Privy Council Appeal No. 51 of 1925.

The British Columbia Electric Railway Company, Limited - - - *Appellants*

v.

Kathleen Pribble - - - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD FEBRUARY, 1926.

Present at the Hearing:

LORD DUNEDIN.
LORD SUMNER.
LORD WRENBURY.
LORD DARLING.
LORD SALVESEN.

[*Delivered by* LORD SUMNER.]

The respondent was a passenger on the appellants' street railway in the City of Vancouver, who had paid her fare and reached the end of her journey, and fell from the car as she was getting off the step at the rear of it. There was a hole in the step, which ought not to have been there, and her heel caught in it, so that, as she moved on, her foot was held. Her injuries were grave. Rather more than six months afterwards she brought her action. She recovered judgment for $5,000.

The appellants pleaded that the action was statute-barred by virtue of section 60 of their statute, namely, the Consolidated Railway and Light Company Act, 1896. The Trial Judge, Macdonald, J., relying on the cases of *Sayers* (12 B.C.R. 102) and *Viney* (32 B.C.R. 68), overruled this objection. On appeal this was affirmed, McPhillips, J., dissenting. The opinion of Martin, J., concurred in by Macdonald, J., is this:—

> "In view of the largely irreconcilable, as I think, state, of certain decisions, which are binding upon this Court and necessarily fetter the expression of our opinions, I think the best course to adopt is not to disturb the judgment in such doubtful conditions, but to leave it to a higher tribunal, which could do so, should it be so disposed, on a reconsideration *de novo* of the whole matter, which is one of considerable public importance and is now in an unsatisfactory legal state."

McPhillips, J., reviewed the course and state of the authorities very fully and with much care, and concluded with the words :—

> "I have no hesitation in arriving at the conclusion that the limitation provision (section 60) effectively disposed of the case and that the appeal should be allowed."

As these expressions indicate, there is a long history both of statutory limitation of actions brought against railway companies and of judicial decisions upon the enactments, which requires consideration before the section in question is construed.

The section now under consideration runs as follows :—

> "60. 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."

In 1896 clauses of this character had long been in use throughout Canada. Before the first general Railway Act in 1851 they had been inserted in special railway charters. They appeared in Provincial and in Dominion, in general and in private Acts. They repeatedly survived consolidation. A very common wording ran : "injury sustained by reason of the railway." It appears (see per Patterson J.A. in 3 Ont. A.R., at p. 622) that this phrase was added in Canadian statutes to the older words of similar sections in English Railway Acts. This form had been restrictively interpreted in Canada in many cases. Some Courts held that such clauses did not apply to actions, which could be framed in contract ; some that they did not apply, where negligence on the part of the railway company was the gist of the complaint ; some held affirmatively that they refer only to the construction or maintenance of works authorised by a special Act ; some negatively that they do not refer to things done in the ordinary course of business as common carriers, but only to things done by a railway company as a company exercising statutory powers. The reasoning by which the Courts arrived at these substantially similar conclusions may be stated thus. The words "sustained by reason of the railway," mean sustained, because a railway is being made or is in existence and is being maintained. They refer to the railway, not to its user, and certainly not to negligence committed on or in connection with it. Contracts, being made by a railway company voluntarily and subject to general rules of law, prescribe within themselves the terms on which they are to be performed or vindicated, and, in the absence of special stipulations, railway companies must in their contracts be subject to the same law as applies to ordinary contracting parties. Statutory provisions should not be read as extending to contracts or as giving advantages not bargained for.

The decisions had not always proceeded in perfect conformity with one another, but in the general result they agreed. They began in 1856, and, before the enactment now under discussion was passed in 1896, a limited construction of the old form of words was well settled. Indeed, until quite recent years, long after the Dominion Railway Act of 1903 adopted a new wording, they do not seem to have been questioned. The authorities down to 1905 are very fully examined in *Anderson* v. *Canadian Pacific Railway*, (17 O.R. 747), and *Ryckman* v. *Hamilton and Grimsby Railway Company* (10 Ont. L.R. 419).

In particular, before 1896, the following aspects of the matter had been judicially dealt with throughout Canada and excluded from the operation of limitation sections, which were not always expressed in the same but always in similar words : accident to a passenger or his goods carried under contract, *Roberts* v. *Great Western Railway*, 1857, (13 U.C.R., Q.B., 615), *Whitman* v. *Western Counties Railway*, 1884, (17 N.S.R. 405) ; actions for trespasses and other torts not necessarily arising out of the working or maintenance of the railway, such as fire spreading from land belonging to a railway company to another owner's land, *Prendergast* v. *Grand Trunk Railway*, 1866, (25 U.C.R., Q.B., 193) ; libel by a railway manager in the discharge of his office, *Tench* v. *Great Western Railway*, 1872, (32 U.C.R. Q.B. 452) ; trespass on the plaintiff's gravel pit by a contractor working for the defendant company, *Brock* v. *Toronto Railway*, 1875, (37 U.C.R., Q.B., 372).

On the other hand, such limitation sections had been held to apply to running over a plantiff's horses, which had got upon the railway line, 1859, *Auger* v. *Ontario and Simcoe Railway* (9 U.C.R., C.P., 164) ; to injury caused by the negligent accumulation of leaves on the line of rails, *McCallum* v. *Grand Trunk Railway*, 1870, (30 U.C.R., Q.B., 122), 1871, (31 U.C.R., Q.B., 527) ; to injury to a person, run down by a train while driving over a level crossing, 1860, (*Brown* v. *Brockville and Ottawa Railway*, 20 U.C.R., Q.B., 202), the principle being thus expressed—" by reason of the railway . . . extends to an injury sustained on the railway by reason of the use made of it " ; to injury caused to a passer-by, who jumped into a drain to avoid the defendants' car, driven at excessive speed, and so hurt himself, *Kelly* v. *Ottawa Street Railway*, 1879, (3 A.R. 616) ; to injury to a passenger in a train belonging to one company by the engine of another, which came into collision with it, *Conger* v. *Grand Trunk Railway*, 1887 (13 O.R. 160) ; to damage by felling timber in purported pursuance of powers given to a railway by statute, *Follis* v. *Port Hope Railway*, 1859, (9 U.C.R. C.P., 50) ; *McArthur* v. *Northern, etc., Railway* (15 O.R. 733, 17 A.R. 86). Again, in *North Shore Railway* v. *McWillie*, 1890, (17 S.C.R. 511), the opinion had been expressed (per Gwynne J.) that damage by sparks, negligently allowed to escape, was not covered by such a clause, since the cause of injury was simply

negligence, not the exercise of statutory powers nor the existence of the railway itself, and, similarly, in *Reist* v. *Grand Trunk Railway* (15 U.C.R., Q.B., 355), it was laid down that the limitation applied to actions founded on acts of commission, not of omission or non-feasance.

So much for the state of the law, of which the Legislature may be deemed to have had cognizance before enacting section 60 in 1896. To this it may be supposed to have directed its attention It is plain that the words added to the old formula in 1896 must have some additional effect attributed to them, but that effect is in dispute. They were clearly not intended to incorporate in the new legislation the effect of the decided cases, for that effect was not uniform. Furthermore, the case to be legislated for was not that of a railway company simply, but of a railway company which carried on other undertakings. The decisions since 1896 have further to be considered, for they are relevant authorities on the interpretation of the statutory language, which was accordingly used. At intervals over a considerable number of years the Courts of British Columbia have interpreted the meaning of section 60, and their decisions are all one way. In the case of *Sayers*, 1906, (12 B.C.R. 102), Duff, J., adhered to the old current of authority and charged the jury that the section did not apply to a passenger carried under contract. His reasoning was as follows. The clause refers to the company's obligations towards the public generally and towards the plaintiff as a member of that public, but not to obligations under special contracts, which the plaintiff may have made as an individual for the carriage of himself or his goods. If the words " works or operations " are taken out of their context, they would be coterminous with all that the company has or does and would make the mention of " the railway or tramway " otiose. They would also apply the six months' limit indiscriminately over the whole wide field of the company's authorised undertakings. To read the words *separatim* is enough to satisfy them all and is a suitable meaning to be adopted *contra proferentes*. The limitation accordingly applies to injuries by reason of (*a*) the railway, (*b*) the tramway, (*c*) works, not being the railway or the tramway, and (*d*) operations outside the railway or the tramway. To extend the words *ultra* would interfere with the rights of members of the public, with whom the company might voluntarily contract in the ordinary way of business. In the case of one of the companies absorbed by the present appellants, viz., the Westminster and Vancouver Tramway Company, a railway theretofore governed by the General Railway Act of the Province, section 42, it would, inferentially and without express words, substitute therefor section 60 of the Act of 1896, though it was considerably more favourable to the company and the Act itself was obtained by its private application to the Legislature.

The Court of Appeal affirmed this direction, and there the matter rested in British Columbia till *Viney's* case, 1923, (32 B.C.R.

468), when, notwithstanding the authority of *Winnipeg Electric Railway Company* v. *Aitken* (63 S.C.R. 586), decided upon similar but not identical words, the Court of Appeal declared itself bound by the case of *Sayers*, but disposed of the matter then in hand (a case of a passer-by) in favour of the railway company, on the ground that it fell in any case within the words "by reason of the tramway." In the meantime, in *Turner's* case, 1917, (49 S.C.R. 470), Duff, J., had declared his adherence to his former view, and Anglin, J., had doubted if the section applied to a case of negligence at all. This case was eventually decided on another Act, the Families' Compensation Act, 1911.

General legislation, however, had taken a different direction. In 1903 the Dominion Legislature, in the Consolidated Canadian Railway Act, altered the old formula, "by reason of the railway" to "by reason of the construction or operation of the railway" (section 242), a change subsequently adopted in many public provincial Railway Acts, notably in Ontario in 1906, in Manitoba in 1913, and in British Columbia in 1911 (c. 194) and 1924 (c. 218). When the case of the *Winnipeg Electric Railway Company* v. *Aitken* (63 S.C.R. 586) was decided in the Supreme Court, it was recognized as having shaken the authority of *Sayers's* case by its criticisms, in spite of the fact that it is a decision upon a section contained in the Manitoba Railway Act and differently worded. The prior authorities are there fully re-examined by Anglin, J. The plaintiff, a passenger in one tramcar, was injured, when about to alight, by reason of another tramcar of the same company coming into collision with it, and his action was held to fall within the limitation section, viz., section 116. Duff, J., after observing that the word "operations" presents no difficulty, goes on to say that the case of *Canadian Northern Railway* v. *Pszenicnzy* (54 S.C.R. 36) has in effect overruled the construction of limitation sections generally as inapplicable to actions for breach of contract, since no valid distinction can be drawn between the contract of employment, under which Pszenicnzy was on the railway line and the contract of carriage, under which passengers travel. After a full examination of the decisions, Anglin, J., concludes that on the words of the Manitoba statute the claim of the plaintiff passenger was barred by the limitation clause. For his full and weighty reasoning reference should be made to the full report of his judgment, to which, and to the judgments of his colleagues who concurred with him, their Lordships feel themselves to be much indebted.

In the result in this case the Court of Appeal of British Columbia, no doubt rightly, felt itself bound by the decisions of the Court in previous cases, but in view of the authorities to the contrary, especially in the Supreme Court of Canada, on cognate though not identical words, intimated, as before stated, that the present case might go farther with advantage. The question is not affected by any previous decisions of

their Lordships, for in *Canadian Northern Railway* v. *Robinson* (1911 A.C., at p. 745) their Lordship's Board, holding that the limitation section in the Dominion Railway Act of 1903 did not apply to an action for discontinuance of facilities, merely observed that the words of that section—"operation of the railway"—"signify simply the process of working the railway as constructed," and in *Gentile's* case (1914 A.C. 1034) advisedly refrained from expressing any opinion touching the present matter. Though the whole point is one of mere construction of about twenty words, as to which no previous decision is binding upon their Lordships, they cannot but feel the importance of adopting a construction, if it be possible, which will harmonize the various limitation sections in common use in Railway Acts throughout Canada and, perhaps, bring to an end the difficulties arising from a conflict of decisions.

To apply the ordinary generalities as to the interpretation of statutes is in this case of even less direct assistance than usual. The Act is a private Act, but the presumption that it should be construed *contra proferentes* is of little weight. Even if it can be said that the section is reasonably capable of being read in two ways, neither in itself being preferable to the other as a matter of construction, it is not so clear that in 1896 the Legislature of British Columbia ought to be deemed to have meant to legislate in the sense less beneficial to the company. As a matter of Parliamentary bargain it may have been the policy of the Legislature to give liberal terms in consideration of the public advantage of the undertakings authorized by the Act, but of policy their Lordships cannot be judges. The Legislature may, of course, have desired to give as little as possible to the undertakers, but it may also have had in view the semi-public advantage to the enterprise of being safeguarded against groundless or exaggerated claims. Railway companies, if they need any special limitation of actions at all, need them as much and for the same reasons, whether the person suing for injuries sustained is a passenger or a passer-by. If it is just to put the passer-by under terms as to the prompt commencement of litigation, it is equally just to impose them on the passenger. In practice a limitation is more necessary in accident cases than in cases of injury to property rights inflicted by reason of the construction or maintenance of the railway, since fraud is much more possible in the former class of action than in the latter, and after a considerable lapse of time the company has little or no chance of defending itself against a charge of causing a personal accident by the negligence of its servants. Hence it might perhaps be expected that the additional words were inserted, albeit for the benefit and at the instance of the company, in order to relieve it from the disadvantages imposed by the decisions and not *contra proferentes*.

It is urged, on the other hand, that in the case of a private Act, as, after all, this is, the canon is invariably applicable, and, further, that in view of the very wide undertakings authorized by the Act itself, no reference to the

railway or the tramway need be understood by the additional words at all. New undertakings were authorized by the Act, which required new words appropriate to them, but that was no ground for giving more extensive advantages in respect of the old undertakings, especially if such extension would have involved disregard of a long series of judicial decisions.

The Act, the benefit of which is now vested in the appellant company, authorized the Consolidated Railway and Light Company not only to acquire and carry on the undertakings of separate tramway, railway and electric light and power undertakings, but also to construct new tramways and works, and it is contended that the new words " works and operations " may be satisfied by referring them to things done in exercise of these new powers.

It is better, therefore, to turn to the precise wording of the section itself. Two points ought first to be noticed which do not appear to have been dwelt upon in the case of *Sayers*. (1) The verb to " operate " and the noun-substantives " operations " or " operation " occur frequently in other parts of the Act than section 60, and always apparently in the familiar colloquial sense of carrying on the several undertakings, which the company is empowered to construct and maintain (see sections 33, 34, 43, 48, 50, 51). Accordingly, to read the words as enumerating four separate causes, each exclusive of the others, viz., railway, tramway, works other than a railway or tramway, and operations, is inadmissible. The operations must be operations of, on, or with some railway, tramway or works, operations which may be careless or careful, and performed in either manner either under a contract or under a non-contractual duty. (2) The collocation of the four words in section 60, " tramway," " railway," " operations " and " works," by reason of which the injuries, to which the section applies, may be occasioned, is not a collocation of words, which are all of the same character. " Works " may probably, from the way in which the word is used in section 51, be assigned to works for generating or using electricity. If so, the word is *in pari materiâ* with the words " tramway " or " railway," which speak for themselves. They are all physical things, constructed for use or, colloquially speaking, for " operations." This last word, on the other hand, denotes not a thing, but an activity, a use made of a thing. Those who argue, that injuries occasioned by reason of the use made of a tramway or by reason of the contractual use of a tramway are not intended to come within the section, may be placed in this dilemma. Does " by reason of the tramway " extend to the tramway and also to the company's user of it or not ? Unless it does, " operations," which is a general word covering all the company's operations, must include the operations or modes of using and carrying on the tramway, and the true question comes to be, can it or can it not be predicated of the plaintiff that she was injured by reason of an operation of the company, that is, of some conduct of the company and its servants in operating the

tramline with a defective car? If it does, so that the express mention of "operations" means operations of something which is not a tramway, then decisions which confine the words "by reason of the tramway" to the construction and maintenance of the authorized works and forbid any extension to their operation must be wrong. Alternatively, if the word "operations" means the operating of the whole of the company's undertakings, tramways included, then the accident in question, occasioned by operating the tramway, is within the section, unless either injuries to a person carried under a contract or injuries occasioned by negligence are excluded. Whichever alternative is adopted, some one or more of the decisions must be disregarded. The exclusion of injuries to persons in a contractual relation with the company does not rest on any express words, but on the supposed general character and scope of limitation sections in Railway Acts. If escape is sought by contending that the section as a whole is subject to an unexpressed exception either of injuries to persons, who stand to the company in the particular contractual relation of passengers, carried for reward by undertakers, who make such carriage their business, or of injuries, occasioned by negligence of any kind or at any rate by negligence consisting in mere non-feasance, the question at once arises what authority there is for making any such implied exception? The words, "for indemnity for," though long in use, do not appear to be used in a strict sense, for no contract to indemnify can be suggested and they may be disregarded: but taking the relevant words, "all actions for any damage," these cannot be construed as meaning "all such actions for such damages except such as involve contracts of carriage or proof of negligence," for the language is unqualified. The section is expressed in general terms. If the action is one of the kind described, the section applies, for all such actions are within it. If the contention is rested on the benevolent policy of the Legislature towards injured persons, there is nothing to establish or to warrant the inference of such a policy. If it is rested on the general tenor of such sections in Railway Acts, the argument would import these exceptions into sections even more generally expressed, say in the words "by reason of the construction or operation." This view would apply, if at all, to public Acts, to the Dominion Act, the Manitoba Act, and the British Columbia Act and to the present private Act alike. If actions, in which the right of the person carried arises out of a contract, are outside the section, then the case of *Pszeniczy* was wrongly decided. If the view be correct that "by reason of" means by reason of the thing itself and not by reason of negligence in the use of the thing, then the very numerous cases which apply these sections to running over a passer-by negligently, must be wrong, though why it should be the policy of the Legislature to be more careful of the interests of the passenger than of the pedestrian it is impossible to see. The view, that such sections impliedly exclude contractual claims from their application, leads to results

so extraordinary as to be almost fatal to any implication, for it has often been pointed out that accident cases are generally capable of being pleaded either in contract or alternatively in tort. Negligence and personal trespass being the substance of the complaint, they are essentially actions independent of contract. After the most careful consideration of the matter their Lordships are of opinion that the reasoning of *Sayers's* case is wrong and that the reasoning in *Aitken's* case gives true guidance to the construction of the present section. This appears to have been at the root of the adoption of the words " construction or operation " of the tramway in the Dominion Railway Act. They think that it is impossible to limit section 60 of the appellants' Act in any of the following ways :—(*a*) by applying it only to such personal injuries as are incapable of being pleaded as breaches of contract ; (*b*) by applying it only to such personal injuries as are occasioned without negligence on the part of the company or its servants ; (*c*) by applying it only to such personal injuries as are occasioned by reason of the railway or tramway, whose construction or maintenance is authorised, and not by reason of the operation or user of them in the course of the business or undertaking, which the company is authorised by statute or by charter to carry on. So far, then, section 60 applies to the present claim and defeats it.

A further argument was submitted to their Lordships, which rests on the latter portion of the section. It appears in substance to be founded *inter alia* on the dissenting judgment of Davies, J., in *Greer* v. *Canadian Pacific Railway* (51 S.C.R., at p. 371), following the earlier observations of Burton, J., in *Kelly's* case (3 A.R., at p. 619)—" the meaning of these words ' by reason of the railway ' is to my mind rendered clear by the concluding passage of the section . . . and confines the protection of the statute to acts of commission and not of omission." The argument is this. The cause of action is negligence, and negligence in a respect, which no statute authorises. Accordingly, the action does not fall within the section. Dividing it, as structually may well be done, after the words " and not afterwards " and before the words " and the defendant may plead," it was submitted that both limbs must apply to the same subject matter, viz., that named, in the first words down to " operations of the company," as the cause of action to which the section applies. The enactment is (1) that it must be vindicated by action begun within six months, and (2) that, if thus duly sued for, it may be answered by a particular form of plea and by proof thereunder that " the same was done in pursuance of and by authority of this Act." What is the meaning of " the same was done " ? Obviously not the tramway, for a tramway is not done ; it is made. The reference must be to the damage sustained by the plaintiff and done by the company, and therefore the last words of the section are definitive, a limitation of the class of action to which the whole section applies.

Grammatically, there may be a good deal to be said for this

construction, but, unfortunately, it reduces the section almost to absurdity. Firstly, if no action comes within the section except such as can be defeated by proof of the authority of the statute, surely that answer suffices and a further stipulation for a time limit is not needed. Secondly, it is not under this Act that the tramway was made, but under the special Act of the Vancouver Electric Railway and Light Company, whose system was taken over and whose powers and privileges were acquired by the Consolidated Railway and Light Company under its incorporating Act of 1894. Thirdly, as a negligent construction or maintenance of the tramway is not authorised by this or any Act, the benefit of limitation is refused to the whole class of actions, in which a tramway company needs it most, viz., actions for the consequences or the alleged consequences of the negligence of its servants.

The argument, however, entirely depends on the assumption that the antecedent to the words " the same " is " any damage or injury sustained." If this assumption is not made, the two limbs of the section are independent of one another, though linked together by a simple copulative " and." If " the same " refers to the next preceding subject, viz., " the special matter," the second limb only means that the defendant may (that is, if he chooses and is able to do so) prove " special matter," consisting of statutory powers given in law and an exercise of them in fact. The expression is cumbrous, but it does not in itself help to limit the class of actions, to which the whole section applies.

As their Lordships conceive, the true explanation of the latter part of the section is much simpler. The advantage of pleading the general issue is one which has been given, modified or taken away by statute in many ways and for various reasons. It is exclusively a pleading advantage and is independent of the merits of the case or the substantive defence that may be capable of being proved under it. It has a long history, going back to 7 James I, c. 5, and although from time to time this mode of pleading has been regulated by the general system of pleading in vogue, its substantive character remains unchanged, though now its utility is probably much less than it used to be.

It was a common practice in Railway Acts, long before 1896, to express in one clause both a limitation of the time for bringing actions against the company and a provision that the company might plead the general issue. In substance, nevertheless, the right to have a given class of actions commenced within a limited period or not at all and the right to defend an action under a plea of the general issue are wholly disconnected matters. They properly fall within one chapter dealing with advantages given to the company in connection with litigation, but they are more conveniently enacted in separate sections and subsections than in one continuous sentence without other division than the insertion of the word " and." It is an accident that in 1896 the

latter form was adopted. The Legislature of British Columbia (see Statutes of 1924, ch. 218, s. 269) has adopted, for the last fifteen years, the form, at once more convenient and correct, of throwing the limitation into one subsection and the right to plead the general issue into another, and the fact that at the same time the shortened phrase " construction or operation of the railway " is used and actions on breaches of contract, express or implied, for or relating to the carriage of any " traffic," including passengers, are excluded from the section, shows that the state of the authorities had the consideration of the Legislature, and that its policy as to passengers is now expressly and authoritatively declared. Thus the ambiguity that may arise in construing such a section as section 60 in the present case is prevented in future for actions against the provincial railways in general.

Upon the whole case their Lordships are of opinion that the appeal succeeds and that the judgment for the plaintiff given in the action must be set aside and be formally entered for the defendant company. Their Lordships are further informed that, in consideration of her injuries and of the fact that the general aspect of the matter concerns themselves alone, the appellants have voluntarily arranged with the respondent not to ask for repayment of any sums already paid to her in consequence of the judgments below, a liberal proceeding to the spirit and justice of which their Lordships think effect should now be given by making no order as to the costs of this appeal. They will humbly advise His Majesty accordingly.

In the Privy Council.

THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED

v.

KATHLEEN PRIBBLE.

DELIVERED BY LORD SUMNER.

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