of a "proper and efficient" service as regards measures required for the safety of the public on the highways (by regulation of speed and otherwise) as well as in the interest of the patrons of the railway—would in the case of a short railway of 12 or 15 miles in length, having no through connections, present no greater difficulty than the working of an ordinary street car system in a large city.

By the special Act, ch. 66, 6 & 7 Edw. VII., it is declared that "subject to the provisions of the 'Railway Act'" the agreement referred to and another to which a brief reference will be necessary set forth in the schedule to the statute, shall be legal and binding upon the parties thereto and it is enacted that

> such respective parties may do whatever is necessary in order to give effect to the substance and intention to the said agreements.

Light is thrown upon the effect of the words "substance and intention" in the ratify-

ing statute by a reference to the agreement of 1904 between the Canadian Pacific Railway Company and the respondent company which the statute also authorizes the respondent company to carry out. This agreement requires the company to establish an "electric street car" service between the corner of Robson street and Granville street (one of the principal thoroughfares in Vancouver) and Kitsilano, a route lying entirely within the municipal boundaries (except where it passes over the Canadian Pacific Railway Bridge at False Creek) crossing on the way numerous city streets. The operation of this service required the running of the cars on Granville street between Robson street and the northern terminus of the railway bridge over the respondent company's tracks and this part of the service being operated over the respondent company's own street railway in Vancouver, a provincial undertaking, neither in whole or in part declared to be "a work for the general advantage of Canada," it follows that the parties must have had in view the use of cars of a character conforming to the provisions of the provincial law and to the arrangements between the respondent company and the municipality with respect to its street car service in Vancouver; and by the very terms of the agreement itself, the service provided is to be an extension of that street car service and is to be a continuous service from the corner of Robson and Granville streets to Kitsilano and back.

As regards this agreement there could be no manner of doubt that what was contemplated was "a street car service" in the strict sense "proper and efficient" as the agreement requires.

It follows from what I have said that the "sub-

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stance and intention" of the ratified agreements was that a "street car service" and an "electric car service" should be provided by means of cars not equipped with steam whistle and bell in compliance with the requirements in respect of locomotives, of the "Railway Act," but of the kind used by the respondent company in its already established electric car services. The agreements contemplated, I repeat, as protection of the public at highway crossings and on the highway generally against the dangers incidental to the working of the service not the specific precautions prescribed by the "Railway Act" when such precautions would be unusual and impracticable but such precautions as would properly be taken in the operation of "proper and efficient" services of the character authorized; the "law of the Dominion of Canada" as pointed out above, in section 16 of the agreement means the law as it affects the particular undertaking.

That such cars should be equipped with efficient brakes is obviously contemplated—brakes, that is to say, efficient for use in such a service; but unqualified license as to the speed of cars might reduce this requirement to an idle formality.

The public would be entitled to expect the observance in both these services of the safeguards and precautions commonly observed in the operation of services of the same character for the protection of persons using the streets. That is what the agreements contemplate and that therefore is what the statute contemplates and that is undoubtedly what the respondent company professed, and no doubt quite honestly attempted to carry out.

Such being the effect of the special Act it is proper to note that by section 3 of the "Railway Act" the provisions of the special Act in so far as it is necessary to give effect to them shall be taken to override the provisions of the general Act.

Conformably to the spirit of that provision it is, I think, to the character of the service established and authorized (which excludes the use of most important special precautions for the safety of the public at highway crossings prescribed by the "General Railway Act") that we must look for the purpose of ascertaining whether or not the general rule against negligent execution of the statutory powers applies in the matter of the speed of cars at such crossings. It results, I think, from what I have said, that the proper answer to the question is, yes.

As regards the crossing and the car in question there are, however, two reasons which put the question of the duty of the appellant company in relation to speed beyond question. First, as to the crossing—there was a stopping-place there and in the ordinary course of operation the car would be brought under control to enable the motorman to stop for passengers; and there could consequently be no general overriding necessity or convenience to prevent the taking of proper measures for the safety of the public on the highway; as to the car, the fact alone that it was not equipped with proper brakes was sufficient to limit in the special circumstances any otherwise uncontrolled discretion as to speed, assuming such discretion as a general rule to exist.

Two further questions arise: First, was the learned trial judge right in finding as a fact that had

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the car been equipped with a proper brake Hayes, the motorman, would nevertheless have been unable to stop it or to check its speed sufficiently to avoid a collision or to make it harmless if one had occurred? My view is that the finding cannot now be interfered with in this court, first, because it was concurred in by the majority of the Court of Appeal and it is at least quite impossible to treat the conclusion that the plaintiff had not adequately established the affirmative of this issue as clearly erroneous. And secondly, I agree fully with the Chief Justice of the Court of Appeal in his opinion that on the evidence presented, Mr. Justice Murphy could not properly have reached any other conclusion and that the testimony on which the appellant relies for impeaching the finding of the trial judge is quite worthless. The evidence relied upon is that of one Andrews who says that he was acquainted with the car that caused the injury and that going at a rate of 35 to 40 miles an hour at the place where the accident occurred he could with the brake in proper order have brought the car to rest, to use his own language, in "about 12 poles" that is to say within a space of 1,200 feet. He is then asked to say within what distance he could reduce the speed from 40 miles an hour to 10 miles an hour assuming the appliances to be in perfect order. His testimony given in answer to that question, put by Mr. Justice Murphy himself, was that he thought he could effect such a reduction while the car was traversing a space of about 200 feet. I agree with the learned Chief Justice of the Court of Appeal that the learned trial judge was entitled to disregard this evidence.

It is too obvious for argument that both state-

ments of the witness cannot stand; which is to be accepted? It is evident that Mr. Justice Murphy did not consider he had evidence before him justifying the conclusion that with perfect appliances the speed of the car could be reduced from 40 to 10 miles an hour in less than 400 feet; and this view cannot be satisfactorily explained away on the assumption that the trial judge misunderstood the answer to a pointed question asked by himself.

The next question is: Does the principle in *Loach* v. *British Columbia Electric Railway Co.*(1), apply in view of this finding of the learned trial judge? Mr. Tilley relies upon the following passage in the judgment of Lord Sumner, speaking for the Judicial Committee, at p. 725:—

> Here lies the ambiguity. If the "primary" negligent act is done and over, if it is separated from the injury by the intervention of the plaintiff's own negligence, then no doubt it is not the "ultimate" negligence in the sense of directly causing the injury. If, however, the same conduct which constituted the primary negligence is repeated or continued, and is the reason why the defendant does not avoid the consequence of the plaintiff's negligence at and after the time when the duty to do so arises, why should it not be also the "ultimate" neglgence which makes the defendant liable?

Mr. Tilley argues that Hayes' negligence really came to an end when he put the emergency appliances into operation on seeing the horses approaching the railway tracks about 16 or 18 feet west of the west rail, although the effect, he admits, of his negligent conduct did not; and this, he argues, distinguishes Hayes' personal negligence from the negligence of the company in not providing the car with a proper brake, while (he argued) Hall's negligence in going on to the track after Hayes had done every-

(1) [1916] 1 A.C. 719.

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thing he could to stop the car, intervened between the negligence of Hayes and the final catastrophe. The acceptance of this argument seems to lead to the rather embarrassing position that if the rate of speed had been such that the car (equipped with a proper brake) could have been stopped in time to avert the accident the company might have been responsible; while given the higher rate of speed at which a proper brake would be ineffective the company would escape responsibility.

But assuming that in such a case as this it is possible to separate the negligence of the official responsible for default in failing to provide a proper brake from the negligence of the motorman who runs at a speed which is excessive not only in view of the fact that the brake is defective, but would have been excessive, that is to say, unreasonably excessive, even if the car had been equipped with proper appliances—assuming that the negligence of Hayes and that of this official can be considered as distinct negligences and that the two together ought not to be regarded as constituting one negligence, (see the judgment of Lord Watson in *Smith* v. *Baker*(1), at p. 352), I think the judgment in *Loach's* case, when due effect is given to the whole of it, requires us to hold that the trial judge was entitled to find Hayes' negligence to have been the sole cause of the injury of which the appellant company complains.

I think this conclusion follows from the observations upon *Brenner* v. *Toronto Railway Co.*(2). To make this clear it will be necessary very briefly to indicate what was involved in that

(1) [1891] A.C. 325. (2) 40 Can. S.C.R. 540.

case. The plaintiff, a girl of 18, being on the south side of Queen street in Toronto and having to cross the street saw a car coming towards her from the east, and assuming that she had time to cross before the car would reach her line of advance, she proceeded, and arriving at the car track, stepped on to the track in front of this car without having taken any precaution to ascertain its position before doing so and without having given the motorman any warning of her intention. She was immediately struck down and terribly injured.

The plaintiff's case at the trial was that the car, when she saw it, was at a considerable distance from her and that she was reasonably entitled to assume, if it was proceeding at the usual speed, that she could cross the track before it came up to her; that it was due to the motorman's negligence in driving the car at an excessively high rate of speed that this reasonable expectation was unfulfilled; and that this negligence of the motorman was the sole cause of the accident. The defendant's case was that when the plaintiff left the sidewalk after seeing the car approaching it was only a short distance east of her with power thrown off and running at about 6 miles an hour; and that the motorman reasonably assumed that she had no intention of crossing in front of the car until as she approached the rail her seeming want of attention to the noise of the gong which he was sounding excited his apprehensions and he applied first the brake and afterwards the reversing apparatus; but that after he had done this she stepped in front of the car and was knocked down. The plaintiff alleged also that assuming the car was mov-

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ing at a moderate rate of speed, as the defendants alleged, the motorman was negligent in not stopping sooner. The jury rejected the plaintiff's case in its entirety finding the plaintiff's negligence to be the sole cause of her injury. Their findings acquitted the motorman of negligence in the matter of speed involving, in view of the judge's charge, a finding that the motorman if he had more swiftly divined the plaintiff's intention to cross the track, could have stopped the car in time to avoid a collision, but negativing the charge of negligence in failing to do so.

On appeal to the Divisional Court the charge of the learned trial judge was attacked in this way. The scene of the accident was immediately opposite the terminus of University Avenue, a street which runs north from the northerly boundary of Queen street. A few feet east of University avenue, another street, University street, runs in the same direction from the northerly limit of the street also without crossing it. One of the rules of the company required the motorman on approaching a "crossing" to throw off the power or reduce the speed of his car so as to get it under control with a view to emergencies. The Divisional Court held that in approaching the easterly limit of University street the car was approaching a "crossing" and that this rule applied. The motorman in fact did not throw off his power or reduce his speed until he reached the easterly limit of University avenue. The plaintiff impeached the direction of the learned judge and asked for a new trial on the ground that under a proper direction they might have found that the motorman was negligent in not throwing off power or reducing speed on approaching University

street and that they might moreover have found that if he had done so the motorman might in consequence of the reduced momentum, thereby occasioned, more effectually have checked his car on the application of the emergency apparatus and thus left the plaintiff a fraction of time more to escape. The Divisional Court gave effect to this contention. On appeal to the Court of Appeal it was held that there was no misdirection, that the rule in question had been sufficiently brought to the attention of the jury. In this court the defendant company contended that supposing the rule might more pointedly have been brought to the attention of the jury on the issue of the motorman's negligence, a new trial ought nevertheless to be refused because when the admitted facts were considered with the conclusions of fact necessarily involved in the findings of the jury, it was clear that the plaintiff must fail because, assuming the motorman had been negligent in failing to observe the rule and that this negligence was one cause of the accident, still the plaintiff's negligent conduct was such that consistently with the conclusions involved in the verdict which were not affected by the alleged misdirection and the admitted facts the jury could only have found that this conduct was a "direct and effective cause" of the mishap. In other words, assuming the mishap to have been due in part to the negligence of the motorman and in part to the negligence of the plaintiff, then under the undisputed principles of the law of negligence the plaintiff could not in such circumstances recover. This contention prevailed with Girouard J. and myself.

The effect of their Lordships' observations at pp.

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725 and 726 appears to be that their Lordships disapprove of this view of *Brenner's* case.

The broad principle is, of course, undisputed (it is distinctly recognized in the last paragraph of their Lordships' judgment in *Loach's Case*) that a plaintiff whose negligence is a direct cause of the injury complained of cannot recover even though the accident would not have occurred but for the defendant's own negligence; in other words, where the injury complained of is "directly" caused by the negligence of the plaintiff and the defendant. (See Lord Esher in *The Bernina*(1), at p. 61, and Lindley L.J. in the same case at pp. 88 and 89, and Mr. Justice Willes in *Walton* v. *The London, Brighton and South Coast Railway Co.*(2)). That is to say if the injury is not only the actual consequence but the consequence which any reasonable person in the plaintiff's position, knowing what the plaintiff knew, must have seen to be the probable consequence of his negligence and the chain of causality is not interrupted by the negligence of the defendant, then it is settled law that the plaintiff cannot recover. The effect of their Lordships' disapproval of the judgment mentioned seems to be that on the facts, undisputed or involved in the findings in *Brenner's* case which were unaffected by the misdirection, if there was any, the jury would have been entitled to find that the plaintiff's negligence was not a "direct" cause of the accident in the sense above indicated if they had found that the motorman was negligent in not observing the rule and that this negligence was one of the causes of the accident. There was in fact, it may be noted,

(1) 12 P.D. 58. (2) H. & R. 424, at pp. 429 and 430.

nothing in the judgment referred to at p. 725 expressed or intended as a "comment" on any of the judgments in the Divisional Court; and one must, I think, assume especially in view of the sentence at the top of p. 726 that the observation on p. 725 was not intended as *obiter* and was not directed to any single sentence detached from its context or considered apart from the concrete issues raised by the *Brenner* appeal.

The plaintiff in *Brenner's Case* had deliberately, knowing the car to be near and approaching her, stepped on the track in front of it without looking to see exactly where it was until, as she said, the catastrophe was "upon her" and, as the jury found, without any reasonable excuse for doing so; and after the motorman divining her intention, had made every proper effort to avoid a collision by trying to stop the car with his emergency apparatus, which he could have done had she given any reasonable warning of her intention to cross the track.

The effect of the approval of the judgment in the Divisional Court in *Brenner's* case seems to be that the negligence of the motorman, in the case before us, notwithstanding his efforts to stop the car, must be regarded as continuing in the sense of being operative down to the moment of impact, while their Lordships expressly declare in *Loach's* case that the negligence of the teamster is to be considered to have ceased to operate when looking up on Sands' exclamation he, for the first time, became aware that a car was approaching but too late to enable him to escape.

ANGLIN J.—In the same accident in which the horses were killed and the wagon wrecked for loss of

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which the present plaintiff sues, one Sands, who accompanied the driver, also lost his life. In an action brought by his administrator against the present defendants, although the jury had found contributory negligence by Sands, the Judicial Committee of the Privy Council held them answerable for his death, (*Loach* v. *B.C. Electric Rly. Co.*(1)), on the ground that they

> could and ought to have avoided the consequences of that negligence and failed to do so, not by any combination of negligence on the part of Sands with their own, but solely by the negligence of their servants in sending out the car with a brake whose inefficiency operated to cause the collision at the last moment, and in running the car at an excessive speed, which required a perfectly efficient brake to arrest it.

In that decision their Lordships have authoritatively determined, as stated in the head-note to the report, that:—

> The principle that the contributory negligence of a plaintiff will not disentitle him to recover damages, if the defendant, by the exercise of care, might have avoided the result of that negligence, applies where the defendant, although not committing any negligent act subsequently to the plaintiff's negligence, has incapacitated himself by his previous negligence from exercising such care as would have avoided the result of the plaintiff's negligence.

Lord Sumner answered the contention that the contributory negligence of Sands (which was the same as that found by the learned trial judge against the present plaintiff) had continued up to the moment of the collision by stating that "it does not correspond with the fact;" and his Lordship adverted to the distinction between negligence and its consequences. These observations are directly applicable to the facts as disclosed by the evidence and found in the present case.

(1) [1916] A.C. 719.

The difference between *Loach's* case and the case at bar on which respondents rely is that, whereas in the former the jury had found that

> the motorman could have stopped the car if the brake had been in effective condition,

in the case now before us the trial judge, though he held the brake was defective, and thought that, had it been efficient, the horses might have got over the crossing, did

> not think (he could) hold it proven that the wagon would also be across, and, if not, the horses would probably have been killed and certainly the wagon would have been damaged.

Nevertheless,

> applying the law as laid down in Loach v. B.C. Electric Rly. Co., in reference to this same accident to the facts as found at the conclusion of the trial,

the learned judge held the defendants liable on the ground that by running at a reckless rate of speed in approaching a dangerous crossing the motorman had disabled himself from preventing the collision, which he might otherwise have avoided. If the rate of speed under the circumstances amounted to negligence, and disability to avoid the collision resulted from it, it was just as truly "'ultimate' negligence which makes the defendant liable" as was the sending out of the car with a defective brake, which their Lordships so characterized in *Loach's* case because of the motorman's consequent incapacity to avoid killing the unfortunate Sands.

That it would be negligent, without the warrant of statutory authority, to drive a railway train or a tramcar when nearly approaching an unprotected highway level crossing at a speed approximating 40

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miles an hour (as was done in this case) is indisputable. Under some circumstances it might be more than merely negligent; it might be criminal.

The defendants are a Dominion railway company. They seek to justify the otherwise indefensible conduct of their motorman by invoking the "Dominion Railway Act;" and they cite the decision of this court in *Grand Trunk Railway Company* v. *McKay*(1).

It was determined in that case that the speed of a train passing through a thickly peopled portion of a city, town or village, unless so restricted by a special order of the Railway Committee of the Privy Council (now the Railway Board), need not be limited to six (now ten) miles an hour, under section 8 of 55 & 56 Vict. ch 27 (now section 275 (1) of the "Railway Act"), when the fences on both sides of the track are maintained and turned into cattle guards at highway crossings as prescribed by section 6 (now section 254 (2)) of that Act. (But see subsection 3 of section 275, as enacted by 7 & 8 Edw. VII., ch. 32, sec. 13.) The decision in the *McKay* case is also authority for the proposition that, at all events in the case of a steam railway, such as was there under consideration, if the requirements of the statute and of any orders or regulations duly made thereunder as to the protection of a highway level crossing are complied with, there is no legal limitation which would make approaching and running over it at any rate of speed practically necessitated by the exigencies of rapid transit *per se* illegal or negligent *quoad* the public using such highway. That was merely an application of the rule that an action will not lie for the doing of

(1) 34 Can. S.C.R. 81.

that which is authorized by statute. What is *necessary* for accomplishing the purpose of a legalized undertaking will be deemed within the purview of the powers conferred for carrying it out.

No doubt the presence in it of subsection 1 of section 275, already adverted to, and of subsection 4 of the same section (as enacted by 8 & 9 Edw. VII., ch. 32, sec. 13), which limits the speed at crossings where there has been an accident, and of section 30 (*g*) and sections 237 and 238 (8 & 9 Edw. VII., ch. 32, sections 4 & 5) affords strong ground for the contention that in the case of steam railways, with which it is chiefly concerned, the "Railway Act" impliedly sanctions trains approaching and passing over the ordinary rural highway level crossing at a rate of speed limited only by the duty of not unnecessarily imperilling the safety of the trains and of passengers and employees. The chief purpose of authorizing the establishment of steam railways—rapid transit between widely separated points—(*Wakelin* v. *London and South Western Rly. Co.*(1)), would be frustrated in Canada if the trains run upon them were obliged to reduce speed on approaching every unprotected rural highway which they cross at grade level.

I do not understand, however, that *Grand Trunk Railway Company* v. *McKay*(2), or any other decision is authority for the proposition that statutory powers may be exercised with reckless disregard for the common law rights of others. Even in cases where the Act, speaking generally, authorizes the running of trains at a high rate of speed and the Board of

(1) '12 App. Cas. 41, 46. (2) 34 Can. S.C.R. 81.

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Railway Commissioners has not made an order for special protection under section 237 or section 238 (8 & 9 Edw. VII., ch. 32, sections 4 and 5) or, in the case of urban crossings, an order regulating speed under section 275(3), circumstances may exist at particular level crossings which involve peril from running at high speed obviously exceptionally great. Failure to have a train under such control that it can be stopped, or its speed sufficiently reduced to avoid injury *at such a crossing*, when there would be a reasonable opportunity to do so if the speed were moderate, would amount to reckless disregard of the rights of others. As put in the very recent case of *Hewlett* v. *Great Central Railway Co.*(1), by the Lord Chief Justice of England, presiding in the Court of Appeal,

> The common law said that when statutory powers were conferred in the absence of special provision to the contrary, those powers must be exercised with reasonable care.

Although the House of Lords (1916, 2 A.C. 511), applying the principle of the decision in *Moore* v. *Lambeth Waterworks Co.*(2), reversed the judgment of the Court of Appeal because the danger had been created not by the doing of that which the statute specifically authorized, but by a subsequent diminution of light owing to the exigencies of the war, for which the company was not responsible and against the consequences of which it was under no obligation to provide, Lord Sumner took occasion to state the principle of law which governs the operation of railways in these terms:—

> In such cases the authority in question is given in general terms; it is, for example, authority to work railways and to run railway

(1) 32 Times L.R. 373.

(2) 17 Q.B.D. 462.

trains in the undertakers' discretion; hence it is reasonable to infer that the Legislature, in using such general terms, and in authorizing for the undertakers' benefit what would otherwise be a nuisance, meant them to exercise their authority with reasonable care, and not without it.

Where statutory rights infringe upon what but for the statute would be the rights of other persons, they must be exercised reasonably, so as to do as little mischief as possible. The public are not compelled to suffer inconvenience which is not reasonably incident to the exercise of statutory powers: *Southwark & Vauxhall Water Co.* v *Wandsworth Board of Works* (1).

The common law rights of persons using highways are abrogated or subordinated only to the extent necessary to enable railway companies given crossing rights to exercise their statutory powers in a reasonable manner having regard to the purpose for which such powers are conferred: *Roberts* v. *Charing Cross, Euston and Hampstead Rly. Co.* (2).

The photographs in evidence and the testimony as to the motorman being unable, owing to the station built in the angle between the railway track and the highway and close to both, intercepting his view, to see approaching vehicular traffic on the highway until it was almost on the railway (the driver of the wagon probably could not see the coming car until his horses were actually on the rails) afford ground for thinking that the danger at the crossing now under consideration was exceptionally great. But this aspect of the case was not dwelt upon below and I allude to it chiefly to preclude the misapprehension that this judgment proceeds on the assumption that the "Railway Act" authorizes the running of trains at very high speed over every unprotected rural highway crossing, however exceptional the danger due to the surroundings.

(1) [1898] 2 Ch. 603, 611.

(2) 87 L.T. 732.

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As Mr. Justice Sedgwick and Mr. Justice Davies both pointed out in the *McKay* case, at pp. 89 and 98, the provision made in Great Britain for the maintenance and operation of gates wherever a railway crosses a highway at the level is economically impracticable in Canada. In lieu of it Parliament has enacted that certain signals and warnings—the blowing of a steam whistle and the ringing of a bell ("Railway Act," section 274), and the erection of a painted sign-board (section 243)—should be substituted. The statutory authorization of running trains at a high and undoubtedly dangerous rate of speed when approaching and passing over highway level crossings, which would at common law be illegal and would render the company answerable for resultant injuries, must, I think, be taken to be conditional upon the company providing and utilizing the means of danger-warning substituted by the "Railway Act" for the impracticable gates, and also upon their complying with the explicit provisions of section 264 as to equipment with efficient brakes, which, of course, implies maintaining them in good working order. (No doubt for the protection of passengers and employees it is also a pre-requisite that the roadbed should be properly constructed and maintained.) Unless these requirements of the statute intended to lessen the danger inseparable from the running over unguarded highway level crossings at a high rate of speed are complied with, the statutory sanction, in my opinion, cannot be invoked, the common law standard of reasonableness applies, and running at a speed which, under all the circumstances, is unreasonable is unwarranted and amounts to negligence towards the public lawfully using such highways.

For the safety of that public the statute prescribes that

> Every *locomotive* shall be equipped and maintained with a bell of at least thirty pounds in weight and with a steam whistle (section 267),

and that

> When any train is approaching a highway crossing at rail level, the *engine* whistle shall be sounded at least eighty rods before reaching such crossing, and the bell shall be *rung* continuously from the time of the sounding of the whistle until the *engine* has crossed such highway (274 (1)).

At every highway level crossing the company is required to maintain a sign-board with the words "railway crossing" printed on each side thereof in letters at least six inches high (section 243). This latter precaution is no doubt quite practicable in the case of electric tramlines or railways operating on private rights of way through rural districts. That it was not taken in the present case, as the photographs of the locus in evidence shew, affords an indication that the defendants did not consider the section prescribing it applicable to an electric tramway such as that which they operated. That is a more reasonable presumption than that they deliberately violated the statute. I am not, however, to be taken as holding that section 243 was not applicable. On the contrary I incline to think it was and that failure to comply with it would probably, without more, suffice to render the running of the tramcar at a dangerously high rate of speed when approaching and passing over the highway crossing, if otherwise justifiable, unlawful.

But an electric tramcar is neither a "locomotive" nor an "engine" within the meaning of sections 267 and 274 of the "Railway Act." It is not equipped

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with the appliances for giving warning prescribed by section 267. Evidence to that effect was not given, it is true, but it is a matter of such common knowledge that it is a proper subject of judicial notice that the electric tramcar carries neither a steam whistle nor a "bell of at least thirty pounds in weight," nor indeed any bell which can be "rung;" and it would indeed be startling to tramway companies were it held that the "Railway Act" imposes such an obligation. The compressed air whistle sometimes supplied and the ordinary foot-gong operated by the motorman, while reasonably sufficient as substitutes for giving warning at shorter distances of the approach of comparatively slow-moving tramcars, do not serve the same purpose as the steam whistle and the heavy locomotive bell; and it is scarcely practicable for a motorman, if properly attending to his other duties, to keep the foot-gong continuously sounding while traversing eighty rods before passing over every highway crossing. The sections of the "Railway Act" which prescribe these safeguards in lieu of the impracticable gates, equipment with and use of which are made conditions of the implied authorization to run at a high rate of speed over level highway crossings, were clearly not meant to apply to electric tramcars. The special provisions made for electric cars by secs. 277, 278 and 393(2) of the "Railway Act" tend to confirm this view. Moreover, the practical necessity, on which the implication of the right to run trains on steam railways over unprotected highway level crossings (where the statute or an order made under it has not prescribed a reduced speed) at the same high rate of speed as that maintained on the company's private right of way

chiefly rests, does not exist in the operation of the ordinary electric tramcar, whose speed can be so readily reduced and so rapidly increased that it is quite practicable to exact that it shall approach and pass over these crossings at such moderate rate of speed as should commend itself to a court or jury as reasonable under all the circumstances. It follows that the "Railway Act" does not authorize the running of tramcars when approaching and passing over unprotected highway level crossings at a dangerously high rate of speed. In the absence of any maximum speed otherwise fixed by law for the operation of a tramcar when approaching and passing over such crossings the standard of reasonableness must govern, and any speed so great that the car is not under reasonable control, having regard to the circumstances, must be deemed unlawful.

The learned trial judge found—in my opinion properly—that the defendants' tramcar was running at an excessive rate of speed in approaching the crossing. He also found that there had been contributory negligence by the plaintiff's driver. He further found upon sufficient evidence that but for the disability created by the excessive and unreasonable rate of speed the motorman could have avoided the collision notwithstanding such contributory negligence. I am, with great respect, of the opinion that on these findings his conclusion that the defendant company was liable under the law as laid down in *Loach* v. *B.C. Electric Railway Co.* was sound and should not have been disturbed.

But I am also of the opinion that the learned judge's finding that it was not proved that an effec-

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tive brake would have enabled the motorman to avoid the collision cannot be sustained. This court is, no doubt, extremely loath to disturb such a finding when it has been affirmed by a provincial appellate court. In the present case, however, it seems to be quite clear that in the Court of Appeal there was a misapprehension of the evidence by the two learned judges who upheld this finding. Macdonald C.J.A. (with whom McPhillips J.A. concurred), assumed that the witness Andrews had said that with an efficient brake the motorman could have reduced the speed of the car to ten miles an hour "at the time of impact." Now when the motorman saw the horses upon, or about to enter upon, the crossing, he was still 400 feet away. He says he immediately applied his brakes. His car was then running from 35 to 40 miles an hour. Andrews' testimony was that if going 40 miles an hour he could with brakes in good condition reduce the speed to 10 miles an hour within 200 feet. If so it would seem reasonable to infer that he could stop the car in the remaining 200 feet. The affirmance of the trial judge's finding in the Court of Appeal is therefore not entitled to the weight which must otherwise have been given to it. Indeed it would appear that the trial judge himself was probably under a similar misapprehension as to the effect of Andrews' testimony. Presumably referring to it, he says:—

> I would not care to be in a wreck that was struck with a street car that size with the momentum it would have of a forty mile speed, and then getting down to ten miles. Surely it would kill your horses just the same.

There is no question of credibility involved. Under these circumstances I think we may treat the

finding that an effective brake would not have enabled the motorman to avoid the collision, as open to review.

Having regard to the admittedly defective condition of the brake, to the fact that the point of impact of the car was between the horses and the wagon, to the evidence of the motorman that he "did not want to bring the car up with a jar," that he "could have stopped it in a shorter distance by throwing people off their seats," that "after (he) hit" he "released the brakes to a certain extent to prevent a jar * * * threw off the reverse and eased off the brakes," and to the fact that even under these conditions the car stopped about 500 feet beyond the crossing, I think it is a reasonable and proper inference that had the brakes been in good condition and effectively applied the car would either have been stopped before reaching the crossing, or its speed would have been so reduced that the horses and wagon would have had time to clear it. An additional moment or two would have sufficed. It is not wholly without significance that in the *Loach* case—of course it may have been on evidence somewhat different—Lord Sumner said:—

> if the brake had been in good order it should have stopped the car in 300 feet.

Mr. Justice Martin in the Court of Appeal has dealt satisfactorily with this aspect of the case and I agree with him that:—

> On the inference to be drawn from facts about which there is no real dispute * * * the accident could * * * have been avoided if the brake had been in good order.

If this conclusion be correct the present case falls directly within the decision in *Loach's* case.

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For the foregoing reasons I am with respect of the opinion that this appeal should be allowed with costs in this court and in the Court of Appeal and that the judgment of the trial court should be restored.

BRODEUR J.—I am of opinion that this appeal should be allowed with costs of this court and of the court below, and that the judgment of the trial judge should be restored. I concur with my brother Anglin.

Appeal allowed with costs.

Solicitors for the appellant: *Senkler & Van Horne.*

Solicitors for the respondent: *McPhillips & Smith.*