

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Canadian Northern Railway Company v. Thomas D. Robinson and another, from the Supreme Court of Canada ; delivered the 27th July 1911.

PRESENT AT THE HEARING :

VISCOUNT HALDANE.

LORD MACNAGHTEN.

LORD SHAW.

LORD DE VILLIERS.

LORD ROBSON.

[DELIVERED BY VISCOUNT HALDANE.]

This is an Appeal from a Judgment of the Supreme Court of Canada, which, by a majority of three to two, dismissed an Appeal from an Order of the Court of Appeal for Manitoba. This Order dismissed the Appeal of the Appellants against a Judgment of Mr. Justice Metcalfe awarding damages to the Respondents for the neglect and failure of the Appellants between 31st October 1904 and 28th September 1906 to supply proper facilities for receiving, forwarding, and delivery of traffic upon the railway of the Appellants.

In 1888 one of the Respondents established a fuel business in Winnipeg, on premises adjoining the railway, which then belonged to the Northern Pacific and Manitoba Railway Company, and that Company, at his request, constructed a spur track or siding into his yard

for his convenience. A lumber business was subsequently added to the fuel business, and this enlarged business was, from 1903 onwards, carried on by the Respondents in partnership. The Railway Company worked the siding, which does not appear to have been constructed on the terms of any express agreement, till 1901, when the railway became vested in the Appellants. On 12th June 1904 the Appellants gave notice to discontinue the facilities afforded by the siding, and in November in that year cut it off. The Respondents in 1905 commenced proceedings before the Board of Railway Commissioners for Canada for restoration of the facilities which the siding afforded, and on 19th February 1906 the Board made an Order directing the Appellants to restore these facilities at the expense of the Respondents, and without prejudice to the right of the Appellants to expropriate them. On appeal to the Supreme Court of Canada the Order was affirmed. Meantime, on the 22nd September 1906, another Order was made by the Board further defining the facilities to which the Respondents were entitled, and the Order was carried into effect.

The Respondents in October 1908 commenced an Action in the Court of King's Bench in Manitoba, claiming damages for the temporary deprivation of the facilities. Mr. Justice Metcalfe decided in their favour, and directed a reference as to the amount of damage suffered.

The Order of the Board deciding that the Respondents were entitled to the facilities in question, and that they had been unreasonably deprived of them, was made under sections 214 and 253 of the Railway Act of Canada, 1903. Section 214 provides in effect that a railway company is to furnish at all stopping places established for the purpose accommodation for the receiving and loading of traffic offered for

carriage and shall carry such traffic. Section 253 provides that the company is to afford all reasonable and proper facilities for receiving, forwarding, and delivering traffic. Subsection 2 of this Section also provides that the Board may determine as a question of fact whether the company has complied with this provision. By Section 42 the decision of the Board on any question of fact is made conclusive in all Courts. Section 294 provides that the company, doing or causing, or permitting to be done, any matter, act, or thing contrary to the provisions of the Act, or to the orders or directions of the Governor in Council or the Board or minister made thereunder, or omitting to do any matter, act, or thing required to be done on the part of the company, is to be liable to any person injured thereby for the full amount of damages sustained by reason of such act or omission. Section 242 provides that all actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, or if there is continuation of damage within one year next after the doing or committing of such damage ceases. Subsection 2 of the same Section declares that nothing in Section 242 shall apply to any action brought against the company upon any breach of contract, express or implied, in the carriage of any traffic, nor to any action against the company for damages under any Section of Part XI. of the Act respecting tolls. By Section 306 of the Railway Act of 1906 the provisions of Section 242 of the Act of 1903 were re-enacted substantially in the same words, excepting that for the concluding words of Sub-section 2 "any section of " Part XI. of this Act respecting Tolls," the words " the following provisions of this Act respecting " Tolls " were substituted.

The first question on the present Appeal is whether the Action was barred by the special limitation provisions, just quoted, as not having been brought within one year either of the original act of discontinuance of facilities, or even of the Order of the Board declaring the Respondents' title. If not barred by these special provisions it is common ground that the Action is barred by no other statute of limitations. In the opinion of their Lordships the special provisions do not apply. They are confined to damages or injury sustained by reason of the construction or operation of the railway. The words of exception in the Sub-section relate to carriage of traffic and to tolls, and do not require any construction which extends the meaning of the phrase "operation of the railway." Such operation seems to signify simply the process of working the railway as constructed. The refusal or discontinuance of facilities for making a siding outside the railway as constructed and connecting it with the line does not appear to be an act done in the course of operating the railway itself. Their Lordships have examined the Railway Act as a whole, and they are of opinion that the special provisions for limiting the time of bringing Actions of certain classes to a period of one year from the origin of the cause of action do not apply to a case of refusing or discontinuing facilities such as the present.

The next question is whether there has been such a breach of the statutory obligation to afford reasonable and proper facilities for receiving, forwarding, or delivering traffic upon or from the railway. On this point their Lordships think that the Order of the Railway Board, affirmed as it was on appeal, is, under Section 42, conclusive as to what was really a question of fact, the question whether the facilities which the Respondents used to enjoy of sending and taking delivery of traffic over a spur track not

forming part of the railway itself, but allowed to be connected, were facilities of a kind to which the Respondents were entitled. It appears to them that the Order of the Board did not originate this right, but recognised it as already existing. This appears to be the effect of Sub-section 2 of Section 253. The result is that their Lordships are of opinion that the Judgments in the Courts below were right, and they will humbly advise His Majesty that this Appeal should be dismissed with costs as between solicitor and client.

In the Privy Council.

THE CANADIAN NORTHERN RAILWAY
COMPANY

v.

THOMAS D. ROBINSON AND ANOTHER.

DELIVERED BY VISCOUNT HALDANE.

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