WILLIAM M. KERR AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY (DEFENDANTS ..... RESPONDENT.

1895
*Oct. 7.
*Dec. 9.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Prescription—Commencement—Continuing damage—Tortious Act—Public work—Contractor—Liability of principals for act of.

The prescription of a right of action for injury to property runs from the time the wrongful act was committed, notwithstanding the injury remains as a continuing cause of damage from year to year, when the damage results exclusively from that act and could have been foreseen and claimed for at the time.

A company building a railway is not liable for injury to property caused by the wrongful act of their contractor in borrowing earth for embankments from a place, and in a manner, not authorized by the contract.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side) reversing the portion of the judgment of the Superior Court against the defendants which was not acquiesced in.

The action was brought by the plaintiffs for compensation for injury to his property by the construction of a part of the road of the defendant company through the city of Montreal. Damages were claimed and allowed by the Superior Court on several heads of injury, all of which were acquiesced in and settled by the defendant company except one by which the plaintiffs were awarded $5,500 for the closing up of a right of way which he claimed to have enjoyed for over

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1895

KERR v. THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY.

thirty years. The company appealed from this portion of the judgment on two grounds both of which had been pleaded, namely, that the plaintiff's action, not having been taken within two years from the time the wrongful act complained of was committed, was prescribed by art. 2261 C. C. and also by the Railway Act, and that the alleged closing up of the right of way was the unauthorized act of the contractor for the construction of the road for which the company was not responsible. The Court of Queen's Bench gave effect to this latter contention and reversed the judgment of the Superior Court as to this head of damage, and also held that the amount awarded to plaintiff was not justified by the evidence and that the judgment was *ultra petita* in that said amount covered past and future damages and relieved the company from the obligation to restore the right of way which was asked by the declaration.

The plaintiff appealed from such judgment to this court.

Taylor for the appellant. The judgment of the Superior Court was not *ultra petita*. The company had the choice to restore the property or pay damages and cannot complain if the latter is ordered. *Pion* v. *The North Shore Railway Co.* (1).

The company is not relieved from liability on the ground that the wrongful act was committed by the contractor. The Railway Act entitles the plaintiff to compensation from the company for any damage sustained by the building of the road. See *Pion* v. *The North Shore Railway Co.* (1); *Morrison* v. *The City of Montreal* (2); *Wood* v. *The Atlantic & North-West Railway Co.* (3); Railway Act, 1888, secs. 92 and 145.

The damages were continuous and the prescription does not apply. *Grenier* v. *The City of Montreal* (4).

(1) 14 App. Cas. 612.
(2) 25 L. C. Jur. 1.
(3) Q. R. 2 Q. B. 335.
(4) 25 L.C. Jur. 138.

1895

KERR v. THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY.

Abbott Q.C. for the respondent. The contractor was entirely independent of the company who could not have prevented him from doing the injury complained of. *Hughes* v. *Percival* (1); *Steele* v. *The South Eastern Railway Co.* (2); *Ellis* v. *The Sheffield Gas Co.* (3).

The plaintiff's action was prescribed. See *McGillivray* v. *The Great Western Railway Co.* (4); *May* v. *The Ontario & Quebec Railway Co.* (5).

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed for the reasons given in the judgment of Mr. Justice Taschereau.

TASCHEREAU J.—Under article 2261 of the Civil Code the appellant's right of action was prescribed when he instituted these proceedings. The doctrine of the continuance of damages relied upon by him to answer the plea of prescription, does not help him in this case (6). It has been carried too far in the cases he quoted. The prescription runs from the act which causes the damage, when the damage complained of results exclusively from that act, without any new tortious act from the tort-feasor, and when the damage complained of could have been foreseen and claimed for at the time that the *quasi* offence which caused it was committed, or within two years therefrom. Had the plaintiff then a right of action, in which he would have recovered compensation for prospective damages, including those he now claims? That is the question. If he then had that action, as the appellant here clearly had after the company's acts he complains of, the prescription runs from the time his right of action accrued. *Breakey* v. *Carter* (7). There is no new right of action

(1) 8 App. Cas. 443.
(2) 16 C. B. 550.
(3) 2 E. & B. 767.
(4) 25 U. C. Q. B. 69.
(5) 5 C. L. T. 551.
(6) 1 Sourdat, no. 638.
(7) Cass. Dig. 2 ed. 463.

1895

KERR v. THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY.

arising every day of the year. The damages are consecutive but not successive. And I can see no difference on this point between injuries to property and bodily injuries. Compare *Canadian Pacific Railway Co.* v. *Robinson* (1).

I would dismiss the appeal.

Taschereau J.

GWYNNE J.—The sole question upon this appeal is whether or not the defendants are responsible for the acts of an independent contractor employed by them in the construction of their railway in digging and carrying away and depositing upon the line of railway earth taken from a piece of land of one Howell altogether outside of the railway land but situate between the land of the plaintiff and a highway called Hallowell street, and over which land of Howell at the place where the soil was dry and the earth taken away therefrom the plaintiff claims to be entitled to a right of way from his own land to Hallowell street. The sole ground upon which the claim of the plaintiff to make the defendants responsible for these the acts of their independent contractor is rested, is a clause in the contract between the defendants and the contractor whereby, as is claimed, the defendants, by agreeing to provide the contractor with necessary borrowing pits, have made themselves responsible for his acts even though such acts should constitute trespass upon the property of others, or otherwise tortious to others. The only clauses in the contract having any relation to the question are those numbered respectively 22 and 32 and are as follows:—

22. In cases where the adjoining roadbed excavations are insufficient to form embankments the deficiency will generally be made by widening the cuts and by putting wider ditches through them; but there are special cases where earth will have to be hauled several miles

(1) M. L. R. 6 Q. B. 118; 19 Can. S. C. R. 292; [1892] A. C. 481.

to make up embankments, and it is understood that the cost of this haul is to be included in the contract or schedule price and also the cost of any trestle work that may be required to deposit it, and in no case will the contractor be allowed to borrow without the consent in writing of the engineer.

32. Roads constructed to and from any point on the line of railway for the convenience of the contractor for the conveyance of the material or otherwise must be at his own risk, cost and charges, but the company will provide the necessary land for the right of way and borrow pits.

The necessary land for borrow pits in this clause mentioned are plainly, as it appears to me, places where by the consent in writing of the engineer given under clause 22 the contractor has been allowed to borrow earth. It is not suggested that the place in question was such a place or that in point of fact the contractor had any actual authority whatever from the defendants to take earth from the place under consideration. Upon no principle of law can the defendants be made responsible for independent tortious acts of the contractor; for his acts if tortious to the plaintiff the contractor himself alone must be responsible. Appeal dismissed with costs.

SEDGEWICK J.—I am of opinion that this appeal should be dismissed both on the ground of prescription and on the ground that the company is not liable for the wrongful act of the contractor.

KING J.—I concur in the judgment of Mr. Justice Gwynne.

GIROUARD J.—I agree with Mr. Justice Taschereau that the plaintiff's action was prescribed. The appeal must fail also on the ground taken by Mr. Justice Gwynne.

Appeal dismissed with costs.

Solicitors for the appellant: *Taylor & Buchan.*

Solicitors for the respondent: *Abbotts, Campbell & Meredith.*