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*May 10.
*Oct. 16.

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

AND

MICHAEL PSZENICNZY (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Railways—Negligence—Construction of statute—"Railway Act," R.S.C. 1906, *c.* 37, *s.* 306—*Constitutional law—"Civil rights"—Jurisdiction of Dominion Parliament — Provincial legislation — "Employers' Liability Act," R.S.M.*, 1913, *c.* 61—*Paramount authority—"Operation of railway"—Limitation of actions—Conflict of laws.*

An employee of a Dominion railway company sustained injuries while engaged in unloading rails from a car alleged to have been unsuitably equipped for such purposes. The unloading of the rails was for the convenience of the company in using them to replace other rails already in use on the constructed tracks. An action was brought to recover damages, under the Manitoba "Employers' Liability Act," R.S.M., 1913, ch. 61, within two years from the time of the accident, the limitation provided by section 12 of that Act, but after the expiration of the limitation of one year provided, in respect of actions against Dominion railway companies, by the first sub-section of section 306 of the "Railway Act," R.S.C., 1906, ch. 37. The fourth sub-section of section 306 provides that such railway companies shall not be relieved from liability under laws in force in the province where responsibility arises.

Held, affirming the judgment appealed from (25 Man. R. 655), that, in the exercise of authority in respect of railways subject to its jurisdiction, the Parliament of Canada had power to enact the first sub-section of section 306 of the "Railway Act," R.S.C., 1906, ch. 37, providing a limitation of one year for the commencement of actions against Dominion railway companies for the recovery of damages for injury sustained by reason of the construction or operation of the railway. *Grand Trunk Rway. Co.* v. *Attorney-General for Canada* ((1907) A.C. 65), applied.

Per Fitzpatrick, C.J. and Davies, Anglin and Brodeur JJ. (Idington J. *contra*).—The fourth sub-section of section 306 of the "Railway

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

Act," R.S.C., 1906, ch. 37, does not so qualify the limitation provided by the first sub-section thereof as to admit the application, in such cases, of a different limitation provided under provincial legislation. *Greer* v. *Canadian Pacific Rway. Co.* (51 Can. S.C.R. 338) followed.

The unloading of rails for the convenience of a railway company to be used in replacing those already in use on the constructed permanent way is included in "operation of the railway" under the first sub-section of section 306 of the "Railway Act," R.S.C., 1906, ch. 37. Idington J. *contra.*

The judgment appealed from (25 Man. R. 655) was reversed, Idington J. dissenting.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment maintaining the plaintiff's action entered by Prendergast J. on the verdict of the jury at the trial.

The circumstances of the case are stated in the headnote.

O. H. Clark K.C. for the appellants. The judgment appealed from is erroneous in holding that sub-section 4 of section 306 of the Dominion "Railway Act" restricts the application of sub-section 1 of that section to causes of actions which do not arise under the laws of the province where the liability was incurred. We refer to *Greer* v. *Canadian Pacific Rway. Co.*(2), *per* Anglin J. at page 351; *Canadian Pacific Rway. Co.* v. *Roy*(3), and *West* v. *Corbett*(4). Under the laws in force in Manitoba, an action by a servant against his master for common law negligence must be begun within six years, and if brought under the "Employers' Liability Act" it must be brought within two years. The effect of section 306 is to cut down the time for bringing a common law action against a Dominion railway company to one year and, therefore, a servant suing a Dominion railway company for com-

(1) 25 Man. R. 655.
(2) 51 Can. S.C.R. 338.
(3) [1902] A.C. 220.
(4) 47 Can. S.C.R. 596.

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mon law negligence is restricted to one year. It follows that a servant suing a railway company for negligence under the "Employers' Liability Act" would have to bring his action within the same time.

M. J. Gorman K.C. for the respondent. The injury was not sustained by reason of the "construction or operation" of the railway. The work upon which the appellants were engaged at the time of the accident was a work of renewal or maintenance, and not of construction or operation. The real proximate cause of the injury was the negligence of the appellants' foreman in using a defective roller. That is not "construction or operation" of the railway, or any part of it, but the negligence of a foreman who so carelessly exercised his superintendence that the injury was sustained. *Canadian Northern Railway Co.* v. *Robinson*(1), *per* Davies J. at page 397, Duff J. at page 401, and Anglin J. at page 409; and, on the appeal to the Privy Council(2), *per* Lord Haldane at page 745.

Sub-section 2 of section 306 limits the application of sub-section 1 to those cases where "the damages or injury alleged were done in pursuance of and by the authority of this Act or of the Special Act." The action of the appellants in replacing rails was not done in pursuance of and by the authority of the Act. There was no duty imposed by the Act to do this. It has not even been suggested that it was necessary. It was a purely voluntary act, not founded upon any duty or responsibility. Nor was the negligent action of the foreman in using the defective roller done in pursuance of and by the authority of the Act. *Lyles* v. *Southend-on-Sea Corporation* (3), *per* Vaughan

(1) 43 Can. S.C.R. 387. (2) [1911] A.C. 739.
(3) [1905] 2 K.B. 1.

Williams, L.J., at page 13. The limitation applies only to actions brought in respect of injuries caused directly, and not indirectly, by the construction or operation of the road, and is not intended to apply to suits founded upon injuries to civil rights unconnected with railway legislation in its true sense. The appellants are subject to the provisions of the "Employers' Liability Act," R.S.M., 1913, ch. 61, sec. 12, providing a limitation of two years for the commencement of actions. *Canada Southern Rway. Co.* v. *Jackson* (1).

Sub-section 4 of section 306 qualifies sub-section 1 and excludes its operation where the injury complained of comes within the jurisdiction of and is specially dealt with by the laws of the province in which it takes place, provided that such laws do not interfere with the powers of the Dominion Parliament respecting railway legislation. By its position in the Act, it applies against the railway company provincial laws imposing liability for wrongful acts or negligence so far as these laws do not encroach upon Dominion powers. Sub-section 1 prescribes the limitation in the case of actions for damages arising within the provisions of the "Railway Act," while sub-section 4 makes it clear that there was no intention to affect the laws in force in any of the provinces where a liability of a company arises under those laws or to impose a limitation less than that imposed by the provincial law. *British Columbia Electric Railway Co.* v. *Turner*(2), *per* Idington J. at page 487; Abbott, Railway Law, page 209; Maxwell on Statutes (5 ed.), page 463.

Section 306 applies only 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 com-

(1) 17 Can. S.C.R. 316.

(2) 49 Can. S.C.R. 470.

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panies 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 neglect of a company or its servants in the construction or operation of the road. *North Shore Rway. Co.* v. *McWillie*(1), *per* Gwynne J. at page 514.

THE CHIEF JUSTICE.—The plaintiff's claim for damages is alleged in his factum to have arisen in these circumstances:—

> The plaintiff was a labourer and at the time of receiving the injury he was employed with others by the defendant in unloading steel rails from a box car, in which they had been shipped to the defendant, to a flat car, for more convenient distribution along the railway. The company at the time was replacing the old track with heavier rails.

It appears, therefore, that the injury complained of was sustained by reason of the construction and operation of the railway and the question to be decided is, does the limitation of section 306, para. 1 of the "Railway Act" apply, the action not having been commenced within the year.

Assuming, as I think we must, that it was competent to the Dominion Parliament to pass this legislation I am satisfied that the language of paragraph 1 is sufficiently comprehensive to include all claims for damages, whether they arise at common law or under a statute. The claim was originally made at common law and under the statute, but was finally submitted to the jury as an action under the provincial "Workmen's Act."

I have reluctantly come to the conclusion that paragraph 4 of section 306 gives the respondent no assistance. That paragraph is applicable to the cause of action and means that if an accident occurs for which

(1) 17 Can. S.C.R. 511.

the company would be liable either at common law or under some special provincial statute, nothing contained in the Act, and no inspection had under the Act, will in any wise diminish or affect any such liability or responsibility. Here it is admitted that there was originally a good cause of action, but the suit to enforce the claim was not brought within one year next after the occurrence out of which the cause of action arose. Prescription under the civil law is a manner of discharging a debt by lapse of time. A debt or obligation, on the other hand, is not affected by a statute which says it may not be enforced after a certain period of time. The statute, in paragraph 1, does not affect the cause of action, it merely fixes one year as a reasonable time within which an action may be brought to enforce that right of action.

I do not think that the case of *Greer* v. *Canadian Pacific Railway Co.*(1) is applicable. The courts below disposed of that case on the ground that the injury complained of was caused by something done in pursuance and by authority of the "Railway Act," (*per* Anglin J. at page 350), and in that conclusion the majority of this court concurred. Here we have to deal with a case of negligence.

I would allow although with much regret.

DAVIES J.—I am of opinion that this appeal must be allowed. I cannot doubt that the injuries of which the plaintiff complains were sustained by him "by reason of the construction or operation of the railway" within the meaning of those words in section 306, ch. 37 of the Revised Statutes of Canada, 1906, the Dominion "Railway Act," nor do I doubt that sub-section 1 of that section was *intra vires* of the Dominion Parliament.

(1) 51 Can. S.C.R. 338.

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The court below held, for different reasons assigned by the judges, that this section of the "Railway Act" was not applicable to the negligence complained of and that the limitation in the "Employers' Liability Act" of the province for bringing the action within two years was the governing section and not section 306 of the Dominion "Railway Act" which fixed the time at one year.

At the time, however, when the judgment was given the judgment of this court in the case of *Greer* v. *Canadian Pacific Railway. Co.*(1) had not been reported and was not called to the attention of the court below.

That case is now reported and determined that sub-section 1 of section 306 of the "Railway Act," R.S.C. (1906) ch. 37, applied to injuries caused by the *negligent* construction or operation of the railway and that sub-section 4 did not restrict or affect the limitation in sub-section 1.

I was one of the judges who dissented from the judgment in *Greer's Case*(1); but, of course, I am bound by it and I am quite unable to distinguish the appeal now before us from that judgment, though I freely admit the difficulty of reconciling the 4th sub-section of section 306 with the rest of the section.

For this reason I would allow the appeal and dismiss the action with costs it not having been brought within the limitation prescribed in section 306 of the "Railway Act."

IDINGTON J. (dissenting).—The only question raised herein is whether or not section 306 of the "Railway Act" can be relied upon as a bar to an action under the Manitoba "Employers' Liability Act"

(1) 51 Can. S.C.R. 338.

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which enables a recovery for damages suffered by an employee under such circumstances as in question herein by action brought during the period of two years from the happening of the accident.

The Court of Appeal for Manitoba were unanimous in holding it was not, but *Greer* v. *The Canadian Pacific Railway Company*(1), though decided then, had not been reported.

Whether the decisions of that case by the Ontario courts, which were reported, were cited or considered does not appear. They were accepted by the majority of this court as correct.

The only question now left is whether or not that case is distinguishable in principle from this.

I, with great respect and some hesitation, find in the stress laid in the opinion of two of my brother judges, composing the majority deciding that case, upon section 297 of the "Railway Act," that the cases are distinguishable.

It is conceivable that a burning of refuse including old ties on the track was rendered imperative by that section.

If that view is accepted, though it was not mine, then the company acting under the paramount authority of the "Railway Act" and discharging a duty created thereby could not be held bound by any Act of the legislature in conflict therewith and, as a corollary thereto, the applicability of the limitation of action in section 306 of the "Railway Act" may be arguable.

There is nothing of that sort in this case.

It cannot be pretended, at least so far it has not been since the legislation questioned in, and the decisions in the case of *In re Railway Act of* 1904(2), and

(1) 51 Can. S.C.R. 338. (2) 36 Can. S.C.R. 136.

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the same case under the name of *Grand Trunk Railway Company* v. *Attorney-General of Canada* (1), that the "Employers' Liability Act" or similar legislation does not bind the railway companies.

Subject therefore to the limitations imposed upon me by the decision in the *Greer Case*(2) thus understood, I remain of the opinion I expressed therein and for the reasons assigned in that case.

The case of *Canadian Northern Railway Company* v. *Anderson*(3) cited therein, in my opinion, seems much in point. That was a case arising out of work carried on for purposes of construction. The sole difference is that this is a case of a man engaged in the transportation of rails intended for construction or repair and renewal, and that was a case of a man engaged in procuring ballast to be transported and used in construction. Yet in that case leave was refused by the Judicial Committee to appeal from our decision(4).

The enactment of sub-section 4 of section 306, now in question, by the last revision of the statutes places it under the limitation clause therein as if germane thereto and thus emphasizes its purpose and effect.

But quite independently of such relation it is in substantially the same form in which it has remained ever since the session of 1868, immediately after Confederation; and was obviously designed by the change of expression then adopted to render effective just such provincial legislation as now in question.

It helps nothing to trace its history beyond the enactment of said 31 Vict. ch. 68, sec. 40, when the

(1) [1907] A.C. 65.
(2) 51 Can. S.C.R. 338.
(3) 45 Can. S.C.R. 355.
(4) 45 Can. S.C.R. vii.

laws of a province were excepted as well as anything in the "Railway Act" itself.

The argument set up in the appellant's factum that to give effect to it in the way contended for in the judgments of the learned judges of the court below, would destroy the effect of the decision in *Roy* v. *The Canadian Pacific Railway Company*(1) is answered by the fact that it was relied upon therein and held not to have such effect.

To give effect to the argument herein for appellant would go a long way to destroy sub-section 4 of any efficacy whatever. As a matter of law I incline to think the section never was necessary to protect those entitled to claim under such legislation as the "Workmen's Compensation Act" or the "Employers' Liability Act" in question here. But it clearly was the design of the Parliament of Old Canada in providing against railway accidents, of which some shocking illustrations were present to the minds of everyone in the Canada of those days and doubtless led to the enactment of the statute in which the substance of this section is first found.

It was intended no doubt to brush aside any possibility of any one ever arguing that such provisions as then enacted were intended to affect the civil rights of any one.

That was, as already stated, extended to protect the right of any one acquiring rights under provincial legislation from anything in the "Railway Act" including the section, now section 306, sub-sections 1 and 2.

Again it was at the same time as the Act was revised, in 1903, that this section was placed as a subsection of section 242 in that Act.

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

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The character of that revision was radical in many respects and intended to protect the public in many ways as, for example, by the creation of a Board of Railway Commissioners and in relation to the very subject of the limitations of actions against railways, was so amended as to change the original words used in that regard "by reason of the railway" to the words "by reason of the construction or operation of the railway" and adding sub-section 2 which is now sub-section 3 of section 306.

The railway companies had obtained conflicting decisions as to the meaning of the words "by reason of the railway" but never succeeded in bringing contracts within the range of that limitation. To make clear that it should not sub-section 2 of said section 242 was adopted. And, as if to make clear that provincial or other legislation should not be affected by the limitation clause, it put the present sub-section 4 of section 306 under the same caption.

However clumsy the effort there cannot be much doubt of the intention to let it be treated as if part of the limitation and qualifying it.

It effectually did so if we should only read it literally by itself as preserving for those entitled to relief under any provincial legislation to the full effect thereof including the limitation of any action resting thereon.

Of such legislation that now in question is part and must stand unimpeached or unaffected by a limitation statute designed for other purposes than in any way controlling or affecting anything save that strictly within the operation of the "Railway Act" itself.

If the usual rule governing statutory limitations of actions is adhered to, the text of section 306, sub-sections 1 and 2, cannot be extended to apply to such

legislation as the Act in question herein and the collocation of sub-section 4 should put it beyond peradventure.

The appeal should be dismissed with costs.

ANGLIN J.—For reasons which it deemed sufficient Parliament has thought it desirable to give to every railway company under its jurisdiction the protection of a statutory limitation of one year after the time when the damage has been suffered within which all actions or suits against it for indemnity for any damages or injury sustained by reason of the construction or operation of the railway must be brought. If this "law is truly ancillary to railway legislation," although it should deal with and affect civil rights in the province and should overlap provincial legislation, it is *intra vires* and must prevail in cases which fall within its scope. *Grand Trunk Railway Co.* v. *Attorney-General for Canada*(1). Many reasons may be surmised why Parliament should consider it advisable, if not necessary, for the efficient and satisfactory working and management of their undertakings, that railway companies should be relieved from the necessity of preserving records of accidents and keeping available as witnesses for more than a year employees and other persons who may be in a position to give evidence as to them. With the merits of such a policy we are not concerned. So long as Parliament has not, under the guise of railway legislation, enacted what is not such but is truly legislation as to civil rights, its authority may not be questioned. I am unable to say that this vice is present in sub-section 1 of section 306 of the "Railway Act," which, though frequently before the courts, has never been challenged as *ultra vires*.

(1) [1907] A.C. 65.

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That the injury suffered by the respondent was sustained in the operation of the railway in my opinion does not admit of doubt. As their Lordships of the Judicial Committee said in *Robinson* v. *Canadian Pacific Railway Co.*(1),

> such operation seems to signify the process of working the railway as constructed.

In loading and unloading freight and goods upon railway cars the company's servants are assuredly engaged in the process of working the railway. It was negligence in the providing of means for such operation that caused the injury for which this action is brought. That actions based on such negligence are within the protection afforded by sub-section 1 of section 306 has been held in several cases in this court. *West* v. *Corbett*(2); *Canadian Pacific Railway Co.* v. *Robinson*(3); *Greer* v. *Canadian Pacific Railway Co.*(4).

But, it is urged, the Manitoba "Employers' Liability Act" gives a new statutory remedy for such an injury when sustained by an employee of the company and provides a special period of limitation within which an action under it may be brought. To such a case, it is argued, the general limitation of the Dominion "Railway Act" does not apply. I am somewhat at a loss to appreciate the ground of distinction suggested between rights of action arising under the common law of the province and rights of action created or conferred by provincial statutes where there is a question of the application to them of paramount Dominion legislation. The question is not, as it was in *Robinson* v. *Canadian Pacific Railway Co.*(5), which of two pro-

(1) [1911] A.C. 739.
(2) 47 Can. S.C.R. 596.
(3) 43 Can. S.C.R. 387.
(4) 51 Can. S.C.R. 338.
(5) [1892] A.C. 481.

vincial limitation sections governs. If it were, a very strong argument could be made for applying the special provision found in the statute conferring the right of action. The question is whether a provision of a Dominion Act, framed in terms making it applicable to all actions against Dominion railway companies for infringement of civil rights in the course of the construction or operation of the railways which cause injury or damage, should be held inapplicable in cases where by provincial legislation a defence that would otherwise be available to railway companies, as employers, has been taken away, because the provincial legislation has annexed to the right to maintain an action in such cases the condition that it shall be brought within two years. The right of action in the present case, although it exists by virtue of the "Employers' Liability Act" having taken away the defence of common employment, is, nevertheless, for damages or injury sustained by reason of the operation of the railway and as such, in my opinion, falls within and is governed by the period of limitation prescribed by section 306 of the Dominion "Railway Act." To hold differently would be improperly to allow otherwise valid provincial legislation to prevail over *intra vires* Dominion legislation in a field in which they overlap. *Compagnie Hydraulique de St. Francois* v. *Continental Light, Heat and Power Co.*(1).

The history and construction of sub-section 4 of section 306 were recently considered in *Greer* v. *Canadian Pacific Railway Co.*(2), and, for the reasons there stated by Mr. Justice Duff and myself, I am of the opinion that sub-section 4 does not render sub-section 1 inapplicable to the case at bar.

(1) [1909] A.C. 194.

(2) 51 Can. S.C.R. 338.

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Anglin J.

The appeal should be allowed with costs in this court and in the Manitoba Court of Appeal, and judgment should be entered dismissing the action with costs.

BRODEUR J.—I concur in the opinion of Mr. Justice Anglin. This appeal should be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Clark & Jackson.*
Solicitors for the respondent: *Murray & Noble.*