TORONTO-ST. CATHARINES TRANSPORT LIMITED (*Plaintiff*) ..... APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO and CANADIAN NATIONAL RAILWAY COMPANY (*Defendants*) ..... RESPONDENTS.

1953
*Oct. 7,
1954
*Jan. 26.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Railways—Municipal Corporations—Highways—Limitation of Actions—Whether failure by municipality to maintain overhead clearance imposed by Railway Act creates separate cause of action from that available under Municipal Act—The Railway Act, R.S.C. 1927, c. 170, ss. 263, 392—The Municipal Act, R.S.O. 1937, c. 266, ss. 480, 481.

Section 263 of the *Railway Act*, R.S.C. 1927, c. 170, provides that unless otherwise directed by the Board of Railway Commissioners, the clear headway above the surface of the highway at the central part of any overhead structure shall be not less than 14 feet. By order of the Board, the Parkway Drive Subway in the City of Toronto, over which passed the tracks of the C.N.R., was constructed by the railway company, the City of Toronto being charged with the maintenance of the pavement on the floor of the subway. In the course of such maintenance the City caused the surface of the highway to be raised thereby reducing the overhead clearance to less than the statutory minimum. In consequence of damages suffered as a result of such reduction the appellant sued the railway company and the City. The trial judge, McRuer C.J.H.C., dismissed the action against the railway but gave judgment against the City. No appeal was taken as to the dismissal as against the railway company, but on an appeal by the City to the Court of Appeal for Ontario, the judgment against the City was set aside.

Held: (Rinfret C.J. and Kerwin J. dissenting), that nothing in the *Railway Act* conferred upon individuals suffering damage by reason of a breach by a municipal corporation of s. 263 a separate or new cause of action. The appellant had a right of action under the *Municipal Act*, R.S.O. 1937, c. 266, but the action not having been brought within three months from the time the damages were sustained, such action was barred by the limitation provisions thereof.

Per: (Rinfret C.J. and Kerwin J. dissenting):—The appellant did not allege non-repair or nuisance but brought its action under s. 263 of the *Railway Act*. The action of the city in improving the pavement did not by itself place the highway out of repair or create a nuisance; it was only by reason of the lessening of the clearance that s. 263 was infringed. No remedy by way of a penalty is imposed specifically for a breach of s. 263 but the summary of the existing law by Lord Simonds in *Cutler* v. *Wandsworth* Stadium [1949] A.C. 398 at 407, indicates that what must be considered is the object and purpose of

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey and Cartwright JJ.

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the enactment. The object of Parliament in providing for the clearance was not the protection of railway companies and municipalities but the benefit of all users of the highway, and when the appellant as one of that class suffered a particular damage as a result of a breach of the section, it is entitled to compensation.

Decision of the Court of Appeal for Ontario [1952] O.R. 29, affirmed.

APPEAL from the judgment of the Court of Appeal for Ontario (1) allowing the appeal of the Defendant (Respondent) from the judgment of McRuer C.J.H.C. (2) in favour of the appellant.

B. J. Thomson, Q.C. for the appellant.

F. A. A. Campbell, Q.C. and *A. P. G. Joy* for the respondent.

The judgment of the Chief Justice and Kerwin JJ. (dissenting) was delivered by:—

KERWIN J.:—The plaintiff in this action, Toronto-St. Catharines Transport Ltd., appeals from a decision of the Court of Appeal for Ontario setting aside the judgment at the trial, of the Chief Justice of the High Court, which had adjudged that the appellant recover against the respondent, the City of Toronto, the sum of $2,035 and costs. Originally Canadian National Railway was also a defendant but there was no appeal from the dismissal of the action as against it.

On November 25, 1946, the appellant, which operates a trucking service was transporting on a tractor-trailer what is known as a low pressure firebox type heating boiler. While in the course of so doing, on Parkside Drive, in the City of Toronto, the boiler was damaged when it came in contact with the ceiling of a subway over which were laid the tracks of Canadian National Railway. This subway was constructed pursuant to an order of the Board of Railway Commissioners for Canada of December 8, 1909, made under ss. 59 and 238 of the *Railway Act* of Canada, R.S.C. 1906, c. 37 (as amended by s. 5 of c. 32 of the 1909 statutes), and later appearing as ss. 39 and 257 of R.S.C. 1927, c. 170. By the Board's order the subway was constructed by the Railway Company (then the Grand Trunk Railway Company of Canada) and a contribution to the cost thereof was

(1) [1952] O.R. 29; [1952] 1 D.L.R. 602.

(2) [1951] O.R. 333; [1951] 3 D.L.R. 613.

made by the City. It is unnecessary to refer further to the terms of the Board's order in view of s. 263 of R.S.C. 1927, c. 170:—

263. Unless otherwise directed or permitted by the Board, the highway at any overhead railway crossing shall not at any time be narrowed by means of any abutment or structure to a width less than twenty feet, nor shall the clear headway above the surface of the highway at the central part of any overhead structure, constructed after the first day of February, one thousand nine hundred and four, be less than fourteen feet.

Since it was not "otherwise directed or permitted by the Board" the clear headway in the Parkside Drive subway should not be less than fourteen feet at any time.

In the original construction the required headway was provided but subsequently the City made repairs to the pavement on Parkside Drive thereby raising its level and diminishing the statutory clearance. The damage to the boiler was caused by reason of this diminution and I agree with the two Courts below that there was no negligence on the part of the driver of the appellant's tractor-trailer which caused or contributed to the damage.

The important question is whether the appellant has a separate cause of action because of the infringement by the City of s. 263 of the *Railway Act,* or whether it had only an action under ss. 480 and 481 of the Ontario *Municipal Act,* R.S.O. 1937, c. 266:—

480. (1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default the corporation shall subject to the provisions of *The Negligence Act* be liable for all damages sustained by any person by reason of such default.

(2) No action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained.

(7) Nothing in this section shall impose upon a corporation any obligation or liability in respect of any act or omission of any person acting in the exercise of any power or authority conferred upon him by law, and over which the corporation had no control, unless the corporation was a party to the act or omission, or the authority under which such person acted was a by-law, resolution or license of its council.

481. The provisions of subsections 2 to 8 of section 480 shall apply to an action brought against a corporation for damages occasioned by the presence of any nuisance on a highway.

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The City contends that, although by raising the level of the pavement it created a nuisance or a condition of non-repair within the meaning of these sections, for which the appellants had a right to bring an action, as the action was not brought until after the expiration of three months from the time that the damages were sustained, s-s. 2 of s. 480 is a complete bar.

However, the appellant did not allege that Parkside Drive was out of repair or that there was a nuisance thereon but brought its action under s. 263 of the *Railway Act*. It should be emphasized that what is complained of is an infraction of this section and not of an Order of the Board and, therefore s. 392, referred to in the reasons for judgment in both Courts below, has no bearing upon the matter. This section imposes a penalty upon every company and every municipality or other corporation which neglects or refuses to obey an order of the Board.

Since the City intentionally raised the level of Parkside Drive, we may at once put aside the question which has been considered in some cases as to whether negligence must exist. The question is whether the breach of a statutory obligation affords a right of action to a person injured as a result of that breach. In *Cutler* v. *Wandsworth Stadium Ld.* (1), the House of Lords decided that no action lies at the suit of an individual bookmaker against the occupier of a licensed dog-racing track on which a totalisator is lawfully in operation for failure to provide him with "space on the track where he can conveniently carry on bookmaking," in accordance with s. 11, s-s. 2(*b*) of the Betting and Lotteries Act, 1934. The obligation imposed by that section was enforceable only by criminal proceedings for the penalties specified in s. 30, s-s. 1 of the Act. At page 407, Lord Simonds states that the answer to such a question as the one before us depends "on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted." The remainder of the paragraph contains a clear statement of the problem:—

> But that there are indications which point with more or less force to the one answer or the other is clear from authorities which, even where they do not bind, will have great weight with the House. For instance, if a statutory duty is prescribed but no remedy by way of penalty or

(1) [1949] A.C. 398.

otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration. But "where an Act" (I cite now from the judgment of Lord Tenterden C.J. in *Doe* v. *Bridges* (1), "creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner." This passage was cited with approval by the Earl of Halsbury L.C. in *Pasmore* v. *Oswaldtwistle Urban District Council* (2). But this general rule is subject to exceptions. It may be that, though a specific remedy is provided by the Act, yet the person injured has a personal right of action in addition. I cannot state that proposition more happily, or indeed more favourably to the appellant, than in the words of Lord Kinnear in *Black* v. *Fife Coal Co. Ltd.* (3): "If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by Lord Cairns in *Atkinson* v. *Newcastle Waterworks Co.* (4), and by Lord Herschell in *Cowley* v. *Newmarket Local Board* (5), solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention." An earlier and a later example of the application of this principle will be found in *Groves* v. *Wimborne (Lord)* (6) and *Monk* v. *Warbey* (7), in the former of which cases the Act in question was described by A. L. Smith L.J. (8), as "a public Act passed in favour of the workers in factories and workshops to compel their employers to do certain things for their protection and benefit."

O'Connor v. *Bray* (9), is a decision of the High Court of Australia. Regulation 31(*b*) of the *Scaffolding and Lifts Act*, 1912, N.S.W., prescribed that safety gear must be provided for all lifts except direct acting lifts and service lifts in which no person travels. It was held by Dixon, Evatt and McTiernan JJ. that a person injured as a result of the non-observance of the statutory duty thus imposed has a cause of action against the person responsible under the regulations for the care, control and improvement of the lift. At page 478 Dixon J. states:—

Whatever wider rule may ultimately be deduced, I think it may be said that a provision prescribing a specific precaution for the safety of others in a matter where the person upon whom the duty laid is, under

(1) 1 B. & Ad. 847, 859.
(2) [1898] A.C. 387, 394.
(3) [1912] A.C. 149, 165.
(4) (1877) 2 Ex.D. 441, 448.
(5) [1892] A.C. 345, 352.
(6) [1898] 2 Q.B. 402.
(7) [1935] 1 K.B. 75.
(8) [1898] 2 Q.B. 402, 406.
(9) (1937) 56 C.L.R. 464.

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the general law of negligence, bound to exercise due care, the duty will give rise to a correlative private right, unless from the nature of the provision or from the scope of the legislation of which it forms a part a contrary intention appears. The effect of such a provision is to define specifically what must be done in furtherance of the general duty to protect the safety of those affected by the operations carried on.

With this statement I agree.

In *Salt* v. *Town of Cardston* (1), the appellant was injured by his horse running into an unguarded guy wire supporting an electric light pole erected by the Town of Cardston within a road allowance. It was held that the accident was a case of failure to construct a public work "so as not to endanger the public health or safety" within the meaning of s. 20 of c. 37 of the 1907 Alberta Statutes, being "An Act to Amend the Cardston Incorporating Ordinance of the North-west Territories", and not a case of non-repair within s. 87 of "The Municipal Ordinance" of the North-west Territories, and that, therefore, the appellant's claim was not barred by the limitation of six months provided by the latter. It was pointed out by Duff J., as he then was, at page 617, that the subject-matters of the two sections might in some slight degree overlap. There the Court was faced with the provisions of two Ordinances as amended. Here we have, on the one hand, the Legislature of the Province of Ontario, legislating in relation to municipal institutions, creating a new duty upon municipalities with respect to highways and both as to it and the common law liability for misfeasance prescribing a limitation of action. On the other hand, we have Parliament legislating in relation to railways and prescribing a duty so that it and the Legislature were dealing with entirely different matters. In my view, not only does that circumstance not take the case out of the decision in *Salt* v. *Town of Cardston* but in fact it weighs in favour of the contention that Parliament was creating a new right when one bears in mind another matter now to be mentioned.

It may be assumed that a municipality would not perform its duty under ss. 480 and 481 of the *Municipal Act* if there be something above the highway, although not on it, and that were it not for the *Railway Act* and the Board's order, the structure above the pavement on Parkside Drive

(1) (1920) 60 Can. S.C.R. 612.

might constitute a nuisance or lack of repair. It had been held in Ontario that notwithstanding any liability which might be cast by statute upon a railway company to maintain and repair a bridge and its approaches by means of which a highway was carried over a railway, such highway was still a public highway, and the municipality was, therefore, bound to keep it in repair and was not absolved from liability for default merely because the railway company might also be liable. *Mead* v. *Township of Etobicoke and Grand Trunk Railway Company* (1); *Fairbanks* v. *The Township of Yarmouth et al* (2). This was in the absence of a provision relieving the municipality from liability where the duty was cast upon a railway company. It was subsequently held in *Holden* v. *Township of Yarmouth et al* (3), that by a provision first introduced into the *Municipal Act* in 1896, no liability is now imposed on a municipal corporation for want of repair of a railway crossing by reason of its being of too high a grade and the omission to fence, the obligation being placed solely on the railway company by a section of the *Railway Act*. This provision of the *Municipal Act* appears in s-s. 7 of s. 480 of the *Municipal Act* quoted above. The action of the City in improving the pavement on Parkside Drive did not, by itself, place the highway out of repair or create a nuisance; it was only by reason of the lessening of the clearance between the pavement and the ceiling of the subway that s. 263 of the *Railway Act* was infringed.

No remedy by way of penalty or otherwise is imposed specifically for a breach of s. 263. We were referred to s. 444 whereby, if no other penalty is provided in the statute for anything done contrary to the provisions of the Act, certain named parties shall be liable to a penalty; and to s. 448 prescribing the procedure for the imposition and recovery of any penalty and setting out the procedure whereby the Board, if it has reasonable ground for belief that any company, person or corporation is violating the provisions of the Act, may request the Attorney General of Canada to institute proceedings on behalf of His Majesty. Even if it be assumed that either of these sections, or both of them, could apply to the City, the fact that penalties are

(1) (1889) 18 O.R. 438. (2) (1897) 24 A.R. 273.
(3) (1903) 5 O.L.R. 579.

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imposed thereby does not necessarily deprive the appellant of a right of action under s. 263. The summary of the existing law contained in the speech of Lord Simonds in *Cutler* v. *Wandsworth Stadium Ld., supra,* indicates that we must consider the object and purpose of the enactment. The object of Parliament in providing for the clearance was surely not for the protection of railway companies and municipalities. The fixing of the clear headway was for the benefit of all users of the highway and when the appellant as one of that class suffered a particular damage as a result of a breach of the section, it is entitled to compensation. It may be necessary at some time in the future to consider the decision of the Court of Appeal in *Phillips* v. *Britannia Hygenic Laundry Co. Ltd.* (1), referred to in the reasons for judgment in both Courts below but at the moment it is sufficient to state that in my opinion the judgment proposed in the present appeal is not at variance with any of the authorities referred to therein.

The appeal should be allowed and the judgment of the Court of Appeal set aside with costs throughout and the judgment at the trial restored.

TASCHEREAU J.:—In the City of Toronto, on the 25th of November, 1946, the plaintiff's tractor-trailer unit loaded with a low pressure fire box type heating boiler, was being driven in a southerly direction on Parkside Drive which passes under a subway, on top of which are the tracks of the Canadian National Railway. While proceeding under, the boiler came into collision with the subway, by reason of the clearance being less than fourteen feet in height, as required by s. 263 of the *Railway Act.*

This subway had been built by the Canadian National Railway Company, pursuant to Order No. 10169 of The Board of Railway Commissioners, which directed the City of Toronto to maintain all necessary pavement and sidewalks on the floor of the subway. The City respondent fulfilled this obligation, but in so doing raised the level of the highway, so that the clear headway above the surface at the central part, was less than fourteen feet. There can be no doubt that this was the cause of the accident.

(1) [1923] 2 K.B. 832.

The Chief Justice of the High Court maintained the action against the City of Toronto, but the Court of Appeal unanimously reversed this decision.

The question that has to be determined is whether this case should be governed by the *Railway Act* or by the *Municipal Act*. The relevant sections of the *Railway Act* are the following:—

263. Unless otherwise directed or permitted by the Board, the highway at any overhead railway crossing shall not at any time be narrowed by means of any abutment or structure to a width less than twenty feet, nor shall the clear headway above the surface of the highway at the central part of any overhead structure, constructed after the first day of February, one thousand nine hundred and four, be less than fourteen feet.

392. Every company and every municipal or other corporation which neglects or refuses to obey any order of the Board made under the provisions of this Act, or any other Act of the Parliament of Canada, shall for every such offence, be liable to a penalty of not less than twenty dollars nor more than five thousand dollars.

I have come to the conclusion that the combined effect of these two sections is not to give a right of action to the plaintiff against the City. As the learned Chief Justice of the Court of Appeal said in his reasons for judgment, s. 392 provides the means of enforcement of orders of the Board, but does not create any new right of action for damages.

I have no doubt that the City, by raising the surface of the level of the highway, created a nuisance which is actionable at common law. This right is specifically reserved by s-s. 4 of s. 392. But unfortunately for the appellant, its action is barred by s. 453, s-s. 2 of the *Municipal Act* (R.S.O. 1950, c. 243) which says that no action shall be brought for the recovery of damages occasioned by the default of a corporation to keep a highway in proper repair, after the expiration of three months from the time when the damages were sustained. In the present case, the action was brought one year and a half after the accident.

I would dismiss the appeal with costs.

RAND J.:—This appeal raises a question of some importance under s. 263 of the *Railway Act* which reads:—

Unless otherwise directed or permitted by the Board, the highway at any overhead railway crossing shall not at any time be narrowed by means of any abutment or structure to a width less than twenty feet, nor shall the clear headway above the surface of the highway at the central part of any overhead structure, constructed after the first day of February, one thousand, nine hundred and four, be less than fourteen feet.

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The overhead crossing involved was built in 1909 under an order of the Board of Railway Commissioners, now called Transport Commissioners, directing what is known as a "grade separation" of an existing level crossing, with the structure at the required clearance. The order by clause 11(*a*) provided:—

> *Subways.*—Where the railway is carried over a highway by means of a subway towards the construction of a portion of which the City is by this Order directed to contribute, the Railway Company shall, at its own expense, maintain the abutments and girders necessary to carry its tracks; and the City shall, at its own expense, maintain all necessary sewers, pavements, and sidewalks on the floor of the subway and the approaches thereto.

In the course of years, through work done on the highway, its surface became so far raised as to reduce the clearance to thirteen feet, six inches. A boiler being carried on a truck owned by the appellant, the top of which was slightly under fourteen feet above the pavement, struck the bottom of the structure and was damaged and these proceedings followed. The action against the Railway Company was dismissed on the authority of *Canadian National Railways* v. *Guérard* (1), in which this Court held the railway not responsible for the reduction of the clearance under circumstances similar to those here, and from that judgment no appeal was taken; but the claim against the Municipality was maintained. This was reversed by the Court of Appeal on the ground that the action was barred by the three months limitation of s. 480(2) of the *Municipal Act,* c. 266, R.S.O. 1937 which applies to liability for default in repair of the highway and arising from nuisance.

The narrow question is whether s. 263 imposes on the Municipality a statutory duty to maintain the prescribed clearance that runs to the benefit of every individual using the highway, for a breach of which an action will lie. If it does, the limitation provision does not apply; if not, it does.

The *Railway Act* deals primarily with railways and their impact on the conditions existing when constructed. They must cross highways, and the several provisions of the statute, ss. 255, 256 and 257, giving the Board authority to require works and measures for the "safety, protection and convenience of the public" at highway crossings are

(1) [1943] 1 S.C.R. 152.

directed at the risks so created. The obligations to maintain and to bear the cost of these works or measures is determined by the Board and is embodied in orders made by it.

But the field into which municipalities are drawn by the necessities of public safety and convenience extends no further than is reasonably necessary to carry out the purposes of the statute; and although its provisions are to be given a broad and liberal interpretation, there is obviously a line at which it stops: *B.C. Electric Railway Co.* v. *Van. Vic. & East. Railway Co.* (1).

Admittedly the province has primary jurisdiction over and responsibility for the ordinary administration of highways. Is s. 263 to be interpreted as imposing new duties on municipal bodies in matters within that administration? When a highway is lowered to pass under a railway, prima facie, in its new level and contour, it is in the same jurisdictional position as before: it is a highway with all the ordinary attributes and, except as to the relationship to the railway so established, subject to the same law as before the change: *Carson* v. *Weston* (2). That the Board may make special provision for the safety and convenience of the public arising from the risks attributable to the works ordered or the fact of the crossing is undoubted; but the mere lowering of the highway level will not ordinarily come within that scope. The province, and the municipality as its delegate, can, for example, close the highway; it can restrict the highway to traffic in one direction and reduce the width of the travelled portion; it can limit the height of vehicles and loads on a particular highway or through the subway; the municipality can decide against pavement and revert to earth or gravel where no question of injurious effect on the railway structure is involved. I will assume that there might be situations where the Board could order a municipality to maintain a certain clearance or a specified ascent or descent of the highway at a crossing. But there is no such order here and the ordinary provision in an order for the maintenance of the pavement and other works such as sewers, is directed really to their cost, not their continuance, and is made under s. 39 of the Act.

(1) [1914] A.C. 1067. (2) (1901) 1 O.L.R. 15.

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Rand J.

It is of some significance that s. 385 gives a right of action for damages for any breach of duty committed by a railway company or any person acting on its behalf for violation of any provision of the Act or the special act incorporating the company, but the section does not extend to municipalities or other persons who may be within duties imposed by the Act.

S. 392 provides for penalties for disobedience to an order of the Board and s-s. (4) declares that

> Nothing in or under this section shall lessen or affect any other liability of any such company, corporation or person, or prevent or prejudice the enforcement of such order in any other way.

But I find no provision either specific or general, and we have been referred to none, which imposes a penalty upon any person other than a railway company, or a person acting for or in connection with it, for a breach of s. 263.

There is a clear distinction between the maintenance of the clearance as a requirement of the statute and the creation beneath the structure of such a reduced clearance as to amount to a nuisance or to constitute negligent repair. In the latter case, all the surrounding circumstances would be pertinent, but in the former the only question would be whether the clearance had not been maintained and whether the breach of the statute has caused the damage.

I am therefore unable to interpret s. 263 as evidencing an intention on the part of Parliament to impose a duty on the municipal authority extending in benefit to each member of the public using the highway through the subway, to maintain, in relation to the conditions of the highway, the clearance specified by the statute; and the appeal should be dismissed with costs.

KELLOCK J.:—Robertson C.J.O., in delivering the reasons for judgment of the Court of Appeal said:

> By order of the Railway Board the subway was so constructed that it provided a clearance of 14 feet above the surface of the highway. Further by order of the Board, the Municipal Corporation was required to maintain all necessary pavements and sidewalks on the floor of the subway and on the approaches to the subway.

The appellant contends that clearance is not a subject of the order at all but that it is a matter regulated entirely by

the provisions of s. 263 of the *Railway Act*. From this it is argued that s. 392 has no application in the present instance. I do not agree with this contention.

It is provided by s. 257, the relevant section, that where a railway is already constructed across a highway, the Board may order the company to submit a plan and profile and may order that the railway be carried over the highway or that the highway be carried under the railway. S. 39 provides that when the Board, by any order, directs any works to be constructed, it may, except as otherwise expressly provided, order by what company, municipality or person, interested or affected by such order, the same shall be constructed and maintained, and s. 259 authorizes the Board to apportion the cost.

Had the Board by its order directed that the clearance should have been 15 feet, for example, any failure to maintain this height would, clearly, have been a breach of the order. Merely because the 14 feet mentioned in s. 263 was not departed from but insisted upon by the order, does not, in my opinion, render the requirement as to height any the less a part of the order. In my view, therefore, the situation does not differ from what it would have been had the accident occurred by reason, for example, of a hole in the floor of the subway, occasioned by neglect on the part of the respondent.

In such a case I do not think that, on the proper construction of the *Railway Act*, a right of action under that statute is given against the respondent. In my view, the inclusion of s-s. (4) in s. 392 and the lack of any mention of a municipal corporation in s. 385, indicate only too clearly that it was not the intention of Parliament to give any remedy apart from what is expressly provided for by the statute.

In my view, the duty which is envisioned by the statute as resting upon the municipality is well expressed in the language of the present order by which the respondent is required to maintain all "necessary" pavements and sidewalks. The necessity for these, in the present case, is left to provincial law. The necessity for any pavement at all

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might be non-existent should the traffic carried by the highway not warrant it, but in so far as pavements and sidewalks are necessary under provincial law, the respondent is directed by the order to bear the expense.

Such decisions as *Fairbanks* v. *Yarmouth* (1), and *Mead* v. *Etobicoke* (2), as well as *Carson* v. *Weston* (3), are in accord with this view. Want of repair of a highway exists not only with respect to what is underfoot but also with respect to overhead obstructions; *Ferguson* v. *Southwold* (4). In the case at bar the overhead structure remained as originally constructed. The highway, however, was as much out of repair by reason of the pavement having been built too high as it would have been had its surface been allowed to disintegrate. The obligation to maintain the highway imposed by the *Municipal Act* remained upon the respondent with the consequence that the limitation provisions of that statute apply.

I would therefore dismiss the appeal with costs.

ESTEY J.:—The appellant suffered the damages here claimed when a low pressure type heating boiler, being transported on one of its tractor-trailers, was damaged passing through a subway on Parkside Drive, one of the streets in the respondent city.

This subway, as constructed by the Grand Trunk Railway Company (now Canadian National Railways) under order of the Board of Railway Commissioners numbered 10,169 and dated December 8, 1909, provided a clearance of fourteen feet. This order was made under the provisions of ss. 59 and 238 of the *Railway Act* (S. of C. 1909, c. 32, in R.S.C. 1927, c. 170, ss. 39 and 256). The relevant portions of the order provide for an apportionment of the cost and direct that the respondent "shall, at its own expense, maintain all necessary sewers, pavements, and sidewalks on the floor of subway and the approaches thereto." This order did not specify the height of the subway and, therefore, the provisions of s. 263 apply, which require a "clear headway above the surface of the highway at the central part of any overhead structure" be not less than fourteen feet.

(1) (1897) 24 O.A.R. 273.
(2) (1889) 18 O.R. 438.
(3) (1901) 1 O.L.R. 15.
(4) (1895) 27 O.R. 66.

The appellant in this action claimed damages against both the C.N.R. and the respondent city. The learned Chief Justice presiding at trial found "the overall height of the load was less than fourteen feet" and "that the damages were sustained by reason of the fact that there was not a clearance of fourteen feet at the centre of the exit of the subway for vehicles passing from north to south." The obligation to maintain this clearance rested upon the respondent and he, therefore, dismissed the claim against the C.N.R. and awarded damages in the sum of $2,035 against the respondent. No appeal was taken by the appellant against the dismissal of the C.N.R. claim, but upon an appeal taken by the respondent the learned judges in the Court of Appeal reversed the learned trial judge and directed that the action be dismissed as against the respondent. In this further appeal we are, therefore, not concerned with the C.N.R., but only with what, if any, liability, in the circumstances, rests upon the respondent city.

It is not disputed either that the clearance of fourteen feet required by law was originally provided nor that subsequently, in repairing the pavement, the city, in breach of its duty, raised the latter, thereby reducing the headway to less than fourteen feet and justifying the finding of the learned Chief Justice.

This damage was suffered November 25, 1946, and the action commenced by writ issued July 18, 1947. The respondent, therefore, contends that the action, not having been commenced within the period specified by s. 480 of the *Municipal Act* (R.S.O. 1937, c. 266, now R.S.O. 1950, c. 243, s. 453), cannot be maintained.

480. (1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default the corporation shall subject to the provision of *The Negligence Act* be liable for all damages sustained by any person by reason of such default.

(2) No action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained.

Section 481 reads:

481. The provisions of s-s. 2 to 8 of s. 480 shall apply to an action brought against a corporation for damages occasioned by the presence of any nuisance on a highway.

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The Legislature, in enacting s. 480, not only set forth the common law liability of municipal corporations, but imposed a further and more general liability to repair highways which would include certain types of nonfeasance and the words "such default" in s. 480(2) refer to and apply to the entire liability under s. 480(1). In s. 481 the Legislature made the statutory period of three months in s. 480(2) applicable to actions for nuisance. It follows, therefore, that whatever liability under the common law or the *Municipal Act* may have rested upon the respondent for its failure to maintain the fourteen-foot clearance, a claim therefor was barred at the time this action was commenced by virtue of the three-month limitation specified in s. 480(2).

If, therefore, the appellant can succeed, it must be by virtue of a claim founded upon liability for damages imposed by the provisions of the *Railway Act*. The only section relied upon as imposing a relevant duty in s. 263:

> 263. Unless otherwise directed or permitted by the Board, the highway at any overhead railway crossing shall not at any time be narrowed by means of any abutment or structure to a width less than twenty feet, nor shall the clear headway above the surface of the highway at the central part of any overhead structure, constructed after the first day of February, one thousand nine hundred and four, be less than fourteen feet.

The appellant contends that as this statute imposes a duty not existing at common law, for which it creates no remedy in the event of a breach, an injured party may proceed by action to recover the damage suffered. Willes J. in *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1); *31 Hals.*, 2nd Ed., p. 550, para. 737; *Comyn's Digest* (Action upon Statute (F)); *Addison on Torts,* 8th Ed., p. 104. Whether such a liability exists must depend upon the intention of Parliament as expressed in the statute, and the rules discussed under the above citations are but aids in construing a statute for the purpose of ascertaining that intention. Sir Lyman Duff, after discussing certain of these aids, stated:

> But the object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable by action; or whether the remedies provided by the statute are intended to be the sole remedies available by way of guarantees to the

(1) (1859) 6 C.B. (NS) 336 at 356.

public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of the non-performance of that duty. *Orpen* v. *Roberts* (1).

and Atkin L.J. (later Lord Atkin) stated:

In my opinion, when an Act imposes a duty of commission or omission, the question whether a person aggrieved by a breach of the duty has a right of action depends on the intention of the Act. *Phillips* v. *Britannia Hygienic Laundry Co.* (2).

Parliament does not, in this section, expressly provide that in the event of a breach the municipality may be liable either in damages or penalty. Our attention was directed to s. 392, which provides a penalty upon a municipality "which neglects or refuses to obey any order of the Board made under the provisions of this Act." The duty to maintain the fourteen-foot clearance is imposed, in this case, by s. 263 of the Act and, therefore, s. 392, being referable only to orders of the Board, has no application.

The *Railway Act* contains many provisions dealing with the construction and maintenance of railways, the equipment to be used thereon as well as the management and operation thereof. Under the heading "Action for Damages" Parliament enacted ss. 385 to 390 inclusive. Section 385 is a very wide and comprehensive section which reads in part:

Any company which or any person who . . . does, causes, or permits to be done any matter, act or thing contrary to the provisions of this or the Special Act, or to the orders . . . of the Board made under this act, omits to do any matter, act, or thing thereby required to be done . . . shall, in addition to being liable to any penalty elsewhere provided, be liable to any person injured by any such act or omission . . .

The word "company", as used in this section, must be construed as defined in s. 2(4), which does not include a municipal body such as the respondent. In other words, in this general provision, imposing liability for damages even where a penalty is provided, Parliament has not imposed such liability upon municipal corporations. The subsequent sections under this heading deal specifically with cattle upon the railway, fires caused by locomotives, failure to equip trains and other matters which are not relevant hereto, except to observe that nowhere under this heading is liability for damages imposed upon a municipal body such as the respondent.

(1) [1925] S.C.R. 364 at 370. (2) [1923] 2 K.B. 832 at 840.

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Immediately following the foregoing sections, and under the heading "Offences, Penalties and Other Liability," a number of sections are set forth, including s. 392.

Parliament, in this statute, has in some cases expressly provided, in the event of a breach, for both the imposition of a penalty and liability in damages. In other cases it has provided for a penalty and preserved other rights which may exist against the party committing the breach; and further, in certain cases for a penalty only. Then in s. 444 it provides for a penalty upon the company or the officers thereof in the event of a breach where no other penalty is provided, but here again this section has no relevance, as the word "company" does not include a municipal corporation such as the respondent.

Our attention was not directed to, nor have I found any section which, in the event of a breach on the part of a municipality for failure to maintain the clearance of fourteen feet as required by s. 263, expressly imposes liability upon a municipal corporation. That s. 263 imposes a new duty upon the municipality must be conceded, but to construe this section, in the event of a breach, as giving a remedy in damages to the injured party would appear to be contrary to the intention of Parliament. Section 263 gives the Board power to alter or change the fourteen-foot clearance and where that power is exercised and a breach thereof is committed s. 392 provides that a penalty may be imposed upon the municipality, and then provides in s-s. (4):

> (4) Nothing in or done under this section shall lessen or affect any other liability of such company, corporation or person, or prevent or prejudice the enforcement of such order in any other way.

Parliament, in this sub-section, shows an intention not to impose a new liability, but rather to preserve "any other liability." It is not suggested that "any other liability" exists under the *Railway Act*. Parliament, in enacting this sub-section, would have in mind common law liability and the possibility of relevant provincial legislation, and to preserve any liability that might exist by virtue of either of them. The imposition of a penalty and this preservation indicate, in the event of a breach of an order of the Board, that Parliament did not intend to create a remedy in damages in favour of an injured party. It would not appear

reasonable to conclude that Parliament intended to create a new remedy in damages in favour of an injured party for a breach of the fourteen-foot clearance required by s. 263 but if that clearance was altered by the Board as that section contemplates then there would be only such liability as is preserved under s-s. (4). Moreover, the fact that Parliament has, in other sections, adopted express language to indicate its intention with respect to liability in damage in favour of an injured party rather supports the view that s. 263, without express language, should be construed as not creating such a remedy.

The possibility that ultimately it may be found that no penalty for a breach of s. 263 is provided would not affect the intention of Parliament in respect to liability for damages to an injured party.

The appeal should be dismissed with costs.

CARTWRIGHT J.:—The facts out of which this appeal arises and the relevant statutory provisions are set out in the reasons of my brothers Kerwin and Rand. At the hearing, it was decided that we should not interfere with the concurrent findings of fact absolving the appellant from contributory negligence and the situation with which we have to deal may therefore be summarized as follows. While the appellant's motor vehicle was being lawfully driven along a highway in the City of Toronto, the boiler which it was carrying was damaged by striking a bridge carrying a railway across the highway. The clearance between the surface of the highway and the under-surface of the bridge was thirteen feet six inches. The height of the top of the boiler from the surface of the highway was greater than this clearance but less than fourteen feet, the clearance prescribed by s. 263 of the *Railway Act*. The Railway Company had constructed the bridge the required distance above the surface of the highway but the Respondent City had at some time thereafter raised the surface of the highway so that the clearance was reduced to thirteen feet six inches. There is no suggestion that the surface of the highway was otherwise out of repair. It is common ground that the duty of keeping the highway in repair rested upon the Respondent City.

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Under these circumstances, in my opinion, apart altogether from the provisions of the *Railway Act*, the appellant had a right of action against the City for damages caused by a nuisance on the highway. Any obstruction on a highway which to a substantial degree renders the reasonable exercise of the right of passage unsafe or inconvenient is a public nuisance at common law; and a member of the public who has sustained a substantial injury, beyond that suffered by the rest of the public, resulting directly from such nuisance may maintain an action for damages. This right, as is pointed out by Meredith J. in *Ferguson* v. *Township of Southwold* (1), exists equally whether the nuisance is overhead or underfoot.

It cannot, I think, be doubted that the placing of a solid structure over a highway at a height of fourteen feet constitutes a nuisance at common law unless it is so placed under statutory authority. The effect of the relevant provisions of the *Railway Act* is to give such statutory authority but on the condition that a clearance of not less than fourteen feet be maintained between the surface of the highway and the overhead structure.

The Railway Company having complied with the Act in this regard has rightly been absolved from liability by the learned Chief Justice of the High Court following the decision of this Court in *Canadian National Railways* v. *Guérard* (2), and against this part of his judgment no appeal was taken.

So long as the City maintained its pavement in such a manner that the clearance between its surface and the bridge was not less than fourteen feet it had statutory authority to permit and maintain a condition which would otherwise have been an actionable nuisance. When it raised the pavement it lost that protection. In my opinion the effect of s. 263 of the *Railway Act* is not to create any right of action against the City but rather to relieve the City conditionally from a liability to action which would otherwise have existed. The City, having failed to observe the condition upon which immunity depends, remains liable in the same manner as if the *Railway Act* had given no statutory authority for the construction and maintenance of the

(1) (1895) 27 O.R. 66 at 74. (2) [1943] S.C.R. 152.

bridge, that is to say, it remains liable to an action for damages for creating or maintaining a nuisance at common law. This right of action is however barred by the combined effect of ss. 480(2) and 481 of the *Municipal Act*, as the action was not commenced until after the expiration of three months from the time when the damages were sustained.

The same result is reached if, instead of regarding the situation resulting from the raising of the pavement by the City as a nuisance, the City's action is regarded as an act of misfeasance. As was said by the learned Chief Justice of Ontario:— "The Act of the appellant in raising the level of the pavement was no doubt an act of misfeasance, and, therefore, actionable at common law." Such right of action is equally barred by s. 480(2) of the *Municipal Act*.

For the reasons set out above and for those given by the learned Chief Justice of Ontario, I am of opinion that, to use the words of Lord Simonds quoted by my brother Kerwin, "on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted" the proper conclusion is that it was not the intention of Parliament to confer upon individuals who might suffer damage by reason of the failure of a municipal corporation to comply with s. 263 of the *Railway Act* any new right of action against such municipal corporation. It was quite unnecessary to create any fresh cause of action as ample remedies were already available to the appellant both under the *Municipal Act* and at common law.

In my view, s-s 4 of s. 392 of the *Railway Act* was inserted *ex abundanti cautela* to prevent any suggestion that the rights of action existing under the common law and the provincial statutes were superseded by the sanctions of a penal nature provided for the enforcement of obedience to the provisions of the Act and the orders of the Board.

It was said by Riddell J.A. in *Howe* v. *Howe* (1), that "the maxim '*expressio unius est exclusio alterius*' was never more applicable than when applied to the interpretation of a statute"; and the fact, that when, by s. 385 of the *Railway Act*, Parliament confers on any person injured by an act or omission in contravention of the Act or the orders of the

(1) [1937] O.R. 57 at 61.

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Board a right of action against certain companies and persons it uses to describe those against whom such right of action is given words quite inapt to include a municipal corporation, furnishes an indication that Parliament did not intend to create any new right of action against municipal corporations but rather to leave an injured person to exercise his existing remedies.

In the case at bar the rights of action which the appellant possessed against the City were ample to enable it to obtain satisfaction for the damage caused by the latter's wrongdoing but unfortunately it has lost these rights through failure to commence its action within the statutory period of limitation.

For the above reason I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Haines, Thomson & Rogers.*

Solicitor for the respondent: *W. G. Angus.*

*PRESENT: Kerwin, Rand, Locke, Cartwright and Fauteux JJ.