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*Oct. 18.
*Nov. 21.

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT)..... } APPELLANT;

AND

HATFIELD AND SCOTT, LIMITED (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK.

Carrier—Liability—Carrier or warehousemen—Notice to owner.

A condition in the bill of lading for carriage of goods by the C.P.R. Co. to New York under a joint tariff was that the company would be liable for loss of, or injury to, the goods caused by the negligence of another carrier from which the latter was not relieved by the terms of the bill of lading. The goods were lost while in the custody of the other carrier after they arrived in New York.

Held, that the onus was on the C.P.R. Co. of showing that the loss was not caused by negligence or, if it was, that the other carrier was relieved from liability.

Another condition was that if the goods were not removed within forty-eight hours after written notice had been given of their arrival the carrier could keep them on its premises and be responsible as warehouseman only or, at its option, after giving notice of its intention to do so, place them in a public warehouse at the risk of the owner and be free from liability. The goods were kept on the premises for a few days after notice of their arrival was given to the consignee and then, without further notice, were placed in a public warehouse where they became unfit for sale and were abandoned by the owner.

Held, that the carrier was not relieved by the terms of this condition; the goods were not kept on the premises and so the liability was not that of a mere warehouseman; and it was not relieved from liability by placing them in a public warehouse as no notice was given of its intention to do so.

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

APPEAL from the judgment of the Appeal Division of the Supreme Court of New Brunswick (1), affirming the verdict at the trial in favour of the respondent.

Potatoes were shipped from Hartland, N.B., for carriage by the appellant to New York. The bill of lading contained the following clauses:—

Sec. 1. The carrier of any of the goods herein described shall be liable for any loss thereof or damage thereto except as hereinafter provided.

Sec. 2. In the case of shipments from one point in Canada to another point in Canada, or where goods are shipped under a joint tariff, the carrier issuing this bill of lading, in addition to its other liability hereunder, shall be liable for any loss, damage or injury to such goods from which the other carrier is not by the terms of this bill of lading relieved, caused by or resulting from the act, neglect, or default of any other carrier to which such goods may be delivered in Canada, or under such joint tariff, or over whose line or lines such goods may pass in Canada or under such joint tariff, the onus of proving that such loss was not so caused or did not so result being upon the carrier issuing this bill of lading. The carrier issuing this bill of lading shall be entitled to recover from the other carrier on whose line or lines the loss, damage, or injury to the said goods shall have been sustained the amount of such loss, damage, or injury as it may be required to pay hereunder, as may be evidenced by any receipt, judgment, or transcript thereof. Nothing in this section shall deprive the holder of this bill of lading or party entitled to the goods of any remedy or right of action which he may have against the carrier issuing this bill of lading or any other carrier.

Sec. 6 (part) Goods not removed by the party entitled to receive them within forty-eight hours (exclusive of legal holidays), or in the case of bonded goods within seventy-two hours (exclusive of legal holidays), after written notice has been sent or given, may be kept in car, station, or place of delivery or warehouse of the carrier, subject to a reasonable charge for storage and to the carrier's responsibility as warehousemen only, or may, at the option of the carrier (after written notice of the carrier's intention to do so has been sent or given), be removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the risk of the owner and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(1) 57 D.L.R. 453

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The goods were carried to New York over the line of the New York Central Ry. Co. On arrival notice was given to the consignee who did not take delivery. They were kept on the premises for a few days and then placed in a public warehouse, but the carrier did not give written notice of its intention to do so. While in the warehouse they became unfit for sale and were abandoned by the owners.

F. R. Taylor K.C. for the appellant. The evidence does not establish negligence on the part of the carrier. But in any event it is only liable as a warehouseman. At common law after notice is given of the arrival of the goods at their destination, and after a reasonable time therefrom has elapsed, the liability as carrier ceases, and it is then only that of bailee. *Mitchell* v. *Lancashire and Yorkshire Ry. Co.* (1); *Chapman* v. *Great Western Ry. Co.* (2).

The same is the case under condition 6 of the bill of lading. By keeping the potatoes on the carriers' premises for more than forty-eight hours after notice of arrival was given the liability of warehouseman was established and that of carrier was not restored by placing them in the warehouse.

W. P. Jones K.C. for the respondent, referred to *Getty & Scott* v. *Canadian Pacific Ry. Co.* (3); *Rogers Lumber Co.* v. *Canadian Pacific Ry. Co.* (4).

IDINGTON J.—The appellant and those for whom it is, by the terms of its contract, responsible, disregarded the conditions imposed upon it thereby and placed the goods in question where such goods never should have been placed and caused thereby the destruction of said goods.

(1) [1875] L.R. 10 Q.B. 256.
(2) [1880] 5 Q.B.D. 278.
(3) [1917] 40 Ont. L.R. 260.
(4) [1916] 27 D.L.R. 414.

The learned judge in a fair and lucid charge to which no objection of any kind was taken by counsel submitted to the jury questions to which no exception was taken.

Upon the answers thereto and the admitted facts the learned trial judge for the reasons that appear in his opinion directed judgment to be entered for respondent.

The Appeal Division of the Supreme Court of New Brunswick, upon an appeal taken thereto by appellant herein, for reasons assigned by it, covering, correctly, so far as I understand, some points of fact not expressly mentioned by the learned trial judge, upholds his reasons and thus leaves me, agreeing as I do in all said reasons, unable to add anything useful thereto.

I therefore am of the opinion that this appeal should be dismissed with costs.

DUFF J.—The contract provides that where goods are shipped under a joint tariff, (which is the present case) "the carrier issuing this bill of lading * * * shall be liable for any loss, damages or injury from which the other carrier is not, by the terms of the bill of lading, relieved, caused by, or resulting from the act, neglect or default of any other carrier to which such goods may be delivered * * * under such joint tariff * * * the onus of proving that such loss was not so caused or did not so result, being on the carrier issuing this bill of lading." This language is clear and the effect of it is that on proof that goods were received by a carrier under "a joint tariff" the appellant company is "liable" for the loss, damage or injury to such goods unless it establishes one of two things: 1st, that such loss, damage or injury is something in respect of which, by

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the terms of the bill of lading, "the other carrier" is not to be responsible, or 2nd, that such loss, etc., was not caused or did not result from the act, neglect or default of "the other carrier."

The onus resting upon the company is the *onus probandi* in the strict sense, that is to say, the company is the actor in the litigation in respect of these two issues, and in so far as they involve questions of fact the company must fail unless it establish affirmatively by reasonable evidence that upon them it is entitled to succeed. The company relies upon article 6 of the conditions, which is in these words:—

> Section 6 (part). Goods not removed by the party entitled to receive them within forty-eighth hours (exclusive of legal holidays), or in the case of bonded goods within seventy-two hours (exclusive of legal holidays), after written notice has been sent or given, may be kept in car, station or place of delivery or warehouse of the carrier, subject to a reasonable charge for storage and to the carrier's responsibility as warehouseman only, or may at the option of the carrier (after written notice of the carrier's intention to do so has been given), be removed to and stored in a public or licensed warehouse at the cost of the owner, and there held at the risk of the owner and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

Now it is undisputed that the goods were not "kept in car, station or place of delivery or warehouse of the carrier" and therefore that branch of this article limiting the carrier's responsibility in such a case to that of warehouseman has no application and the company's sole recourse must be to the provision which entitles the carrier, upon giving written notice, to remove the goods to a public or licensed warehouse. I have no doubt that written notice here means written notice to the owner and it is admitted that such notice was not given; such notice is an essential condition and accordingly it follows that this branch of the article is also without application.

As to damages, I concur in the view taken in the court below that section 4 of the contract fixes the damages. The trial judge was therefore right in instructing the jury as he did. The sole issues were issues in respect of which as already mentioned the company was actor. There is no evidence upon which the jury could properly have found for the company upon those issues. The case appears to be a peculiarly simple one although it has perhaps been obscured by the accumulation of irrelevancies which it has attracted during its progress through the courts. It is proper, however, to observe that the argument advanced to the effect that the New York Central Company's responsibility ceased after the expiration of forty-eight hours after the arrival of the goods in New York, is really beside the point. The conditions prescribed by the second section impose responsibility for loss unless that loss is something in respect of which the bill of lading itself relieves the carrier; and these conditions are not satisfied unless such release is to be found in express language or by necessary implication from the language of the document. Section 6 provides for exemption from liability in certain specified cases and the facts of the present case do not bring it within any of these exemptions.

ANGLIN J.—The material facts of this case are sufficiently stated in the opinion of the learned trial judge and in that of the Chief Justice of New Brunswick delivering the unanimous judgment of the Court of Appeal (1).

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If findings of the jury were necessary to maintain the judgment which the plaintiff holds, I incline to think it could not be sustained. But I agree with the trial judge and the court of appeal of New Brunswick that upon the conditions of the bill of lading under which the plaintiff's goods were shipped, their loss raises a presumption of liability on the part of the defendant as the primary or issuing carrier, and that there is no evidence in the record on which a finding could be based that would rebut that presumption.

By clause 1 of the conditions the issuing carrier (the defendant) assumes liability for any loss of, or damage to, the goods, except as otherwise therein provided.

By clause 2 where goods are shipped under a joint tariff (admittedly this case), the issuing carrier assumes liability for loss, damage or injury to such goods caused by, or arising from, any act, neglect or default of any other carrier to whom the goods may be delivered under such joint tariff, (in this case the New York Central Rly. Co.) from which such other carrier is not relieved by the terms of the bill of lading. The issuing carrier also assumes the onus of proving that such loss was not so caused or did not so arise.

By clause 3 a number of possible causes of loss or injury are categorically excepted from those entailing liability on the carrier. None of them was the cause of the loss of the plaintiff's potatoes. The only one of these excepted causes relied on by counsel for the appellant was "inherent vice in the goods." There is nothing in evidence to suggest the existence of such a vice—nothing to shew that the potatoes would have become unfit for sale if given reasonable care and attention.

Clause 3 further provides for the carrier's liability being that of a warehouseman in the event of the goods being destroyed by fire more than 48 hours (72 hours in the case of bonded goods) after written notice of arrival of the goods at destination—making it clear that responsibility as carrier does not terminate when actual transit is completed and also that it continues as to other causes of loss even after expiry of the 48 hours "free time."

Clause 6 provides two methods by which the carrier may be relieved of this responsibility. By adopting one its responsibility may be reduced to that of a warehouseman; by pursuing the other it may entirely escape further responsibility. In this case neither of the prescribed courses was taken. The New York Central Railway Company placed the goods in a public or licensed warehouse, but without giving notice of intention to do so. The goods became unfit for sale while in this warehouse and still under the control of the carrier to whom they had been transferred by the original carrier who issued the bill of lading, and whose responsibility had not been either reduced to that of a warehouseman or extinguished because of non-compliance with the conditions prescribed by clause 6 for effecting one or other of these results.

There is no evidence to negative the presumption arising under the bill of lading that the loss of the potatoes is ascribable to some neglect or default of such transferee-carrier. Indeed there is not a little pointing to the conclusion that its selection of a public or licensed warehouse unsuited for the storage of the potatoes was the direct cause of their loss. Had the jury found negligence of the New York

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Central Railway in this respect, in the absence of the notice of intention requisite to bring the defendant within the protection of clause 6, a judgment against it based on that finding would have been unassailable. But without such a finding the failure of the defendant to discharge the onus which it assumed by the bill of lading of disproving that the loss of the plaintiff's goods was due to some act, neglect or default of its transferee-carrier justifies a judgment upholding its responsibility. I agree with the reasoning on which Mr. Justice Crocket founded his conclusion that the defendants remained liable in respect of the shipment in question as common carriers under the terms of the bill of lading.

The full value of the consignment at the point of shipment, plus freight charges, etc., paid by the plaintiff, has been allowed as damages. There is evidence that the price of potatoes had declined before the plaintiff's potatoes had suffered deterioration attributable to any act or omission of the New York Central Railway Company. But clause 4 of the bill of lading provides that the amount of the loss for which the carrier shall be liable shall be computed on the basis of the value of the goods at the place and time of shipment (including freight and other charges, if paid, and duty, if paid or payable and not refunded), unless a lower value has been represented in writing by the shipper or agreed upon, or is determined by the classification or tariff on which the rate charged for carriage is based. None of these exceptions is invoked but it is said that from the value of the goods at the time and place of shipment should be deducted any decline in price before the happening of the event which entails liability on the carrier. The amount of the damages awarded is admitted to have

been the value at the time and place of shipment. The total loss of the shipment is conceded. I agree with the learned trial judge and the court of appeal that clause 4 deprives the defendant of any advantage which it might otherwise have had from falling prices in the potato market just as it would preclude the plaintiff from claiming the benefit of an advance in the price of potatoes. The clause was no doubt inserted to avoid difficulty and uncertainty in the assessment of damages. The value of the goods at the place and time of shipment would probably be known to the carrier when assuming responsibility and it would be in its interest to have this value fixed as the basis of that responsibility rather than the uncertain and unknown future value at the place and time of delivery. This stipulation probably operates in the interest of the carrier more often than in that of the shipper.

The appeal in my opinion fails and should be dismissed with costs.

MIGNAULT J.—I concur with Mr. Justice Anglin.

CASSELS J.—I concur with Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitor for the appellant: *H. H. McLean.*

Solicitors for the respondent: *Jones & Jones.*