THE JOHN GOODISON THRESHER COMPANY (PLAINTIFFS) ..... APPELLANTS;

AND

THE TOWNSHIP OF McNAB (DEFENDANT) ..... RESPONDENT.

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*Nov. 29, 30.
*Dec. 23.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Statute—Construction—Ontario "Municipal Act"—Bridges—Crossing by engines—Condition precedent—R.S.O. (1897) *c.* 242—3 *Edw. VII. c.* 7, *s.* 43—4 *Edw. VII. c.* 10, *s.* 60.

R.S.O. (1897) ch. 242, as amended by 3 Edw. VII. ch. 7, sec. 43, and 4 Edw. VII. ch. 10, sec. 60, provides as follows:—

"10. (1) Before it shall be lawful to run such engine over any highway whereon no tolls are levied, it shall be the duty of the person or persons proposing to run the same to strengthen, at his or their own expense, all bridges and culverts to be crossed by such engines, and to keep the same in repair so long as the highway is so used.

"(2) The costs of such repairs shall be borne by the owners of different engines in proportion to the number of engines run over such bridges or culverts. R.S.O. 1887, ch. 200, sec. 10.

"(3) The two preceding sub-sections shall not apply to engines used for threshing purposes or for machinery in construction of roadways of less than eight tons in weight. Provided, however, that before crossing any such bridge or culvert it shall be the duty of the person or persons proposing to run any engine or machinery mentioned in any of the sub-sections of this section to lay down on such bridge or culvert planks of such sufficient width and thickness as may be necessary to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine or machinery; and in default thereof the person in charge and his employer, if any, shall be liable to the municipality for all damage resulting to the flooring or surface of such bridge

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

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or culvert as aforesaid. 3 Edw. VII. ch. 7, sec. 43; 4 Edw. VII. ch. 10, sec. 60."

Held, affirming the judgment of the Court of Appeal (19 Ont. L.R. 188), Fitzpatrick C.J. and Girouard J. dissenting, that the strengthening of a bridge or laying of planks over it is a condition precedent to the right to run an engine over the same, and any engine crossing without observing such condition is unlawfully on the bridge and liable for injury resulting therefrom.

Held, also, Fitzpatrick C.J., and Girouard J. dissenting, that planks required by sub-sec. 3 over a bridge or culvert were not intended merely to protect the surface from injury by contact with the wheels of the engine or machinery passing over it, but was also to guard against the danger of the flooring giving way.

APPEAL from a decision of the Court of Appeal for Ontario(1) reversing the judgment of a Divisional Court by which the verdict for the plaintiffs at the trial was maintained.

The issues raised for decision on the appeal are sufficiently stated in the above head-note.

Robinette K.C. and *J. M. Godfrey* for the appellants.

William White K.C. and *W. M. Douglas K.C.* for the respondent.

THE CHIEF JUSTICE (dissenting).—I am of opinion that this appeal should be allowed for the reasons stated by Chief Justice Moss.

GIROUARD J. (dissenting) was of the opinion that the appeal should be allowed.

DAVIES J.—This was an action brought against the defendant municipality for damages sustained by reason of a traction engine less than 7 tons in weight be-

(1) 19 Ont. L.R. 188.

longing to the plaintiff falling through a bridge of the appellant municipality which was alleged to have been so insufficiently constructed as not to have been able to carry such traction engine safely across.

The defendant municipality counterclaimed for damages caused to the bridge by the illegal and improper action of the plaintiff in attempting to take the engine across the bridge without complying with the statutory requirements in that regard.

Both here and in the Court of Appeal the case was argued upon the findings of facts of the trial judge which were accepted by both parties. These findings so far as they are necessary to refer to in the view I take of the case were that the stringers of the bridge were inadequate to carry the weight (about four tons) that would come upon them from the rear wheels of the engine in question, but that the use of planks as required by the statute when taking such an engine across the bridge would have added to the sustaining power of the stringers sufficiently to have enabled them to have carried the weight of the engine in safety.

The trial judge and a minority of the Court of Appeal held that the provisions of the statute were intended simply as a means for the protection of the surface of the bridge, and not for the purpose of strengthening its carrying capacity, and that failure to comply with these requirements in such a case as this did not relieve the municipality from what would otherwise be its responsibility.

The judgment of the majority of the court was to the effect that compliance with the conditions set forth in the proviso of the statute was in the nature of a condition precedent to the user of the bridge by such

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traction engine, and that failure to comply with them before and when taking the traction engine across, made such user an unlawful one.

The statute referred to is chapter 242 of the Revised Statutes of Ontario, 1897, as amended by 3 Edw. VII. ch. 7, sec. 43, and 4 Edw. VII. ch. 10, sec. 60.

Section 10 of the said Act as amended provides as follows:

> 10 (1) Before it shall be lawful to run such engines over any highway whereon no tolls are levied, it shall be the duty of the person or persons proposing to run the same to strengthen, at his or their own expense, all bridges and culverts to be crossed by such engines, and to keep the same in repair so long as the highway is so used.
>
> (2) The costs of such repairs shall be borne by the owners of different engines in proportion to the number of engines run over such bridges or culverts. R.S.O. 1887, ch. 200, sec. 10.
>
> (3) The two preceding sub-sections shall not apply to engines used for threshing purposes or for machinery in construction of roadways of less than eight tons in weight. Provided, however, that before crossing any such bridge or culvert it shall be the duty of the person or persons proposing to run any engine or machinery mentioned in any of the sub-sections of this section to lay down on such bridge or culvert planks of such sufficient width and thickness as may be necessary to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine or machinery; and in default thereof the person in charge and his employer, if any, shall be liable to the municipality for all damages resulting to the flooring or surface of such bridge or culvert as aforesaid. 3 Edw. VII. ch. 7, sec. 43; 4 Edw. VII. ch. 10, sec. 60.

The conclusion I have reached is that the construction of the statute by the majority of the Court of Appeal was the right construction, that the provisions of sub-section 3 as to the precautions to be taken by the person in charge of the traction engine before taking it across the bridge were obligatory and a condition precedent to the right to take the engine across, and not having been observed the engine was on the bridge unlawfully.

The intention of the statute, so far as engines eight

tons in weight and over are concerned, is clear beyond dispute. The persons in charge must, before crossing the bridges and culverts, strengthen them at their own expense to enable them to bear safely the weight of such engines. The third sub-section, while declaring that these provisions should not apply to engines used for threshing and other defined purposes of less than eight tons in weight, went on to provide other duties and obligations which were to be observed as well by these special classes of engines if they were taken across bridges or culverts as by any other engines. It says *before crossing* any such bridge or culvert it shall be the duty of the person in charge of the engine to lay down planks, etc. No language could be stronger or clearer. But it is contended that the object of this planking is further on clearly set out, that it has nothing to do with the strengthening of the bridge, and that its neglect in view of the finding of the trial judge with regard to the inadequacy of the stringers of this bridge to carry the weight which the rear wheels of the engine brought to bear on them is of no importance.

The argument is weighty and there is no doubt the language of the proviso is not as apt and clear as it might well have been.

I do not agree, however, with the contention that the object of the proviso was simply and only the protection of the surface of the bridge from being injured. The proviso went much further than that, and was, to my mind, clearly intended to protect the planks of the bridge from being broken through by reason of the great weight (some four tons in the case of the engine in question), which the rear wheels, if they passed directly over the planks, would necessarily bring

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to bear on them with all the possible consequences which might follow, and so it stipulated as a condition of the crossing of the bridge by any such engine for the laying down of these longitudinal planks, along and over which the engine wheels should pass. The obvious effect of these longitudinal planks would be by distributing the weight carried not only to protect the surface of the flooring from being torn, worn or scratched, but to minimize the danger of the planks of the flooring being broken through by the enormous weight to which they would be subjected if the wheels passed over them in direct contact with them. These provisions and statutory obligations placed upon the engine driver before using the bridge were conditions precedent to the right of user, and were obligatory upon him. Their primary object may have been the protection of the surface of the flooring of the bridge or culvert from injury, but that was not their only object, as I have shewn. Compliance with these statutory conditions incidentally strengthened the bridge's carrying power and the special finding in the case before us is that if observed it would have so strengthened the bridge in question as to have prevented the accident.

The two findings must be read together. That which holds the stringers of the bridge to have been inadequate to bear the weight of the engine when carried over the bridge without compliance with the statutory conditions is neutralized by the holding that compliance with the conditions would have ensured safety.

I would dismiss the appeal with costs.

IDINGTON J.—I am, with great respect, unable to comprehend how a man can recover damages suffered

by him from doing that in an illegal manner which if done in a legal manner would have caused him no injury.

The finding of fact that if the bridge in question had had the planks laid upon it by appellant as required by the statute, it would have been of sufficient strength to have ensured safety, seems to me to be an impassable barrier to the appellant herein.

I think the statute clearly prohibits any use of such bridges for the purpose attempted by appellant, unless and until the provisions of the statute are complied with. It seems idle to argue, as persistently pressed upon us, that the object of the legislature was merely to preserve to the municipality a right of action instead of preserving a bridge for the public use.

Some practical men in the legislature understood quite well what they were about in this regard, even though it did take some time in a struggle extending over a great many years preceding the various amendments to the "Act to authorize and regulate the use of traction engines on the highways," to get this indifferent expression of a duty that they well understood was needed to be imposed in prohibitory terms.

The amendment, it may be observed, relates to culverts as well as bridges. It would entail needless expense to make all these safe for an eight-ton load likely to be needed only once or twice a year, when a simple and not very burdensome measure of precaution on the part of those to be so served, at such rare intervals, might avoid that expense.

I agree so fully with the reasoning of Mr. Justice Garrow that I need not enlarge further here, merely to repeat what is well stated.

Yet I may be permitted to add that it may be a

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question whether or not negligence, as American authorities have it, is as accurately descriptive of the legal barrier in appellant's way as to say simply that what was done being illegal, therefore appellants doing it directly led to its injury, and hence that there is no foundation for its action.

The appeal should be dismissed with costs.

DUFF J.—I think the action should be dismissed because I think the findings of the learned trial judge shew that *mishap* was caused by the failure of the plaintiffs' servants to perform the conditions under which alone they were entitled to take the engine upon the bridge. The question presented turns, in my judgment, upon the effect to be given to the phrase "flooring or surface" in the context in which it is found. The view of the learned trial judge was that the object of the enactment was to provide protection for the surface of the platform constituting the travelled highway against injury by contact with the wheels of vehicles of the kind dealt with; and that in the phrase quoted "flooring" adds nothing to the meaning conveyed by "surface."

The phraseology used to describe the injury which the bridge is to be protected against ("injury" * * "from the contact of the wheels") does undeniably suggest that the legislature had the protection of the surface very clearly in its view and desired to emphasize it. The question, however, at this point is: Can the object of the section be taken to be limited to that? Are we really justified in treating "flooring or surface" as equivalent to the surface of the flooring?

The construction put forward by the appellant mainly rests upon the words "caused by the contact with the wheels." But the statute is not making provi-

sion against the effects of mere contiguity of the surface of the wheels with that of the floor; the contact contemplated is that of wheels resting or moving upon the bridge and carrying the weight of the engine; and it is every injury arising from contact in such circumstances that is provided against. Let us suppose boards broken by a smooth-wheeled engine; why is that a kind of injury not within this language? To hold so would effect the obliteration of the word "flooring"; are we justified in obliterating it? The legislature might be justly concerned with protecting the surface of such floors from defacement. But why not also in protecting the boards and the frame supporting them from breaking under the strain of a heavy load. One can quite understand the legislature assuming that the main superstructure of bridges would be sufficient to support such a weight; but the fact that they have done so affords no basis for presuming an intention to expose every bridge floor in the province to the same test. While, no doubt, the section presents an inviting field for controversy, I do not think the doubtful phrases relied upon afford a satisfactory ground for refusing to attribute their full significance to the concluding words "for all damage," etc.

The meaning of the word "flooring" as applied to a bridge is indicated clearly in the following passages and unquestionably in the absence of a controlling context includes such longitudinal joists as that which gave way in the accident in question here:

> The timber frame-work of floors is called "naked flooring." It is of three kinds—single, double and framed. Single flooring consists of a series of joists stretching across the whole void from wall to wall, without an intermediate support. The flooring boards are laid on the top of these, and the ceiling of the lower story fixed to the under

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side. Double flooring consists in laying binding joists across the floor about six feet apart, crossed above by bridging joists, and also crossed below by the ceiling joists. Framed flooring is provided with girders or beams in addition to the binding, bridging and ceiling joists. 3 Encyclopædia Americana "Carpentry."

The flooring is so arranged as to constitute a platform adapted to the character of the traffic carried over it, and forms a subsidiary part of the superstructure; but the main superstructure is that which carries the distributed weight of the floor and its load, transferring it to the supports on either side. 2 Nelson's Encyclopædia, p. 287.

Double flooring (see Plate XXIV., fig. 8, Nos. 1 and 2, and Plate XXV., fig. 3) consists of three distinct series of joists, which are called binding, bridging and ceiling joists. The binders in this are the real support of the floor; they run from wall to wall, and carry the bridging joists above and the ceiling joists below them. Binders need not be less and should not be much more than 6 feet apart, that is, if the bridging or flooring joists are not inordinately weak. 4 Ency. Brit., p. 482.

In this view it is not necessary to consider many of the questions that occupied a good deal of attention at the argument.

Appeal dismissed with costs.

Solicitors for the appellants: *Cowan & Towers.*

Solicitor for the respondent: *J. E. Thompson.*