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*Oct. 21, 22.

Dec. 9.

EDWARD WASHINGTON (PLAINTIFF)..APPELLANT;

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) .... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railways—Statute, construction of—51 *V. c.* 29, *s.* 262 *(D.)—Railway crossings—Packing railway frogs, wing-rails, etc.—Negligence.*

The proviso of the fourth sub-section of section 262 of "The Railway Act" (51 V. c. 29 (D).) does not apply to the fillings referred to in the third sub-section and confers no power upon the Railway Committee of the Privy Council to dispense with the filling in of the spaces behind and in front of railway frogs or crossings and the fixed rails of switches during the winter months.

Judgment of the Court of Appeal for Ontario (24 Ont. App. R. 183) reversed.

APPEAL from the judgment of the Court of Appeal for Ontario (1) reversing the judgment of Mr. Justice Street in the High Court of Justice and dismissing the plaintiff's action with costs.

This action was tried before Mr. Justice Street and a jury at Hamilton on the 11th of May, 1896. The

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 24 Ont. App. R. 183.

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jury answered the questions submitted favourably to the plaintiff and assessed damages at $2,500. The learned trial judge reserved judgment on the findings of the jury, and on the motion of the defendants' counsel for a non-suit until the 29th day of May, 1897, when he directed judgment to be entered for the plaintiff for $2,500 and costs. On an appeal by the defendants the Court of Appeal for Ontario set aside the judgment and verdict and dismissed the action with costs.

The plaintiff was a yardman in the employ of the defendants and on the morning of the 16th January, 1896, was engaged in coupling cars forming part of a freight train in defendants' yard at Hamilton. While coming out from between two cars which he had just coupled his foot caught in a frog or between a wing-rail and frog-rail and he was thrown down, a car passing over and severing his right arm. The grounds of negligence alleged so far as material to be stated, are:—That the defendants had neglected to pack the space between the rails in the railway frog over which the cars were passing and in which plaintiff's foot was caught, as required by the Workmen's Compensation for Injuries Act (1), and the Railway Act (2), thus permitting a defective condition or arrangement of the ways, works, machinery, plant or premises connected with or intended for or used in the defendants' business. The defendants denied negligence and pleaded that the Railway Committee of the Privy Council, in pursuance of the powers conferred by section 262 of The Railway Act, by an order made in November, 1889, allowed them to omit the packing or filling of frogs and of the spaces between wing-rails and frogs and between guard-rails and fixed rails from

(1) 49 V. c. 28 s. 4 (Ont.); 55 V. c. 30 s. 5 (Ont.) (2) 51 Vict. ch. 29 s. 262 (D.)

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the month of December to the month of April in each year and directed that such order should be permanent, and that the order was in force at the time that the accident happened between the months of December and April when the packing was lawfully left out of the frogs, etc. The plaintiff contended that the Railway Committee had no power to dispense with the filling of the frogs, etc., during the winter months.

At the trial the following questions were left to the jury:—1. Was the plaintiff's foot caught in the frog or between the wing-rail and the frog-rail? 2. Were the defendants guilty of any negligence which led to the accident? 3. If so, in what did such negligence consist? The jury answered that the plaintiff's foot was caught in the frog; that defendants were guilty of negligence in not having the frog packed or protected; and they assessed the damages at $2,500, for which sum judgment was entered. A verdict entered for appellant was affirmed by the Divisional Court but set aside by the Court of Appeal.

Staunton for the appellant. The respondents are required to have their frogs filled with packing all the year round by section 262 of the Railway Act. The Railway Committee had no authority to dispense with the packing required by sub-section three in the spaces behind and in front of frogs or crossings, and between the fixed rails of switches where such spaces are less than five inches in width. The application of the proviso of the fourth subsection is limited to the filling specially mentioned in that clause, namely, in the spaces between any wing-rail and any railway frog, and between any guard-rail and the track-rail along the side of it at their splayed ends. These words must be read in their ordinary sense as written. *Grey* v. *Pearson* (1); *Thelluson* v. *Rendlesham* (2), at

(1) 6 H. L. Cas. 61; 26 L. J. Ch. 473. (2) 7 H. L. Cas. 429.

page 519; *Lowther* v. *Bentinck* (1), at page 169; *Leader* v. *Duffey* (2) at page 301; *Re Hamlet* (3), at page 435. Beale, Legal Interpretation, p. 236; Abbott's Railway Law of Canada, p. 394.

McCarthy Q.C. for the respondents. The sub-sections of the statute must be read together as paragraphs relating to a common subject. Maxwell (3 ed.) pp. 59, 74; Hardcastle (2 ed.) 238. Even sub-heads have been doubted to create distinctions. *Union Steamship Co.* v. *Melbourne Harbour Trust Commissioners* (4); *Hammersmith Railway Co.* v. *Brand* (5); *Eastern Counties, etc., Railway Co.* v. *Marriage* (6).

The respondents have neglected no duty under the Dominion Railway Act, and there is no right of action against them here under that Act. The order of the Railway Committee in any event affords a good defence. *Rex.* v. *Newark upon Trent* (7); *Cohen* v. *The South Eastern Railway Co.* (8), at page 260; *United States* v. *Babbit* (9). *Ex parte Partington* (10).

The judgment of the court was delivered by:

SEDGEWICK J—The only question involved in this appeal is as to whether the proviso at the end of sub-section 4 of section 262 of the Railway Act (Canada), 51 Vict. ch. 29, applies not only to the sub-section in which it is placed but to sub-section 3 as well. If the proviso is confined to sub-section 4 alone then the appeal must be allowed and the trial judgment restored, otherwise the appeal fails.

The whole section above referred to is as follows:

(1) L. R. 19 Eq. 166.
(2) 13 App. Cas. 294.
(3) 39 Ch. D. 426.
(4) 9 App. Cas. 365.
(5) L. R. 4 H. L. 171.
(6) 9 H. L. Cas. 32.
(7) 3 B. & C., 59, 71.
(8) 2 Ex. D. 253.
(9) 1 Black, U. S. R. 55.
(10) 6 Q. B. 649.

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262. This section shall apply to every railway and railway company within the legislative authority or jurisdiction of the Parliament of Canada.

2. In this section the expression "packing" means a packing of wood or metal, or some other equally substantial and solid material, of not less than two inches in thickness, and which, where by this section any space is required to be filled in, shall extend to within one and a half inches of the crown of the rails in use on any such railway, shall be neatly fitted so as to come against the web of such rails, and shall be well and solidly fastened to the ties on which such rails are laid.

3. The spaces behind and in front of every railway frog or crossing, and between the fixed rails of every switch where such spaces are less than five inches in width, shall be filled with packing up to the underside of the head of the rail.

4. The spaces between any wing-rail and any railway frog, and between any guard-rail and the track-rail alongside of it, shall be filled with packing at their splayed ends so that the whole splay shall be so filled where the width of the space between the rails is less than five inches, such packing not to reach higher than to the underside of the head of the rail: Provided however that the Railway Committee may allow such filling to be left out from the month of December to the month of April in each year, both months included.

5. The oil cups or other appliances used for oiling the valves of every locomotive in use upon any railway shall be such that no employee shall be required to go outside the cab of the locomotive, while the same is in motion, for the purpose of oiling such valves.

There can be no question but that in Canadian legislation the numbers of sections and sub-sections are constituent parts of an Act. It often happens that one section of an Act refers to another section by its number, and it would in that case be absurd to say that the numbering formed no part of the Act. It must necessarily be deemed a part of the Act, otherwise no effect can be given to a provision of that kind. Notwithstanding the general rule that the title of an Act forms no part of it, we were compelled in a case in this court to hold that owing to the form which the enactment took in that particular case, even its title was part of it. *O'Connor* v. *Nova Scotia Telephone*

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Co. (1). A Bill passing through the legislature is invariably divided into sections. These sections are before Parliament during every stage of legislation and must be taken to have a legislative effect.

The question then is, does the "filling" mentioned in the proviso extend to the "filling" referred to in sub-section three as well as in sub-section four?

There can be no doubt that according to the grammatical construction of sub-section four the proviso is confined to that sub-section alone. It is in fact admitted that *primâ facie* the proviso is so limited, but it was agreed that the legislature must necessarily have intended that it should take a wider scope and include all kinds of filling prescribed by the whole section. Now, it is an elementary principle that the grammatical or ordinary sense of words used in a statute are to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the statute, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that inconsistency and absurdity, but no further. *Grey* v. *Pearson* (2). In order therefore to extend the proviso beyond its *primâ facie* limits, giving its words a secondary and extended meaning in order to give effect to the presumed intention of the legislature, clear and conclusive reasons must be shown to compel us to put such a construction upon it.

Reading the whole section any one would naturally suppose that the legislature intended to distinguish between that class of filling mentioned in sub-section three, and the class mentioned in sub-section four, and that the first filling was to be a permanent fixture, and that the second might, under certain circumstances,

(1) 22 Can. S. C. R. 276. (2) 6 H. L. Cas. 61.

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be dispensed with during the winter months. There was no evidence on this point before us; it was only suggested why such a distinction should be made. I am no expert, but I can readily understand why the spaces behind and in front of a "frog" should at all times be kept filled, in consequence of its permanently dangerous character, while the intervening spaces between a guard-rail and the track-rail alongside of it may not be so dangerous, and that it may be convenient during the winter time for the purpose of more easily keeping the track free from ice and snow to permit such spaces to be open during the winter months. It is not clear to me why a distinction should be made in the case of the spaces between the fixed rails and a switch and the spaces referred to in sub-section four, but that is no reason why I should assume there is no distinction. Whatever the reason may be, if the enactment, as a matter of fact, makes it we must give effect to it. No reason has been presented which forces us to depart from the ordinary meaning of the terms employed, or to extend the proviso beyond its grammatical meaning. Clearly in a case like the present the burden of sustaining the claim for a wider construction is upon him who claims it. The burden in the present case has not been sustained.

With great deference we have to dissent from the view taken by the Court of Appeal. The error in their judgment seems to have been in the assumption that the Legislature intended to give a wider meaning to the proviso and that the whole argument was to show that there was no insuperable obstacle by reason of the words themselves to prevent that wider meaning from being given to it. In our view, in dealing with a case like the present we must begin with the words themselves giving them their grammatical,

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primary, and ordinary meaning. If it is, however, made clear that they are susceptible of a broader scope and of taking in a wider range that must be proved by circumstances and considerations imperatively forcing that conclusion upon us. These circumstances have not been shown to exist. The appeal must therefore be allowed and the original judgment restored. The appellant is entitled to costs in all the courts.

Sedgewick J.

*Appeal allowed with costs.**

Solicitors for the appellant: *Staunton & O'Heir.*

Solicitor for the respondents: *John Bell.*

*Leave to appeal from this judgment to the Judicial Committee of the Privy Council has been granted.