

CC1818

No. 48 of 1911.

In the Privy Council.

21, 1915

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

CANADIAN
LIBRARY

BETWEEN

THE GRAND TRUNK RAILWAY COMPANY
OF CANADA

UNIVERSITY OF LONDON
W.C.1.
(Defendants) Appellants,

AND

ALBERT NELSON ROBINSON

22 JUL 1953
(Plaintiff) Respondent.
INSTITUTE OF ADVANCED
LEGAL STUDIES

APPELLANTS' CASE.
RESPONDENT'S CASE.
RECORD.

BATTEN, PROFFITT & SCOTT,
13, VICTORIA STREET, WESTMINSTER,
For the Appellants.

BLAKE & REDDEN,
17, VICTORIA STREET, WESTMINSTER,
For the Respondent.

INSTITUTE OF ADVANCED
LEGAL STUDIES,
25, RUSSELL SQUARE,
LONDON,
W.C.1.

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(Defendants) APPELLANTS,

AND

ALBERT NELSON ROBINSON,
(Plaintiff) RESPONDENT.

Appellants' Case

BATTEN, PROFFITT & SCOTT,
13 Victoria St., Westminster, S.W.,
Solicitors for Appellants.

PRINTED BY SATURDAY NIGHT PRESS,
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(Plaintiff) RESPONDENT.

10

APPELLANTS' CASE.

1. This is an appeal by special leave from the judgment of the Supreme Court of Canada dated the 6th day of May, 1913, reversing the judgment of the Court of Appeal for Ontario and restoring the judgment of the trial Judge whereby he directed judgment to be entered in favour of the respondent for the sum of \$3,000.00, the Chief Justice of Canada dissenting.

Rec., p. 81.
Rec., p. 55.
Rec., p. 43.

20 2. The question involved in this appeal is the right of the respondent to recover damages against the appellants for injuries received by him as the result of an accident on the appellants' railway when travelling in charge of livestock under a "Livestock Special Contract" authorized by the Board of Railway Commissioners for Canada, one of the terms of which relieved the appellants from liability for injuries arising from accident while so travelling.

Rec., p. 35.
Rec., p. 39.

3. The respondent lives in a small town in Ontario called South River and volunteered to go to a town called Milverton and bring back a horse by rail from Milverton to Dr. McCombe at South River. It was apparently arranged that the respondent was to have all his expenses paid by Dr. McCombe, but whether he was to receive remuneration for the services which he volunteered to perform does not appear.

Rec., p. 12.
l. 34

Rec., p. 27.
l. 23.

30 4. Apparently Dr. McCombe had been in communication with a Dr. Parker in Milverton who had arranged to purchase the horse for him, and

Rec., p. 17.
l. 30.

- Rec., p. 10,
l. 13. when the respondent arrived at Milverton he was met by Dr. Parker, taken out to see the horse, and either on the day of his arrival at Milverton or the next day the horse was brought to the appellants' siding to be shipped on a car of the appellants', Dr. Parker having previously arranged with the agent of the appellants to have a car placed at the loading platform for the horse's reception.
- Rec., p. 17,
l. 37.
- Rec., p. 13,
l. 12. 5. The respondent Robinson, Dr. Parker and two other men then loaded the horse, and having done this the respondent went with Dr. Parker into the appellants' agent's office, which is some little distance from the loading platform, and informed the agent that the horse was 10
- Rec., p. 35. loaded, and the agent thereupon made out a contract between Dr. Parker as shipper and the appellant company as carrier in which the company acknowledged receipt of a mare consigned to Dr. R. J. McCombe, of South River. After the agent had filled out the contract he handed it to Dr. Parker to sign. Dr. Parker signed the contract and then handed it back to the agent, who also signed the contract, and after the agent signed it he handed it across the counter to Dr. Parker, making the remark: "That is yours." Dr. Parker took it, folded it up, and said: "I had better mail this to Dr. McCombe," but the appellants' agent then said: "Better give it to this gentleman (meaning the respondent Robinson) for he will need it 20
- Rec., p. 18,
l. 6. to indicate that he is accompanying the horse." Dr. Parker then handed it to the respondent and Robinson, without reading it, put it in his pocket.
- Rec., p. 13,
l. 29.
- Rec., p. 13,
l. 38. 6. The respondent then boarded the train with the horse, was recognized by the conductor in charge of the train as the man in charge of the horse, and no fare was demanded from him. As a matter of fact no fare was paid by him, the horse being sent collect on delivery to Dr. McCombe, the man in charge being charged for at half-fare rate, which was included in the amount charged against Dr. McCombe.
- Rec., p. 13,
l. 37.
- Rec., p. 27,
l. 36.
- Rec., p. 11,
l. 16. 7. While the respondent was returning from Milverton to South River with the horse and was sitting in the conductor's van, an accident hap- 30
- Rec., p. 35. pened and the respondent was injured, and it is for the injuries then sustained that he now seeks to recover damages from the appellants.
- Rec., p. 39.
- Rec., p. 26,
l. 5. 8. The contract on which the respondent was travelling, and had in his pocket, is known as the "Livestock Special Contract," being a contract authorized by the Board of Railway Commissioners for Canada by an order dated the 17th of October, 1904. Across the face of the contract in large red letters appear the words: "Read this Special Contract." Dr. Parker admits that he had an opportunity to read it if he had so desired but did not avail himself of the opportunity and handed the contract folded to the respondent Robinson. Whether he, the respondent, 40
- Rec., p. 13,
l. 29. looked at it or not he does not know, but the respondent in his evidence says that he did not take the trouble to look at the contract, simply putting it in his pocket and leaving it there for some days.
- Rec., p. 35. 9. On the side of the contract appear in large letters the words: "Pass man in charge at half fare," and the second last clause of the contract provides that in the case of the company (appellants) granting to

the shipper or his "nominee" the privilege of riding on the train at less than full fare for the purpose of taking charge of the shipper's property while in transit. "then as to every person so travelling on such pass or reduced fare the company is to be entirely free from liability in respect of his death injury or damage whether caused by the negligence of the company or its servants or employees or otherwise howsoever." A copy of the said contract appears at page 35 of the Record and a copy of the order approving of same appears at page 39 of the Record.

10 Great diversity of opinion exists in the minds of the different Courts before whom this case has come as to the respondent's exact position. There is, however, no dispute in regard to the facts. Robinson volunteered to travel with the horse; he was present when the horse was shipped; he was present when the contract was made; he saw Dr. Parker sign it; he heard the conversation which passed between Dr. Parker and the appellant company's agent; he knew that the contract which was handed to him was his authority to travel with the horse; he was recognized by the train crew as the man in charge of the horse; he paid no fare; he was not aware of the conditions of the contract under which he was travelling though he had ample opportunity to inform himself as to the conditions; no attempt was made to conceal them from him.

Rec., p. 13.
ll. 23-40.

20 11. The learned trial Judge held that the respondent was not bound by the contract made between the shipper and the carrier, to which the respondent was not a party and of the terms of which he had no knowledge, and also holds that the respondent's common law rights against the appellants were not taken away by the contract made between the appellants and Dr. Parker. The learned Judge thus states his views:

Rec., p. 45.
l. 48.

30 "I am firmly of the opinion that Robinson's common law rights against the defendants were not taken away by the contract made between the defendants and Dr. Parker. Any other view appears to me necessarily to imply that by a contract to which he was not a party, under which he derived no benefit—the reduction in fare benefiting only the consignee—and of whose terms he had neither notice nor knowledge, his right to be carried without negligence on the part of the defendants was extinguished, and they were empowered, without incurring civil liability, to maim and almost kill him while he was lawfully upon their train. If such can possibly be the effect of the special contract, a higher Court must so decide."

and directs judgment to be entered for the respondent for the amount assessed by the jury.

40 12. From this judgment the appellants appealed to the Court of Appeal for Ontario, and on the 19th of November, 1912, that Court gave judgment reversing the judgment of the learned trial Judge, two members of the Court dissenting.

Rec., p. 56.

13. The view of the majority of the Judges in the Court of Appeal for Ontario was that the respondent's rights must be determined by the contract under which he was travelling and as the company were auth-

Rec., p. 59.
l. 43.

orized by the order of the Board of Railway Commissioners for Canada to use that form of contract, and as one of the conditions clearly excluded liability, the respondent could not recover.

Rec., p. 61.

14. The learned Judges who dissented in the Court of Appeal for Ontario thought that there was a possible intermediate ground between the two "extremes" as they called them, mentioned in the judgment of the majority of the Court, and held that the respondent in this case occupied the intermediate position, being lawfully upon the train, but not being under the terms of the special contract.

Rec., p. 59,
l. 1.

15. A further question was also raised in the Court of Appeal for Ontario as to the authority of the Board of Railway Commissioners for Canada to authorize the making of the contract relieving the company from liability in cases of accidents arising from negligence, but this point was determined in favour of the appellants in that Court and is not dealt with specifically by the Judges in the Supreme Court of Canada. 10

Rec., p. 81.

Rec., p. 82.

16. The respondent appealed from the judgment of the Court of Appeal for Ontario to the Supreme Court of Canada and on the 6th of May, 1913, the Supreme Court of Canada delivered judgment allowing the respondent's appeal and restoring the judgment of the trial Judge. The learned Chief Justice of Canada dissented, and agreed with the views expressed by the majority of the Judges of the Court of Appeal for Ontario. 20

Rec., p. 82,
l. 18.

17. In the Supreme Court of Canada Mr. Justice Davies expressed the opinion that the respondent was neither travelling under and by virtue of the contract which Dr. Parker had signed, nor was he a trespasser, but that he was there as a licensee, and had the conditions of the contract been called to his attention he probably would have been bound by them. They—the company—fail because the respondent had no knowledge of the condition sought to be invoked against him. Mr. Justice Idington thinks that because the attention of the respondent was not called to the terms of the contract either by the appellants' agent or by Dr. Parker the company is liable. Mr. Justice Anglin apparently thinks that because the appellants failed to call the attention of the shipper's "nominee" to the terms of the contract under which he was travelling he is entitled to recover for any injuries which he received while so travelling. 30

Rec., p. 83,
l. 20.

Rec., p. 86,
l. 23.

18. Before considering the duty owed by the appellants to the respondent, which must depend upon the position he occupied in regard to them while travelling on the train on which he was injured, it is proposed first to discuss the effect of the "Livestock Special Contract" and the order of the Board approving of the same.

19. The right of a carrier to exempt himself from liability has always been recognized by the courts, both in England and in Canada, but this right was taken away from the railway companies of Canada (which are subject to the Railway Act of Canada), by Sec. 340, Cap. 37. Revised Statutes of Canada, 1906, which enacts that no contract or condition can be made by a railway company impairing, restricting or limiting its liability in respect of the carriage of any traffic unless such class of contract has 40

been approved by an order of the Board of Railway Commissioners for Canada.

20. In view of the point which was raised in the Court of Appeal for Ontario, and also in the Supreme Court of Canada, as to the power of the Board of Railway Commissioners to make this contract, it might be convenient here to trace the legislation giving the Board of Railway Commissioners power to order and approve of the "Special Livestock Contract."

10 21. By Sec. 26 of the Railway Act, Chap 37, Revised Statutes of Canada, it is enacted as follows:

"26. The Board shall have full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested:

(b) requesting the Board to make any order, or give any direction, sanction or approval, which by law it is authorized to make or give, or with respect to any matter, act or thing, which by this Act, or the special Act, is prohibited, sanctioned or required to be done.

20 2. The Board may order and require any company or person to do forthwith, or within or at any specified time, and in any manner prescribed by the Board, so far as is not inconsistent with this Act, any act, matter or thing which such company or person is or may be required or authorized to do under this Act, or the special Act, and may forbid the doing or continuing of any act, matter or thing which is contrary to this Act, or the special Act; and shall for the purposes of this Act have full jurisdiction to hear and determine all matters whether of law or of fact."

"Sec. 30. The Board may make orders and regulations:

(h) with respect to any matter, act or thing which by this or the special Act is sanctioned, required to be done, or prohibited; and,

(i) generally for carrying this Act into effect."

30 "Sec. 31. Any rule, regulation, order or decision of the Board shall, when published by the Board, or by leave of the Board, for three weeks in the 'Canada Gazette,' and while the same remains in force, have the like effect as if enacted in this Act, and all courts shall take judicial notice thereof. 3 Edw. VII., c. 58, ss. 30 and 40."

"Sec. 284. The company shall, according to its powers:

40 (a) furnish, at the place of starting, and at the junction of the railway with other railways, and at all stopping places established for such purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway;

(b) furnish adequate and suitable accommodation for the carrying, unloading and delivering of all such traffic;

(c) without delay, and with due care and diligence, receive, carry and deliver all such traffic; and,

(d) furnish and use all proper appliances, accommodation and

means necessary for receiving, loading, carrying, unloading and delivering such traffic.

7. Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant. 3 Edw. VII., c. 58, s. 214; 6 Edw. VII., c. 42, ss. 19, 20 and 23."

"Sec. 340. No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board. 10

2. The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited.

3. The Board may by regulation prescribe the terms and conditions under which any traffic may be carried by the company. 3. Edw. VII., c. 58, s. 275." 20

The following sections of the Railway Act of Canada are also of importance in this connection:

"322. All tariff by-laws and tariffs of tolls shall be in such form, size and style, and give such information, particulars and details as the Board may, by regulation, or in any case, prescribe. 3 Edw. VII., c. 58, s. 256.

"327. Every standard and special freight tariff shall be filed with the Board, and shall be subject to the approval of the Board.

2. Upon any such tariff being filed and approved by the Board the company shall publish the same, with a notice of such approval in such form as the Board directs in at least two consecutive weekly issues of the 'Canada Gazette.' " 30

"339. The company shall deposit and keep on file in a convenient place, open for the inspection of the public during office hours, a copy of each of its tariffs, at the following places respectively:

(a) Standard passenger and freight tariffs at every station or office of the company where passengers or freight respectively are received for carriage thereunder;

(b) Special passenger and freight tariffs, at every station or office of the company where passengers or freight respectively are received for carriage thereunder, and, as to such freight tariffs, as soon as possible, at each of its stations or offices to which freight traffic is to be carried thereunder. 40

2. The company shall keep on file at its stations or offices, where freight is received and delivered, a copy of the freight classification, or classifications, in force upon the railway, for inspection during business hours.

3. The company shall post up in a prominent place at each of its stations where passengers or freight respectively are received for carriage, a notice in large type directing the public attention to the place in such station where the passenger or freight tariffs respectively are kept on file for public inspection during business hours, and the station agent, or person in charge at such station, shall produce to any applicant, on request, any particular tariff in use at that station which he may desire to inspect."

10 22. A short time prior to the 17th day of October, 1904, certain railway companies of Canada, among them the appellant company, submitted for the approval of the Board of Railway Commissioners for Canada, among other forms, a form of "Livestock Special Contract," and after due consideration by the Board a "Livestock Special Contract" was agreed upon and an order of the Board was made on the 17th day of October, 1904, approving of the contract as settled by the Board, and authorizing the railway companies to use the same. Rec., p. 41.
Rec., p. 39.

20 23. The said order of the Board of Railway Commissioners approving of the "Livestock Special Contract" was duly published for three weeks in the "Canada Gazette," as appears by pages 823, 876 and 920 of the "Canada Gazette" for 1904, volume thirty-eight, and a copy thereof was filed with the company's agents as required by sec. 339, and the said order and contract by virtue of sec. 31, chap. 37, Revised Statutes of Canada, had a like effect as if enacted in the Railway Act, and all courts were compelled to take judicial notice thereof.

24. We therefore have in the first place a contract which has the like effect of an Act of Parliament binding on all parties, and of which it is presumed they have notice, and it was under this contract that the respondent Robinson was travelling at the time of his accident, and the appellants contend that whether he had notice of the terms of the same or not it is binding upon him.

30 25. The respondent Robinson, however, had contended that the Board of Railway Commissioners for Canada had no power to authorize such a contract; that their powers were limited under sec. 340 to impairing, restricting or limiting the liability, but it is respectfully submitted that sub-sec. 2 gives the Board full power to determine the extent of the restriction or limitation or impairment, and that under the power so vested in them they would have the right to say, dealing with the contract as a whole, that the company's liability was limited to a certain amount for the livestock, and that as to the shipper's "nominee," the man in charge, nothing should be recovered. Rec., p. 59.
1. 5.

40 26. If, therefore, the Board of Railway Commissioners had power, as the appellants submit they had, to make this contract, and this contract had the force and effect of a statute, then the respondent Robinson, who was travelling as the nominee of the shipper, cannot escape from its consequences, notwithstanding the fact that he was not aware of the conditions which it contained.

27. The learned judges who dissented in the Court of Appeal for On-

tario, and the majority of the learned judges of the Supreme Court of Canada, have based their judgments largely upon the fact that the respondent Robinson was not aware of the conditions on the contract, and that therefore those conditions were not binding upon him, and they have relied in their judgments upon cases in England and in Canada where people purchased tickets with certain conditions on the backs of the tickets where it was held that the purchasers were not bound by the conditions if they were not aware of them, and where the person selling the tickets had not taken steps to call the purchaser's attention to the conditions on the back. The fact, however, must not be overlooked that in those cases the conditions on the back were not authorized by the Railway Act, or by the Board of Railway Commissioners; they were put there by the company for their own protection, and the courts very properly held that having placed these conditions on their tickets for their own protection, it was their duty to call the attention of the purchasers to the fact that there were conditions, especially where the purchasers were incapable of reading them themselves. 10

Rec., p. 13,
l. 32.

Rec., p. 12,
l. 34.

28. The position of the respondent Robinson in this case is entirely different. True, he did not read the conditions, but was it the duty of the appellants to call them to his attention? He volunteered to go and get the horse, and the shipper nominated him as his representative to travel with the horse. In ninety-nine cases out of a hundred the railway companies' agents never see the "nominee" of the shipper, and it must be presumed that when the Board of Railway Commissioners authorized the contract they recognized the conditions under which live stock are shipped in Canada, and that it would be impossible for the railway companies to call the attention of the "nominee" of the shipper to the terms of the contract under the circumstances as they exist. 20

29. For example, take the case of a large shipment of cattle or horses. The cattle are loaded at the loading platform at the cattle pens; the owner or the shipper leaves his "nominee" in charge to see that they come to no injury; he then goes to the agent's office, which may be many hundred yards away, makes out his contract and signs it, and subsequently returns to his "nominee" and hands him the contract as his ticket, or his authority to travel with the live stock. Is it the duty of the railway company's agent to follow the shipper back to the loading platform for the purpose of informing the shipper's "nominee" of the conditions under which he is to travel, or is it the duty of the shipper who employs the man to travel with his live stock to so inform him. 30

Rec., p. 18,
l. 5.

Rec., p. 20,
l. 9.

30. It is respectfully submitted that in this case, when the contract was spread out before Dr. Parker, who signed it, he must have seen, and did see, the words in large red letters across the face of the contract: "READ THIS SPECIAL CONTRACT." He did not do so. He simply signed it, and then handed it to his "nominee" as his authority for travelling with the horse. Whether he presumed that the respondent Robinson was aware of the terms or would inform himself of the terms 40

does not appear. At any rate he did not think it of sufficient importance to suggest to him that he should read the conditions, and the Respondent himself apparently paid no attention to the ticket more than to put it in his pocket, to be produced if he should be called upon to produce it, which, as a matter of fact, it never was.

Rec., p. 13.
l. 37.

31. The agent of the appellants did not know the respondent, and for all he knew he might be a man who was accustomed to ship horses or travel in charge of same, and as the shipper did not see fit to warn him or to call his attention to the conditions, the company's agent did not do so, and it is submitted that it was not his duty to do so. There was no concealment of the conditions by the agent; they were on the face of the contract, not on the back, and the attention of anybody opening the contract would be immediately called to the same by the invitation to read the contract.

32. The appellants, therefore, respectfully submit that quite apart from the statutory effect of the contract they fulfilled their full duty to the shipper and to his "nominee," and that the respondent cannot now seek to relieve himself of the conditions of the contract by saying: "I never read them, and my attention was not called to them."

33. The appellants submit that under the conditions as they exist here they cannot be held responsible for the injuries which the respondent sustained. If we assume that he is a trespasser, as suggested by some of the learned judges, the appellants' only duty to him would be not to wilfully injure him. If we assume that he is a licensee, as suggested by some of the learned judges, he must take his chances as to accidents, which are always liable to happen in the operation of railway companies, and the appellants' only duty to him would be not to entrap him in any way. The learned judge has suggested that he has common law rights, but the appellants are unable to understand what common law right there is to travel on their trains. It must be by virtue of a contract of some kind. The fact that he was not aware of the conditions of the contract would not of itself relieve him of their effect. The trial judge has not held that he had not reasonable notice of them, assuming that it was the appellants' duty to give him notice. All he held was that the respondent did not know of them. So that the only possible duty that it could be suggested that the appellants owed to the respondent would be to inform him of the conditions of the contract, but it is respectfully submitted that it is the shipper's duty to notify his "nominee," and that the appellants are protected by virtue of the order of the Board of Railway Commissioners for Canada from any liability in this case.

Rec., p. 45.
l. 48.

34. The appellants respectfully submit that the judgment in review

is erroneous and ought to be reversed, for the following, among other, reasons:

1. That the Board of Railway Commissioners for Canada had power to authorize and approve the "Livestock Special Contract."

2. That the "Livestock Special Contract" had the effect of a statutory enactment, and is binding on all persons.

3. That the respondent was travelling under the provisions of that contract.

4. That the respondent had ample opportunity to read the conditions of the contract, and his failure to do so cannot relieve him of those provisions.

5. That the appellants owed the respondent no duty to call his attention to the conditions of the contract.

D. L. McCARTHY.

In the Privy Council

No. 48 of 1914.

On Appeal
From the Supreme Court of Canada

BETWEEN :

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AND

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Appellants' Case

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Westminster, S.W.,
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