GEORGE D. ROBERTSON (PLAINTIFF)..APPELLANT; 1895

AND *Mar. 18, 19. *June 26.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of statute—Railway Act, 1888 s. 246 (3)—*Railway Co.—Carriage of goods — Special contract — Negligence — Limitation of liability for.*

By. s. 246 (3) of the Railway Act, 1888, (51 V. c. 29 [D]) "every person aggrieved by any neglect or refusal in the premises shall 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 servants"

Held, affirming the decision of the Court of Appeal, that this provision does not disable a railway company from entering into a special contract for the carriage of goods and limiting its liability as to amount of damages to be recovered for loss or injury to such goods arising from negligence. *Vogel* v. *Grand Trunk Railway Co.* (11 Can. S. C. R. 612), and *Bate* v. *Canadian Pacific Railway Co.* (15 Ont. App. R. 388) distinguished.

The Grand Trunk Railway Co. received from R. a horse to be carried over its line and the agent of the company and R. signed a contract for such carriage which contained this provision: "The company shall in no case be responsible for any amount exceeding one hundred dollars for each and any horse," &c.

Held, affirming the decision of the Court of Appeal, that the words "shall in no case be responsible" were sufficiently general to cover all cases of loss however caused, and the horse having been killed by negligence of servants of the company, R. could not recover more than $100, though the value of the horse largely exceeded that amount.

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*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1), affirming, by an equal division of opinion, the judgment of the Divisional Court (2) in favour of the defendant company.

The appellant, the plaintiff in the action, issued a writ on the 3rd day of November, 1891, against the defendants indorsed to recover damages for the loss of a valuable trotting horse known as "Henry R," shipped by him at Windsor for St. Catharines on the 15th day of September, 1891, upon the Southern Division of the defendants' railway.

In consequence of a collision between two of the defendants' freight trains, at a point near Stoney Creek, a short distance west of St. Catharines, on defendants' said line, the plaintiff's horse was killed.

The defendants, in answer to said action, set up a special contract signed by the plaintiff at the time of shipment whereby they contended he was limited in his recovery, if any, even in case of negligence, to the sum of $100, and they paid that sum into court with their amended statement of defence.

The special contract so set up contained the following provision:

"And in consideration of said agreement to transport at said special rate it is hereby mutually agreed by and between the parties hereto that the said Grand Trunk Railway shall not be liable for any loss or damage which the shipper or owner of said live stock may suffer by reason of delay. * * * And the said company shall in no case be responsible for any amount exceeding one hundred dollars for each and any horse or head of cattle, (10) dollars each for sheep, hog or calf transported."

The plaintiff contended that even if the company could limit its liability for damage caused by negli-

(1) 21 Ont. App. R. 204. (2) 24 O. R. 75.

gence, the terms of this contract were not comprehensive enough to cover such cause of loss. But he also relied on section 246 (3) of the Railway Act, 1888, as preventing a railway company from so protecting itself from liability. Section 246 of said Act is as follows:

"246. All regular trains shall be started and run as near as practicable at regular hours, fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previously thereto offered for transportation at the place of starting, and at the junctions of other railways and at usual stopping places established for receiving and discharging way passengers and goods from the trains."

"2. Such passengers and goods shall be taken, transported to and from, and discharged at such places, on the due payment of the toll, freight or fare lawfully payable therefor."

"3. Every person aggrieved by any neglect or refusal in the premises, shall 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 servants."

At the trial of the action the defendants admitted that the collision occurred through the negligence of their employees, and the learned judge left to the jury simply the question of damages and reserved all questions of law. The jury assessed the damages at $5,000, and judgment was entered for the plaintiff for that amount, with costs

Upon appeal by the defendants to the Common Pleas Divisional Court the judgment of the trial judge was reversed, and the action dismissed with costs. The plaintiff then appealed to the Court of Appeal and

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that court affirmed the judgment of the court below by an equal division of opinion, the Chief Justice and Mr. Justice Osler agreeing with the Divisional Court, and the Chancellor and Justice Maclennan being in favour of the plaintiff.

Moss Q.C. and *Collier* for the appellant. *Vogel* v. *The Grand Trunk Railway Co.* (1), decided that under precisely the same legislation as that in section 246 (3) of the Railway Act, 1888, a railway company could not contract itself out of liability for negligence. Then if it is to be held that it can limit the pecuniary amount of its liability that would be practically to effect what Vogel's case said it could not do.

Even if the amount of liability can be so limited the contract in this case would not cover loss by negligence which must be expressly mentioned to cause an exemption. See *Nicholas* v. *The New York Central Railroad Co.* (2).

Osler Q.C. and *W. Nesbitt* for the respondents referred to *Dixon* v. *The Richelieu Navigation Co.* (3); *Barnard* v. *Faber* (4).

THE CHIEF JUSTICE.—I refer to the judgment of Mr. Justice McMahon in the Divisional Court for a full statement of the facts. Two questions call for decision. First, did the special contract set out in the amended statement of defence, according to the fair meaning of the language used, cover the case of negligence?

Secondly, if liability for negligence was, by the terms of the contract, limited as to the amount of damages to be recovered, was such a stipulation legal and was it one which it was competent to the respondents to enter into, having regard to the provisions of the statute (51

(1) 11 Can. S. C. R. 612.
(2) 89 N. Y. 370.
(3) 15 Ont. App. R. 647.
(4) [1893] 1 Q. B. 340.

Vic. chap. 29, sec. 246, subsec. 3) and to what was decided in *Vogel's Case* (1)?

I am of opinion that both these questions must be answered in the affirmative.

The words of the special contract material to the present question are, that the "said company shall in no case be responsible for an amount exceeding $100 for each or any horse or head of cattle, or $10 each for sheep, hog, or calf transported."

Mr. Justice Maclennan, who was of opinion that the statute did not interfere with the respondents' *primâ facie* right to enter into a contract limiting their liability to ascertained damages, gave judgment in favour of the appellant, upon the ground that the terms of the agreement were not sufficiently comprehensive to embrace a case of loss or damage occasioned by the negligence of the respondents' servants.

I am unable to agree in this conclusion. The valuation fixed upon in consideration of the special rate was general, and no distinction is made between the value to be assumed in a case of negligence and in a case of accident. There would be no reason for presuming such a discrimination between the value in one case and the other, and the language used "shall in no case be responsible" is sufficiently general to cover all cases of loss, however caused, as they undoubtedly were intended to do. In the case of *Hart* v. *Pennsylvania Railroad Co.* (2), the agreement was certainly not more specific in its terms than in that before us; the same argument was used that these general terms did not apply when there was a loss by negligence, but the court held the contrary. Secondly, it appears to me, that nothing decided in *Vogel's Case* (1) touches the points raised in the appeal now before us. In *Vogel's*

(1) 2 O. R. 197; 10 Ont. App. R. 162; 11 Can. S. C. R. 612.

(2) 112 U. S. R. 331.

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Case (1) the question was as to exemption from all liability, and nothing there decided established, or tended to establish, that it was not competent to the respondents to enter into an agreement for pre-ascertained damages, or for limited liability, if that term is preferred. The subsection which is invoked by the appellant is worded as follows:

> Every person aggrieved by any neglect or refusal in the premises, shall 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 servants.

This is an enactment which ought not to be extended beyond its literal meaning, and that is plainly confined to the prohibition of any contract relieving the company from liability for negligence. To say that it is to shut out the company from limiting its liability for damages by an agreement fixing a value on goods carried, would be to extend its language by implication to a case which does not appear from any part of the Act itself to have been within the contemplation of the legislature. So far indeed from this being so, we may reasonably infer that the legislature never intended to enact a provision which would most assuredly have the result so forcibly pointed out in the judgment of the learned Chief Justice of Ontario, viz., that, when it was sought to compel the company to carry property of great value for rates which would not cover the equivalent of a fair premium for insuring, we should find the company refusing to carry, and thus, on a calculation of profit and loss, preferring to pay damages for such refusal to incurring a risk without adequate compensation. The case relied on by Mr. Justice McMahon in his elaborate judgment is, in my opinion, in point and entirely supports the learned judge's conclusions. In that case of *Hart* v. *Pennsylvania Railroad*

(1) 11 Can. S. C. R. 612.

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Co. (1), the question presented was identical with that now before us. The only difference existing between the two cases is, that, whilst in the present case the power of contracting themselves out of liability for negligence is taken away from the railway company by statute, in the case of *Hart* v. *Pennsylvania Railroad Co.* (1) the same prohibition was derived from the common law prevailing in the state by the law of which the contract was governed. Blachford J., in delivering the unanimous judgment of the Supreme Court, says:

> It is the law of this court that a common carrier may, by special contract, limit his common law liability, but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants.

The case therefore, although of course not binding upon us, is one which, having regard to the high authority of the great court from which it emanated and to the admirable reasoning by which its conclusions are supported, we may safely follow.

Adopting the reasons there given, we find every difficulty which had been or possibly could be suggested in the present case completely answered.

Some reference was made in the judgments in the Court of Appeal and also on the argument here to the case of *Bate* v. *Canadian Pacific Railway Co.* (2). I may say at once, that that case was not decided on the authority of Vogel's case, but on a totally different point there arising on the findings of the jury, viz., that the appellant had not read, and could not (in the state of her eyesight) have read, the conditions on the ticket, and that she was misled as to the effect of those conditions by the answers she received in reply to her inquiries addressed to the ticket clerk of the defendants. In short it was decided upon the authority of *Henderson* v. *Stevenson* (3), which was followed in preference

(1) 112 U. S. R. 331. (2) 15 Ont. App. R. 388.
(3) L. R. 2 H. L. Sc. 470.

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to *Watkins* v. *Rymill* (1), and the choice thus made between two apparently conflicting authorities, seems now to be confirmed by the very late case of *Richardson Spence & Co.* v *Rowntree* (2), which is a decision to to the same effect as *Bate* v. *Canadian Pacific Railway Co.* (3) on facts very similar.

The appeal must be dismissed with costs.

TASCHEREAU J.—I adopt Chief Justice Hagarty's reasoning in the Court of Appeal, as reported in 21 Ont. App. R. 204. This appellant saw no objection whatever to have his horse valued at one hundred dollars when he benefited from the undervaluation, but when the horse is killed he would repudiate his submission to the undervaluation. A horse that is worth one hundred dollars when shipped cannot be worth five thousand dollars when killed next day.

If it is not true that it was worth only one hundred dollars when shipped it does not lie in the appellant's mouth to say so. I would dismiss the appeal.

GWYNNE J.—I am of opinion that this case is not concluded by the judgment of this court in *Vogel* v. *Grand Trunk Railway Co.* (4). Subsequently to that judgment being rendered the company, with the view I presume of protecting themselves from what appeared to them to be the severity of that judgment, procured the assent, under the provisions of the statute in that behalf, of the Governor in Council to a new tariff, with which alone we have to deal in the present case.

The clause of the statute upon which the judgment in *Vogel* v. *Grand Trunk Railway Co.* (4) proceeded was the same in terms as the clause of the statute now in force, namely, ch. 109, sec. 104, ss. 2 and 3 R. S. C.

(1) 10 Q. B. D. 178.
(2) [1894] A. C. 217.
(3) 15 Ont. App. R. 388.
(4) 11 Can. S. C. R. 612.

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By that section it is provided that goods shall be taken, transported and discharged by the company on due payment of the toll, freight or fare lawfully payable therefor, and that every person aggrieved by any neglect or refusal in the premises shall 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 servants. Now that there should be any toll or freight lawfully payable for the carrying of goods by the company must depend upon the terms of the tariff of tolls or freight approved under the provision of the statute, by order of the Governor General in Council, for sec. 16 ss. 9 of ch. 109 R.S.C., enacts that no tolls shall be levied or taken until approved by the Governor in Council, &c.

In Vogel's case this court held that this section applied to prevent the company from relieving themselves by contract from an action for the loss of horses received by them for transportation, such loss having arisen from the negligence of the servants of the company, and that the fact that what the defendants had done was merely to let to the plaintiff a car which he loaded with horses and which the defendants undertook to draw did not prevent the application of the section. The *ratio decidendi* therefore, as it appears to me, was that the section, prohibiting, as it was held it did, the company from contracting against liability from loss by negligence, applied, by reason of the defendants having been by their tariff then in existence under an obligation to carry the horses delivered to them at a rate provided for in such tariff. But by the new tariff, which has been adopted since the judgment in Vogel's case, and which, approved in the manner required by the statute, has been substituted for the one which was in force when

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Vogel's case was before the court, and has become a lawful tariff confirmed by the provisions of the statute in that behalf, the defendants are under no obligation whatever to carry racers, although they do by that tariff, so approved and made valid in law, undertake to carry them at the same rate as they do carry horses of ordinary value, subject however, to the condition that the owner shall incur all risk of loss or damage from any cause whatever including negligence. Such a condition, besides being perfectly reasonable and fair to be made in a contract for the carriage of animals which the defendants are under no obligation to carry, is made perfectly free from all doubt as to its validity by the tariff approved as required by the statute; the section therefore of the statute which declared that the railway company could not relieve themselves from an action for loss or damage, arising from negligence, of goods which the defendants were bound to carry by their tariff, has no application in the present case, which is an action for the loss of a race horse which they were not under obligation to carry, and which by their tariff, approved as required by statute, and so given the force of law, they only undertook to carry upon condition that the owner should bear the risk of all loss or damage from whatever cause arising.

Now as to the facts of this case, the plaintiff, well knowing the terms of this tariff, which may be said to be the statutory tariff, brought his horse to the defendants, but did not disclose to them the fact that he was a race horse, and he asked the defendants' servants for and procured from them their bill of lading for an ordinary horse and signed it and thereby in effect, as I think, under the circumstances, represented the value of his horse to be no more than $100, which sum and no more the defendants by the bill of lading so obtained by the plaintiff undertook to pay in the

event of loss. The plaintiff now claims $5,000, which he alleges to be the value of his horse as a race horse, although he neither represented the animal to be such, when delivered to the defendants, nor did they undertake to carry him as such.

To hold this case to be governed by Vogel's case and that the plaintiff is entitled to recover herein, besides being, as I conceive it would be, a judgment unwarranted by the *ratio decidendi* in that case, would be to construe that case so as to enable the plaintiff to commit a fraud upon the defendants. The question in the present case, but for the payment by the defendants of $100, which they agreed to pay in the event of loss from any cause, would more properly, in my opinion, have been whether the plaintiff, he not having shipped the horse as a race horse, but upon the form used for the transportation of horses of ordinary value, had not by such deception lost all right even to the $100.

The appeal should in my opinion be dismissed with costs.

SEDGEWICK J. concurred.

KING J.—I am of opinion that this appeal should be dismissed with costs for the reasons given in the judgment of the Chief Justice.

Appeal dismissed with costs.

Solicitors for appellant: *Collier & Shaw.*

Solicitor for the respondents: *John Bell.*