

CANADA / JUDGMENT

British Columbia Electric Railway Co. v. Crompton

(1910) 43 SCR 1

COURT

Supreme Court of Canada

DECIDED

15 February 1910

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British Columbia Electric Railway Co. v. Crompton

Collection

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Date

1910-02-15

Report

(1910) 43 SCR 1

Judges

Fitzpatrick, Charles; Davies, Louis Henry; Idington, John; Duff, Lyman Poore; Anglin, Francis Alexander

On appeal from

British Columbia

Subjects

Statutes

Decision Content

Supreme Court of Canada

British Columbia Electric Railway Co. v. Crompton, (1910) 43 S.C.R. 1

Date: 1910-02-15

The British Columbia Electric Railway Co. (Defendants) Appellants;

and

Frank Crompton (Plaintiff) Respondent.

1909: October 14; 1910: February 15.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA

Construction of statute—Limitations of actions—Contract for supply of electric light—Negligence—Injury to person not privy to contract—"Consolidated Railway Company's Act, 1896," 59 V. c. 55 (B.C.), ss. 29, 50, 60.

The appellant company, having acquired the property, rights, contracts, privileges and franchises of the Consolidated Railway and Light Company, under the provisions of "The Consolidated Railway Company's Act, 1896" (59 Vict. ch. 55 [B.C.]), is entitled to the benefit of the limitation of actions provided by section 60 of that statute. Idington J. dissenting. The limitation so provided applies to the case of a minor injured, while residing in his mother's house, by contact with an electric wire in use there under a contract between the company and his mother.

Judgment appealed from (14 B.C. Rep. 224) reversed, Davies and Idington JJ. dissenting.

APPEAL from the judgment of the Supreme Court of British Columbia[1], reversing the judgment of Lampman, Co.J., and maintaining the plaintiff's action with costs.

The plaintiff, an infant suing by his next friend, was injured, while residing in his mother's house, by coming in contact with an electric wire in use there in connection with the supply of electric light under a contract between the company, defendants, and his mother. The defendants acquired the property, rights, contracts, privileges and franchises of the Consolidated Railway and Light Company, under the provisions of "The Consolidated Railway Company's Act, 1896" (55 Vict. ch. 55 (B.C.)), and carried on the operation thereof in their own name. By the 60th section of this Act it was provided that actions for indemnity for injury sustained by reason of the works or operations of the company should be commenced within six months next after the date when the injury was sustained and not afterwards. The injury was sustained on the 26th of December, 1907, and the action was commenced on the 31st of October, 1908. The action was dismissed at the trial, but this judgment was reversed by the judgment now appealed from.

The questions in issue on the present appeal are stated in the judgments now reported. A. E. McPhillips K.C. for the appellants.

Travers Levis K.C. for the respondent.

THE CHIEF JUSTICE.—I agree in the opinion stated by Mr. Justice Duff.

DAVIES J. (dissenting).—I have had the opportunity of reading the judgment in this case prepared by Duff J. and I agree with his reasoning and conclusion that the appellants are entitled to claim the protection of section 60 of the "Consolidated Railway Companies Act, 1896," of British Columbia, in cases coming within it.

I am, however, unable to agree with him that such section can be invoked in the circumstances of this case.

The duty for breach of which the defendants here have been held liable was a duty arising out of their contract to supply electric light to the house of the plaintiff's mother. That contract, which does not appear to have been in writing, was not a personal one to supply light to and for the use of the occupier alone, but to my mind obviously from its very nature, object and purpose extended as well to those of her household. The 44th section of their charter provided expressly that defendants should "supply electricity to any premises lying within fifty yards of any main supply or cable suitable for that purpose on being required by the owner or occupier of such premises." It was clearly within the contemplation of all parties that the electricity supplied should be for the premises of the occupier and therefore necessarily for the use of the occupants of the house. I hold that the duties and obligations arising out of such a contract extend to all those for whose use and benefit it was clearly entered into, and are not limited to the person contracted with alone. Such duties and obligations towards the members and servants of the household are the same as and of equal degree with those towards the householder himself with whom the contract was made. In each case it is an implied duty or obligation arising out of the contract, and being so not affected by the section referred to. I understand my learned brother's opinion to be that the section could not be invoked by the company against the mother with whom they made the contract, because in her case, as he puts it, such an action would be based upon a violation of a contractual right. I agree to that, but it is not a violation of any express right, but of an implied duty arising out of the contract, and is in my opinion available as well to those for whose benefit the contract was undeniably made as to the person entering into it. I assume therefore that the only difference between us is as to the proper interpretation and meaning of the contract for supplying electricity.

The contract being for the supply of electricity to the house of plaintiff's mother, and as I think it must be read for the use of herself and family and servants, was subject to such stipulations and conditions as the parties to it might expressly agree upon. These might well be the measure of the defendant's duty arising out of it as well to the person with whom they contracted as to others for whose benefit the contract was entered into. If the company faithfully carried out their contract and injury nevertheless ensued they might be absolved from all liability on the plain ground that they owed no duty to any person of which they were guilty of a breach. But it does seem to me that the measure of the duty they owed to the person with whom they undeniably contracted was the same as that which they owed to all those for whose benefit the contract was obviously made. In all such cases the duty is an implied one, and arises as necessarily in the case of those for whose use the electric fluid is to be supplied as in that of the actual party to the contract. This it is which distinguishes the case of those persons for whose benefit and use the contract is made from the general public. In the present case, as I hold, a clear duty arises out of the contract to this special class of persons for a breach of which when injured any member of it has a right to sue, and which duty and right arising out of the special contract is not within the limiting provision of section 60, invoked by the company here as an answer to this action. The electricity supplied to and for the house of the plaintiff's mother in this case was necessarily, to

the knowledge of the company supplying it, for the use of all persons lawfully in the house, whether as members of the family or servants of the owner or occupier.

The duty arising out of the company's contract to supply the house with electricity, involved on the part of the company the exercise of the highest skill, care and attention with respect to their wires and the transmission through them into the house of such a dangerous element or power as electricity. To construe the clause limiting the liability of the company to damages for negligence in the discharge of such duty as not applicable to cases where the person immediately contracting has been injured, but as applicable to others for whose benefit the contract must have been entered into, and who I hold were within the contemplation of the parties to the contract, would be to attribute an intention to the legislature which the language of the section does not, as I interpret it, express. I rest my judgment upon the broad ground that the section in question does not extend to any breach of the duty arising out of the contractual obligation on the defendant's part to supply the house of the plaintiff's mother with electricity, and that such duty and obligation arises in the circumstances of this case out of the contract as well towards the son of the owner or occupier living in the premises with his mother as towards the mother herself, and that such being the case and the section not being invocable by the company against the boy's mother in a case of damage to her own person cannot be invoked against the son.

The negligence which caused the plaintiff's injuries in this case was not active and positive negligence amounting to misfeasance, but was non-feasance on the part of the company's servants in neglecting to keep their wires leading into the premises of the plaintiff's mother properly insulated. To maintain his action, therefore, plaintiff must have shewn the existence of a contract entered into for his benefit as well as others, and for a breach of the defendant's duty arising under which he had a right of action. Such a contract I have already attempted to shew was proved.

As to authorities I have carefully studied the cases cited on the argument and others. Many of them are reviewed by Osler J.A. in *Ryckman v. Hamilton, Grimsby and Beamsville Electric Railway Co.*[2], and more recently by Riddell J. in *Allen v. Canadian Pacific Railway Co.*[3]. The cases of *Taylor v. Manchester, Sheffield and Lincolnshire Railway*[4], where *Alton v. Midland Railway Co.*[5], is discussed and commented on, *Marshall v. York, Newcastle and Berwick Railway Co.*[6], and *Austin v. Great Western Railway*[7], though cases against carriers, are instructive upon the general question involved here.

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

IDINGTON J. (dissenting).—The question raised on this appeal is whether or not the respondent's action must be held barred by the following section which appears in an Act to amend an Act to incorporate the Consolidated Railway and Light Company, and to consolidate certain Acts relating thereto, and to change the name thereof to the Consolidated Railway Company, and which reads as follows:—

All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage is sustained.

By section 29 of the said Act the Consolidated Railway Company, amalgamating a number of other railway companies was given the right to mortgage

all tolls, incomes, franchises, uncalled capital and property both real and personal,
and subject to certain conditions named,

to take possession of the said property so mortgaged, and to hold and run the same for the benefit of the bondholders thereof; or to lease or sell the said property so mortgaged after such default, and upon such terms and conditions as may be stated in such deed; and in case of any such lease or sale, the lessee or purchaser shall have the right to exercise all the powers and franchises by this Act conferred upon the company, and the said property may continue to be held and operated under the provisions of this Act, with the corporate name and powers of the company; and such lessee or purchaser shall have the same rights, powers, privileges and franchises, and shall stand in the same position, as regards the said tolls, incomes, franchises, powers, uncalled capital and property, real and personal, as the company itself under this Act.

The Consolidated Railway Company under the powers given in said section ultimately sold to the appellant in exercise of the powers in said section 29, but did not

operate under the provisions of said Act with the corporate name and powers of the company.

The appellants kept their own corporate name and acted under their own powers, and those given a buyer under said statute.

The accident to the respondent was a result of negligence on the part of the appellants in carrying on the electric lighting part of the business.

Another statute known as the "British Columbia Railway Act," by section 8, provided as follows:—

Every company established under a special Act shall be a body corporate under the name declared in the special Act, and shall be invested with all such powers, privileges, and immunities as are necessary to carry into effect the intentions and objects of this Act and of the special Act therefor, and are incident to such corporation or are expressed or included in the "Interpretation Act," 1890, ch. 39, sec. S.

That section and section 42 of the same Act, with other sections thereof, were incorporated by the Act above referred to therein. That section 42, so far as it bears on the case before use, reads as follows:—

All actions for indemnity for damage or injury sustained by reason of the railway shall be instituted within one year next after the time of the supposed damage sustained, or if there be continuance of damage, then within one year next after the doing or committing of such damage ceases and not afterwards; and the defendants may plead not guilty by statute, and give this Act and the special Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act and the special Act.

I consider both sections, 60 of the first mentioned Act, and section 42 of the "British Columbia Railway Act," may have operative effect given to them without at all helping the appellant's contention. As to the effect of sections 29 and 60 of the first above mentioned Act, if I understand that contention aright, it is that inasmuch as a lessee or purchaser under section 29 is given

the same rights, powers, privileges and franchises, and shall stand in the same position as regards the said tolls, incomes, franchises, powers, uncalled capital, and property real and personal, as the company itself under this Act,

the protection given by section 60 limiting actions against the consolidated, or selling company, is carried by the words just quoted to the protection of the appellant, that is the purchasing company in actions against it.

We must interpret these words just quoted without the aid of direct authority as no case can be found directly in point.

Probably no one ever before tried to strain so far a kind of legislation usually given a restricted interpretation.

It is not seriously contended that the words "powers and franchises" are to be looked for to maintain appellant's contention. The words "rights and privileges" were in themselves, or each in itself, and especially coupled with these other words, relied upon.

Can the word "rights" in this connection, covering much that is obviously in relation to property or right thereto or therein or something transferable from the Consolidated Railway Company to the British Columbia Electric Company, as result of purchase, be extended to something implied as subject matter liable to be so operated upon by the enactment as to constitute the vesting in the latter of anything in the nature of a right to set up the statute of limitations which appears in section 60?

I have tried unsuccessfully to find any case wherein the word "right" has been held as meaning any such legislative substitution as we must hold it to mean if by virtue of it we give effect to appellant's contention.

One or two cases illustrate its legislative meaning and the disinclination of the courts to extend same beyond the context in which it is found. In *re Earl of Devon's Settled Estates*^[8], was a case arising under the "Real Property Limitations Act, 1833," when it was contended that the word "right" as used therein covered a power of appointment to uses. Chitty J. said as to such contention:—

No real property lawyer in 1833 would have spoken of a power of appointing uses as an "estate, interest, right or possibility." The terms "right" and "possibility" are used in their technical sense. "Right," for instance, applies to the case of an estate turned to a right which could be enforced only in a real action. I hold that a power is not within the section.

Then we have numerous analogous cases cited in Stroud's Judicial Dictionary, vol. 3, pages 1738 et seq..

In the case of *Kearns v. The Cordwainers' Co.*[9], it was held competent for the Thames Conservancy, 1857, to invade the common right which any of the public had theretofore exercised, notwithstanding the words of the reservation that none of the powers in the Act contained,

shall extend to take away, alter or abridge any right, claim, privilege, franchise, exemption or immunity to which any owners or occupiers of any lands, etc., are now by law entitled; nor to take away or abridge any local right of ferry, etc. The same shall remain and continue in full force,

and also that these words must be held to have been intended to cover something vested, and not that falling within a general public right.

Perhaps the nearest application of the word "right" to what is in question is that maintained in the case of *Ex parte Raison*[10], where it was held that a bankrupt's right to apply for his discharge under the provisions of section 28 of the "Bankruptcy Act" of 1833, notwithstanding its repeal, was preserved to him by section 38 of the "Interpretation Act" of 1889. It was held that section 38, declaring that the repeal of an Act is not to affect any right, privilege, obligation, or liability, acquired, accrued or incurred in that section, preserved the right.

That was the reservation to the individual of a personal right and illustrates both what I have referred and what I am about to refer to.

Nor do I think the word "privileges" any more effective. It may mean benefits affecting a class of persons or a right conferred on a definite person. In neither sense does it serve herein the appellant which is not one of a class in this relation, nor is it the specific person named.

The right to plead a statute of limitations is a privilege, but only as Wood on Limitations, ch. 4, section 31, puts it, and that defence it gives, as follows:

The plea of the Statute of Limitations is generally a personal privilege, and may be waived by a defendant, or asserted, at his election; but where he has parted with his interest in property, his grantees, mortgagees, or other persons standing in his place are entitled to avail themselves of all the advantages of his plea.

I think it would be futile to suggest that the grantees or mortgagees of the property in question herein fall within the meaning of this paragraph except in a limited sense.

And that limited sense so far as relative to the quality of transferability is confined to its effect as an incident of the property or right transferred. It passes only therewith and not otherwise.

If, for example, there happened to be any right of property or contractual right possessed by the vendors or mortgagors herein at the time when they transferred, mortgaged or sold the property, I think it would be quite within the right of the appellant in such case as the mortgagee or vendee to plead, just as the vendor might have pleaded, the Statute of Limitations involved in that relation.

But is this case in hand the raising of an issue at all like unto that? What is the Statute of Limitations in this section 60 relative to? Is it not against something done or omitted to have been done by the company individually enabled to set up the defence provided for in section 60.

It is not the case that arises under the "General Railway Act" in relation to a class.

Its individual character would probably be effective to protect in the appellants' hands the assets transferred as against actions for something done or omitted by the consolidated company. The section does not in terms provide that its assignee may have any such right in regard to some act or omission that the assignee may have been or become guilty of.

The express provision in question, it is to be observed, appears, by accident probably, in the same Act in which is incorporated as shewn above the general law of the province in regard to the subject of railways.

Why attribute to the legislation an intention to extend such an absurdity?

It is only by a process of ratiocination resting on inferences and implications that such a result as appellant desires can be arrived at.

Having regard to these and other foregoing considerations and to the well-known rule that anything in the way of legislation abridging the public rights or the rights of any of the public in favour of one acquiring a concession from Parliament or other legislative body must be construed strictly, and that the right must not be extended by implication, can we say that that process I refer to as relied on herein is satisfactory?

I prefer to say with Lord Cottenham in *Webb v. Manchester and Leeds Railway Co.*[11]:

If there be any reasonable doubt as to the extent of the powers (given in the private Act) they must go elsewhere and get enlarged powers but they will get none from me by way of construction of their Act of Parliament.

Moreover the section in its very wording is expressly as against anything sustained "by reason of the tramway or railway" and the words following "or the works or operations of the company" may well be confined to the same subject matter of the railway.

If the rule just now referred to regarding the restrictions of concessions is adhered to it may well be argued the privilege is not definitely extended to the lighting department of the company, and all which that implies. That leads to the same result and even if that is waived for argument sake, it is not shewn this particular part of that work existed at the time of the transfer and hence could not have been transferred with such a right.

It may be said in reply it is not the work that is transferred, but the right itself.

Take it that way then the selling company was left without any Statute of Limitations to protect not only its interest in regard to accident cases, but also manifold interests of any and every kind for no distinction is made.

Is it conceivable such ever was the the intention of anybody? It may be said that is not what is meant by transfer of such a right, but the enjoyment of the like right in common with the selling company.

Tried that way the obvious reply is that this language is not that which any one would use to confer such a common right.

Nay, more, we find the language and purpose of section 29 is relative to property and rights of property to be enjoyed and even if need be the entire corporate powers may be enjoyed by the vendees; yet we find the vendee itself shrank, for some reason or other, from going so far in the acquisition and exercise of rights of the vendor.

In short, it refrained from accepting that alone which would have given semblance to a right to claim what it now seeks. I have looked at many cases dealing with the application of Statutes of Limitations, and they uniformly treat, as already said, such statutes in a strict sense restricting them to operations within the literal limits expressed in each case.

Having regard to the foregoing I think the appeal should be dismissed with costs.

DUFF J.—This appeal arises out of an action brought by the respondent (a minor) against the appellants, in the County Court of Victoria, B.C., claiming indemnity for injuries suffered by him in consequence of an electric shock received through a wire connecting the lights in his mother's house with the mains of the appellants' lighting system in Victoria.

At the trial it was shewn by the appellants that the wire through which these lamps were supplied was under normal conditions charged with a harmless (secondary) current of electricity at low pressure (110 volts), but that it was carried by cross—bars upon which was also carried a wire owned by the municipality of Victoria, conveying a (primary) current of high pressure (2,000 volts) supplying an arc lamp for lighting a street in the vicinity.

The accident was explained by the appellants on the theory that the swaying of a tree near these wires had brought about a contact between them, thereby causing the current of high pressure to be transferred to the wire connected directly with that through which respondent was injured; and the jury found that the injury was attributable to the negligence of the defendants in maintaining their wires in a situation too close to the trees and in stringing their wires too close

to that of the municipality. The questions arising upon the appeal are two: First, whether the appellants are entitled to claim the protection of section 60 of the "Consolidated Railway Companies Act of 1896," upon which they rely; and secondly, assuming them to be so, whether that section has any application in the circumstances of this case.

It will be more convenient (since I have come to the conclusion that the appellants are entitled to invoke that enactment) to discuss the second of these questions first. The words of the section are as follows:—

All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage is sustained, or if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act.

If we leave out the words "or the works or operations of the company" the section is the same as that found in the "Railway Act" of Canada before the amendment of 1903, except that the period of one year prescribed by the latter Act is by this section reduced to six months. Before the Act which we have now to construe came into force this provision of the Dominion "Railway Act" and the corresponding provisions of the provincial railway Acts had been the subject of much judicial discussion. The various opinions and perhaps even the various decisions are not quite harmonious; but there had been, I think (subject to one observation), a substantial concurrence of decision and almost a concurrence of opinion upon two points: First, that the limitation prescribed by the section was not available where the action was or might have been founded upon a violation of some contractual right; and, secondly, that in any case it only applied where the cause of action was something done or omitted to be done by the company in the exercise or the professed exercise of what, for want perhaps of a better phrase, have been called its "statutory powers." In "statutory powers" one does not, of course, mean to include all the corporate capacities of a company constituted by statute; but only the various powers (conferred by the legislature) to do something which, if done without statutory authority, would (either by reason of the doing of the thing itself, or by reason of some harm arising out of it) expose the person doing it to proceedings for legal redress at the suit of an individual or *ad vindicatam publicam* at the instance of the proper authorities. The reported judgments, however, suggest the observation that there has been some doubt whether the application of the section is restricted in either of these two respects where the thing done or omitted which gives rise to the action is done or omitted in carrying on some business which the statute not only empowers, but requires the company to carry on. By a still narrower construction of the words "by reason of the railway," Mr. Justice Gwynne, in the *North Shore Railway Co. v. McWillie*[12], appears to confine the operation of the section to those cases in which the cause of action arises out of some act done or omitted in the exercise, or professed exercise, of the company's powers in respect either of the construction or the maintenance of its line. For the purpose of deciding the immediate point

under consideration it is immaterial I think which of these views be accepted. The words of the section before us are

by reason of the tramway or railway or the works or operations of the company;

and if we give to these words the narrowest of all the constructions suggested it is difficult to see on what ground it can be held that they are not applicable to the circumstances of this case. The negligence from which the respondents suffered consisted in the company permitting the wire conveying the electric supply for incandescent lamps to be so situated that it was liable to be brought into contact with a wire charged with electricity at a dangerously high pressure. That was negligence either in the construction of its works or in the maintenance of its works. Upon their plain reading the words

damages or injury by reason of the * * * works * * * of the company

obviously embrace any harm arising from such negligence, and it is sufficiently apparent, if I have justly appreciated the effect of the judicial pronouncements touching the construction of the corresponding clause in the railways Acts, that there is nothing in the opinions so expressed to require or justify the exclusion of this case from the operation of the section, unless indeed the circumstances bring it within the principle of those cases in which the section has been held not to be applicable because of the action being based upon a violation of a contractual right.

I do not think this case can be brought within that principle.

It is impossible to hold that in contracting with the mother to supply light for her dwelling house, they contracted with her as agent for the various members of her family and thereby became liable to be sued by each of them for any failure in the execution of the contract. The duty which they owed the respondent was precisely that which they owed generally to persons coming in contact with appliances connected with their system, viz.: so to construct, maintain and work their system that as far as reasonable (which means in this case the highest practicable) care and skill could avoid it such persons should not be exposed to unnecessary danger of injury by electricity, whether generated by them or transmitted to their wires from the mains of the municipality which they were supporting on their poles.

In respect of his rights against the appellants in this action, the respondent stands in the same situation as that of any other person suffering from a breach of the same general duty; and without taking undue liberties with the words of the section they cannot be so narrowed as to exclude all such persons from its operation.

To come then to the question whether the defendants are entitled to invoke this section. The answer to that question depends chiefly upon the construction of section 29 of the Act, which is in the following words:—

The directors of the company may from time to time raise and borrow, for the purposes of the company, such sum or sums of money, upon such terms and in such manner, as they may consider expedient, and may issue bonds or debentures of the company, in sums of not less than

fifty dollars, or ten pounds sterling, each, and on such terms and credit and at such prices as they may think proper, and may pledge or mortgage all the tolls, incomes, franchises, uncalled capital and property, both real and personal (whether then acquired or that may hereafter be acquired), of the company, or any part thereof for the repayment of the moneys so raised or borrowed, and the interest thereon; and any such mortgage deed may contain such description of the property, tolls, incomes, franchises, uncalled capital and property, real and personal (acquired or to be acquired), mortgaged by such deed and upon such conditions respecting the payment of the bonds or debentures secured thereby and of the interest thereon, and the remedies which shall be enjoyed by the holder of such bonds, or by any trustee or trustees for them, in default of such payment, and the enforcement of such remedies; and may provide for such forfeitures and penalties in default of such payment as may be approved by the directors; and may also contain, with the approval aforesaid, authority to the trustee or trustees upon such default as one of such remedies, to take possession of the said property so mortgaged, and to hold and run the same for the benefit of the bondholders thereof; or to lease or sell the said property so mortgaged after such default, and upon such terms and conditions as may be stated in such deed; and in case of any such lease or sale, the lessee or purchaser shall have the right to exercise all the powers and franchises by this Act conferred upon the company, and the said property may continue to be held and operated under the provisions of this Act, with the corporate name and powers of the company; and such lessee or purchaser shall have the same rights, powers, privileges, and franchises, and shall stand in the same position, as regards the said tolls, incomes, franchises, powers, uncalled capital, and property real and personal, as the company itself under this Act.

The majority of the full court have held that the effect of the sentence

and the said property may continue to be held and operated under the provisions of this Act with the corporate name and powers of the company,

is to limit the application of section 60 to the case of actions against the Consolidated Railway Company itself or against a purchaser or lessee operating "with the name of" that company. It is not disputed, and it was assumed, I think, by all the members of the court below, that the rights conferred by the succeeding sentences of the section do not rest upon any such condition. In this view, it may or may not be that to take advantage of the authority here given to "hold and operate" the property

under the provisions of the Act with the corporate name and powers of the company, (whatever may be the precise meaning of those words) it is necessary that the purchaser should assume the name of the Consolidated Railway Company either alone or in conjunction with the "corporate powers" of the company; but whatever may be said upon that point, the purchaser might elect to act or not to act under this authority, and if he should elect not to take advantage of it, he would not be thereby deprived of the benefit of any of the rights which, as purchaser, he would, under other parts of the section, be entitled to exercise. In a word, in this view, the assumption of the corporate name if it be a condition at all, is a condition affecting only the exercise of the authority (whatever that may be) conferred by these particular words.

I think the weight of argument favours this view. The words quoted seem to be inserted parenthetically, and having regard to the circumstance that when the power of sale should come to be exercised the mortgagor company would most probably be in financial difficulties, it is highly unlikely that the legislature would encumber the transfer with a condition requiring that the purchasers should carry on the undertaking in that company's name. Such a condition would most certainly embarrass the company in raising money on the security of its debentures to an extent which might well prove almost prohibitive.

Does section 29 then (apart from these words) invest the purchasers with the authority to invoke the benefit of section 60? The object of that section (29) is to enable the company to raise money by debentures charged upon

the tolls, incomes, franchises, uncalled capital, and property both real and personal of the company or any part thereof. To carry out that object the company is authorized to mortgage to trustees for the debenture-olders such part of its property and franchises as it may see fit. The section goes on to provide that authority may be given to the trustees upon default to take possession of the property mortgaged and "run it" for the benefit of the debenture-olders and to lease and sell it; and then the section enacts that

in case of any such lease or sale the lessee or purchaser shall have the right to exercise all the powers and franchises by this Act conferred upon the company,

(here follow the words quoted above which I now omit);

and such lessee or purchaser shall have the same rights, powers, privileges and franchises and shall stand in the same position as regards the said tolls, incomes, franchises, powers and uncalled capital and property, real and personal, as the company itself under this Act.

The legislature seems to have had in contemplation here two kinds of transactions, one in which some integral part of the company's undertaking should be mortgaged to secure the repayment of the moneys borrowed; the other, in which the whole of the company's undertaking should be the security. It is obvious that in its application to the first case some restriction must be put upon the generality of the concluding provision which I have just quoted; the "rights, powers, privileges and franchises" dealt with in the last sentence would in that case be such "rights, powers, privileges and franchises" only as should be comprised within or be necessary or incidental to that part of the undertaking charged. In the second case, the language leaves no room for doubt that the undertaking of the company was to be dealt with, to use Lord Watson's phrase in *Redfield v. Wickham*[13] "as an integer" and that every power, privilege and franchise forming a part of the undertaking or necessary or incidental to the working of it conferred or confirmed by the Act or acquired under the authority of the Act should be exercisable by the purchaser to the same extent and subject to the same conditions as by the company itself. It is not disputed that in this case the whole of the property and franchises transferable under this section (so read) were acquired by the appellants.

With great respect, I am unable to agree with the contention that the right conferred upon the company by section 60 is not strictly a privilege. A reference to Austin, *Jurisprudence*, p. 519, and 8 Bacon's *Abridgment* (verbo "Privilege") shews that such a qualified immunity is not only so described with accuracy, but in accordance with the ordinary use of the word by English lawyers.

The only question, therefore, is whether there is anything in the context or in the purpose of the legislature as disclosed by the statute which requires us to give it a more restricted meaning. It is argued that it ought to be read in such a way as to bring it into harmony with the other terms in connection with which it is used and that in that view (I think I am putting the point fairly) it must be held to imply a privilege of a positive kind as distinguished from a mere immunity; that indeed, associated as it is with rights assigned as security for the payment of the company's debts and vesting in the purchaser directly as the result of the transfer to him, it connotes the idea of property. It is said, and quite truly, that the right granted by section 60 has nothing in it of this nature; and moreover that it is a right, so to speak, of a purely personal character, akin to the general power of the corporation to sue and be sued, and not one which is in any way incidental to the enjoyment of the company's property or to the working of its undertaking. I do not think after careful consideration that the word "privilege" as it occurs in the collocation "rights, powers, privileges and franchises" can properly be so limited. What the legislature seems to be providing for is the vesting in the purchaser not only of those things which are comprised within the enumerated "tolls, incomes, franchises, uncalled capital, and property both real and personal," which pass to him by the direct operation of a transfer from the trustees, but all those rights and privileges which are conferred by the Act upon the company as necessary or incidental to the full exercise and enjoyment of what is transferred.

I think the right conferred by section 60 is within this class of privileges. In my view that section is at least limited in its operation to causes of action arising out of something done or omitted in the course of the exercise by the company of its "statutory powers" (in the sense already explained) whether in its construction, maintenance or operation of its undertaking; whether a still narrower construction is the true one, it will be unnecessary to consider. It is observable that the statutory authority under which these powers are exercised merely has the effect of making lawful acts which, if done without such authority, would or might expose it to legal proceedings, and that this protection, speaking generally, is available only when those powers are exercised reasonably. Section 60 goes a step further. It provides that where in the exercise or the professed exercise of these powers something is done or omitted in such a way (in such circumstances of negligence or otherwise) that the statute does not afford an absolute exemption from liability—in such a case, any action must be brought within the prescribed period. The provision thus seems to be rather an extension in a qualified sense of the protection just mentioned; and to be conferred upon the company not simply as a corporate entity bearing a particular name, but as a company incorporated by the legislature for the purpose of carrying on certain specified undertakings which it must be assumed the legislature has supposed to be of public importance.

I think the appeal should be allowed with costs in this court and of the appeal to the full court and the judgment of the County Court judge restored.

ANGLIN J.—I agree in the conclusion reached by Mr. Justice Duff and Mr. Justice Davies, that the appellants are entitled to the benefit of section 60 of the "Consolidated Railway Companies Act, 1896," to the same extent as was the Consolidated Railway Company itself.

For the reasons given by Mr. Justice Duff, I am also of the opinion that in order to obtain the benefit of that section, the defendants are not required to carry on their operations in the name of "The Consolidated Railway Company."

I am unable, however, to accept Mr. Justice Davies' view that the plaintiff's action is so founded upon contract that section 60 affords no defence to it. Had the plaintiff's mother, with whom the defendants contracted, been injured in circumstances similar to those attending the injury to the plaintiff, her action would have been in tort rather than in contract and section 60 would probably have been applicable even in her case. *Lyles v. Southend-on-Sea Corporation*[14]. I fail to understand how the present plaintiff can found a claim upon breach of a contract to which he was not a party. His action, in my opinion, is necessarily in tort. *Edwards v. Vestry of St. Mary, Islington*[15], at page 341, per Bowen L.J.; *Earl v. Lubbock*[16]; *Winterbottom v. Wright*[17], at page 114.

I would, therefore, allow this appeal with costs.

Appeal allowed with costs.

Solicitors for the appellants: McPhillips & Hcisterman

Solicitor for the respondent: J. A. Aikman.

[1] 14 B. C. Rep. 224.

[2] 10 Ont. L. R. 419.

[3] 19 Ont. L. R. 510.

[4] [1895] 1 Q.B. 134.

[5] 19 C.B. (N.S.) 213.

[6] 11 C. B. 655.

[7] L. R. 2 Q.B. 442.

[8] [1896] 2 ch. 562.

[9] 6 C. B. (N.S.) 388.

[10] 60 L.J. Q.B. 206.

[11] 4 Mylne & C. 116.

[12] 17 Con. S. C. R. 511.

[13] 13 App. Cas. 467, at p. 477.

[14] [1905] 2 K.B. 1.

[15] 22 Q.B.D. 338.

[16] [1905] 1 K.B. 253.

[17] 10 M. & W. 109.

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