Privy Council Appeal No. 109 *of* 1924.

Aristide Ouellette - - - - - - - - *Appellant*

v.

The Canadian Pacific Railway Company - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 30TH MARCH, 1925.

Present at the Hearing:

VISCOUNT HALDANE.
LORD DUNEDIN.
LORD SHAW.
LORD PHILLIMORE.
LORD DARLING.

[*Delivered by* LORD SHAW.]

The respondent Company operates a line of railway running through Hull near Ottawa in the Province of Ontario. The line crosses, at rail level, St. Florent Street of the former town. The level crossing is open, without protecting gates or guard.

On the afternoon of the 31st August, 1922, two children of the appellant, 10 and 13 years of age, were riding in a Ford motor lorry, driven by one Bertrand, when an accident took place at the level crossing. Two engines and tenders of the respondent Company, coupled together and running backwards—that is to say, with the tender of the foremost engine being pushed on ahead—ran into the lorry and the appellant's children were killed.

The evidence is voluminous, but the admissions made in the argument sufficiently raise the point of law. These admissions were (1) that the foremost of the two engines was, besides, of course, shoving on its tender before it, pulling the hindmost

engine and tender; and (2) the driver and stoker of the foremost engine were prevented by the tender in front of it from seeing the lorry on the crossway until after the tender had struck it.

An action for damages ensued and it was tried before Acting Chief Justice Martin and a jury. The jury found that the accident was due partly to the negligence of Bertrand, the driver of the lorry, and partly to the fault of the respondent Company " for not having a man on the back of tender." By the law of Quebec, in cases of divided responsibility the Court is allowed to divide the damages. The jury having found $3,000 damages in all, the Court accordingly awarded one half against Bertrand and one half against the Railway Company.

The Railway Company moved the Court that, notwithstanding the verdict, the action should be dismissed on the grounds, *inter alia*, that " there was no legal obligation on the part of the defendant to have a man at the end of the tender," and that the absence of a man on the front end of the tender was not " a fault in law." The Trial Judge dismissed the motion and entered judgment against the Railway Company for $1,500.

The Company, being still dissatisfied, appealed to the Court of King's Bench for the Province of Quebec (Appeal Side). That Court, consisting of five learned Judges, unanimously dismissed the appeal.

The Company, being still dissatisfied, appealed to the Supreme Court of Canada. Two of that Court agreed with the six Judges in the Courts below, but three of them thought otherwise, and the appeal was sustained and the action dismissed. Hence the present appeal.

The questions before the Board turn on the construction of certain sections (in particular section 310) of the Railway Act of Canada of 1919.

Section 310 (1) provides as follows :—

Trains or cars moving reversely.

310 : (1) Whenever in any city, town or village, any train not headed by an engine is passing over or along a highway at rail level which is not adequately protected by gates or otherwise, the Company shall station on that part of the train, which is then foremost, a person who shall warn persons standing on, or crossing, or about to cross the track of such railway, 1917, c. 37, s. 7.

The interpretation clause of the Act is section 2. By sub-section 34 thereof " train " includes any engine, locomotive, or other rolling stock. And by sub-section 25 :—

> " Rolling stock " means and includes any locomotive, engine, motor car, tender, snow plough, flanger and every description of car or of railway equipment designed for movement on its wheels, over or upon the rails or tracks of the Company.

If this were a train, then the foremost part of it was the back of the tender which was being pushed forward by the first engine. *De facto*, there was no man on that foremost part, and *de facto* also, as stated, there was no warning given. It was, indeed,

impossible for the engine driver or stoker of the engine to perform the duty of look-out and warning, as the tender obscured their view of the railway track and the borders thereof. It was in these circumstances therefore also impossible to take effectively those precautions which the statute plainly intended should be made for the protection of persons "standing on, or crossing, or about to cross the track" of the railway. *Prima facie*, section 310 of the statute had been disobeyed, and the protection it was meant to afford to citizens in their foot and vehicular passage at the level crossing was not afforded; the fatal results ensued; and the Company's responsibility is plain. This would be so unless the section really provides something different from what its words in ordinary use mean.

The respondent Company, however, maintains that there was no obligation to put a man upon the foremost part of the train, namely, the tender, first because the two engines with their tenders did not constitute a "train," and, secondly, because "engine" includes "tender," and the man on the engine was therefore on the tender, and the engine was in the front, and those on the engine, whether they could see forward or not, were on the foremost part of the train. The majority of the learned Judges of the Supreme Court have upheld these contentions. Their Lordships, having carefully perused the opinions, are unable to agree. On the contrary, they agree with the two learned Judges of the minority and with the judgments of the six learned Judges of the Court below.

The argument for the respondent Company, of course, depended upon the construction of the sections of the statute referred to. That construction was approached from two points of view, namely, first, from the point of view of the words themselves in their ordinary meaning, and, second, from the point of view of these words according to the light thrown upon them by the context and also in particular by previous railway legislation.

(1) Was this a train?

Their Lordships think it was. They cannot agree with the view that to constitute a train there must be cars attached to the engine. Sub-section 34 says plainly that a train includes any engine, locomotive, or other rolling stock, and rolling stock comprehends a large list of things and of equipment "designed for moving on its wheels." According to the argument there might have been a long string of locomotives, engines, motor cars, tenders, snow-ploughs, flangers, and other equipment upon wheels, but all that would not have been a train unless there had been cars there. In the result this would make the level crossing on the track traversable by all that class of vehicles without look-out and without warning, and with all the concomitant dangers accordingly to the public at the crossing, and this on the ground that the accidents were caused by railway stock in motion, drawn or pushed by engine power, but that such accidents were not caused by a train. Their Lordships disagree with these views.

Secondly, the Company insists that, on a proper construction of the section, a tender is not something which can be separately considered, but is simply part of the engine, and that accordingly, whether the engine goes first and its driver and stoker have a clear view and the tender is behind them, or whether the tender goes first and obscures the view of the driver and stoker, comes to all the same thing. It is simply, so it is argued, one engine, and whether it be going with its tender in front or behind, being just an engine, it must be always held to be leading its train.

The argument is answered by a simple reference to sub-section 25 defining rolling stock. In it the engine is treated as one thing in a considerable enumeration of things, and the tender is treated as another thing. But the next point upon section 310 is that it does not deal with engines or tenders as such in this provision protective of the public and passengers on the track. It deals with the point as to a proper look-out and warning by a person who is to be stationed, not upon the engine named as such, or the tender named as such, but upon "that part . . . which is then foremost."

It need hardly be remarked that, for practical purposes, which are as just stated, protective and remedial, the section would, as already indicated, entirely fail if it was to be so construed that the foremost part of the train, manifestly chosen as the proper part for look-out and warning, was to be treated as a part from which such look-out and warning were impossible.

Their Lordships are of opinion that the section should not be so construed, and they agree with the learned Judges of the minority in the Supreme Court, that a construction of the words which would go far to impair their protective and remedial character is distinctly contrary to the manifest intention of the Canadian legislature. They desire to add that in the opinion of the Board the words of the section are not doubtful or ambiguous, but are, for all practical purposes, quite clear. Their Lordships incline to the view that this would also have been the opinion of the learned Judges of the majority had it not been that they thought that they were moved by a comparison of the language of the section with that employed in previous legislation.

Such a reference to previous legislation may be forced upon a Court by reason of the ambiguity employed in the use of terms which the mind could not readily grasp without a previous preliminary interpretation. But it is always a process of construction which is accompanied with much danger. In the view of the Board there was no need to resort to such a method in the present case for the simple reason thus put by the learned Malouin J. :—

> "Le legislateur est presumé avoir voulu dire ce qu'il exprime et le juge ne peut chercher en dehors du texte de la loi son intention quand le texte est clair et ne prête à aucun doute."

It is important that the results of the labours in Canada of bringing

the law compendiously up to date whether these may be characterised by the term "revision" or "codification" should be not impaired by the danger alluded to. As Lord Halsbury said in *The Bank of England* v. *Vagliano Brothers*, [1891] A.C. 107, a well-known case dealing with the construction of the language employed in the English Bills of Exchange Act :—

> "It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that, where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code another law prevailed."

It is true that, when such comparison is entered upon, quite a variety of changes of expression may occur. This is not unnatural. As is remarked by the learned Idington J. :—

> "And a remarkable feature of the contention is that the plain meaning of the words are to be given another meaning because some words used in an old Act were dropped out, when such changes as made were obviously part of a revision of the entire legislation relative to railways, and intended to make clearer the law and improve in many respects by eliminating useless verbiage."

But the danger of error would become acute if once presumption were to be made that because there was a difference of expression, therefore it must necessarily follow that there was meant to be a difference of the law. The words actually employed must stand for interpretation as they are found unaffected by any such presumption. In the present case their Lordships' reference to previous legislation was not required, there being no confusion or ambiguity to remove.

Their Lordships, however, out of respect to the learned Judges, have considered the change of language upon which they found. The predecessor of section 310 of the present Railway Act was section 276 of Chapter 37 of the Revised Statutes for Canada of 1906. That section was in these words, viz. :—

> "Whenever in any city, town or village any train is passing over or along a highway rail level, and is not headed by an engine *moving forward in the ordinary manner*, the company shall station on that part of the train, *or of the tender, if that is in front*, which is then foremost, a person who shall warn persons standing on, or crossing, or about to cross the track of such railway."

The words which are italicised have been omitted in the present statute. The omission having taken place, the section is less cumbrous, and effects the very same object of protection of pedestrians and others using level crossings in a town, just the same as before. It can never be suggested that the legislature intended to remove a manifest protection to the public, without plainly saying so, but as an inference arising from a comparison of statutory texts. To take the instances alluded to by the learned judges in the majority in the Court of Appeal: If a train is not headed by an engine, then the company is to station on the

foremost part of the train persons to warn those standing on or crossing the track. This applies clearly to the case where the tender is that part of the train which is then foremost, and if the tender is the foremost part of the train, which it undoubtedly is, there was no occasion, as in the old statutes, for mentioning the tender at all if that was in the front, because the tender, of course, is the part of the train foremost at any rate. If the engine was not moving forward in the ordinary manner, that is to say, was backing, then, of course, it was shoving the train or the tender in front of it. It had the foremost part of the train in front of it, namely, the tender, and the whole of those words italicised were unbusinesslike and surplusage as compared, so the legislature might have thought, with the far-better-expressed section 310 of the latest revision.

In their Lordships' opinion this train was headed by a tender—properly so called—and not by an engine. It was therefore not a train to be excused from the conditions prescribed by the Railway Act of Canada, 1919, section 310 (1).

Did the legislature of Canada really intend, by the readjustment of the forms of expression as stated, to impair or undo the warning and protection given to the public at level crossings in towns and villages in Canada? It is, in their Lordships' opinion, in the last degree unlikely that any such intention could have been entertained, nor was it carried out. Of course, if the words "on a reasonable construction" could not mean anything else, a Court would be bound to accept such a result, however unexpected and lamentable, but upon a sound construction of the words they think that the jury were rightly advised and they agree with the opinion of the eight Judges in the Courts below and think that the argument for the respondents is erroneous.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed with costs in the Courts below, and with such costs of this appeal as are in practice awarded to parties appearing in *formâ pauperis*.

In the Privy Council.

ARISTIDE OUELLETTE

v.

THE CANADIAN PACIFIC RAILWAY COMPANY

DELIVERED BY LORD SHAW.

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