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*March 2.
*May 4.

JOHN S. GREER (PLAINTIFF) .....APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS). } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Railways—Right of way—Clearance of combustible matter—Burning worn-out ties—Injury from spread of fire—Limitation of action—"Operation of the railway"—"Railway Act" (*R.S.C.* [1906] *c.* 37, *ss.* 297, 306).

Held, per Fitzpatrick C.J. and Duff, Anglin and Brodeur JJ., that when worn-out ties are burned by a railway company on its right-of-way in performance of the duty imposed by section 297 of the "Railway Act" to keep the right-of-way free from unnecessary combustible matter any damage or injury resulting therefrom is caused by reason of the "operation of the railway" within the meaning of that phrase in section 306, and the right of action for such damage or injury is prescribed by one year.

Per Duff J.—The injury in such case may be caused by reason of the "operation of the railway" though the company, in burning the ties, was not performing the duty imposed by section 297.

Per Davies and Idington JJ. dissenting.—By sub-section 2 of section 306 the application of the section is limited to cases in which the injury was caused "in pursuance of and by authority of this Act or of the special Act" and as the burning of the ties was not so authorized the prescription could not be relied on.

Held, also, Idington J. dissenting, that sub-section 4 of section 306 did not prevent the application of the provision in sub-section 1 for limiting the time in which action could be brought.

The decision of the Appellate Division (32 Ont. L.R. 104) maintaining the judgment at the trial (31 Ont. L.R. 419) was affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming the judgment at the trial(2) in favour of the defendant company.

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

(1) 32 Ont. L.R. 104. (2) 31 Ont. L.R. 419.

The company's servants burned a number of worn-out ties on the right-of-way and the fire ran over on plaintiff's land and destroyed his property. In his action for damages the negligence of the defendants was admitted and the only question in dispute was whether or not they were entitled to plead that the action should have been brought within one year from the commission of the injurious act as provided in section 306, sub-section 1, of the "Railway Act." This question was decided in favour of the defendants in both courts below.

Laidlaw K.C. for the appellant. Section 306 of the "Railway Act" does not apply to the case of a breach of a common law duty. *Prendergast* v. *Grand Trunk Railway Co.*(1); *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric Railway Co.*(2); *Geddis* v. *Proprietors of Bann Reservoir*(3); *Myers* v. *Bradford Corporation*(4).

The burning of the ties was no part of the operation of the railway. *Canadian Northern Railway Co.* v. *Robinson*(5).

MacMurchy K.C. for the respondents. The words "construction and operation" include everything necessary for maintaining the work of the railway. *Hodinott* v. *Newton, Chambers & Co.*(6); *Sadd* v. *Maldon, Witham and Braintree Railway Co.*(7). See also *Forsythe* v. *Canadian Pacific Railway Co.* (8); *Kennermann* v. *Canadian Northern Railway Co.* (9), at page 76.

(1) 25 U.C.Q.B. 193.
(2) 10 Ont. L.R. 419.
(3) 3 App. Cas. 430.
(4) 31 Times L.R. 44.
(5) 43 Can. S.C.R. 387; [1911] A.C. 739.
(6) [1901] A.C. 49.
(7) 6 Ex. 143.
(8) 10 Ont. L.R. 73.
(9) 3 Sask. L.R. 74.

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The Chief Justice.

THE CHIEF JUSTICE. — Both courts below have found on the admissions of the parties that this claim is for damages arising out of an injury sustained by the plaintiff by reason of something negligently done in the operation of the railway and that the limitation of section 306, sub-section 1, R.S.C., [1906] ch. 37, applies.

For the reasons assigned by the Chief Justice in the court below I am of opinion that the judgment appealed from should be confirmed with costs.

DAVIES J. (dissenting).—This action is one which again directly raises the question of the proper construction of the limitation section 306, chapter 37, of the "Railway Act," R.S.C., 1906. Does that section cover and extend to cases where the damages sought to be recovered were admittedly caused by or proved to have been caused by the negligence of the railway company and its servants ?

In this appeal it is admitted that the fire which was started by the defendants' servants on the defendant company's right-of-way, to consume worn-out or discarded sleepers, escaped from that right-of-way to the plaintiff's property and destroyed it through the negligence of the company's servants. Unless, therefore, section 306 can be invoked by the company as a defence to this action, the appeal should be allowed.

In a late case heard in this court and not yet reported, of *London Street Railway Co.* v. *Kilgour* (not reported), I had occasion to consider the proper construction of a section of the private Act of the street railway company practically the same as the one now before us, and the conclusion I reached in that case

was that the limitation section there in question did not extend to or cover damages caused by the "illegal or negligent running" of the street railway.

Before reaching the conclusion I did in that *London Street Railway Case* (not reported), it became necessary for me carefully to read and consider all the cases decided in Ontario upon the true meaning of similar limitation sections in the public or private Acts of that province relating to railway companies.

These cases and the reasoning of the different judges who from time to time decided them were most conflicting and impossible to reconcile, so much so that in the late case of *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric Co.*(1), in 1905, Osler J., when delivering the judgment of the Court of Appeal for Ontario, said:—

> In the present state of the authorities it is to be desired that a clear ruling should be given upon the subject by the Supreme Court.

I agreed in my construction of the section in question with the conclusion of Gwynne J., in *North Shore Railway Co.* v. *McWillie*(2).

It seems to me that sub-section 2 of section 306 in its latter part contains the key to determine the meaning of the words in the first part of the section,

> damages or injury sustained by reason of the construction or operation of the railway,

and limits the application of the section to cases where the company can prove that the injury or damage sued for was done or caused

> in pursuance of and by authority of this Act or of the special Act

or *bonâ fide* assumed by the company to be so.

(1) 10 Ont. L.R. 419.

(2) 17 Can. S.C.R. 511, at p. 514.

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It did seem to me that this sub-section 2 was inconsistent with the contention that the section extended to cases of damages caused by the illegal construction or operation of the railway and equally so with respect to damages caused by the negligent construction or operation of the railway.

In neither case could it be said that the damages were caused

in pursuance of and by the authority of the Act,

and in my judgment it was only to cases which could fairly be said to come within those words that the section could be construed to extend. Many acts and things might be fairly and *bonâ fide* assumed by the company and its servants to be within the powers conferred on them and to be in pursuance of and by the authority of the Act, and such cases might well be held to be within the protection of the section.

But wilful illegal acts or negligence admitted or proved causing damage were outside of the protection the section was intended to give the company.

I have seen no reason to change my opinion that

the section applies and was only intended to apply to cases in which the damage arises from the execution or neglect in the execution of the powers given to or *bonâ fide* assumed by the company for enabling them to construct and maintain their railway, and does not and was not intended to apply to cases where damages have been caused by reason of the default or negligence of the company or its servants in the construction or operation of the road.

IDINGTON J. (dissenting).—One of the questions raised herein is whether or not respondent when, in violation of the "Forest Fires Prevention Act of Ontario," setting out a fire on its right-of-way and thereby causing damage to another is entitled to set up in defence the statutory limitation given by section 306 of the "Railway Act."

If not so entitled then it will be unnecessary to consider the defence in light of the obligation resting upon respondent by virtue of the common law whereby the possessor of land was practically liable for the spreading of fire originating on his land as to be in effect an insurer against loss caused thereby.

I incline to think the result should be held the same in either case, but the frame of section 306 is such that due regard must be had to each and all of its four sub-sections in applying the section to see that in any given case it is not misapplied.

In the first place there is an obvious limitation implied in the words

> sustained by reason of the construction or operation of the railway

used in the first sub-section. With regard thereto I shall presently have something to say and authorities to cite.

But meantime let it be observed that by sub-section 2 what the company may prove and rely upon is that the

> damages or injury alleged were done in pursuance of and by the authority of this Act or of the special Act.

Can setting out a fire ever be said to be done in pursuance of the Act? For the construction of the railway in a country such as ours I can understand the necessity to be such as to bring the act of setting out fire as within the meaning of some things to be

> done in pursuance of * * * this Act.

But this railway had been so long constructed that the ties, or some of them, had got so worn and decayed as to need replacement. There was need for repair which is not mentioned in the provision in question. Hence respondent is driven to place reliance upon the word "operation" and by a strained construction

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thereof to claim that the work in question which was needed to enable the railway to be safely operated is part of the operation.

This does not appear to me to be the plain ordinary meaning of the language, but to be directly in conflict with the interpretation put thereon by this court in the case of *Robinson* v. *The Canadian Northern Railway Co.*(1), and by the Judicial Committee of the Privy Council(2).

That was a case where a siding laid down for the use of the plaintiff in shipping over defendant's railway was torn up and taken away and defendant refused to so operate its railway as to give plaintiff his accustomed facilities.

It seemed to me then as a fairly arguable proposition that in a sense it might fall within the term "operation of the railway." But it did not seem to me then that giving due weight thereto the limitation in question was ever intended to reach and cover such an indirect incident relative to operation as would protect the company if regard was had to the proper application of the Statute of Limitations. Such statutes are never to be read as furnishing protection against anything but what the plain ordinary meaning of the words used will clearly cover.

If there is a doubt in regard thereto it must be resolved in favour of him whose right is sought to be taken away.

This case falls well within the decision in the *Robinson Case*(1).

Then there is the case of the *Canadian Northern Railway Co.* v. *Anderson*(3), not referred to in argu-

(1) 43 Can. S.C.R. 387. (2) [1911] A.C. 739.
(3) 45 Can. S.C.R. 355.

ment or in the courts below, where the railway company sought unsuccessfully to have a similar indirect application made of the section. Leave to appeal was refused by the Judicial Committee of the Privy Council. The work carried on there in question was that of procuring, out of a sand pit the company was possessed of, material for ballasting their railway and which ballast was carried by the gravel trains of the company engaged in executing the work.

It was forcibly argued there that the operation in the sand pit was in fact either for construction of the railway or its repair and hence within the extended meaning of the word "operation." I submit it was quite as much within either term as the illegal conduct of the respondent in setting out a fire in a prohibited district at the time in question.

The setting fire there was entirely unnecessary as a means of clearing the right of way. There is no statutory authority within the meaning of sub-section 2 for doing such an unnecessary act.

That brings us to a consideration of sub-section 4 which in very comprehensive language prevents the company from claiming relief

> from or in any wise diminish or affect any liability or responsibility resting upon it under the laws in force in the province in which such liability or responsibility arises, either towards His Majesty or towards any person, or the wife or husband, parent or child, executor or administrator, tutor or curator, heir or personal representative, of any person, for anything done or admitted to be done by such company, or for any wrongful act, neglect or default, misfeasance, malfeasance, or non-feasance, of such company.

The "relief" referred to surely must include that which is the very subject-matter of the section as a whole.

It seems expressly designed to withdraw from the

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operation of sub-section 1 of the section anything falling within the meaning of local laws giving a right of action to those suffering from unjustifiable violation by the company of such local laws.

If it does not apply to such a case as this it would be hard to find application for it. The fundamental law constituting the company and endowing it with the rights and privileges it has, cannot be interfered with by any local legislation. Hence I use the phrase "unjustifiable violation" for I can conceive of the case of a legislature enacting that over which it has no power to meddle with.

I read this sub-section as subject to such limitation.

I can find no conflict, however, between that which the Dominion Parliament has enacted and empowered the respondent to do, and that which the legislature has by the Act above referred to expressly rendered illegal.

In other words the plain purpose of this sub-section 4 is to limit the powers conferred by excluding therefrom the possibility of being held to authorize that which a provincial law may in the ordinary course of things have enacted to govern the conduct of all, including railway companies.

Again the fundamental principle upon which this legislation proceeds is that what the law authorizes to be done needs no other defence, but that there are cases in doing that which it has been expressly authorized to do a railway company may act negligently and to meet the incidents of such negligence this statutory limitation is given and to that only.

This is not a case falling within the principle and hence not within the scope or purpose of the enact-

ment. It is a clear case of doing that which was wholly illegal and is by sub-section 4 recognized as such.

Before parting with this I may observe that the case of *Hoddinott* v. *Newton, Chambers & Co.*(1), cited in respondent's factum has deeply impressed me. Unfortunately that impression got from a reading thereof is entirely adverse to the pretensions of the respondent herein.

The language used in the statute there in question and which had to be construed was the phrase,

is either being constructed or repaired by means of a scaffolding.

The scope of the whole was the liability arising out of the use of or need for the use of a scaffolding.

Yet there where the only question was whether a supplementary work could fall within such phraseology there was a remarkable difference of opinion between very able judges.

Seeing what the purpose of the legislation there in question was I can assent to every line of the late Lord Macnaghten's judgment and yet be permitted to surmise what quick work he would have made of such pretensions as set up here by respondent. And evidently the dissenting judges would have been astonished at such a proposition as there put forward and herein.

I think the appeal should be allowed with costs throughout and judgment be entered for the damages agreed on with costs.

DUFF J.—I concur with the Court of Appeal in the conclusion that the direct and effective cause of the damages in respect of which the action is brought was

(1) [1901] A.C. 49.

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the conduct of the company's servants in the "operation of the railway." I do not think it is wise to attempt to lay down any criterion other than that supplied in the clause itself for determining what cases are within the words "construction or operation of the railway." The present case I think is near the line but within it. I think counsel for the railway company was right in the opinion he expressed that nothing in section 297 or in the accompanying sections does in any way modify the common law responsibility of the company in making use of fire for the purpose of clearing its right-of-way.

And I am far from satisfied that there is any evidence in the record which would justify the conclusion that what was done by the company's servants was done in the intended exercise of any power impliedly conferred by that section. I do not think, however, that this necessarily excludes the application of sub-section 1 of section 306.

As to sub-section 4 of this section, this sub-section read literally would deprive sub-section 1 of all effect except in those cases in which the cause of action is not given under provincial law. That result would follow because it is obvious that the obligation (*ex delicto*) created by the company's wrong whether you look at it from the point of view of the person of incidence or of the person of inherence is "affected" by limiting the time within which the accessory right of action vested in the person of inherence may be exercised even in Canada alone. It is therefore impossible to deny that if you are to give the words of sub-section 4 their full value, when literally read, you must limit the operation of sub-section 1 to causes of action which do not arise under the provincial law.

But sub-section 4 is one of those sweeping general sections that one finds in the "Railway Act," which must be applied cautiously and with reasonable regard to the broad canon of construction that such sweeping provisions are not generally to be read as displacing particular provisions with regard to particular subjects to which when literally read they are repugnant. That is the view of the earlier enactment (which for all relevant purposes was the equivalent of sub-section 4) that was taken in the *Canadian Pacific Railway Co.* v. *Roy*(1). Sub-section 4 and sub-section 1 must be read together, and sub-section 4 given such effect as leaves it open to us to give a reasonable construction to subsection 1. I may add that it does not appear to me to help us very much to say that sub-section 1 only affects the remedy and not the right. It seems indeed improbable that Parliament should have contemplated limiting the exercise of the plaintiff's right of action in Canadian courts while leaving subsisting the obligation — capable of enforcement, of course, in other courts; yet such would be the effect of holding that sub-section 1 is a provision relating only to the procedure. An injured passenger, who by lapse of time had lost his right to sue in the Canadian courts, might sue in New York or in Chicago, and in the case of Dominion railways that course might present very little inconvenience.

Moreover, as regards causes of action given by provincial law only, it appears to me that it would be arguable that a Dominion enactment relating only to procedure would be *ultra vires*.

(1) [1902] A.C. 220.

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Anglin J.

ANGLIN J.—The only question which arises on this appeal is whether the defendant company is entitled to the benefit of the limitation afforded by sub-section 1 of section 306 of the "Railway Act," R.S.C., [1906] ch. 37. The plaintiff's property was damaged by fire which escaped from the defendants' right-of-way. The fire was started by the defendants' servants to consume worn out and discarded ties or sleepers and it is admitted that its escape to the plaintiff's property was attributable to their negligence. Subject to what is to be said as to the effect of sub-section 4, I am of the opinion, for the reasons assigned by the learned Chief Justice of Ontario and Middleton J., that sub-section 1 of section 306 affords a defence to the plaintiff's action. It should, I think, be presumed that the purpose in view in burning the ties was to discharge the duty of freeing the right-of-way from combustible material imposed on the company by section 297 of the "Railway Act." No evidence was given at the trial, the facts being admitted. The learned trial judge proceeded without objection on the assumption that the burning of the ties was in intended fulfilment of the statutory duty of the defendants — with

an intention to carry on the railway in good faith.

In the Appellate Division the judgment proceeds on the same basis of fact and it should not now be departed from. The resultant damages sued for were, therefore, in my opinion, sustained

by reason of the construction or operation of the railway.

Although the use of fire for the destruction of inflammable material on the right-of-way is not expressly authorized by the "Railway Act," it is common knowledge that it is a means which is most effici-

ent and which it is customary to employ, and I cannot think that its use for that purpose entails liability unless accompanied by negligence which causes injury. No doubt there are other methods of fulfilling the duty imposed by section 297; and it may be that, under some circumstances, the use of fire would be so highly and so obviously dangerous that it would in itself afford *primâ facie* evidence of negligence. But I am unable to accede to the view that for that reason a railway company in burning old ties on its right-of-way is not discharging a duty imposed by section 297, or that it thereby assumes responsibility of the kind and degree to which the defendant in *Rylands* v. *Fletcher* (1) was held to be subject.

Nor does sub-section 4 exclude the application of sub-section 1, of section 306 to the present case as the plaintiff contends. First enacted by 20 Vict. ch. 12, sec. 17, as part of

An Act for the Better Prevention of Accidents on Railways,

the prototype of sub-section 4 was, of course, confined in its application to the several sections of that statute. They provided for the inspection of railways and reports thereupon to the then Board of Railway Commissioners. The words "under this Act" and "anything in this Act contained" in section 17 had thus a restricted reference. It is scarcely necessary to state that the limitation provision now found in sub-section 1 of section 306 was not a part of chapter 12 of 20 Vict. When the "Railway Act" was consolidated in 1859, as chapter 69 of the Consolidated Statutes of Canada, section 17 of chapter 12 of 20 Vict. was brought into it as section 190, the words "under

(1) L.R. 3 H. L. 330.

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this Act" and "in this Act" being retained, perhaps inadvertently, with the result, if they should be given full effect, that the scope and application of the section was enormously extended. But it still remained one of a group of sections relating to inspections and reports of accidents, and it was so continued through 31 Vict. ch. 68, sec. 40; 42 Vict. ch. 9, sec. 52, and R.S.C., [1886] ch. 109, sec. 80, until the revision of 1888, when it first appears, in chapter 29 of 51 Vict., in proximity to the limitation section, No. 287, yet as a separate section, No. 288, and under the heading,

> Company not relieved from legal liability by inspection or anything done hereunder.

As originally enacted and (substantially) as it stood until 1906 the language of the section was:—

> No inspection had under this Act nor anything in this Act contained or done or ordered or omitted to be done or ordered under or by virtue of the provisions of this Act shall relieve or be construed to relieve any railway company of or from any liability or responsibility resting upon it by law * * * for anything done or omitted to be done by such company, or for any wrongful act, neglect or default, misfeasance, malfeasance or non-feasance of such company, or in any manner or way to lessen such liability or responsibility or in any way to weaken or diminish the liability or responsibilty of any such company under the existing laws of the province.

When so worded it was still reasonably clear, notwithstanding its presence in the general "Railway Act," that the section had no reference to the limitation provision, which neither relieved from, lessened, weakened, or diminished any liability or responsibility of the railway company. While it stood as a separate section in the "Railway Act" of 1888, this provision was relied upon before the Judicial Committee in *Canadian Pacific Railway Co.* v. *Roy*(1), for

(1) [1902] A.C. 220, at p. 228.

the proposition that, although Parliament had authorized the use of steam locomotives by railway companies, this section expressly maintained the liability of the company, which it was claimed existed under provincial law, for damages caused by employing such locomotives

in the ordinary and normal use of the railway

and without negligence.

Dealing with this argument the Lord Chancellor said (at p. 231) :—

Section 288 is more plausibly argued to have maintained the liability of the company, notwithstanding the statutory permission to use the railway; but if one looks at the heading under which that section is placed, and the great variety of provisions which give ample materials for the operation of that section, it would be straining the words unduly to give it a construction which would make it repugnant, and authorize in one part of the statute what it made an actionable wrong in another. It would reduce the legislation to an absurdity, and their Lordships are of opinion that it cannot be so construed.

It was not until 1903 that what is now sub-section 4 was appended to the limitation section as sub-section 3 (3 Edw. VII., ch. 58, sec. 2). It, however, still substantially retained its original form. It was only in the revision of 1906 that it assumed the form in which we now find it:—

No inspection had under this Act, and nothing in this Act contained, and nothing done or ordered or omitted to be done or ordered, under or by virtue of the provisions of this Act shall relieve or be construed to relieve, any company of or from, or in anywise diminish or affect any liability resting upon it under the laws in force in the province in which such liability or responsibility arises, etc.

The substitution of the word "affect" for the former words "lessen or in any way weaken" in my opinion does not alter the applicability or effect of the sub-section. It remains a provision dealing with lia-

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bility or responsibility. Sub-section 1, on the other hand, does not deal with, or in any way "diminish or affect" liability or responsibility. Unlike the "Real Property Limitation Act," but like the "Limitation Act" of King James I. it only bars the remedy by action or suit. The liability remains intact and unaffected and may be made available by the person having a right to indemnity for any damages or injuries sustained if he should have an opportunity to set it up without resort to an action or suit. *Wainford* v. *Barker,* 1697(1); *Curwen* v. *Milburn*(2). With due respect for the draftsmen of 1903 and 1906, sub-section 4 should not be found in the same section with sub-section 1 of section 306. Historically there is no connection between the two; they have no bearing one upon the other; and there collocation is misleading.

Moreover, having regard to its history and to the view taken of it in *Canadian Pacific Railway Co.* v. *Roy* (3), I think sub-section 4 cannot be construed as maintaining or re-establishing a responsibility or liability against which the authorization conferred by section 297, in respect of acts done in the *bonâ fide* discharge of the duty which it imposes, affords immunity. Of course the liability for negligence remains; but to that the limitation of sub-section 1 of section 306 must apply unless we should treat sub-section 4 as rendering it nugatory and thus "reduce the legislation to an absurdity."

The plaintiff also invoked section 4 of the Ontario "Forest Fires' Prevention Act" (R.S.O., [1897] ch. 267). It was admitted that the fire which caused the

(1) 1 Ld. Raymond 232. (2) 42 Ch. D. 424, at p. 434.
(3) [1902] A.C. 220.

damage was set out on or about the 15th of July and that a proclamation had been issued under sub-section 1 declaring the district to be a fire district under the statute. Assuming, in the plaintiff's favour, that in the burning of ties in the discharge of their duty under section 297 of the "Railway Act," the defendant company was subject to this provincial legislation (*Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours*(1), and *Grant* v. *Canadian Pacific Railway Co.*(2)), it does not help him. Section 15 of the "Forest Fires' Prevention Act" was as follows:—

> Nothing in this Act shall be held to limit or interfere with the right of a person to bring and maintain a civil action for damages occasioned by fire, *and such right shall remain and exist as though this Act had not been passed.*

The only effect which this legislation could have would be to render it unnecessary for the plaintiff to prove negligence, breach of statutory duty causing damage being his cause of action. But, although the starting of the fire contrary to the provisions of section 4 of the "Forest Fires' Prevention Act" should entail civil responsibility for any injurious consequences, notwithstanding that the defendants were acting in the discharge of their duty under section 297 of the "Railway Act," the damages suffered by the plaintiff were nevertheless sustained

> by reason of the construction or operation of the railway,

and would, therefore, come within sub-section 1 of section 306, which, as already pointed out, does not "in any wise diminish or affect any liability or responsibility under" the provincial statute.

I am, for these reasons of the opinion that this appeal fails and should be dismissed with costs.

(1) [1899] A.C. 367. (2) 36 N.B. Rep. 528, at pp. 533, 545.

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Brodeur J.

BRODEUR J.—This is an action where we have to construe section 306 of the "Railway Act," which provides that an action or suit for indemnity for any damage or injury sustained by reason of the construction or operation of a railway shall be commenced within one year next after the time such supposed damage is sustained.

Some old ties had been removed from respondents' railway and had been piled to be burned. When they were so burned the fire started over the land of the appellant and he has taken an action for damages more than a year after the damage had been sustained.

The respondents claim that this destruction of the ties was, under section 297 of the "Railway Act," the fulfilment of a duty imposed by that section.

That section 297 provides that the company shall maintain its right-of-way free of dead dried grass, weeds and other unnecessary combustible matter.

There is no doubt that those old ties were combustible matter and that they had to be removed from the right-of-way. Was it necessary, however, to burn them, or should they not have been removed in some other way ?

On that point the evidence is not given, as to the way the track should be kept clear, but the trial judge stated that it was found that it was a custom of the railway company that decayed ties were burned upon the right-of-way. Then if the company was fulfilling a duty which was imposed on it by the "Railway Act" it might be stated that the burning of those ties was part of the operation of the railway and the damage which might be caused as a consequence of the carrying out of that duty should be claimed within one year after the damage had been sustained.

It is not, after all, a very serious hardship for those who might claim those damages. The liability of the company under the common law is not restricted because in one case as in the other they are bound to pay the damages which their negligence might cause. The only difference is that in one case it is provided that those damages should be claimed within one year after the damage had been sustained.

For these reasons, the judgments of the courts below which applied the Statute of Limitations as enacted by section 306 of the "Railway Act" should be confirmed and the appeal dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *William Laidlaw.*

Solicitors for the respondents: *MacMurchy & Spence.*