THE CANADIAN NORTHERN RAILWAY COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

THOMAS D. ROBINSON AND W. E. ROBINSON (PLAINTIFFS) ..... RESPONDENTS.

1910
*May 11.
*June 15.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Action—Damages—Denial of traffic facilities—Injury by reason of operation of railway—Limitation of actions—"Railway Act," 3 Edw. VII. c. 58, s. 242—Construction of statute.

Injuries suffered through the refusal by a railway company to furnish reasonable and proper facilities for receiving, forwarding and delivering freight, as required by the "Railway Act," to and from a shipper's warehouse, by means of a private spur-track connecting with the railway, do not fall within the classes of injuries described as resulting from the construction or operation of the railway, in section 242 of the "Railway Act," 3 Edw. VII. ch. 58, and, consequently, an action to recover damages therefor is not barred by the limitation prescribed by that section for the commencement of actions and suits for indemnity.

Judgment appealed from (19 Man. R. 300) affirmed, Girouard and Davies JJ. dissenting.

APPEAL from the judgment of the Court of Appeal for Manitoba (1), which affirmed the judgment of Metcalfe J., at the trial, maintaining the plaintiffs' action with costs.

The circumstances of the case are stated in the judgments now reported.

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*PRESENT:—Girouard, Davies, Idington, Duff and Anglin JJ.

(1) 19 Man. R. 300.

1910

CANADIAN NORTHERN RY. CO. v. ROBINSON.

Chrysler K.C. and *George F. Macdonell* for the appellants. The action is based upon section 294 of the "Railway Act" of 1903. No action lies under that section because the proper remedy, if any, is given section 253 of that Act. Craies' Hardcastle, 212, 213. Neither does the remedy in the case arise under the latter section because the Board's order to restore the connection was a power exercised under section 214.

The judgment appealed from should be set aside upon the following grounds: (1) The court had no jurisdiction to entertain the action: (2) It is wrong in holding that the order of the Railway Board was a finding of fact conclusive upon the court in this action: (3) There is error in the finding that the respondents were entitled to recover damages arising prior to the 19th February, 1906, the date of the first order of the Board: (4) There is error in the finding that the respondents were entitled to recover damages for the period subsequent to the 19th February, 1906, while the appeal from said order to the Supreme Court of Canada was pending: (5) It should have been determined that the cause of action sued upon was *res judicata:* (6) There is error in giving effect to the order of the Board of the 19th February, 1906, because that order was superseded and abrogated by the Board, and was waived and abandoned by the respondents by the application and proceedings which were concluded by the second order, on 22nd September, 1906: (7) The action should have been dismissed upon the ground that the claim of the respondents was barred by the limitation prescribed by section 242 of the "Railway Act" of 1903.

The following authorities are referred to as to the

enforcing of section 253 in respect to affording reasonable facilities: *South Eastern Railway Co.* v. *The Railway Commissioners*(1); *Darlaston Local Board* v. *London and North Western Railway Co.* (2); *Cowan & Sons* v. *North British Railway Co.* (3); Macnamara on Carriers, 346; *Lancashire Brick and Terra Cotta Co.* v. *Lancashire and Yorkshire Railway Co.*(4); *Perth General Station Committee* v. *Ross* (5); *Grand Trunk Railway Co.* v. *McKay*(6); *Grand Trunk Railway Co.* v. *Perrault*(7).

The claim is barred by limitation of time: See R.S.C., ch. 37, secs. 284, 306, 427; 2 Can. Ry. Cas. 383-389; *McArthur* v. *Northern and Pacific Junction Railway Co.*(8).

Construction and operation include all actions upon the statute for breach of any duty in regard to either construction or operation. Rights arising under contract are excluded. *Levesque* v. *New Brunswick Railway Co.*(9); *McCallum* v. *Grand Trunk Railway Co.*(10); MacMurchy & Denison, Railway Act, p. 480; see also cases collected in, *Zimmer* v. *Grand Trunk Railway Co.*(11); *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric Railway Co.*(12).

Nesbitt K.C. and *Hudson* for the respondents. The grounds upon which the plaintiffs rely generally are: (*a*) That an action lies for breach of a statutory duty

(1) 6 Q.B.D. 586.
(2) [1894] 2 Q.B. 694.
(3) 11 Ry. & Can. Tr. Cas. 96.
(4) [1902] 1 K.B. 651.
(5) [1897] A.C. 479, at p. 489.
(6) 34 Can. S.C.R. 81, at p. 97.
(7) 36 Can. S.C.R. 671, at pp. 677, 679.
(8) 17 Ont. App. R. 86.
(9) 29 N.B. Rep. 588.
(10) 31 U.C.Q.B. 527.
(11) 19 Ont. App. R. 693, at pp. 702-703.
(12) 10 Ont. L.R. 419, at p. 426.

1910

CANADIAN NORTHERN RY. CO v. ROBINSON.

and this right is not limited by the provisions of the "Railway Act" giving the Board of Railway Commissioners jurisdiction to make orders for the performance of specific acts; (*b*) That the finding of the Board that there was a breach of this statutory duty, is conclusive; (*c*) That the plaintiffs suffered damage; (*d*) That their claim was not barred by section 242 of the "Railway Act," 1903; (*e*) That the plaintiffs' claim for damages had not been dealt with by the Board of Railway Commissioners nor by the arbitrators.

An action lies for the breach of a statutory duty. *Groves* v. *Wimborne*(1); *Lancashire and Yorkshire Railway Company* v. *Gidlow* (2); *Davis & Sons* v. *Taff Vale Railway Co.*(3); *Crouch* v. *Great Northern Railway Co.*(4).

The plaintiffs rely on sections 253 and 294 of the "Railway Act," 1903. The Board had no power to award damages, therefore the court can entertain the action. *Duthie* v. *Grand Trunk Railway Co.*(5). If the Board could not entertain claims for damages for a breach of section 214 of the "Railway Act" of 1903, it is evident that its powers are no greater in respect of section 253. The Board is a tribunal possessing only the powers conferred upon it by statute. It was not created to supplant or even to supplement the provincial courts in the exercise of their ordinary jurisdiction, but to exercise an entirely different jurisdiction.

The cases relied on by the respondents are: *Grand*

(1) [1898] 2 Q.B. 402.
(2) L.R. 7 H.L. 517.
(3) [1895] A.C. 542.
(4) 9 Exch. 556.
(5) 4 Can. Ry. Cas. 304.

Trunk Railway Co. v. *Perrault*(1); *Perth General Station Committee* v. *Ross*(2); *Balfour* v. *Malcolm* (3), *per* Lord Campbell, at page 500. The jurisdiction of the court to award damages in the present case is not ousted.

The Board has found that there was a breach of the statutory duty, it had jurisdiction to do so, and that finding is conclusive. *Canadian Northern Railway Co.* v. *Robinson*(4). Apart from the provision of section 42(3) of the "Railway Act," 1903, the decision of the Board is that of a court of record (section 8, "Railway Act," 1903), and, on a matter once litigated between the same parties, it is conclusive. *Shoe Machinery Co.* v. *Cutlan*(5); *Lea* v. *Thursby*(6).

The plaintiffs suffered damage by reason of the defendants' refusal to supply reasonable facilities. This finding of Mr. Justice Metcalfe has not been questioned by the defendant.

The plaintiffs' action is not barred by section 242 of the statute. The provision of that section being a special limitation should be construed strictly. Abbott's Railway Law, 269; Maxwell on Statutes, 429; *Anderson* v. *Canadian Pacific Railway Co.*(7). The breach of statutory duty of which the plaintiffs here complain would not appear to be within the above section if the words therein are given their ordinary and proper meaning. The injury was not caused by construction nor by operation of the railway.

Under the old railway Acts where the words of the

(1) 36 Can. S.C.R. 671.
(2) [1897] A.C. 479.
(3) 8 Cl. & F. 485.
(4) 37 Can. S.C.R. 541.
(5) [1896] 1 Ch. 667.
(6) [1904] 2 Ch. 57, at p. 64.
(7) 17 O.R. 747.

1910

CANADIAN NORTHERN RY. CO. v. ROBINSON.

corresponding section were "by reason of the railway," it was held in a number of cases that the provisions referred only to acts of commission and not to omissions. *Reist* v. *Grand Trunk Railway Co.*(1), *per* Robinson C.J.; *North Shore Railway Co.* v. *McWillie* (2), at page 514; *Findlay* v. *Canadian Pacific Railway Co.*(3), where all the authorities are collected.

In dealing generally with actions (sec. 294, "Railway Act," 1903; sec. 427, Act of 1906) Parliament has been careful to provide for acts of omission as well as of commission. When the "Railway Act" was recast in 1903, it was divided into headings. The sections in Part VII. were put under the heading of "Construction of Railway," and of Part IX. under the heading of "Operation of Railway." Section 242 is placed at the end of the latter group. Section 253, which gives the plaintiffs their right of action, is grouped under a subsequent heading, namely, Part XI., "Tolls." The words "construction" and "operation" used in section 242, would seem to be properly applied only to rights of action arising in matters dealt with under these headings. The court should regard these headings as furnishing a key to the clauses ranged under them: *Hammersmith and City Railway Co.* v. *Brand*(4); *City of Toronto* v. *Toronto Railway Co.*(5).

The plaintiffs' claim for damages has not been dealt with before.

We also rely on: *City of Dublin Steam Packet Co.* v. *Midland Great Western of Ireland Railway Co.*(6);

(1) 15 U.C.Q.B. 355.
(2) 17 Can. S.C.R. 511, at p. 514.
(3) 2 Can. Ry. Cas. 380.
(4) L.R. 4 H.L. 171.
(5) [1907] A.C. 315.
(6) 8 Ry. & Can. Tr. Cas. 1.

1910

CANADIAN NORTHERN RY. CO. v. ROBINSON.

Girouard J.

Pickering, Phipps et al. v. *London and North Western Railway Co.*(1); *Charrington, Sells, Dale & Co.* v. *Midland Railway Co.*(2).

GIROUARD J. (dissenting).—The Railway Board has found in this case and this court has declared on a previous occasion(3), that the respondents have been deprived of reasonable railway facilities and ordered the same to be restored.

In a case like this the "Railway Act" of 1903, section 242, gives an action against the railway company to the proprietor who has been injured by its action. This action is entirely based upon this statute and I cannot conceive that it has any existence outside of its provisions. I quite agree with Mr. Justice Davies that it is outlawed or prescribed by the limitation of one year of that section.

I would, therefore, allow the appeal with costs.

DAVIES J. (dissenting).—After a great deal of consideration I have reached the conclusion that the contention of the appellants with respect to the effect of the 242nd section of the "Railway Act," 1903, prescribing a limitation for the bringing of actions for damages must be given effect to in this action.

The appellant company and its predecessors in title of the railway operated the same so far as the plaintiffs in this case were concerned by supplying them with spur-track facilities for the carriage to and from their premises adjoining the railway line of goods consigned to them and from them to others.

(1) 8 Ry. & Can. Tr. Cas. 83. (2) 11 Ry. & Can. Tr. Cas. 222.
(3) 37 Can. S.C.R. 541.

1910

CANADIAN NORTHERN RY. CO. v. ROBINSON.

Davies J.

In the autumn of the year 1904, after giving them notice of its intention to withdraw these spur-track facilities, the company tore up the spur-line and thus effectually discontinued the facilities.

In September, 1905, the respondents applied to the Railway Board for an order directing the appellant company "to replace the siding wrongfully taken up from petitioners' property," and in February, 1906, the Board made an order

> that the railway company be, and it is hereby directed to restore the spur-track facilities formerly enjoyed by the applicants for the carriage, despatch and receipt of freight in car-loads over, to and from the line of the said railway company, and the connection between such spur-track and the railway siding on the land of the applicants.

The company appealed to this court, which held that the Railway Board had, in the circumstances, jurisdiction to make the order of 1906.

In the meantime, pending the appeal, Parliament had amended the 253rd section of the "Railway Act," providing that the reasonable facilities which every railway company was required to afford under that section should include reasonable facilities for receiving, forwarding and delivering traffic upon and from those sidings or private branch railways, etc.

This amending statute came into force on 13th July, 1906, and, immediately thereafter, without waiting for the decision of this court on the appeal from the jurisdiction of the Railway Board to make the order of 1906, the respondents made a new application to the Railway Board, dated 28th July, 1906, for a restoration of their former siding track facilities. The appellants had already made an application to the Board for leave to expropriate the lands of the respondents, and the two applications were heard by the

Board simultaneously on the 22nd September, 1906, and an order granted allowing the railway company to expropriate respondents' lands, but *making it a condition of such allowance or authority* that it should, before a date in October, connect its tracks with a siding then existing on respondents' lands, and until possession should be acquired by them of respondents' lands

should operate such siding and furnish such facilities in connection therewith as are usual in the case of a private siding connection with a railway.

The railway company, on the 29th day of September, 1906, that is within one week from the making of the order, constructed the siding ordered and made the connection constructed on the private siding upon respondents' lands; and the lands of respondents were expropriated by the railway company pursuant to the leave granted.

The present action was brought on the 27th October, 1908, to recover damages by reason of respondents being deprived of reasonable and proper facilities for the receiving, forwarding and delivery of traffic between the month of November, 1904, when the sidings were removed, and the 29th September, 1906, when they were restored pursuant to the order of the 22nd September, 1906.

Many important questions were raised and argued as to the right of the plaintiffs (respondents) to recover those damages, but in view of the construction I place upon the limitation clause of the "Railway Act," 1903, section 242, it is unnecessary for me to refer to any other of them than the effect of this section.

It reads as follows:

1910

CANADIAN NORTHERN RY. CO. v. ROBINSON.

Davies J.

ACTIONS FOR DAMAGES.

All actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, or if there is continuation of damage within one year next after the doing or committing of such damage ceases, and not afterwards; and the defendants may plead the general issue and give this Act and the special Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by the authority of this Act or of the special Act. 51 Vict. ch. 29, sec. 287.

Nothing in this section shall apply to any action brought against the company upon any breach of contract, express or implied, in the carriage of any traffic nor to any action against the company for damages under any section of Part XI. of this Act, respecting tolls.

The acts complained of, the removal in 1904 of the siding track facilities and the continued operation of the railway without those siding facilities until September, 1906, when they were restored by order of the Board, are the wrongful acts of which the plaintiffs (respondents) complain.

They are acts which, in my opinion, are covered by the language of the section above quoted. They are "damages sustained by reason of the operation of the railway." I construe the words to mean and include not only the actual physical operation of the railway causing injury or damage, but the manner of operation, wrongful, illegal or improper. There can perhaps be no better example of my meaning than the concrete case we have before us.

The railway was operated at the point in question in connection with a private siding on plaintiffs' lands over which their goods were carried to and from their warehouse. The appellant company removed that siding and for nearly two years refused to restore it. They operated the road during those two years without giving the plaintiffs that which they had a right to

have, namely, the track-siding facilities. The plaintiffs applied to the Railway Board to have the siding facilities restored which, as they allege, had been "wrongfully taken away." The Railway Board having, as was maintained by this court, jurisdiction in the matter held that such sidings and connections

> and the privilege of loading cars and delivering goods for carriage on such sidings, and of receiving and unloading goods by means thereof, were facilities within the Act,

and, after reciting the circumstances connected with their removal, held that

> under all these circumstances the discontinuance of the former service seems to the Board to have been unreasonable.

They accordingly ordered their restoration.

"The discontinuance of the former service" was, to my mind, a change or alteration in the manner of operating their road by the company, and was held by the Board to have been "unreasonable." It was, as contended by the plaintiffs, a wrongful and unjustifiable change and one for which they now seek to recover damages. Damages caused by this wrongful removal of, and this wrongful refusal to restore, these siding facilities, appear to me to be clearly within the words of the section "damages sustained by reason of the operation of the road." The road was operated for years with these facilities. They were, as was held, wrongfully withdrawn, and the road continued to be operated for nearly two years without them. The plaintiffs (respondents) claim damages sustained by them by reason of these wrongful acts, the removal of the facilities and the operation of the road without them.

I agree that to deprive the plaintiffs of their right

1910

CANADIAN NORTHERN RY. CO. v. ROBINSON.

Davies J.

of action the words of the limitation clause should be so plain and unambiguous as clearly to embrace the cause of action sought to be included within them. The several cases called to our attention and which I have examined do not put the argument higher than that. They are not of much assistance further than as laying down the general rule of construction which ought to be applied to such sections.

Every case must necessarily depend upon the precise language of the statute being construed. We have no right either to limit or extend the fair, clear and reasonable meaning of the language used by any rule of construction. After all what we must do in each case is to determine what the fair, clear and reasonable meaning of the words used really is, and if we find it includes the action before us we cannot allow any supposed rule of construction to defeat the obvious and clear meaning of the language Parliament has used. In endeavouring to ascertain the scope and meaning of this 242nd section, we must not lose sight of sub-section 2, which excludes from the operation of the section

> actions brought against the company upon any breach of contract, express or implied, in the carriage of any traffic, and actions against the company for damages under any section of Part XI. of this Act relating to tolls.

It is not contended, of course, that this action falls within any of these excepted causes of action, but they afford a very good key or guide to the construction of the main section. The contention is that the words of the main section do not cover the action or conduct of the railway company in cutting off the plaintiffs' siding-track facilities, which for years they had enjoyed as part of the operation of the appellant com-

pany's railway, and in continuing to operate their road for nearly two years while withholding such facilities from the plaintiffs and thereby causing them damage. The mere withholding of their facilities unless they formed a part of the operation of the road, would not have caused any damage to plaintiffs. That damage was caused because the facilities withdrawn did form part of the general operation of the road.

For these reasons I am of opinion that these side-track facilities did form part of the operation of the railway within the meaning of those words in the section above quoted, and that the action is barred by this statute, not having been begun within one year next after the doing or committing of the damage ceased when the siding facilities were restored.

I would, therefore, allow the appeal with costs and dismiss the action.

IDINGTON J.—The facts not expressly proven but necessary to establish the respondents' right of action were all relevant to the question of jurisdiction of, and necessary to have been found as a fact by, the Board of Railway Commissioners in order to establish that jurisdiction, which we held they had to make the order relied upon by the respondents.

It seems to follow as a necessary implication beyond doubt that the facts in question have been so found within section 42 of the "Railway Act" of 1903 as between the parties hereto and hence, for the purposes of this case, conclusively established.

As to the time limit in the Act relied upon to bar this action I do not think it falls in any way one may

1910

CANADIAN NORTHERN RY. CO. v. ROBINSON.

Idington J.

look at it within the class of cases for which the limitation is provided.

The scope and purpose of the provision seem to forbid and the language does not cover it.

A long line of authorities upon many statutes establish the substantial distinction between acts of commission and omission when similar language has been used.

A suggestion put forward, by way of drawing from the exception in sub-section 2, of section 242, an argument to support the alleged bar, seems to me entirely out of harmony with the generally received idea that a statute of limitations must be clear and express, and its operation not dependent on nor to be built upon fine-spun theory or speculation.

Besides, to give full effect to the suggestion would render much of the section as a whole ridiculous when applied to other things its language covers.

The appeal should be dismissed with costs.

DUFF J.—The effect of the finding of the Board of Railway Commissioners in *The Canadian Northern Railway Co.* v. *Robinson & Son*(1), was that the removal of the spur-track in 1904 constituted a denial to the plaintiffs of their rights under section 253 of the "Railway Act" of 1903. I think, moreover, that section 427 confers a right of action for such a breach of duty on the part of the railway company.

The question remaining is whether section 306 of chapter 37 R.S.C. [1906] applies.

That section, in its present form, appeared first in the Act of 1903. The pre-existing section which this

(1) 37 Can. S.C.R. 541.

provision replaced had been the subject of much judicial discussion and of much difference of opinion. The legislature doubtless hoped by the change effected in 1903 to remove some at least of the prevailing uncertainty respecting the state of the law; but I think it a very profitless speculation to inquire into the existing state of the decisions with a view to getting light upon the meaning and effect attributed by the legislature to the language introduced in that year. We must, I think, take the section as it stands and construe its words in the light of other relevant provisions of the statute.

The view put forward by the appellants is that the section applies to any action based upon an alleged violation of any duty by the railway company in course of or in relation to the construction or operation of its works — saving, of course, the exceptions specified in the section itself. The difficulty about this construction is that there appears to be no explanation why if the legislature had meant to pass an enactment having that effect it did not use plain words to express its meaning. The words actually used suggest, I think, that the legislature was trying to express something short of this. The section provides that an essential element in the causes of action to which it applies is that the damage sued for has arisen by reason of the construction or operation of the railway. The fault of the company may be a positive act or omission but unless the action is brought in respect of damage arising by reason of such construction or operation it is outside the scope of the section.

The damages claimed here are made up of the expenses incurred and loss of business occasioned through the absence of specific facilities for shipment.

1910

CANADIAN NORTHERN RY. CO. v. ROBINSON.

Duff J.

I do not think it can be affirmed that in respect of these things the respondents would have been any better off if the railway had never been constructed or had never been in operation; and, that being so, it seems to follow that the damage in question does not strictly fall within the description

> damages or injury caused by reason of the operation or construction of the railway.

If it be said that this interpretation adheres too literally to the grammatical sense of the words used, the answer is that there appears to be no middle ground between a strict literal construction of the section and that put forward by the appellants as indicated above. To adopt the last mentioned construction would appear to be very much like rejecting words which the legislature seems to have deliberately chosen to express its meaning and substituting therefor others which it appears to have deliberately discarded.

ANGLIN J.—Three questions are raised by the appellants: the first, whether in adjudicating upon the right of the plaintiffs to the restoration of a spur-line or siding, which the defendants had removed, the Board of Railway Commissioners determined, as a question of fact, under sub-section 2 of section 253 of the "Railway Act" of 1903, that the railway company had not complied with the provisions of sub-section 1 of section 253 requiring them to

> afford all reasonable and proper facilities for the receiving, forwarding and delivering of traffic upon and from their railway;

the second, whether, if the Board in fact so determined, its finding was binding upon the Court of King's

1910

CANADIAN NORTHERN RY. CO. v. ROBINSON.

Anglin J.

Bench of Manitoba under section 42 of the "Railway Act" of 1903, and, upon proof or admission thereof, entitled the plaintiffs to a judgment for such damages as they suffered by reason of the failure of the company to fulfil this statutory duty in regard to them; and the third, whether the plaintiffs' action for such damages is or is not within section 242 of the same statute.

A perusal of the order of the Railway Board, which bears date the 19th February, 1906, with the reasons given for making it, which accompany it as part of the record in the present case, makes it clear that the Board found that the railway company had deprived the respondents of reasonable facilities; that the siding or spur, as a means of shipping and unloading goods, should be regarded as "facilities" within the meaning of the "Railway Act"; and that such facilities were reasonable and proper and such as the company should afford. The discontinuance of the facilities was further found to have been unreasonable; and on these grounds the company was ordered to restore spur-track facilities to the applicants.

The jurisdiction of the Board to make this order having been questioned, it was affirmed by this court (1). I have no doubt, having regard to the fact that the statute, 6 Edw. VII. ch. 42, section 23, which did not become law until the 13th July, 1906, that the Board intended to determine, and did in fact determine that the railway company had failed to comply with the provisions of sub-section 1, of section 253, and that its refusal of the applicants' request for the restoration of the spur-line had been wrongful.

(1) 37 Can. S.C.R. 541.

1910

CANADIAN NORTHERN RY. CO. v. ROBINSON.

Anglin J.

Unless such a finding of the Railway Board is conclusive in a subsequent action brought to recover damages sustained by reason of the very fact so found, I am unable to appreciate the meaning or effect of the provisions of section 42 (now section 54 of R.S.C. ch. 37). Section 253(2) (now section 318 of R.S.C. ch. 37) expressly provides that the Board may determine as a question of fact whether the company has or has not afforded reasonable and proper facilities; and section 42 declares that the

> finding or determination of the Board upon any question of fact within its jurisdiction shall be binding and conclusive upon all courts.

The jurisdiction of the Board to make the order which it pronounced having been affirmed by this court, the findings of fact upon which the Board based its adjudication must be held to have been made within its jurisdiction and they were properly accepted in the provincial courts as conclusive.

There remains the question of the applicability of the limitation provision contained in section 242 of the "Railway Act" of 1903 upon which counsel for the appellants relied in argument. This action for damages was not brought until the 27th of October, 1908. At that time the revised statute of 1906, ch. 37, which had replaced the "Railway Act" of 1903, was in force and, as a provision relating to remedies and procedure, section 306 of the later Act, which corresponds substantially with section 242 of the Act of 1903, would, if otherwise applicable, govern this action, notwithstanding the fact that the major part of the damages sued for was sustained before the date when it became law.

The spur-track facilities were restored to the plaintiffs on the 29th September, 1906, and service was

1910

CANADIAN NORTHERN RY. CO. v. ROBINSON.

Anglin J.

thereafter supplied to them. The order of the Board for the restoration of the spur had been made on the 19th February, 1906, and its jurisdiction was affirmed by this court (1) on the 10th of October, 1906. Whether the plaintiffs' cause of action was complete and the statutory limitation, if applicable, commenced to run from the date when the damage sustained by the plaintiffs ceased (the 29th September, 1906), or, as argued by counsel for the respondents, a conclusive finding by the Railway Board of the fact that there had been a violation of the statute should be deemed a condition precedent to the plaintiffs' right to sue and their cause of action should therefore be deemed not to have been complete until the final adjudication in this court on the 10th of October, 1906 — considerably more than a year had elapsed from either date before this action was begun. Therefore, if section 306 of the revised statute applies, it affords a defence to the plaintiffs' claim.

So far as material it reads as follows:

306. All actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, or, if there is continuation of damage, within one year next after the doing or committing of such damage ceases, and not afterwards.

2. In any such action or suit the defendants may plead the general issue, and may give this Act and the special Act and the special matter in evidence at the trial, and may prove that the said damages or injury alleged were done in pursuance of and by the authority of this Act or of the special Act.

3. Nothing in this section shall apply to any action brought against the company upon any breach of contract, express or implied, for or relating to the carriage of any traffic, or to any action against the company for damages under the following provisions of this Act, respecting tolls.

During the argument I was somewhat impressed by the contention that the exceptions in sub-section 2, of

(1) 37 Can. S.C.R. 541.

1910

CANADIAN NORTHERN RY. CO. v. ROBINSON.

Anglin J.

section 242, of the "Railway Act" of 1903 (now sub-section 3, of section 306) — particularly that in regard to actions

for damages under any section of Part XI. of this Act respecting tolls

— indicate that sub-section 1 should receive a construction which would make it applicable to this case. But a closer study of the excepting sub-section has satisfied me that it does not support this view. The exception in regard to actions founded on contract is merely declaratory of the construction put upon a corresponding provision of the earlier railway Acts in a long series of decisions. There may have been some fear that any actionable injury or damages occasioned by breach of any duty imposed by the sections respecting tolls might possibly be deemed to have been sustained by reason of the operation of the railway notwithstanding that those sections are not found under the heading "operation." It may, for this reason, have been thought advisable to make an express exception, so that there could be no room to question the intention of Parliament to exclude from sub-section 1 claims arising from breaches of the sections respecting tolls. The presence of these exceptions, therefore, does not, in my opinion, suffice to justify giving to the language of sub-section 1 a wider effect than its literal meaning imports.

In answer to the plea of the statute counsel for the respondents urged —

(1) That because their claim for damages arose under section 253, which was contained in Part XI. of the "Railway Act" of 1903, this case falls within the latter exception in sub-section 2, of section 242;

(2) That by reason of the words, "after the *doing*

or *committing* of such damages ceases," and of the words,

may prove that the same *was done* in pursuance of and by the authority of this Act or of the special Act,

failure to perform a duty imposed by the statute, being a mere act of omission, should be held to be not within the section;

(3) That damage or injury sustained through failure to provide spur-line facilities is not

damage or injury sustained by reason of the construction or operation of the railway.

(1) The first answer made depends upon whether the adjectival phrase "respecting tolls" in sub-section 2, of section 242, should be regarded as qualifying the words "Part XI." (Part XI. is headed "Tolls") or the word "section." If it was intended to include all the provisions of Part XI. within the exception, the words "respecting tolls" were clearly superfluous. Upon an examination of Part XI. it will be found that it contained provisions respecting other matters, for instance, those in section 253 regarding facilities and those in section 272 regarding continuous carriage. Upon a proper reading of sub-section 2, of section 242, of the "Railway Act" of 1903, the phrase "respecting tolls" must, I think, be taken as qualifying the word "section," and it was actions for damages under those sections of Part XI. which respect tolls that were excepted from the limitation imposed by sub-section 1. The substitution in the present Act of the words "for damages under the following provisions of this Act, respecting tolls" — for the words "for damages under any section of Part XI. of this Act, respecting tolls" makes it quite clear that it is only actions for breaches

1910

CANADIAN NORTHERN RY. CO. v. ROBINSON.

Anglin J.

of sections relating to tolls that are excepted from the operation of sub-section 1 of section 306.

(2) Although there is authority for the view that, owing to the presence of the words "doing or committing" in sub-section 1 and "was done" in sub-section 2, of section 306, the limitation should be confined to acts of commission as distinguished from acts of omission — notably the opinions of Moss C.J.A., and that of Burton J.A., in *Kelly* v. *Ottawa Street Railway Co.*(1), particularly at the foot of page 619, and the judgments of Robinson C.J., in *Reist* v. *Grand Trunk Railway Co.*(2), and of Richardson J. in *Findlay* v. *Canadian Pacific Railway Co.*(3); there are other cases such as *Brown* v. *Grand Trunk Railway Co.*(4), which seem opposed to this view. Such English cases as *Wilson* v. *Mayor and Corporation of Halifax*(5), and *Poulsum* v. *Thirst*(6), appear to establish that the better opinion is that, notwithstanding the presence of such words as "committed" or "done," and the absence of any words equivalent to "not done," or "omitted to be done" acts of omission in breach of statutory duty might be within the protection of section 306. See also *Jolliffe* v. *Wallasey Local Board*(7); *Holland* v. *Northwich Highway Board*(8). I am, therefore, unable to accede to the view that merely because it contains the words to which I have alluded, without the addition of such words as "not done" or "omitted to be done," the application of section 306 should be confined to cases of commission as distinguished from cases of omission.

(1) 3 Ont. App. R. 616.
(2) 15 U.C.Q.B. 355.
(3) 2 Can. Ry. Cas. 380.
(4) 24 U.C.Q.B. 350.
(5) L.R. 3 Ex. 114.
(6) L.R. 2 C.P. 449.
(7) L.R. 9 C.P. 62.
(8) 34 L.T. 137.

(3) But have the plaintiffs sustained damages or injury "by reason of the construction or operation of the railway?" I have given to these words much thought and study. Read literally and according to their ordinary use they do not cover the plaintiffs' cause of action. If it had been found that they were entitled to the facilities in question because similar facilities had been accorded by the defendants to rival traders and that the latter had thereby obtained an undue or unreasonable preference or advantage over the plaintiffs (section 253) a stronger case would be made for holding that damages or injury thus sustained by the plaintiffs were caused by the operation of the railway. But that is not the case presented. Upon the order and findings of the Railway Board the case before the court is purely one of refusal or neglect of the defendants to provide for the plaintiffs facilities found to be reasonable. To say that injury thus occasioned "is caused by reason of the construction or operation of the railway" would be to construe these words as including every case of omission to fulfil a duty, the performance of which would constitute part of the construction or operation of the railway. I incline to the opinion that to so read sub-section 1, of section 306, involves an unwarranted extension of a limitation provision.

Moreover, the "Railway Act" (R.S.C. ch. 37) contains one fasciculus — sections 150-259 inclusive — of which the heading is "construction," and another set of sections — 264 to 305 inclusive — under the heading "operation." Section 306 immediately follows the latter group. This arrangement of the statute is entitled to some weight in determining the purview of sub-section 1, of section 306. The authorities upon

1910

CANADIAN NORTHERN RY. CO. v. ROBINSON.

Anglin J.

this point are collected in Craies' Hardcastle, pages 189 *et seq.* See also *City of Toronto* v. *Toronto Railway Co.* (1), at page 324. In the "Railway Act" of 1903 the relative positions of the sections corresponding with these provisions and of section 253 (now section 317) was the same. This classification affords another argument of some cogency in support of the view that actions for damages sustained through breaches of section 317 (formerly section 253) are not governed by section 306.

The exception of actions "for damages under the following provisions of this Act respecting tolls" casts some doubt on the soundness of this argument. But when we recall that such exceptions find their way into statutes often quite unnecessarily and because of sheer excess of caution, it seems obvious that too much weight may easily be given to their presence in determining the proper construction of the principal member of a section.

Parliament could so easily have expressly declared the limitation of section 306 applicable to all actions for injury or damages sustained by reason of a breach of any duty imposed by the statute, if that were its intention, that the deliberate restriction of its application to matters of "construction or operation" seems to afford a strong indication that the purpose was to confine it to matters which in the same statute are classified as matters of "construction" and of "operation." The contrast between the terms of section 306 and those of section 427 (formerly section 294), which declares, if it does not confer, the right of action, confirms this view of the proper construction of the earlier section.

(1) [1907] A.C. 315.

1910

CANADIAN NORTHERN RY. CO. v. ROBINSON.

Anglin J.

For the foregoing reasons I conclude that section 306 does not apply to this action.

I have reached this conclusion with some doubt, due to respect for the opinions of some of my learned brothers to the contrary and founded also upon the series of English decisions above referred to — especially upon *Holland* v. *Northwich Highway Board* (1), in which an omission to discharge a statutory duty was held to be within the protection of a limitation section restricting the right of recovery in proceedings for "anything *done* in pursuance of or under the authority of" the Act. But

the court before holding a claim to be barred by lapse of time must see clearly that the statute applies.

Lightwood's Time Limit on Actions, 1909, page 3. Doubts, however serious, do not justify a reversal.

I reserve for further consideration the applicability of section 306 to actions to recover damages for breaches of the provision introduced by 3 Edw. VII. ch. 42, sec. 23, as an amendment to section 253 of the "Railway Act" of 1903 which has been transferred in revision and is now found as sub-section 2, of section 284 (formerly section 214) within the fasciculus headed "operation." This provision does not apply to the present case.

With some hesitation, I concur in the dismissal of this appeal.

Appeal dismissed with costs.

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Solicitors for the respondents: *Hudson, Howell, Ormond & Marlatt.*

(1) 34 L.T. 137.