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WINNIPEG ELECTRIC RAILWAY COMPANY (DEFENDANT). } APPELLANT;

AND

LAURA AITKEN (PLAINTIFF) . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Limitation of action—Railway—Negligence—Carriage of passenger—Contract—Manitoba Railway Act R.S.M. [1913] c. 168 s. 116.

By sec. 116 of The Manitoba Railway Act "all suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be instituted within twelve months next after the time of such supposed damage sustained or, if there be continuation of damages, then within twelve months next after the doing or committing of such damage ceases, and not afterwards."

Held, reversing the judgment of the Court of Appeal (31 Man. R. 74) Idington and Cassels JJ. dissenting, that the limitation prescribed applies in case of an action brought by a railway passenger claiming indemnity for injury so sustained. *Ryckman* v. *Hamilton, etc., Rly. Co.*, (10 Ont. L.R. 419) considered.

Per Cassels J. The words "or if there be continuation of damages, etc." indicate that the section was not intended to apply to the case of a passenger injured by negligence of the railway as a common carrier.

APPEAL from a decision of the Court of Appeal for Manitoba (1) reversing the judgment at the trial in favour of the defendant.

The only question submitted on the appeal is whether or not the statutory provision quoted in the head-note applies to the case of injury to a passenger. The

PRESENT.—Idington, Duff, Anglin and Mignault JJ. and Cassels J. *ad hoc*.

(1) 31 Man. R. 74.

contention for the respondent is that the action was one claiming damages for breach of contract to carry safely to which the limitation in the Railway Act does not apply. The Court of Appeal so held reversing the judgment for the railway company at the trial.

Tilley K.C. for the appellant.—The earlier decisions in Ontario and other provinces that the limitation clause does not apply to the case of a passenger carried for here are no longer of authority. *Greer* v. *Canadian Pacific Ry. Co.* (1): *Canadian Northern Ry. Co.* v. *Pszenicnzy* (2): and see *Lyles* v. *Southend-on-Sea* (3). The action is based on negligence and its character cannot be changed by claiming for breach of contract.

Chrysler K.C. for the respondent, relied on the Ontario decisions and *Sayers* v. *British Columbia Electric Ry. Co.* (4) approved by Duff and Anglin JJ. in *British Columbia Electric Ry. Co.* v. *Turner* (5).

IDINGTON J. (dissenting).—The respondent was injured whilst a passenger on the appellant's railway by reason of one of the company's cars running behind that in which she was being carried negligently colliding with said car.

The appellant's only defence, so far as this appeal is concerned, is rested upon the following statutory limitation, being section 116 of the Manitoba Railway Act:—

> All suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be instituted within twelve months next after the time of such supposed damage sustained, or if there be continuation of damages then within twelve

(1) 51 Can. S.C.R. 338.
(2) 54 Can. S.C.R. 36.
(3) [1905] 2 K.B. 1.
(4) 12 B.C. Rep. 102.
(5) 49 Can. S.C.R. 470.

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months next after the doing or committing of such damage ceases, and not afterwards; and the defendants may plead the general issue 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 think this, as all statutes of limitation, must be held inoperative as a defence unless the language used is so clearly expressed as to leave no doubt of its meaning and that the intention clearly appears to have been to bar the action in which its limitation is so invoked.

Certainly if we have regard to the judicial opinions expressed in this case and many others upon statutes similarly framed, there must exist the gravest doubt of its ever having been intended by the legislature to take away the right of such persons as respondent resting a claim upon a breach of contract.

I need not labour the question for I cannot hope to succeed better than many others in numerous other cases which turned upon the like legislative expressions.

Many of these cases are cited in the opinions of the learned judges below.

And yet we are asked, by way of escape therefrom, to apply the decisions reached upon the Public Protection Act, 1893, far more clearly expressed than the very ambiguous section above quoted.

I think this appeal should be dismissed with costs.

DUFF J.—The respondent's action against the appellant was brought to recover damages for negligence resulting in a collision between two of the appellant's cars in which the respondent, who was travelling as a passenger in one of them, was injured; and the sole question raised by the appeal concerns the construction of section 116 of the Manitoba Railway Act. That section is in these terms:—

All suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be instituted within twelve months next after the time of such supposed damage sustained, or if there be continuation of damages then within twelve months next after the doing or committing of such damage ceases, and not afterwards: and the defendants may plead the general issue 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.

It is not disputed that the negligence to which the respondent's injuries are to be ascribed was negligence in the working of the appellant company's railway; and the point for examination does not touch the meaning of the phrase "operation of the railway" the application of which, in cases like the present, would seem to present no difficulty but turns upon the view to be taken of the general scope and purview of the section and the precise point for inquiry is: Does this section embrace within its purview an action brought by a passenger for default in the company's duties arising out of a contract of carriage or from the aceptance of the passenger for carriage?

This section appears to have been taken from the first sub-section of section 242 of the Dominion Railway Act of 1903. That section was a modification of an earlier section in which the class of proceedings affected by it was described in these words:

All actions or suits for indemnity for any damages or injuries sustained by reason of the railway,

and these words have been the subject of examination in a series of cases in the courts of Ontario beginning at least as early as 1865. These decisions were subjected to an exhaustive scrutiny in a very able judgment by Osler J. A., speaking for the Ontario

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Court of Appeal in *Ryckman* v. *Hamilton, etc. Ry. Co.* (1) at pages 426 *et seq.*, from which the conclusion was deduced that the class of proceedings contemplated did not include an action based on a railway company's breach of its common law duties founded on its undertaking to carry safely. The decisions were, broadly speaking, based on the view that the protection afforded by the limitation clause was intended to be available only where proceedings were taken against the company for something done in exercise or professed exercise of the special statutory powers given to the company for the purpose of its railway undertaking and was not intended to confer a privilege in respect of proceedings arising out of contracts and relations entered into by the company in the ordinary course of its business as carrier. It is difficult, no doubt, to extract from the judgments a precise definition of the scope of the provision, but one limiting rule was clearly established, and that is that the section did not apply to actions arising out of negligence in the carrying of passengers and some warrant for this way of construing the statute was supposed to be found in the last clause of the section which provided that the

> defendants * * * may prove that the same was done in pursuance of and by authority of this Act or of the special Act.

Perhaps the best summary of these authorities is to be found in the judgment of Boyd C. in *Traill* v. *Niagara St. Catharines and Toronto Rly. Co.* (2) at page 2, and it is in these words:—

> The prescription or limitation clauses of the Railway Act have been uniformly held to apply to actions for damages caused or occasioned in the exercise of powers given by the Legislature to the company for enabling them to construct and maintain the line—but not to

(1) [1905] 10 Ont. L.R. 419. (2) [1916] 38 Ont. L.R. 1.

actions arising out of negligence in the carrying of passengers. This was laid down by the Court of Queen's Bench in 1856, *Roberts* v. *Great Western R. W. Co.* (1). The reason of this rule was well defined by Richards J. soon afterwards in *Auger* v. *Ontario Simcoe and Huron Ry. Co.* (2): "The limitation clauses do not apply when the companies are carrying on the business of common carriers * * * (in the) use (of) locomotives, etc., for the conveyance of passengers and goods, etc., but the liability arises in those cases from the breach of contract, arising from their implied undertaking to carry safely, and to take proper care of the goods, etc." These decisions were accepted as rightly stating the law in *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric Ry. Co.* (3).

The earlier section passed upon in these cases was to be found in virtually identical form in the railway legislation of most of the provinces as well as that of the Dominion and in 1903 as already mentioned that section was replaced in the Consolidation of the Dominion Railway Acts by a section consisting of two sub-sections, the first of which, as already mentioned, is identical with section 116 of the Manitoba Railway Act quoted above, and the second of which was in these words:—

(2) In any such action or suit the defendants may plead the general issue, and may give this Act and the special matter in evidence at the trial, and may prove that the said damages or injury alleged were done in pursuance of and by the authority of this Act.

This substituted section was held by Boyd C. in the decision above cited to be governed in its construction by the course of decision upon the earlier section; and the field of its application was held on that ground as well as by reason of the express language of sub-section (2) to exclude an action by a passenger for the negligent working of the railway. Section 116 of the Manitoba Act contains no provision corresponding to sub-section (2) but it is argued that the considerations to which

(1) 13 U.C.Q.B. 615. (2) [1859] 9 U.C.C.P. 164, 169.
(3) 10 Ont. L.R. 419, 428.

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effect was given in the construction of the earlier section equally apply to section 116 and that the change in language made for the first time in 1903 is not sufficiently marked to indicate an intention on the part of the legislature to bring about a radical change in the law.

The existing section has been the subject of consideration more than once in this court. One of the decisions only has, I think, any relevancy to the present case but that decision does, I think, relieve me from the responsibility of expressing an independent opinion as to the effect of it. I refer to *Canadian Northern Ry. Co.* v. *Pszenicnzy* (1). That was an action brought by an employee of the C. N. Rly. Co. under the Employers' Liability Act of Manitoba, R.S.M. C. 13, sec. 61, for negligence which was held to be the cause of injuries suffered by him while engaged in unloading rails from a car unsuitably equipped for the protection of employees so occupied. Section 306 of the Dominion Railway Act was held to apply. The earlier decisions were relied upon by the plaintiff but it was decided that the section is available in such an action.

This decision necessarily involved the proposition that the principle of the restriction established by the earlier decisions could have no application to section 306. I am not aware of any among the earlier decisions which deal with the case of an action by an employee against the railway company for default in its duty arising out of the contract of employment but every argument which could be adduced to sustain the exclusion of actions by passengers for default in respect of duties arising

(1) [1916] 54 Can. S.C.R. 36.

out of the acceptance of a passenger for carriage applies with, if anything, increased force to such an action by an employee. The rights conferred by the Employers' Liability Act are, to borrow a phrase used by Lord Haldane in delivering the judgment of the Judicial Committee in *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (1), at page 191, "the result of statutory conditions of the contract of employment," that is to say they are rights attached to the relation of the employer and employee by force of the general law governing the reciprocal rights and duties appertaining to that relation and in no way depend upon the special powers and privileges conferred upon the company by statute for the purposes of its railway undertaking. I am unable to perceive any principle upon which a distinction could rest; by which the first clause of section 306 could properly be held at once to include within its ambit such an action by an employee and to exclude from it such an action as that out of which the present appeal arises. It is not unimportant that the course of decision upon a statutory provision so widely in force should retain some perceptible degree of logical coherency.

The appeal must, in my opinion, be allowed and the action dismissed with costs.

ANGLIN J.—The plaintiff was injured when about to alight on Main Street in the City of Winnipeg, from a car of the defendant company in which she had been carried as a passenger. She had paid fare. Her injury was caused by another car also operated by the defendant company running into that in which she

(1) [1920] A. C. 184.

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was, and the collision is now conceded to have been ascribable to negligence in the running of the cars. The action was begun a few days after the expiry of a year from the time when the injury was sustained and the sole question for determination here is whether it is barred by section 116 of the Manitoba Railway Act (incorporated in the defendant company's special Act, 55 Vict. (Man.) c. 56, by s. 32), which reads as follows:—

> All suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be instituted within twelve months next after the time of such supposed damage sustained, or if there be continuation of damages then within twelve 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 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.

Was the plaintiff's injury sustained by reason of the operation of the defendant's railway? This question would seem to admit of but one answer. If the running of the cars is not "operation of the railway," I find it difficult to conceive what would be. Viscount Haldane in delivering the judgment of the Judicial Committee in *Canadian Nor. Ry. Co.* v. *Robinson* (1), referring to the phrase "operation of the railway," found in a similar collocation in section 242 of the Railway Act of Canada of 1903 (s. 306 of c. 37 of the R.S.C. 1906), said at page 745:—

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

In doing the act or acts that resulted in the collision in question the defendants were "working the railway as constructed," negligently, it is true, but with the intention of carrying it on in good faith.

(1) [1911] A. C. 739.

The primary rule of statutory construction is that, unless to do so would lead to absurdity, repugnancy or inconsistency with the rest of the statute the grammatical and ordinary sense of the words should prevail. The language of section 116 of the Manitoba Act is precise and unambiguous. No absurdity, repugnancy or inconsistency can arise from giving to it its natural and ordinary sense. On the other hand to hold that the case of a man in the street who is injured through negligence in running the cars falls within the purview of the section, but that the case of a passenger who sustains injury from the like cause does not, seems to me to involve inconsistency and repugnancy to common sense as well. Unless compelled by authority to hold otherwise, I should have no doubt that the plaintiff's injury was sustained "by reason of the operation of the defendant's railway" and that her action is therefore barred by the Manitoba statute above quoted.

It is said to be established by a long series of decisions, however, that claims for personal injuries sustained by passengers because they do not arise out of the work of construction or maintenance of the railway, are not within this limitation provision; and it is also urged that the plaintiff has based her claim on a breach of the defendants' contract to carry her with due care rather than upon tort and that her action therefore falls within a line of cases in which similar statutory provisions have been held inapplicable to claims for breach of contract.

The only paragraph in the statement of claim in which a contract is alluded to reads as follows:—

3. On or about the 6th day of February, A.D. 1919, the plaintiff was received by the defendant as a passenger on its railway, having

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paid her fare for that purpose, to be by it safely carried in a street railway car going from Saint Boniface aforesaid into Winnipeg aforesaid and north along Main Street in the said City of Winnipeg and delivered at her destination.

The fourth paragraph alleges negligence causing the collision; and that is the substantial issue in the action. The prayer is merely for the recovery of stated damages. All the allegations in the third paragraph might with equal propriety be made in an action for tort as in one for breach of contract. Suing in tort the payment of fare would properly be alleged in order to exclude the idea that the plaintiff had been a trespasser or had been carried gratuitously—to establish the degree of care which the defendant owed her; that she was received as a passenger and was to be carried to a destination would be averred to shew the duration of the defendant's duty as a carrier. Neither by contract nor under its obligation as a carrier was the defendant company bound to carry the plaintiff safely, as the statement of claim alleges. Its duty was to carry her with due care, or, as put by Mr. Justice Dennistoun, citing *Kelly* v. *Metropolitan Ry. Co.* (1),

> safely as far as reasonable care and forethought can attain that end.

Breach of the duty to take such care is negligence and it is that negligence that it was essential the plaintiff should establish in order to maintain her action, in whatever form it was taken. I am not at all satisfied that the form of the plaintiff's action is for breach of contract rather than in tort.

But modern English authority seems to establish that in determining the applicability of a section such as that before us to the case of a person suing a rail-

(1) [1895] 1 Q.B. 944, 946.

way company to recover damages for personal injuries sustained while he was a passenger the distinction as to the form in which the action is launched is not material. *Lyles* v. *Southend-on-Sea Corporation* (1), was such a case. The plaintiff had paid his fare and taken a ticket in the ordinary way and without any special conditions for carriage on a tramway operated by the defendants. He was injured while a passenger, as he alleged, through the fault of the defendants' employees. The question at issue was, whether the defendant was entitled to the benefit of a limitation provision. The existence of a contract, evidenced by the facts that the plaintiff had paid fare and taken a ticket, was relied upon as taking the case out of the statute. The statute invoked (s. 1 of the Public Authorities Protection Act, 1893) bars an action

> against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority * * * unless it is commenced within six months next after the act, neglect or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.

The English Court of Appeal was unanimously of the opinion that

> the action was in substance founded on a breach by the defendants of their duty as a public authority engaged in the carriage of passengers.

Vaughan-Williams L. J. says at page 19:—

> The case of *Taylor* v. *Manchester, &c., Ry. Co.* (2), seems to shew that, even in a case in which a ticket is issued to the passenger, and the passenger through the negligence of the railway company's servants sustains personal injuries, the cause of action arising would in substance, although it might not in form, be founded upon tort and not upon contract.

(1) [1905] 2 K.B. 1.

(2) [1895] 1 Q.B. 134.

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If that decision is applicable to a case arising under the Public Authorities Protection Act, 1893, the result would be that the present action must be treated as one in which the real substantial complaint is not for a breach of contract, but for a tort. *Taylor* v. *Manchester, &c., Ry. Co.* (1), was a decision under the County Courts Act, 1888, the question being whether the costs were to be allowed as in an action of contract or as in an action of tort. But I think the decision is applicable to a case in which the question is whether, in regard to the Public Authorities Protection Act, 1893, an action founded on a breach of the duty of the defendants towards a passenger to whom a ticket has been issued is to be regarded as an action for breach of contract or as an action in respect of a tort; and the result is that the present action fails because it was not brought within the six months limited by the Public Authorities Protection Act, 1893.

The result might have been different if the ticket had had upon its face special conditions, and I do not wish to conclude the question of the obligation of a railway company as common carriers even in cases in which there are no special conditions in the receipt given to the consignor.

Romer L. J. says, at page 20:—

The fact that as a matter of pleading the plaintiff's case against the defendant authority might be stated either as one founded on breach of implied contract, or as one founded on tort, does not appear to me to shew that the words of s. 1 of the Act ought not to be held to apply. The question whether the Act does or does not apply to a particular action or proceeding depends upon what is the substance of the action or proceeding. In the present case the substance of the action is damage to the plaintiff by neglect on the part of the defendant public authority in duly performing its public duty or authority of carrying passengers by its tramway. There was no special or particular contract between the defendant authority and the plaintiff in reference to his journey by the tramway in the course of which the accident occurred. The plaintiff was using the tramway as one of the ordinary public, availing himself in the ordinary way of the general obligation cast upon the defendants to work the tramway and to carry passengers by it.

Stirling L. J., says, at page 21:—

(3) The plaintiff's cause of action does not depend on contract, but arises out of a breach of the duty to carry the plaintiff safely cast upon the defendant corporation by the fact of his being taken as a passenger. *Marshall* v. *York, Newcastle and Berwick Ry. Co.* (2); *Austin* v. *Great Western Ry. Co.* (3); *Harris* v. *Perry & Co.* (4).

(1) [1895] 1 Q.B. 134.
(2) [1851] 11 C.B. 655.
(3) L.R. 2 Q.B. 442.
(4) [1903] 2 K.B. 219.

While the right of the defendant municipality to invoke section 1 of the Public Authorities Protection Act was undoubtedly upheld on the ground that the carriage of tramway traffic had been imposed on it by a statutory authority, this case seems clearly to support the proposition that where the plaintiff's claim rests on negligence of the defendant in the capacity in which it is entitled to the benefit of the statutory limitation, that limitation applies notwithstanding that the plaintiff may be entitled to claim, and may have averred, that such negligence also constituted a breach of the defendant's contract with him. Indeed that this is the position is distinctly recognized by Osler J. A., delivering the judgment of the Court of Appeal in *Ryckman's Case* (1), at pages 431-2, where *Taylor* v. *Manchester, &c., Ry. Co.* (2), is cited as authority for it. The learned judge said:—

> Whether the party was a paying or a gratuitous passenger the substance of the action is a tort for (or) a misfeasance, an act of positive negligence on the defendants' part * * . Even where there was a contract of carriage the plaintiff might have declared simply as for a breach of duty to carry safely, and the application of the limitation clause cannot depend upon the form in which the plaintiff has chosen to bring his action if the facts shew that it arises out of the defendants' breach of duty as carriers.

See too *Kelly* v. *Metropolitan Ry. Co.* (3).

There is not a little to be said in support of the view, if it were material here, that under clause 14 of by-law 543 of the City of Winnipeg, confirmed by 55 Vict. (M.), C. 56, sec. 34, a statutory obligation to operate a street railway service on Main Street was imposed on the defendants much the same as that

(1) 10 Ont. L.R. 419. (2) [1895] 1 Q.B. 134, 138.
(3) [1895] 1 Q.B. 944.

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imposed on the municipality in *Lyles' Case* (1). But my opinion in this case in no wise depends on the company being under any such obligation to operate its railway.

Although sub-section (3) of section 306 of the Dominion Railway Act (R.S.C. 1906, C. 47; now 9 & 10 Geo. V., C. 68, sec. 391), which expressly excepts from the operation of that section

> any action brought upon any breach of contract express or implied for or relating to the carriage of any traffic,

(including the carriage of passengers, s.s. 31 of s. 2), has been said merely to embody an interpretation put upon the limitation clause of the earlier railway Acts and well established by authority; *Canadian Northern Ry. Co.* v. *Anderson* (2); *Canadian Northern Ry. Co.* v. *Robinson* (3); it may possibly go further and exempt from the operation of the section the case, which would otherwise be within sub-section (1), of personal injury to a passenger, when the claim is based on his contractual relations with the railway company, as was held in *Traill* v. *Niagara Ry. Co.* (4). That is a question not now before us and I prefer to reserve it for further consideration, notwithstanding what I said in *Robinson's Case* (3). But under the provision of the Manitoba Act here invoked, from which the express exception made by sub-section 3 of the Dominion section is omitted, I am convinced that although the plaintiff's claim be in form for breach of contract, that circumstance should not be held to take the case out of its operation.

(1) [1905] 2 K.B. 1.
(2) [1911] 45 Can. S.C.R. 355, 368.
(3) 43 Can. S.C.R. 387, 408.
(4) 38 Ont. L.R.1.

But are claims for personal injuries sustained by passengers caused by negligence, however framed, within the purview of the Manitoba statute? I find nothing in its language to exclude them. Two suggestions made in the course of the argument should be noticed here. They were (a) that the words "if there is continuation of damage, etc.," would be inapt in such a case and their presence indicates that the section does not apply to such claims: (b) that the second member of section 116 places a restriction upon the generality of the preceding member which would exclude from it such claims for personal injuries.

(a) As to the former suggestion, I fail to appreciate its force. The legislature has no doubt provided for cases where there is "continuation of damages," but not exclusively. It has equally clearly provided for cases, such as that at bar, where the entire damage is sustained when the injury is inflicted. There are other classes of claims within the section to some of which the provision for continuing damage may be appropriate. Moreover a similar provision contained in the limitation section of the Public Authorities Protection Act, 1893, dealt with in *Lyles' Case* (1), was not held to render the limitation inapplicable to the plaintiff's claim for injuries sustained while a passenger.

(b) The second member of section 116 in my opinion has not any restrictive effect upon the earlier member of the section. It merely sanctions a plea of the general issue and the putting in evidence of the Railway Act and the special Act with the facts necessary to bring the case within the authority they confer. In the revision of the Ontario Railway Act 1906 (6 Edw. VII, c. 30) it was wholly omitted from the limitation section

(1) [1905] 2 K.B. 1.

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(no. 223), presumably in pursuance of a modern Ontario policy to do away with the plea of "not guilty by statute," Holmested Jud. Act, 4 ed., p. 605. Neither the authority of the Railway Act nor that of the special Act affords an answer to claims founded on negligence, and it is for such claims that the protection of the limitation provision is required. It is true that in some of the earlier cases decided when the section dealt with claims for injuries received "by reason of the railway," the view was taken that it applied only to actions for damages occasioned in the exercise, or intended exercise, of powers given for the construction or maintenance of the railway. *Roberts* v. *Great Western Ry. Co.* (1) approved in *Ryckman's Case* (2). I cannot but think that the words "the construction or operation of" were inserted to prevent such a narrow interpretation being given to the section in the future and to ensure that its application should extend to cases of injury arising from the operation or running of the railway as well as to those due to works of construction or maintenance. Parliament and the legislatures should be credited with having had some purpose in making the change. I think that purpose was to put it beyond doubt that the limitation is applicable to all claims for injuries and damages resting on negligence in working the railway. There can of course be no justification for refusing to give effect to the intention with which the law was changed. *The Ydun* (3), at page 241. In *Greer* v. *Canadian Pacific Ry. Co.* (4), my brother Duff was of the opinion that "operation of the railway" includes acts other than those done in the discharge of some duty imposed by statute. With Mr. Justice Dennistoun

(1) 13 U.C.Q.B. 615.
(2) 10 Ont.L.R. 419, 430.
(3) [1899] P. 236.
(4) [1915] 51 Can.S.C.R. 338, 34 .

I adopt the view of Osler J. A., in *Ryckman* v. *Hamilton etc., Ry. Co.* (1), at p. 426, that the words "may prove that the same was done in pursuance of and by authority of this Act and the special Act," mean no more than "may prove that the damage or injury was sustained by reason of the construction or operation of the railway," as in the earlier part of the section.

But, if the limitation should be held to apply only to claims for damage or injury sustained by reason of acts

done in pursuance of and by authority of this Act and the special Act,

I would find it not a little difficult to conceive the running of tramcars on the public streets in the City of Winnipeg to be aught else than something so done. The special Acts in this case are the statutes, 55 Vic., c. 56 (Man.), incorporating the defendant company and ratifying by-law no. 543 of the City of Winnipeg, and 58 & 59 Vic., c. 54.

It is said, however, that in deference to a long series of decisions claims for personal injuries to passengers should be held to be outside the purview of section 116 of the Manitoba Railway Act as it now stands. The two cases chiefly relied on are *Ryckman* v. *Toronto, Hamilton & Grimsby Ry. Co.* (1), in which the Ontario decisions up to that time are reviewed, and *Sayers* v. *British Columbia Electric Ry. Co.* (2), a decision of the full court of British Columbia. In each of these cases it was held that a claim for personal injury sustained while a passenger was not within the limitation provision—in the former section 42 of c. 207 of the Revised Statutes of Ontario, 1897; in the latter section 60 of c. 55 of the statutes of British Columbia for the year 1896. Of course neither of these decisions binds us.

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

(2) [1906] 12 B.C. Rep. 102.

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In the Ontario case Osler J. A., delivering the judgment of the Court of Appeal, says, at page 427:—

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

In the British Columbia case Martin J. said, at page 111:

> The question is not at all free from doubt and it is desirable in the public interest that it should be set at rest either by the legislature or the court of last resort.

It was not until 1903 that the words, "by reason of the railway," of the earlier limitation sections were replaced in the Dominion Railway Act by the words "by reason of the construction or operation of the railway." The corresponding change was effected in provincial railway Acts only some years later. In Manitoba the change was made in 1907 (6 & 7 Edw. VII, c. 36, sec. 3); in Ontario in 1906, (6 Edw. VII, c. 30, sec. 233). The limitation in the Ontario statute considered in *Ryckman's Case* (1), in 1905, dealt with claims for injury or damage sustained "by reason of the railway," and the earlier Ontario and Upper Canada decisions there discussed were based on statutes couched in the like terms. In the *Sayers Case* (2), where the defendant company's Act of Incorporation required that

> 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,

it was held that the words "by reason, *et seq.*" should be read *separatim* as describing different branches of the company's undertaking. The words relating to the carrying of the tramway traffic were held to be "by reason of the tramway or railway," and the

(1) 10 Ont. L.R. 419. (2) 12 B.C. Rep. 102.

court, following the decision in *Ryckman's Case* (1), held the section not applicable to an action for injury sustained by a passenger. A like view had been expressed by Gwynne J. in this court in *North Shore Ry. Co.* v. *McWillie* (2), at page 514.

In *British Columbia Electric Ry. Co.* v. *Gentile* (3), however, which did not come to this court, Lord Dunedin in delivering the judgments of their Lordships said, at page 1039, in referring to s. 60 of the statute dealt with in the *Sayers Case* (4), which had been cited in argument,—

> Their Lordships assume without deciding that the words "operations of the company" include the negligent running of cars.

In *Greer* v. *Canadian Pacific Ry. Co.* (5), the present Chief Justice of Ontario said, at page 107:

> It is no doubt well settled that the limitation section (i.e., s. 306 of the Dominion Railway Act of 1906) does not apply to a cause of action for a breach of the duty of a railway company as a common carrier; and all that was decided in that case (*Ryckman's Case*) (1), was that the action was for breach of the duty of the defendant as a common carrier to carry safely; and that the limitation section did not therefore apply.

With deference, there seems to be some slight confusion here of the responsibility of a railway company as a carrier of passengers with its responsibility as a common carrier of freight. The inapplicability of the limitation section of the Dominion Railway Act as it stood before 1903, and of the corresponding section of the Ontario Railway Act as it stood when *Ryckman's Case* (1) was decided, to claims for personal injuries sustained by passengers may perhaps be

(1) 10 Ont. L.R. 419.
(2) 17 Can. S.C.R. 511.
(3) [1914] A.C. 1034.
(4) 12 B.C. Rep. 102.
(5) 32 Ont. L. R. 104.

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regarded as having been "well settled" after that decision for the purposes of the Appellate Divisional Court, on which it was of course binding. But I doubt if it could in this court or the Privy Council properly be said to be "well settled" even on the plea that a long series of uniform decisions in the lower courts, though erroneous, should not be overruled.

In *Roberts* v. *Great Western Ry. Co.* (1), it was held, Robinson C. J. presiding, that the limitation section (16 V., c. 99, s. 10) did not apply to the case of a passenger injured by the defendant's negligence in running the train. The view which prevailed was that the application of the section was confined to actions for damages occasioned in the exercise of powers of construction or maintenance of the railway. The court was influenced by the terms of the statute, 7 Wm. IV, c. 14, s. 19, which it said "expressed very clearly to what causes of action the limitation of actions was meant to extend." That section read as follows:—

> XIX. And be it further enacted by the authority aforesaid, That when it shall not be otherwise provided in any Act to be hereafter passed, for any of the purposes aforesaid, and whereby powers and authority are given to be exercised over the property, real or personal, or over the person of any individual, for the promoting and securing the objects intended to be advanced by the corporation created by any such Act, then if any action shall be brought against any person or persons, for anything done in pursuance, or in execution, of the powers and authorities given by such Act, such action shall be commenced within six calendar months next after the fact committed; or in case there shall be a continuation of damage, then within six calendar months after the doing or committing such damage shall cease, and not afterwards; and the defendant or defendants in such action may plead the general issue, and give such Act, and the special matter, in evidence at the trial.

(1) 13 U.C.Q.B. 615.

This differs *toto coelo* from the limitation section in the Railway Clauses Consolidation Act, 14 & 15 V. (C.) c. 51, s. 20, the prototype of the section found in the Canadian Railway Acts (C.S.C. 1859, c. 66, s. 83, and later statutes) and resembles the limitation provisions considered in *Palmer* v. *Grand Junction Ry. Co.* (1), and *Carpue* v. *London and Brighton Ry. Co.* (2), which I shall presently discuss briefly.

With profound respect I am unable to accept the view that owing to some historical connection the scope of such general words as "all suits for indemnity for any damage or injury sustained by reason of the railway" found in the Railway Acts and in 16 Vic., c. 99, s. 10 should have been restricted to that of the limitation provision of an earlier statute expressly confined in its application to actions brought for something done in pursuance or in execution of extraordinary powers over private property and persons conferred on railways. Why should Parliament when it dropped the restrictive words of the earlier statute be presumed to have intended nevertheless to continue them in operation notwithstanding the generality of the language in which the later Act is couched? *Roberts' Case* and *Carpue's Case* (2), were the basic authorities for the decision in *Ryckman's Case* (3), and, notwithstanding the change made in the Dominion Railway Act in 1903 by the introduction of the words "the construction or operation of," the view which prevailed in *Ryckman's Case* (3), found favour with the present Chief Justice of this court, who dissented, in *Greer's Case* (4), at pages 341-2. Our courts have too often applied to Canadian statutes decisions of the English courts upon statutes considered to be

(1) [1839] 4 M. & W. 749.
(2) [1844] 5 Q.B. 747.
(3) 10 Ont. L.R. 419.
(4) 51 Can. S.C.R. 338.

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in pari materia but couched in different language, intended to apply to other circumstances and indeed sometimes dealing with a different subject-matter. See the judgment of Duff J., in *Toronto* v. *J. F. Brown Co.* (1), at pages 181 et seq.

In *May* v. *Ontario and Quebec Ry. Co.* (2), it was held by Wilson C. J., after reviewing the prior decisions, that any damage done through negligence upon a railway in the carriage of passengers and the like is damage done "by reason of the railway," and the same view was taken by O'Connor J. in *Conger* v. *The Grand Trunk Ry. Co.* (3). In these two actions, brought by persons who had been injured through alleged negligence of the respective railway companies while being transported as passengers, demurrers by the defendants were maintained.

In *Auger* v. *Ontario, Simcoe & Huron Ry. Co.* (4), a case of horses killed at a highway crossing, Richards J. expressed the opinion that while cases where the liability rested on breach of contract to carry safely (amongst which he included cases of injury to passengers) were excluded from the operation of the limitation section, the principle of the decisions so holding did not extend to actions for tort for an alleged wrong done by the railway in exercising its statutory powers.

In *Prendergast* v. *Grand Trunk Ry. Co.* (5), section 83 of the C.S.C. c. 66, was held not to apply to a case where fire on the right of way had negligently been allowed to spread to adjacent land on the ground that the injury charged was at common law, by one proprietor of land against another, and was quite independent of any user of the railway.

(1) [1917] 55 Can. S.C.R. 153.
(2) [1885] 10 O. R. 70.
(3) [1887] 13 O. R. 160.
(4) 9 U.C. C. P. 164, 169.
(5) [1866] 25 U.C.Q.B. 193.

In *Brown* v. *Brockville & Ottawa Ry. Co.* (1), a case of injury to the plaintiff and his wagon on a highway crossing, Robinson C. J., delivering the judgment of the court said:—

> "By reason of the railway" is a very comprehensive expression.

Referring to the omission of the statutory signals on approaching a highway crossing he added

> It may be said that the damage was not sustained by reason of the railway, but rather by reason of the manner in which the carriages on the railway were driven; but we think the substance and effect are the same in the one case as the other.

The other ground of complaint was defective construction of the crossing.

McCallum v. *Grand Trunk Ry. Co.* (2), was a case of fire, caused by sparks from a locomotive igniting material negligently left on the right of way, which spread to the plaintiff's land. Negligence in regard to the locomotive was not charged. The Court of Error and Appeal held that this was an injury sustained "by reason of the railway."

Draper C. J. A., said at page 532:—

> The *causa causans* was therefore a part of the working of the railway, and the effect was "by reason of the railway," and we are not deciding whether the defendants were guilty of negligence in letting the fire extend in manner and form as the second count charges, but whether, admitting that the second count is proved, it is a count claiming indemnity for a damage or injury by reason of the railway.

Hagarty C. J. C. P. added:—

> It was certainly by reason of the railway the injury was caused.

But he adds:

> The case may be readily distinguished from others where some direct malfeasance has caused injury, or where contracts express or implied are broken.

(1) [1860] 20 U.C.Q.B. 202. (2) [1871] 31 U.C.Q.B. 527.

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In *Anderson* v. *Canadian Pacific Ry.* (1), the limitation section was held not to apply to an action for loss of baggage where there was a special contract limiting the defendant's liabilities.

In the comparatively recent case of *Traill* v. *St. Catherines and Toronto Ry. Co.* (2), Boyd C., held that an action for damages for personal injury to a passenger was not within section 306 of the Dominion Railway Act (1906). But the learned judge seems to have regarded the liability as one for breach of contract.

Until *Ryckman's Case* (3), was decided the law on the point under consideration can scarcely be said to have been "well settled" in Ontario, even under the section as it formerly stood.

In *Kelly* v. *Ottawa Street Ry. Co.* (4), the action, which was to recover damages for injuries sustained by a man in the street owing to the careless driving of one of the defendant's cars, was held by the Court of Appeal to be within the limitation section. If the plaintiff in the case at bar had reached the pavement before the moment of the collision so that her transportation as a passenger had terminated, her action would admittedly have been barred by the Manitoba limitation section. What ground of distinction, not purely whimsical, can be suggested for holding that, although in that case she would have been injured "by reason of the operation of the railway," she should be deemed not to have been so injured because she was still in the vestibule or on the steps of the car in course of leaving it when the collision occurred?

(1) [1889] 17 O. R. 747; 17 Ont. App. R. 480.
(2) 38 Ont. L. R. 1.
(3) 10 Ont. L.R. 419.
(4) [1879] 3 Ont. App. R. 616.

Although this court has in several cases considered the limitation section of the Dominion Railway Act since the introduction into it in 1903 of the words "the construction or operation of" (*Canadian Pacific Ry. Co.* v. *Robinson* (1); *Canadian Northern Ry. Co.* v. *Anderson* (2); *Greer* v. *Canadian Pacific Ry. Co.* (3), and *Canadian Northern Ry. Co.* v. *Pszenicnzy* (4)) the question whether an action for personal injury to a passenger due to negligent running of a train of cars of a railway company comes within the section as it now stands, i.e., whether such injuries are sustained by reason of the "operation of the railway," has never been passed upon here, although the principle of our decision in the case last cited may bear upon it. It is true that in *British Columbia Electric Ry. Co.* v. *Turner* (5), Mr. Justice Duff reiterated the opinion which had prevailed in the *Sayers Case* (6), and I also expressed an inclination to the view that such an action was not within the limitation clause. We were there dealing, however with a British Columbia statute, which read "by reason of the tramway or railway," and I was greatly influenced by the judgment in the *Ryckman Case* (7). I have already alluded to the dicta of Gwynne *J.* in the *McWillie Case* (8), and of Duff J. in *Greer's Case* (3).

Robinson's Case went to the Privy Council and is reported in [1911] A.C., at page 739. The claim there was based on the alleged wrongful cutting off of a spur line. It was held that such a refusal of facilities was not an act done in the operation of the railway

(1) 43 Can. S.C.R. 387.
(2) 45 Can. S.C.R. 355.
(3) 51 Can. S.C.R. 338.
(4) 54 Can. S.C.R. 36.
(5) [1814] 49 Can. S.C.R. 470.
(6) 12 B.C. Rep. 102.
(7) 10 Ont. L.R. 419.
(8) 17 Can. S.C.R. 511.

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and therefore did not fall within the limitation enacted by section 306 of the Dominion Railway Act of 1906. Referring to this section Lord Haldane in delivering the judgment of the Board said, at page 745:—

> 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 under 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 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.

There is no other case in the Privy Council, so far as I am aware, which has any direct bearing on the subject under consideration.

Two English cases, however, much relied on in Ryckman's case and in many of the other Canadian decisions, should be noticed.

In *Palmer* v. *The Grand Junction Ry. Co.* (1), the claim against the company was

> for not safely carrying and conveying some horses in their carriages on the railway whereby one was killed and others were injured.

The question discussed was whether the company was entitled to notice of action under section 214 of its incorporating Act, 3 & 4 Wm. IV., c. 34. That section in terms applied to actions, etc.,

> for anything done or omitted to be done in pursuance of the Act or in the execution of the powers or authorities, or any of the orders made, given, or directed in, by, or under the Act, unless fourteen days' previous notice in writing shall be given by the parties intending to commence or prosecute, etc.

(1) 4 M. & W. 749.

It was held that the company was not entitled to notice of action as for a thing done or omitted to be done in pursuance of the Act. Baron Parke in delivering the judgment of the court, said:—

> The defendants are sued as common carriers, who have received nine horses for the purpose of being taken to their journey's end, which they have not so delivered, but that on the contrary one has been killed, and three severely injured, in consequence of an accident on the railroad; the action is brought against them, therefore, in their character of common carriers; and it appears to me that a breach of their duty in that character is not a thing omitted to be done in pursuance of the act, or in the execution of the powers or authorities given by it.

The difference between the terms of s. 214 of the statute dealt with in the *Palmer Case* (1), and those of the Manitoba limitation provision is manifest. The one is expressly restricted to things done or omitted to be done pursuant to the authority or requirements of the statute or of orders made under it. The other is general in its terms applying to

> all suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway.

It is sought to restrict this general language to damages or injury occasioned by acts "done in pursuance of and by authority of this Act and the special Act" because in the same section provision is made for giving "this Act and the special Act * * * in evidence," under a plea of the general issue. As already stated I regard the inference of such a restriction upon the scope of the earlier member of the section as wholly unwarranted. In making it, to quote Mr. Justice Osler in *Ryckman's Case* (2):—

> judges * * * have refined and limited (the) construction and application

(1) 4 M. & W. 749.

(2) 10 Ont. L.R. 419, 427.

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of the section. The subject matter of the portion of section 116 which follows the semicolon is entirely distinct and different from that dealt with in the earlier part of the section. The two clauses were in my opinion very properly made to form separate sub-sections in the revision of the Dominion Railway Act in 1906 (c. 37, s. 306) and the like arrangement is continued in the new Railway Act of 1919, s. 391 of c. 68 of 9 & 10 Geo. V. See, too, R.S.O. 1914, c.263, s. 265; R.S.B.C. 1911, c. 194, s. 269. The first member of section 116 of the Manitoba Act seems to be directed to claims based on tortious acts or omissions in the course of constructing or operating the railway and must, I think, cover all such cases. Such acts or omissions are not within any statutory authorization. Statutory authorization does not afford a defence to actions founded on them, whether preferred by pleading the general issue or otherwise. The *Palmer Case* (1), moreover, dealt with the contractual obligation of common carriers of freight to carry it safely. In such a case proof of fault or negligence is not at all essential to the plaintiff, as it always is in a claim for personal injuries.

Carpue v. *London & Brighton Ry. Co.* (2), on the other hand, was a case of personal injury to a passenger. The defendant company was incorporated by the 7 Wm. IV. and 1 Vic., c. 119 which, after empowering it to construct the railway and to use locomotives, enacted that no action for anything done or omitted to be done in pursuance of the Act or in execution of the powers or authorities given by it should be brought without twenty days' previous notice. It was held that notice of action was unneces-

(1) 4 M. & W. 749. (2) 5 Q.B. 747.

sary, the defendants being sued in their capacity of common carriers. Here again we find a section of which the application is by its terms expressly confined to cases in which the act or omission constituting the cause of action is something authorized or imposed by the statute. Negligent acts or omissions in the course of the operation of the railway were not so regarded. In the Manitoba statute on the other hand "operation" is now expressly included and that word was inserted, as I think, for the very purpose of precluding in the future the restriction of the general terms in which the first member of the section is couched to matters of construction and maintenance—a restriction which had been inferred by the courts from the presence of the concluding clause of the section in the Canadian Railway Acts when the language of its earlier provision had been "by reason of the railway." See *Parker* v. *London County Council* (1). Neither *Palmer's Case* (2), nor *Carpue's Case* (3), it seems to me, warrants the application of the principle on which it was decided to the limitation sections found in our Railway Acts, federal or provincial, in actions for injuries sustained by passengers through fault or neglect of railway employees in working the railway.

My conclusion from this review of the leading authorities, (for the length of which I feel I should apologize, although it seemed to be necessary because of the uncertainty and confusion existing as to their effect), is that taken as a whole they would not have compelled us to hold that the present action would not have been within the purview of s. 116 had it stood as it was prior to 1907, i.e., if it still read "by

(1) [1904] 2 K.B. 501. (2) 4 M. & W. 749.
(3) 5 Q.B. 747.

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reason of the railway." There certainly is nothing whatever in them seriously to embarrass us in giving the section in its present form the construction for which its plain, precise and unambiguous words, read in their grammatical and ordinary sense, appear to call. "Operation" means "the working of the railway as constructed" and that assuredly includes the running of the cars. While section 116 of the Manitoba statute, notwithstanding the omission from it of a provision similar to s.s. (3) of s. 306 of the Dominion Railway Act of 1906, which can scarcely have been other than designed, may not apply to actions of which the substance is breach of contract, as in cases of loss of or injury to freight in transport, in my opinion it clearly does apply to actions such as that at bar, of which the substance is fault or neglect attributable to the defendant in the operation of its railway occasioning personal damage or injury to the plaintiff. I cannot see any reasonable ground for distinguishing in this respect between the case where the person so injured is a passenger and that where he does not hold that relation to the company but is lawfully where he is, whether on a highway or elsewhere, when he sustains the injury.

I would for these reasons allow this appeal with costs here and in the Court of Appeal and would restore the judgment of the learned trial judge dismissing the action.

MIGNAULT J.—My brother Anglin having made an exhaustive review of the decisions bearing on the construction of the limitation section of the Manitoba Railway Act (R.S.M. 1913, ch. 168, section 116), I propose very briefly to state my reasons for thinking that this appeal must be allowed.

Section 116 reads as follows:—

116. All suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be instituted within twelve months next after the time of such supposed damage sustained or, if there be continuation of damages, then within twelve months next after the doing or committing of such damage ceases, and not afterwards; and the defendants may plead the general issue 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.

The respondent was injured when just about to alight from one of the appellant's cars through a collision brought about by the negligent operation of another of the appellant's cars. She waited more than a year before bringing this action, and the appellant contends that her right of recovery is now barred by section 116. The learned trial judge so held, but his judgment was reversed by the Court of Appeal.

The nature of the respondent's action was much discussed at bar. She alleges that she had been received by the appellant as a passenger on its railway, having paid her fare for that purpose, to be safely carried to her destination, and that owing to the negligence of the appellant in the management of its railway, the car in which she was travelling came into collision with another car operated by the appellant, and she was injured.

In substance this action appears to be based on a tort, the negligent operation by the appellant of its railway. But because some of the cases have distinguished between actions on tort and actions for breach of contract, the respondent urges that she has really sued for breach of contract, to wit, the contract to carry her safely to her destination.

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As I read section 116, the distinction relied on by the respondent would not really help her, for undoubtedly her suit claims indemnity for "damage or injury sustained by reason of the * * * * operation of the railway," and such a suit certainly comes within the intendment of section 116. I might add that the contract implied by the purchase of a ticket for transportation is not a contract to carry the passenger safely, but with due care, and while the word "safely" is often rather loosely used in this connection, its meaning is simply that due care must be exercised in the carriage of passengers. So the allegation of negligence is an essential averment of an action like that of the respondent, whether it be viewed as based on a contract or a tort, and in either event it certainly comes within the language of section 116.

Independently of the many judicial pronouncements on limitation provisions of this kind, no difficulty can arise as to the construction of this section. The inquiry in this case is whether the damage was sustained by reason of the operation (i.e. the negligent operation) of the appellant's railway, and if so we cannot disregard the plain language, construed as it should be according to its ordinary and grammatical meaning, of section 116.

Some decisions have held that the limitation section does not apply to cases where the question is as to the common law liability of a common carrier. But a carrier acts as a common carrier only when he carries goods, of course as a public employment. His liability when he carries passengers is subject to other rules, and does not arise unless negligence be proved (Halsbury, Laws of England, vo. Carriers, paragraphs 1 and 6). Therefore, as I have said, negligence is an essen-

tial element of the right of recovery of the passenger. Whether this takes his action out of the realm of contract into that of tort might be an interesting question to discuss, but I must hold that in any case the action of the respondent is clearly within the descriptive words of section 116.

What I have said disposes of any question as to the applicability of this section to the respondent's action, unless we are bound by authority to hold that, notwithstanding its clear language, it does not bar the action of a passenger for damages caused by reason of the negligent operation of the railway. The consequence of so holding would be rather startling, for the respondent must concede that the section would apply had a stranger on the street been injured by this same collision, while at the same time contending that it does not bar her own action, she having been on the appellant's car as a passenger when the collision occurred. But my brother Anglin has conclusively shewn that the question of the proper construction of section 116 is open to this court, and I entirely agree with him. I may add that the language of provisions like section 116 has been changed from time to time. The wording was "by reason of the railway" when the *Ryckman* and *Sayers Cases*, much relied on by the respondent, were decided. Going further back, as my learned brother has done, we find language that may explain many of the decisions, but to persist in making a distinction which the statute does not now justify after its language has been changed, is something which for my part I cannot agree to.

I do not think that the concluding portion of section 116 can restrict the generality of the limitation clause. It deals with an independent matter, the defences to

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the action, and moreover, if the authority of the statute can sometimes be set up as a defence, it certainly cannot avail where the statutory powers have been negligently used.

My opinion is therefore that the respondent's action is barred by section 116. I would allow the appeal with costs here and in the Court of Appeal and restore the judgment of the learned trial judge dismissing the action.

CASSELS J. (dissenting).—The question raised in this appeal is as to the applicability of section 116 of the Manitoba Railway Act to the case of injury to a passenger by reason of the negligence of the railway. The section reads as follows:—

All suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be instituted within twelve months next after the time of such supposed damage sustained, or if there be continuation of damages then within twelve months next after the doing or committing of such damage ceases, and not afterwards; and the defendants may plead the general issue 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.

Limitation clauses of a similar character applicable to railways have been discussed in a great number of cases, and it has been almost uniformly held that clauses similar to the one in question do not apply to actions arising out of negligence in the carrying of passengers. I think it is too late now to place a different construction on the section.

Down to a certain date, the cases are reviewed by MacMurchy & Denison in the 2nd edition of the Railway Law of Canada, commencing at page 512, and by Chancellor Boyd in *Traill* v. *Niagara, St. Catharines and Toronto Ry. Co.* (1). The authorities

(1) 38 Ont. L.R.

are also elaborately reviewed in the judgments of the Chief Justice of Manitoba and Mr. Justice Dennistoun. I have read over most of the cases referred to. I do not find in any one of them any reference to the words in this section: "or if there be continuation of damages then within twelve months next after the doing or committing of such damage ceases, and not afterwards."

These words seem to me to indicate that the section was not intended to apply to the case of an injury to a passenger by reason of the negligence of the railway as a common carrier. Where a collision takes place and injury is inflicted upon a passenger, the damage or injury is sustained then and there, and it is difficult to see how in that case there could be a continuation of damages.

Moreover I would call attention to the fact that in the Dominion legislation referred to by the Chief Justice and in the Dominion Railway Act of 1919 (9 & 10 Geo. V., c. 68, sec. 391), similar words are found which by reason of sub-section (3) cannot apply to cases of injury to a passenger.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Anderson, Guy & Chappell.*

Solicitors for the respondent: *Coulter, Collinson & Procter.*