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* May 23, 24.
* Dec. 9.

DUFFERIN PAVING AND CRUSHED STONE, LIMITED (DEFENDANT).... } APPELLANT;

AND

FRANCES ANGER AND ANNIE W. DERBYSHIRE (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Limitation of actions—Construction of statutes—Action for damage caused to house by vibration through operation of cement-mixing trucks on highway—Damage sustained more than twelve months prior to commencement of action—Action barred by s. 53 of Highway Traffic Act, R.S.O., 1927, c. 251, as amended—"Damages occasioned by a motor vehicle."

Plaintiff sued defendant for damages for injury to plaintiff's dwelling house in the city of Toronto through vibration caused by operation of defendant's cement-mixing motor trucks in the street in front of the house. Permission had been granted (pursuant to authority under *The Highway Traffic Act*) by the City to defendant to operate said trucks on said street (otherwise the use of such trucks was prohibited by said Act). Practically all the damage was sustained beyond 12 months prior to the date when the action was brought (though operation of the trucks continued for a time within that 12 months period). Sec. 53 of *The Highway Traffic Act* (R.S.O., 1927, c. 251, as amended in 1930, c. 48, s. 11) provided (subject to provisions not material) that "no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained."

Held: The limitation in s. 53 applied, and plaintiff's action was barred.

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

As to construction of the plain words in s. 53, there were cited (*per* the Chief Justice and Davis and Hudson JJ.) the rule stated in the *Sussex Peerage* case, 11 Cl. & F. 85, at 143 (accepted in *Cargo ex "Argos,"* L.R. 5 P.C. 134, at 153, and referred to in *Birmingham Corporation* v. *Barnes,* [1934] 1 K.B. 484, at 500), and (*per* Crocket J.) *Winnipeg Electric Ry. Co.* v. *Aitken,* 63 Can. S.C.R. 586, at 595, and *British Columbia Electric Ry. Co.* v. *Pribble,* [1926] A.C. 466, at 477, 478.

Semble (*per* the Chief Justice and Davis and Hudson JJ.): Where damage is the cause of action or part of the cause of action, a statute of limitation runs from the date of the damage and not of the act which caused the damage; if there be fresh damages within the statutory period, an action in respect of those damages will not be barred (*Crumbie* v. *Wallsend,* [1891] 1 Q.B. 503, following *Darley Main Colliery Co.* v. *Mitchell,* 11 App. Cas. 127). (In the present case the damages, if any, within the limitation period were negligible).

It being held that the action was barred, it was not necessary to determine whether or not, in view of the authorized permission to operate the trucks, the operation could be regarded in law as constituting an actionable nuisance. It was pointed out (*per* the Chief Justice and Davis and Hudson JJ.) that the authority to use the street was not obligatory but only permissive, and that even where there is a statutory obligation upon a person, that does not entitle him to invade the rights of others unless he can show that in practical feasibility the obligation could be performed in no way save one which involves damage to other persons (*Manchester Corporation* v. *Farnworth,* [1930] A.C. 171, at 183. Also *Provender Millers (Winchester) Ltd.* v. *Southampton County Council,* 1939 W.N. 301, at 302, [1939] 3 All E.R. 882, affirmed, 1939 W.N. 367, [1939] 4 All E.R. 157, referred to).

APPEAL from the judgment of the Court of Appeal for Ontario dismissing (Riddell J.A. dissenting) the present appellant's appeal from the judgment of McTague J. (1) in favour of the plaintiffs against the present appellant (one of the defendants) for $500 damages for injury to a dwelling house through vibration caused by operation of appellant's cement-mixing motor trucks on the highway passing in front of the building. The material facts of the case are sufficiently stated in the reasons for judgment now reported. Special leave to appeal to this Court was granted by the Court of Appeal for Ontario. The appeal was allowed and the action dismissed with costs throughout.

D. L. McCarthy K.C. and *K. G. Morden* for the appellant.

J. W. Pickup K.C. for the respondents.

(1) [1938] O.R. 492; [1938] 4 D.L.R. 70.

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The judgment of the Chief Justice and Davis and Hudson JJ. was delivered by

DAVIS J.—This appeal comes to this Court by special leave granted by order of the Court of Appeal for Ontario.

The respondent Frances Anger, on July 18th, 1935, commenced the action against the appellant for damages to her residential property, 349 Beech avenue, in the City of Toronto. She alleged that in the years 1933 and 1934 the appellant was engaged in construction work in connection with the Water Purification Plant under construction for the Corporation of the City of Toronto in the eastern portion of the city and that for the purposes of its construction work the appellant

> operated and caused and procured to be operated upon the said Beech avenue in front of and in the immediate vicinity of the said premises of the plaintiff heavy machines for the mixing of concrete, said machines being mounted on heavy trucks and while in operation the said machines were carried upon the said trucks past the plaintiff's premises at a high rate of speed and in such a manner as to cause severe vibration of the buildings along the course of the said street, including the plaintiff's dwelling-house. As the result of the said acts of the defendants the said dwelling-house of the plaintiff was greatly damaged.

At the end of a long trial the learned trial judge, Mr. Justice McTague, in a considered judgment found as a fact " that the continued operation of these cement mixing trucks did cause physical injury to the plaintiff's property." The learned trial judge discounted, he says, to some extent the estimated cost of repairs advanced on behalf of the respondent but allowed damages in respect of actual physical injury at the sum of $500. This judgment was affirmed on appeal to the Court of Appeal, Riddell, J.A., dissenting. There are concurrent findings of fact because, while Riddell, J.A., accepted without adjudication the finding that the damage was done by the motor trucks to the respondent's house, Fisher, J.A., upon a careful review of the evidence, agreed expressly with the findings of fact of the trial judge, and Henderson, J.A., while not expressly stating his concurrence in the findings, refers to the evidence upon which the trial judge made his findings and affirms the judgment. However that may be, the main argument presented to us was that the appellant had been granted permission by the Corporation of the City of Toronto, pursuant to statutory authority, to operate the trucks on the particular street in ques-

tion and that while the operations may have been a nuisance in the broad sense of the term, they could not under the circumstances be regarded in law as constituting an actionable nuisance. This contention was accepted by Riddell, J.A. Against this view, the effect of the argument on behalf of the respondent was that while such permission had been granted by the municipal corporation, it was permissive merely and not imperative and that there was necessarily implied in the permit that the use of the highway so sanctioned was not to be in prejudice of the common law right of others. We were afforded a very complete argument by counsel on this branch of the case but in my view it becomes unnecessary to determine this question. It may with advantage, however, be pointed out that the authority to use the street was not obligatory but only permissive, and that even where there is a statutory obligation upon a person, that does not entitle him to invade the rights of others unless he can show that in practical feasibility the obligation could be performed in no way save one which involves damage to other persons. *Manchester Corporation* v. *Farnworth* (1). Farwell, J., very recently said in *Provender Millers (Winchester) Ltd.* v. *Southampton County Council* (2) that the speech of Lord Macnaghten in *East Freemantle Corporation* v. *Annois* (3) must be read in the light of the particular facts of that case where the legislature had authorized the actual thing done, so that unless the work was improperly done the corporation could not be made liable for damages suffered by other persons.

The appellant pleaded in its statement of defence that any claim that the respondent may have had by reason of the operation of the trucks referred to in her statement of claim was barred by the provisions of sec. 53 of *The Highway Traffic Act,* being R.S.O., 1927, ch. 251 and amendments thereto. The relevant section as it stood in the Revised Statutes of 1927 was as follows:

53. (1) Subject to the provisions of subsections 2 and 3 no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of six months from the time when the damages were sustained.

(1) [1930] A.C. 171, at 183.
(2) 1939 W.N. 301, at 302; [1939] 3 All E.R. 882 (affirmed in the Court of Appeal, 1939 W.N. 367; [1939] 4 All E.R. 157).
(3) [1902] A.C., 213, 217.

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Subsections (2) and (3) are not material. They deal with the case where death is caused and the action brought under *The Fatal Accidents Act* and the case where the person injured is an infant. In 1930, by 20 Geo. V, ch. 48, sec. 11, the period of limitation in sec. 53 was made twelve instead of six months. The subsection now stands in the same language as amended in 1930 in the Revised Statutes of 1937, ch. 288, sec. 60.

It is important then to repeat that the writ in this action was issued July 18th, 1935, and the statement of claim refers to the operations of the appellant in the years 1933 and 1934. If the statutory limitation of twelve months above mentioned applies to this case, then the damages, if any, sustained beyond the twelve months cannot be recovered. It was frankly admitted by Mr. Pickup that while there might be some damage within the twelve months period, the substantial damage was undoubtedly sustained outside that period of time. It is a fair view of the evidence that the damages, if any, within the twelve months period were negligible.

The learned trial judge in dealing with this aspect of the case said:

> If I have to give effect to the contention it would be serious as to the amount of the plaintiff's damages and perhaps as to the right to recover at all, because I am of opinion that the real damage was probably caused early in the year 1933 when the truck operation was heaviest and not nearly so reasonably carried out as it was after the 24th day of June of that year.

It therefore becomes vital to the respondent's case to determine whether or not her recovery is limited by the twelve months statutory period. The trial judge did not think so. He carefully considered the section of the statute and concluded that the right to damages here is a common law right which does not come within the purview of the statutory provision, and therefore in his opinion this defence had no application. In the Court of Appeal, Riddell, J.A., while not resting his judgment on that point, was of the opinion that the section plainly ousted claims for damages occasioned by a motor vehicle after the expiration of twelve months and he said that if the action were sustainable at all he would give effect to this section. Fisher, J.A., did not deal specifically with the point. Henderson, J.A., discussed the section at some

length and concluded that the statute concerned itself entirely with highway traffic and, having regard to the general purpose and scope of the statute, the limitation section must be deemed to refer to traffic accidents, and upon this reasoning it became clear to the learned judge, he says, that the respondent's action is not one contemplated by *The Highway Traffic Act* or within its scope or purview and that the limitation section cannot apply to it.

The interpretation and application of this special statutory limitation was carefully considered in at least two earlier cases in the Ontario Court of Appeal. In *Harris* v. *Yellow Cab* (1), Mulock, C.J.O., Hodgins and Smith, JJ.A., held (Magee, J.A., dissenting) that the damages to which the limitation applies, so far as the owner of the motor vehicle is concerned, are intended to be those provided for in the Act itself, due to its violation, and not those recoverable at common law or apart from the Act; and therefore an action brought by a passenger in a motor vehicle against the owner, to recover damages for injuries sustained by reason of the negligence of the driver in shutting the door of the vehicle upon the passenger's hand, was not barred, though brought more than six months (the then period of limitation) after the injury. Then in *Hughes* v. *Watkins & Co.* (2), the Court, composed of Mulock, C.J.O., Magee, Hodgins, Ferguson and Grant, JJ.A., held, affirming the judgment of Mr. Justice Riddell who had tried the case with a jury, that the plaintiff's action for damages for her injury (she had been struck while standing on the sidewalk of a city street and injured by the projecting part of a load on the defendants' motor truck negligently driven by their employee as found by the jury) was barred by the limitation section of *The Highway Traffic Act,* the action not having been brought until after the expiration of six months from the time when the damages were sustained. Whether the cause of action was to be regarded as arising under the statute or at common law, the section was held applicable. It was subsequent to this decision that the legislature amended (in 1930) the section by making the statutory period twelve months instead of six months. The judgment of Grant, J.A., in the *Hughes* v. *Watkins* case (2), contained

(1) (1926) 59 Ont. L.R. 8. (2) (1928) 61 Ont. L.R. 587.

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obiter dicta, however, that if damages are occasioned by a motor vehicle upon a highway under circumstances which give a right of action under the provisions of the Act, even though the same circumstances give a right of action at common law (and whether based upon a breach of a contractual obligation or upon tort), the right of action is barred at the expiration of the special statutory period, but, if the circumstances are such as would give a right of action at common law but not under the statute, then the section has no application.

The argument presented on behalf of the respondent in this Court was that the action was a common law action of nuisance and that *The Highway Traffic Act* had no application to such an action; that the statute is dealing with regulation of traffic upon highways and that the cause of action here sued upon exists quite apart from the statute and is not within the scope of it. The respondent relied upon the *dicta* of Grant, J.A., in the *Hughes* v. *Watkins* case (1) and also on the decision in the *Harris* v. *Yellow Cab* case (2).

It is to be observed in the present case that *The Highway Traffic Act* not only deals with traffic accidents but stipulates the width and the length and the weight of vehicles and of the loads that may be moved upon wheels over or upon different classes of highways (old provisions that are now found as secs. 17 and 33 in R.S.O., 1937, ch. 288). It is plain that the use of the particular motor trucks in question in this action upon the highways was prohibited by the statute unless a special permit was issued, pursuant to sec. 34, which provides that the municipal corporation or other authority having jurisdiction over the highway may, upon application in writing, grant a permit for the moving of heavy vehicles, loads, objects or structures in excess of the limits prescribed by section 17 or 33. Permission was in fact granted by the City of Toronto to the appellant to operate their motor trucks on Beech avenue and that permission was given by the municipal corporation pursuant to the authority vested in it by sec. 34, and it is damage alleged to have been caused by those motor trucks that the respondent in this action seeks to recover. It is difficult for me, therefore,

(1) (1928) 61 Ont. L.R. 587. (2) (1926) 59 Ont. L.R. 8.

to accept the contention that the limitation section (now sec. 60) in the statute is not applicable to this action. It very plainly states that, subject to two provisoes which do not affect this action,

> no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained.

The rule of construction is plain:

> If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

This is the rule declared by the Judges in advising the House of Lords in the *Sussex Peerage* case (1) which was accepted by the Judicial Committee of the Privy Council in *Cargo ex "Argos"* (2), and recently referred to by Slesser, L.J., in *Birmingham Corporation* v. *Barnes* (3).

The operation of the trucks continued on Beech avenue for a time within the one-year period. Where damage is the cause of action or part of the cause of action, a statute of limitation runs from the date of the damage and not of the act which caused the damage. If there be fresh damages within the statutory period, an action in respect of those damages will not be barred (*Crumbie* v. *Wallsend Local Board* (4), following the decision in the House of Lords in *Darley Main Colliery Co.* v. *Mitchell* (5)). But in the case now in appeal before us the finding of the trial judge, amply supported by the evidence, is that the substantial damages, assessed at $500, were in fact sustained prior to the one-year period. If there was any further damage within the year it was *de minimis*.

My conclusion, therefore, is that the action is barred by the statute and that the appeal must be allowed, the judgments below set aside and the action dismissed with costs throughout.

CROCKET J.—This action was brought to recover for damage alleged to have been caused to the plaintiffs' residential property on Beech avenue, Toronto, by the opera-

(1) (1844) 11 Cl. & F. 85, at 143.
(2) (1873) L.R. 5 P.C. 134, at 153.
(3) [1934] 1 K.B. 484, at 500.
(4) [1891] 1 Q.B. 503.
(5) (1886) 11 App. Cas. 127.

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tion of heavy machines for the mixing of concrete in front of and in the immediate vicinity of the said property. The statement of claim alleged that the said machines were mounted on heavy trucks and while in operation were carried upon the said trucks past the plaintiffs' premises at a high rate of speed and in such a manner as to cause severe vibration of the buildings along the course of the said street, including the plaintiffs' dwelling house, and that, as a result, the said dwelling house was greatly damaged. It claimed that the acts of the defendants amounted to a nuisance and were an unlawful interference with the use and enjoyment of the property and resulted in permanent injury thereto.

The defendant appellant in its statement of defence alleged that when it operated its trucks on Beech avenue it was authorized to do so by permits issued pursuant to the provisions of ss. 2, 29 and 30 of the Ontario *Highway Traffic Act,* R.S.O., 1927, ch. 251, and amendments thereto, and did so in accordance with the limitations placed upon it by the said Act and the said permits and in a proper and careful manner, and denied that the operation of the trucks damaged the plaintiffs' premises or interfered with the reasonable enjoyment thereof. It also pleaded that the action was barred by the provisions of s. 53 of the said *Highway Traffic Act* and amendments thereto.

On the trial before McTague, J. (without a jury), His Lordship found in effect that the movement and operation of these trucks on Beech avenue was a nuisance, which had caused physical injury to the plaintiffs' property, for which the defendant appellant was liable, though he stated that there could be no question about the right of the Dual-Mix Co. (the defendant appellant's subsidiary) to operate the trucks upon the street and that the *Highway Traffic Act* and the municipal by-laws and regulations were lived up to. He held that the right to recover for this damage was a common law right outside the provisions of the *Highway Traffic Act* and that consequently the action was not barred by the provisions of the limitation section, which had no application to such a case, and accordingly ordered judgment to be entered for the plaintiffs against the defendant appellant for $500 and costs on the County

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Court scale. This judgment was confirmed by the Appeal Court, Riddell, J.A., dissenting, and from the latter judgment special leave to appeal to this Court has been granted.

As I have come to the conclusion that the action must be dismissed on the ground that it was not brought within the time limit prescribed by s. 53 of the *Highway Traffic Act,* ch. 251, R.S.O., 1927, as amended by s. 11, ch. 48 of the Ontario Statutes of 1930, I shall confine myself solely to this point.

There can be no doubt, I think, that the concrete mixing trucks were motor vehicles within the meaning of s. 1 (*h*) of the *Highway Traffic Act,* nor that Beech avenue was a highway within the terms of that statute. The learned trial judge having clearly found that the damage to the plaintiffs' property, for which compensation was sought in this action, was caused by the operation of these cement mixing trucks upon the highway and that the provisions of the *Highway Traffic Act* and the municipal by-laws and regulations were lived up to in connection with their movement along that highway, I am at a loss to perceive how it can well be said that this action was not an action "for the recovery of damages occasioned by a motor vehicle," within the meaning of s. 53 of the *Highway Traffic Act* or that the plaintiffs' right to recover for such damages was a common law right entirely beyond the scope and purview of that statute. Had the trucks been driven at an excessive rate of speed or had there been any negligence of any description in connection with their movement or operation as they proceeded along the highway, to which the damage was properly attributable, no question could have been raised as to the action being barred, provided the damage claimed for was sustained more than twelve months prior to the commencement of the action.

The learned trial judge seems to have based his judgment as to the non-applicability of s. 53 upon the decision of the Ontario Court of Appeal in *Harris* v. *Yellow Cab, Ltd.* (1), and a dictum of Grant, J.A., in *Hughes* v. *Watkins* (2).

In the later case the plaintiff, while on foot on the kerb of a city sidewalk or street, was struck and injured by the

(1) (1926) 59 Ont. L.R. 8. (2) (1928) 61 Ont. L.R. 587.

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projecting part of a load on the defendants' motor truck, negligently driven by their employee, as found by a jury. The Appellate Division held that the action, not having been brought until after the expiration of six months from the time when the damages were sustained, was barred by the limitation section. In his reasons for judgment, Ferguson, J.A., said:—

> It being established and admitted that the injury and damages which form the subject-matter of the plaintiffs' claim occurred and were occasioned by the negligent use of the defendants' motor vehicle in the course of its using a highway for motor travel or motor traffic, I am of opinion that the learned trial Judge [Riddell, J.A.] was right in his conclusion that s. 54 applied to bar the plaintiffs' claim, provided the "damages were sustained" more than six months [as the section then stood] prior to action brought.

This seems to have been the basis of the decision in that case that the action was barred.

It is claimed that it was "the *negligent* use of the defendants' motor vehicle in the course of its using a highway for motor travel or motor traffic," which brought that case within the purview of the section and of the statute, and that, no negligence having been alleged or found in connection with the use of the highway in the present instance, the decision in *Hughes* v. *Watkins* (1) is authority for the proposition that the section does not apply to bar the present plaintiffs' action. For my part I cannot accept this contention.

The section itself says nothing about the damages sued for being occasioned by the negligent operation of a motor vehicle upon a highway. It is directed wholly to the bringing of actions "for the recovery of damages occasioned by a motor vehicle"—a motor vehicle, which can only be lawfully operated on a highway under a permit granted in accordance with the provisions of the *Highway Traffic Act*. That statute contains special provisions regarding the weight, width, etc., of trucks and prescribes penalties for their violation. If any of those provisions had been violated by the defendant appellant's subsidiary in the operation of these trucks along the highway, their operation obviously would have been unlawful, and any damage really occasioned thereby attributable to the defendant appellant's negligence. In that case under the

(1) (1928) 61 Ont. L.R. 587.

doctrine laid down in *Hughes* v. *Watkins* (1) the limitation section would have applied and the plaintiffs would have been required to bring their action within the twelve months period prescribed thereby. It seems to me, with the highest respect, that we could not give effect to the distinction now relied upon in support of the judgment *a quo* without reading into the language of a perfectly clear, precise and unambiguous enactment, words which it does not contain, and, moreover, without holding that the section was enacted as a protection only for those who violated the provisions of the statute, and not for those who observed them.

In *Winnipeg Electric Railway Co.* v. *Aitken* (2), this Court considered a very similar question, viz.: whether an action to recover damages for personal injury, based on a claim for breach of contract of carriage, fell within the provisions of s. 116 of the *Manitoba Railway Act*. It was conceded that the plaintiff in that case had been injured as the result of one of the defendant company's tramcars colliding with another in which she was a passenger, through the negligent operation of the two cars, and the question involved was as to whether, notwithstanding the provisions of s. 116 of the *Manitoba Railway Act*, under which her action for negligence admittedly would have been barred, she was entitled to recover for the damages sustained against the defendant company for breach of the contract of carriage. This Court held, *per* Duff, Anglin and Mignault, JJ., Idington and Cassels, JJ., dissenting, that s. 116 of that Act applied and that the plaintiff could not recover either upon the ground of negligence or of breach of contract. S. 116 of the Manitoba Act provided that

> 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.

Anglin, J., held that the decisive question in the case was whether the plaintiff's injury was sustained by reason of the operation of the defendant's railway, regardless, as I take it, of whether the action was grounded on negligence or on a claim for damages for breach of contract. I reproduce from p. 595 the following paragraph from his judgment:

(1) (1928) 61 Ont. L.R. 587. (2) (1922) 63 Can. S.C.R. 586.

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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 inconsistencey 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.

His Lordship then proceeded to review all the authorities dealing with the construction of limitation sections. Subsequently in the case of *British Columbia Electric Railway Co.* v. *Pribble* (1), s. 60 of the appellant's private Act, which was precisely of the same import as that of s. 116 of the *Manitoba Railway Act,* except that the limitation was six instead of twelve months, came before the Privy Council for construction. The respondent plaintiff in that action was a passenger on the appellant's railway and was injured in alighting owing to the defective step of the car and had brought her action more than six months after the happening of the accident. The Judicial Committee held that the action was barred. Lord Sumner in delivering the judgment of the Board reviewed the Canadian authorities upon the construction of similar limitation sections and in doing so approved of the judgment of Anglin, J., in *Winnipeg Electric Railway Co.* v. *Aitken* (2) and of the judgments of his colleagues who concurred with him. In the course of his reasons Lord Sumner said at p. 477:

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.

and, after dealing with the argument, which had been presented in support of the inapplicability of s. 60, he added (3):

After the most careful consideration of the matter their Lordships are of opinion that the reasoning of *Sayer's* case (4) is wrong and that the reasoning in *Aitken's* case (5) gives true guidance to the construction of the present section.

(1) [1926] A.C. 466.
(2) (1922) 63 Can. S.C.R. 586.
(3) At p. 478.
(4) *Sayers* v. *British Columbia Electric Ry. Co.,* (1906) 12 B.C. Rep. 102.
(5) (1922) 63 Can. S.C.R. 586.

The above quotation from the reasons of Anglin, J., in the *Aitken* case (1) applies, in my judgment, with peculiar force to the case now before us, and I have no doubt that the respondents' action, not having been commenced within twelve months of the time when the damage claimed for was sustained, falls under the prohibition of s. 53, or, as it is now, s. 60 of c. 288 of the Revised Statutes of 1937.

For these reasons I think the appeal should be allowed and the plaintiffs' action dismissed with costs throughout.

KERWIN J.—Shortly after counsel for the respondents commenced his argument, the Court intimated that we did not require to hear him further on the question of fact as to whether the appellant's operations on the highway caused damage to the respondents' house to the extent of five hundred dollars, as we were satisfied that the trial judge's finding in that respect, concurred in as it was by the Court of Appeal, must stand. It is necessary to determine, however, whether any vibrations were set up by the operation of the cement mixers and auxiliary motors as distinct from the vibrations set up by the movement of the trucks themselves along the highway, and also whether any damage was caused thereby.

On behalf of the respondents, the point is thus put in their factum:—

13. It was also argued in the Court of Appeal that the cement mixing operations did not increase the vibrations set up beyond what the movement of the trucks themselves would cause and that the Trial Judge was under a misapprehension in relying upon that operation as causing unusual vibration. There is no evidence at all as to that either one way or the other. The Respondents relied upon the whole operation being an unusual one and the fact that the operation as a whole caused physical damage. It was not incumbent upon the Plaintiffs to show what elements in the Appellant's operations were the factors which produced the damages. If the fact that the operation of the cement mixer did not increase vibration has any bearing on the case it was for the Appellant to have proved the fact. It is submitted that the proper inference from the evidence as to causes of vibration (Case, p. 118, l.1) and from the fact that an auxiliary motor was operating and a drum revolving with movement of cement inside is that such motion would set up vibrations.

The reference to page 118 of the Case is to the evidence of Dr. Harkness, a witness called on behalf of the respondents. Commencing at page 117, his examination-in-chief proceeds as follows:—

Q. Then, Dr. Harkness, in the passage of heavy vehicles—you have heard the evidence in this case, of course?

A. Yes.

(1) (1922) 63 Can. S.C.R. 586.

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Q. Such as trucks carrying cement mixers that we have heard so much about, what are the elements important in estimating the degree or extent of the vibration?

A. The condition of the roadway; the material on which the roadway rests; the weight of the vehicle; the resilience of the springs and tires of the vehicle, and the velocity.

Mr. McCarthy: Condition of roadway; substructure of the roadway; resilience of springs and tires?

Witness: Yes, and the weight of the vehicle and its velocity.

Mr. Robertson: Q. Other things being equal, what is the effect of the increase in velocity?

A. An increase in velocity would increase the impacts on the roadway at least in the ratio of the increase in velocity—if you double the velocity the impacts on the roadway would be at least double, and the vibration caused thereby would be double.

I can find nothing in the record to indicate that the point under consideration was put to any witness and my interpretation of the whole of the evidence is that no case was attempted to be made out that any vibrations that might have been set up by the cement mixers alone caused any damage. The trial judge seems to have found that the damages were caused by the combined operation of the trucks, the mixers, and auxiliary motors. He states:—

The cement mixing trucks are very heavy and are equipped with an auxiliary motor which operates the mixer as the truck travels to its destination. * * * There is no question in my mind that the continued operation of these cement mixing trucks did cause physical injury to the plaintiffs' property. * * * Each truck of the Dual-Mixed Company is in a sense a manufactory. Unusual vibration is caused by virtue of the motor operating the mixer and by the operation of the mixer itself. It is a legitimate operation, of course, but it produces vibration to a degree which might well constitute a nuisance in these circumstances. * * * As between the two principles involved I think I should choose the one which fastens liability on the defendant who operated the cement-mixing trucks. * * * The cement-mixing trucks on the highway are in a sense in the same category as a manufactory established close to the plaintiffs' property.

While, no doubt, throughout the trial emphasis was placed upon the fact that the cement mixers operated while trucks were in motion upon the highway both when carrying cement and when empty, and while it may be a fair inference that the mixers and auxiliary motors did set up vibrations, I am unable to find any evidence to warrant a finding that these vibrations caused damage to the respondents' house. I therefore conclude that in this case the damages were caused by motor vehicles.

There remains for consideration the questions (1) whether the appellant was responsible in law for such

damages, and (2) whether such claim was barred by section 53 of *The Highway Traffic Act* of Ontario which at the relevant time was chapter 251 of the Revised Statutes of Ontario 1927, as amended by 20 George V, chapter 48, section 11. Contrary to the impression formed at the conclusion of the argument, I have concluded, though not without doubt, that any action that might have existed is barred by this section, and it is, therefore, unnecessary to express any opinion upon the first question.

We are not concerned with subsections 2 and 3 of section 53. Subsection 1, as amended, reads as follows:—

> Subject to the provisions of subsections 2 and 3 no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained.

The amendment made in 1930 merely provided that the period of limitation should be twelve months instead of six months.

Taken by themselves the words used in this subsection are clear and unambiguous. In terms they are not limited to circumstances where damages are occasioned by a motor vehicle on a highway; they are not restricted to cases where damages are caused by a motor vehicle coming in contact with a person or thing; they do not state that the damages must have been occasioned by negligence in the operation of a motor vehicle or by reason of the violation of any of the provisions of the Act. It is contended on behalf of the respondents that the subsection must be construed in a narrower sense and that such a claim as the present, based as it is on an alleged nuisance at common law, is not within its purview.

Attention is called to the liability for loss or damage section and the onus section (now sections 47 and 48 of the current *Highway Traffic Act,* R.S.O. 1937, chapter 288) and it is argued that subsection 1 of section 53 should be construed as limited to damages occasioned by contact with a motor vehicle itself in its use of the highway for the purpose of traffic. It is also contended that to give the subsection a meaning broad enough to include the claim made in this action, which is not based on negligent operation of a motor vehicle, would mean that the truck driver, if sued by the respondents in this case for nuisance, would be required by the onus section to disprove negli-

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gence or improper conduct on his part although such issue would have nothing to do with the action.

Upon consideration, I am unable to agree with these contentions. While the vehicles here in question were on the highway, it is to be noticed that not all sections of the Act refer to motor vehicles while upon a highway. Furthermore, cases may arise where damages are claimed as a result of nervous shock " occasioned by a motor vehicle," and while it is unnecessary to express any opinion as to the basis for such an action or as to how far it may extend, it is at least arguable that such actions fall and were meant to come within the terms of section 53. Finally, while it may be that in such an action as the present the onus section of the Act could have no application, since the negligence or improper conduct of the driver is not in issue, the action is nevertheless, in my opinion, one for damages " occasioned by a motor vehicle."

Considerable difference of opinion upon the question has existed in the Courts of Ontario, but upon the whole I am forced to the conclusion that there is nothing in the Act to warrant restricting the plain words of the subsection, " occasioned by a motor vehicle," so that they do not cover the damages sustained by the present respondents. As to whether the action was commenced after the expiration of twelve months from the time that all of the five hundred dollars damages were sustained, the trial judge stated that if he were to give effect to the section

> it would be serious as to the amount of the plaintiffs' damages and perhaps as to the right to recover at all, because I am of opinion that the real damage was probably caused early in the year 1933 when the truck operation was heaviest and not nearly so reasonably carried out as it was after the 24th day of June of that year.

In his factum, counsel for the respondents states:

> The action was not commenced within the time limited by that section,

and before us admitted that he could not state that any of the damages occurred within the statutory period.

The appeal should be allowed and the action dismissed, with costs throughout.

Appeal allowed wih costs.

Solicitors for the appellant: *Armstrong & Sinclair.*

Solicitors for the respondents: *Fasken, Robertson, Aitchison, Pickup & Calvin.*