

KELLY, J.

JUNE 23RD, 1916.

*GRAND TRUNK R. W. CO. v. SARNIA STREET R. W. CO.

Railway—Crossing by Street Railway—Order of Board of Railway Commissioners—Construction of Diamond by Street Railway Company—Liability for Maintenance—Evidence—Derailment of Train—Flaw in Rail Forming Part of Diamond—Failure to Prove Negligence—Limitation of Actions—“Construction or Operation of the Railway”—Ontario Railway Act, R.S.O. 1914 ch. 185, sec. 265 (1)—Dominion Railway Act, R.S.C. 1906 ch. 37, sec. 306.

Action to recover the cost of clearing the wreck of a train of the plaintiffs and repairing the damage to their tracks and rolling stock, alleged to have been caused by the negligence of the defendants in not maintaining the tracks at a crossing of the plaintiffs' lines by the defendants' lines, near Blackwell, in good working order, by reason of which the train was derailed.

The action was tried without a jury at Sarnia.

W. C. Chisholm, K.C., for the plaintiffs.

A. Weir and A. I. McKinley, for the defendants.

KELLY, J., in a written opinion, said that the plaintiffs' road was the senior at the point of crossing referred to. On the 17th June, 1904, the Board of Railway Commissioners for Canada granted an application of the defendants for authority to cross at grade the plaintiffs' lines at this point, and directed that the diamond required for the crossing, together with all other appliances to be placed on the plaintiffs' railway strip, should be procured and provided on the ground by and at the expense of the defendants. The diamond was, in the same month, placed in position under competent supervision; it was carefully and efficiently built.

The plaintiffs' contention was, that the cause of the derailment and the wreck was the defective condition of the diamond. The only defect disclosed by the evidence was a flaw in one of the rails of the plaintiffs forming part of the diamond.

The plaintiffs contended that the defendants were under obligation to maintain the diamond, relying on *Guelph and Goderich R. W. Co. v. Guelph Radial R. W. Co.* (1906), 5 Can. Ry. Cas. 180. But in that case there was an express provision for maintenance. *Grand Trunk R. W. Co. v. United Counties R. W. Co.* (1908), 7 Can. Ry. Cas. 294, also distinguished; and *Edmonton Street R. W. Co. v. Grand Trunk Pacific R. W. Co.* (1912), 7 D. L. R. 888, referred to.