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*March 4.

*June 11.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA..... } APPELLANTS;

AND

FREDERICK A. FITZGERALD *et al*.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Agreement—Additional parol term—Conditions—Carriers—Wilful negligence—"At owner's risk."*

The respondents sued the appellants for breach of contract to carry petroleum in covered cars from *L.* to *H.*, alleging that they negligently carried the same upon open platform cars, whereby the barrels in which the oil was were exposed to the sun and weather and were destroyed. At the trial, a verbal contract between plaintiffs and defendants' agent at *L.* was proved, that the defendants would carry the oil in covered cars with despatch. The oil was forwarded in open cars, and delayed in different places, and in consequence a large quantity was lost. On the shipment of the oil, a receipt note was given which said nothing about covered cars, and which stated that the goods were subject to conditions endorsed thereon, one of which was, "that the defendants would not be liable for leakage or delays, and that the oil was carried at the owner's risk."

*Held*, per Sir *W. J. Ritchie*, C. J., and *Fournier* and *Henry*, J. J., that the loss did not result from any risks by the contract imposed on the owners, but that it arose from the wrongful act of the defendants in placing the oil on open cars, which act was inconsistent with the contract they had entered into, and in contravention as well of the undertaking as of their duty as carriers.

Per *Strong*, *Fournier*, *Henry* and *Gwynne*, J. J.:—The evidence was admissible to prove a verbal contract to carry in covered cars, which contract the agent at *L.* was authorized to enter into, and which must be incorporated with the writing so as to make the whole contract one for carriage in covered cars, and that non-compliance with the provision as to carriage in covered cars, prevented the appellants setting up the condition that "oil was carried at the owner's risk" as exempting them from liability.

*PRESENT.—Sir W. J. Ritchie, C. J., and Strong, Fournier, Henry and Gwynne, J. J.

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APPEAL from a judgment of the Court of Appeal for *Ontario* dismissing the appeal of the above named appellants to the said Court of Appeal from the decision of the Court of Common Pleas of the said Province on the 28th day of June, A.D., 1878, as of Easter Term 41st *Vic.*, discharging a rule *nisi* made in the said Easter Term in a certain cause in the said Court of Common Pleas, whereby respondents were ordered to show cause why the verdict obtained in the said cause should not be set aside, and a verdict entered for the said defendants or a non-suit, pursuant to The Common Law Procedure Act, or why a new trial should not be had between the parties on the ground that the said verdict is contrary to law and evidence, and for admission of improper evidence.

The action was commenced by the respondents against the appellants on the 21st March, 1875, to recover the value of oil said to have been lost in the course of transit from *London* to *Portland* upon the appellants' railway.

The facts of the case are as follows (1):

The respondents, having a contract with the Government of *Canada* for supplying oil at *Halifax*, in the Province of *Nova Scotia*, for the use of the Government, towards the end of April or beginning of May, A.D., 1873, entered into a verbal agreement with the appellants, through their general agent at *London*, for the carriage of the oil from *London* to *Halifax*. In the agreement it was expressly stipulated that, at a certain fixed rate per barrel then agreed upon, the oil should be carried in covered cars, and with as quick dispatch as possible. Afterwards it was discovered that owing to the gauge of the appellants' railway between *London* and *Stratford* differing from the gauge on the remainder of their road, that they could not get a sufficient num-

(1) For pleadings see report of the case, 28 U. C. C. P. 587.

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ber of covered cars at *London* to carry the oil to *Stratford*, whereupon the respondents consented to vary the original agreement in this, that the appellants might carry the oil, from *London* to *Stratford*, on open or platform cars, taking the same from *London* in the evening, so as not to expose the oil to the heat of the sun in the daytime, and that the oil should be transhipped into covered cars at *Stratford*, and should be carried in covered cars from *Stratford* with quick dispatch. The agreement was to apply to, and did apply to, all the oil the respondents would ship to *Halifax* for the Government during the year.

At the time that each of the shipments of oil was made a request or shipping note for the same was signed by the respondents, and a receipt given by the appellants; neither notes nor receipts say anything about covered cars, the mode of carriage, nor do they fix the rate of freight to be paid, but on the back of each of them was indorsed a condition or proviso that "Oil and Molasses will under no circumstances be carried save at the risk of the owners, or parties by whom the same are consigned," and another condition or proviso that "no claim for loss or damage for which this company is accountable, will be allowed unless notice in writing is given to the Station Freight Agent within 24 hours after the goods are delivered," together with other conditions, and the appellants contend that under these conditions they are not responsible for any loss to the respondents' oil.

The respondents shipped oil to *Halifax* by two shipments, one on the 6th of May, 1873, and one on the 10th of June, 1873. Both shipments were sent out from *London* on open or platform cars, and no part of either shipment was transhipped into covered cars at *Stratford*, as agreed by the appellants, but both shipments were carried over the whole line of the appel-

lants' railroad on open or platform cars, and were also greatly delayed on the way, and exposed to the sun and weather on the way, and on the sidings of the appellants' railway at *Montreal* and elsewhere, and on the wharf at *Portland*, and in consequence of such delays and exposure, great loss and damage was sustained by the respondents, and this action was brought to recover compensation for such loss.

The learned Judge who tried the case found, as a fact, that the verbal contract with the appellants' agent was to carry in covered cars as alleged, and rendered a verdict for the plaintiffs, with $1,114 damages.

*Dr. McMichael*, Q. C., and *Mr. Bethune*, Q. C., for appellants :—

The complaint is for leakage of oil carried by the appellants. The ordinary letter of request to the appellants to forward the oil upon the basis of the conditions of the appellants as railway carriers was filled up by the respondents, and they accepted from the agent a receipt for the same, given to them upon the terms of the ordinary bill of lading of the appellants. Now, one of the special conditions of the contract was that they should not be liable for leakage, and "oil and molasses will, under no circumstances, be carried save at the risk of the owner or parties by whom they are consigned." The only question therefore for enquiry is, whether or not the appellants bring themselves within the conditions of the contract which absolve them from the liability and whether these conditions have that effect.

The appellants submit that the effect of the notice contained in these printed documents has freed them from any liability they would otherwise have had as common carriers with regard to these commodities. For a carrier can relieve himself from the common law liability by notice. In this case it was impossible to

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use more comprehensive language. See *Lewis* v. *G. W. Railway* (1).

But then the respondents also contend that the contract sued on was not simply a contract containing ordinary conditions of the appellants' usual shipping notes, but was either partly verbal and partly written, having certain stipulations outside of these conditions, which either controlled or were incorporated with them, or that there was an independent verbal contract, and that the appellants were not entitled to the benefits of the conditions, and so the case, as launched by the respondents, proceeded upon this special contract, stated to have been made with *Mr. Thorpe*, the appellants' agent at *London*, to be read by itself, or that the special contract should be read as having this verbal contract forming part of it.

We deny that any contract was made with *Thorpe*, the agent, except one upon the basis of the ordinary conditions of the appellants, and that if he made any such contract it was beyond the scope of his powers as an agent.

Parol evidence is inadmissible for the purpose of varying the terms of the contract; and *Mr. Thorpe* had no power to make a new or any other contract than this written one, or to vary that contract.

What the respondents desire, is to vary that term of the contract which provides that "oil and molasses will under no circumstances be carried save at the risk of the owners or parties by whom they are consigned," making that passage read as if it were as follows: "In case the oil and molasses are carried in covered cars the Company will, under no circumstances, be liable for oil and molasses carried save at the risk of the owners or parties by whom they are consigned."

(1) 3 Q. B. D. 195.

*Mason* v. *Scott* (1), *Jervis* v. *Berridge* (2), *Harris* v. *G. W. R.* (3), *re Delaware* (4).

In any event the appellants submit that it is clear from the evidence, that there was no power on the part of *Mr. Thorpe* to make any contract on behalf of the appellants on any other terms than those embodied in the terms and conditions of the ordinary bills of lading of the appellants.

The cases which have been referred to in the English Courts in the Court below afford no guide as a proper rule of decision in a case in this country, because the English statute, 17 and 18 *Vic.*, ch. 31, has laid down a rule so entirely different from the rule for interpretation of carriers' contracts at Common Law as to make these decisions entirely inapplicable. That statute avoids all conditions except such conditions as shall be adjudged by the Court or Judge, by whom the question relating thereto shall be tried, to be just and reasonable.

The learned counsel also referred to *Carr* v. *The L. & Yorkshire Ry. Co.* (5); *Austin* v. *The M. S. & Lincolnshire Ry. Co.* (6).

*Fitzgerald* had notice that *Thorpe* had no authority to vary the contract, for the railway authorities had furnished him, as well as the public dealing with them, with the forms of contract containing the conditions upon which they were willing to carry such goods. Surely it is not an unjust inference to say that under these circumstances *Fitzgerald* was affected with notice of the limited authority of *Thorpe*. See *Davis* v. *Scottish Provincial Ins. Co.* (7).

Mr. *Glass*, Q. C., and Mr. *W. W. Fitzgerald* for respondents:

(1) 22 Grant 592.
(2) L. R. 8 Chy. 351.
(3) 1 Q. B. D. 515.
(4) 14 Wallace, 601.
(5) 7 Ex. 707.
(6) 10 C. B. O. S. 454.
(7) 16 U. C. C. P. 1 76.

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The contract and agreement relied on by the respondents was separate and distinct from the said shipping note relied on by the appellants; the contract was a distinct and complete contract in every respect, stating the mode of carriage, viz, in covered cars, and the rate of freight to be charged for the through rate, the place of shipment and of destination, and that the goods should be carried with all possible expedition, and was such a contract as a general agent had full power and authority in the scope of his business to enter into and to bind his principals for the fulfilment of. The evidence shows that *Thorpe* was such general agent, and was accustomed to enter into such contracts on behalf of the appellants, and that as such general agent he did actually enter into the said contract with the respondents.

The case of *Lewis* v. *G. W. Ry.* (1), referred to by the learned counsel for appellants, was entirely a different case from this, because there was a specific provision that the carriage was for a lower rate than was ordinarily charged. In this case there was no reduction, but the appellants were told by the respondents, when the agreement was entered into for the carriage, that unless they would undertake to carry them in covered cars, the goods would not be delivered to them for carriage, as the respondents could have the goods carried in covered cars by the *Great Western Railway*, whereupon the appellants covenanted and agreed to carry the said goods in covered cars, and this express stipulation or agreement was the chief and paramount consideration moving and inducing the respondents to enter into the said contract. In addition to this the learned judge who tried the case, found it as a fact that the contract was to carry in covered cars. See *Cooper* v. *Blacklock* (2); *Broom's* Common Law (3); *Smith* on Contracts (4).

(1) 3 Q. B. D. 195.
(2) 5 App. R. 535.
(3) 6 Ed. 375.
(4) 5 Ed. 521.

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As to clause number four in the special conditions relied on by the appellants, it only binds the respondents to assume and bear the risks ordinarily incurred in the carriage of goods of the class specified in said condition, and does not excuse the appellants from wilful negligence, misconduct, or malfeasance, and does not operate so as to excuse the appellants from wilful destruction of property delivered to them for carriage, by exposing it in such a manner as to render its destruction inevitable, as the appellants did in this case, it being shewn by the evidence that goods of the class and quality in this case could not be safely carried in open or flat cars at the season of the year when these goods were carried, nor does this condition release them from the consequences of the breach of their special contract to carry in covered cars: *D'Arc* v. *London and North Western R. R. Co.* (1).

We also contend the appellants were guilty of gross and inexcusable negligence and malfeasance in carrying the respondents' goods in open or platform cars at the season of the year when they did, and in leaving the same exposed to sun and weather at *Montreal* and elsewhere on the line of their railway and on the wharf at *Portland*, as shewn in the evidence, and the great delay in the carriage from *London* to *Halifax*.

The following, with the authorities already quoted, will be relied on by the respondents: *Morgan* v. *Griffith* (2); *Lindley* v. *Lacy* (3); *Harris et al., Assignees of Foeman* v. *Rickett* (4); *Parsons* v. *Queen Ins. Co.* (5); *Malpas* v. *London and South Western R. W. Co.* (6); *Robinson* v. *Great Western R. Co.* (7).

Dr. *McMichael*, Q. C., in reply:

We say our agent had no general authority to carry

(1) L. R. 9 C. P. 330.
(2) L. R. 6 Ex. 70.
(3) 17 C. B. 578.
(4) 4 H. & N. 1.
(5) 43 U. C. Q. B. 271.
(6) L. R. 1 C. P. 335.
(7) 35 L. J. C. P. 123.

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oil or molasses, and that the respondents had notice of his limited authority, and the court of appeal have come to the conclusion that the agent had no authority to make a verbal contract. If the respondents wanted to bind the company on the agent's agreement, they should have got a different receipt. As to the written contract there has been no breach proved.

Sir W. J. RITCHIE, C. J.:—

In the view I take of this case, it is wholly immaterial whether the alleged verbal contract is imported into and incorporated with the printed receipt or not, for, without reference to any verbal agreement, I think the evidence very clearly shows that both the shipper and the company knew that open cars were not proper to be used, and the company, through its agent, had direct notice that the plaintiffs would not allow their goods to be shipped in open cars, and the company, through their shipping agent, in the usual course of business, received the goods to be conveyed in covered cars, and the contract, if it rested alone on the printed receipt, must be read in connection with these considerations to enable the Court to put on it the proper construction. It cannot be supposed possible that plaintiffs could have agreed that their goods should be shipped in vehicles which, if the uncontradicted evidence is correct, would, to the knowledge of both parties, assuredly involve almost certain injury. I therefore think both parties contracted on the assumption that the railway company would provide cars fit for the service; that in undertaking to carry the goods from one place to another, the company bound itself to provide proper vehicles and means of conveyance to enable it to do what it undertook, otherwise there would be a total abandonment of its character as a carrier, and that their not doing so, was not mere neglect in

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the course of the performance of the contract, but the company's conduct amounted to a refusal to execute the engagement entered into. The written contract therefore was, in my opinion, to send these goods in a proper conveyance. Any other construction would be most unreasonable and unjust, and there is nothing whatever in the contract to absolve the company from the consequences of neglecting to perform a duty that naturally and rightfully belongs to them, nor any stipulation exempting them from gross negligence or misconduct. If sent in proper conveyances the goods would, under the provision that oil was only to be carried at the risk of the owners, be at the risk of the owners, that is, the owners would be responsible for the ordinary risks incurred by the goods in the course of transit along the railway, but not for losses arising from the gross negligence of the carriers. But instead of so sending these goods, the defendants sent them, not in fit and proper conveyances, but in cars wholly unsuited and unfit for the carriage of such goods, and therefore did not carry in pursuance of, but in direct contravention of, their duty and their contract. The case is therefore not one of mere negligence, but of wilful negligence amounting to direct misfeasance. When these goods were placed on open cars, the company divested themselves of the ability to carry the goods as they were bound to do, and the loss arose from the wrongful act of defendants inconsistent with the contract they had entered into, and in contravention as well of their undertaking as of their duty as carriers.

This does not at all resemble the case of a Railway Company charging for the use of cars and the locomotive power only, as in the cases of *Austin* v. *The Manchester, Sheffield, &c., Railway Co.* (1), and *Morville* v. *The Great*

(1) 16 Q. B. 600.

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*Northern Railway Co.* (1); but much more like *D'Arc* v. *London & N. W. Railway Co.* (2), *Philipps* v. *Clark* (3), *Lewis* v. *Great Western Railway Co.* (4), and *Wyld* v. *Pickford* (5).

In *D'Arc* v. *The London & N. W. Railway Co.* (6), Lord *Coleridge*, C. J., says:

> This Court, in *Robinson* v. *Great Western Railway Co.* (7), determined upon a contract in terms very similar to those of the contract in the present case, that the words "at owner's risk" only exempted the company from the ordinary risks incurred by goods going along the railway, and does not cover injury from delay caused by the negligence of the company.

In *Philipps* v. *Clark* (8), the marginal note is:

> A stipulation in a bill of lading that the ship owner "is not to be accountable for leakage or breakage," does not exempt him from responsibility for a loss arising by these means from *gross negligence.*

*Cockburn*, C. J., says (9):—

> He stipulates to be exempted from the liability which the law would otherwise cast upon him in other respects. But there is no reason why, because he is by the terms of the contract relieved from that liability, we should hold that the plaintiff intended also to exempt him from any of the consequences arising from his negligence.

And *Crowder*, J., (10):—

> It is clearly not intended to relieve him from responsibility for leakage or breakage, the result of his negligence and want of care.

In *Lewis* v. *Great Western Railway Co.* (11), *Bramwell*, L. J, says:—

> There is such a mass of authorities to show what "wilful misconduct" is, that we should hardly be justified, as a Court of Appeal, in departing from them, even if we thought them to be wrong. "Wilful misconduct" means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the

(1) 16 Jur. 528.
(2) L. R. 9 C. P. 325.
(3) 2 C. B. N. S. 156.
(4) 3 Q. B. D. 195.
(5) 8 M. & W. 443.
(6) L. R. 9 C. P. 325.
(7) 35 L. J. C. P. 123.
(8) 2 C. B. N. S. 156.
(9) At p. 162.
(10) P. 163.
(11) 3 Q. B. D. 195.

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conduct, must be wilful. It has been said, and, I think, correctly, that, perhaps, one condition of "wilful misconduct" must be that the person guilty of it should know that mischief will result from it. But, to my mind, there might be other "wilful misconduct." I think it would be wilful misconduct if a man did an act not knowing whether mischief would or would not result from it. I do not mean when in a state of ignorance, but after being told, "Now this may or may not be a right thing to do." He might say, "Well, I do not know which is right, and I do not care; I will do this." I am much inclined to think that that would be "wilful misconduct," because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not. I think that would be "wilful misconduct."

*Brett*, L J., says:

Now I apprehend that, in order to construe a written document, the Court is entitled to have all the facts relating to it and which were existing at the time the written contract was made, and which were known to both parties. Certain facts existing at a time when a written contract is made are sometimes customs of trade, or the ordinary usages of trade; sometimes the course of business between the parties; sometimes they consist of a knowledge of the matter about which the parties were negotiating; the Court is entitled to ask for these facts, to enable it to construe the written document; not simply because they are customs of trade, or the course of business between the parties, but because they are facts which were existing at the time, and which have a relation to the written contract, and which are things which must be taken to have been known by both parties to the contract. Here there were certain facts given in evidence which, I think, we are entitled to look at to enable us to construe the phrase "owner's risk."

*Brett*, L. J., again says:—

In a contract where the term wilful misconduct is put as something different from and excluding negligence of every kind, it seems to me that it must mean the doing of something, or the omitting to do something, which it is wrong to do, or to omit, where the person who is guilty of the act or the omission knows that the act, which he is doing or that which he is omitting to do, is a wrong thing to do or to omit; and it involves the knowledge of the person that the thing which he is doing is wrong; I think that if he knows that what he is doing will seriously damage the goods of a consignor, then he knows that what he is doing is a wrong thing to do, and also, as my lord has put it, if it is brought to his notice that what he is doing, or omitting to do, may seriously endanger the things which

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are to be sent, and he wilfully persists in doing that against which he is warned, careless whether he may be doing damage or not, then, I think, he is doing a wrong thing, and that that is misconduct, and that, as he does it intentionally, he is guilty of wilful misconduct, or, if he does or omits to do something which everybody must know is likely to endanger or damage the goods, then it follows that he is doing that which he knows to be a wrong thing to do. Care must be taken to ascertain that it is not only misconduct but wilful misconduct, and I think that those two terms together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission.

*Cotton*, L. J., says :—

Now, I do not think there can be any doubt at all that wilful misconduct is something entirely different from negligence, and far beyond it, whether the negligence be culpable, or gross, or howsoever denominated. There must be the doing of something which the person doing it knows will cause risk or injury, or the doing of an unusual thing with reference to the matter in hand, either in spite of warning or without care, regardless whether it will or will not cause injury to the goods carried or other subject-matter of the transaction. It was asked by counsel, in argument, would it not be wilful misconduct on the part of the servants of the Great Western Railway to put a horse into an open truck? Certainly it would, because every one must be aware that putting a horse into an open truck, out of which he could jump, would, in all probability, lead to the consequence that as soon as the train started, the horse would try to jump out, and be seriously injured.

In *Wyld* v. *Pickford* (1), the marginal note states that a carrier is liable, not only for any act which amounts to a total abandonment of his character of a carrier, or for wilful negligence, but also for a conversion by a misdelivery arising from inadvertence or mistake, if such inadvertence or mistake might have been avoided by the exercise of ordinary care.

Per *Parke*, J., delivering judgment :—

But still he undertakes to *carry* from one place to another, and for some reward in respect of the carriage, and is therefore bound to use ordinary care in the custody of the goods and their conveyance to and delivery at their place of destination, and in providing proper vehicles for their carriage.

(1) 8 M. & W. 443.

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And surely if the owner takes on himself all risk of accident and injury of conveyance, the railway companies are bound to find proper carriages.

I therefore think the Court of Common Pleas and the Appeal Court of *Ontario* were quite right in holding that defendants must bear the loss which obviously resulted from their improper dealing with the goods, and not from any of the risks by their contract imposed on the owners.

STRONG, J., concurred in the judgments delivered in the Court of Common Pleas.

FOURNIER, J., concurred in dismissing the appeal.

HENRY, J.:—

I think the appeal in this case should be dismissed. The parties, through their agents duly authorized, entered into a contract to carry this oil from one point to another, and in doing so undertook impliedly to carry it in a proper manner. They undertook to provide the proper means of transport, so that it should not be subject to damage ordinarily occasioned to such property when exposed to the weather. Oil has been shown, on this trial, to be of such a nature that it loses very largely by absorption into the material of the cask which contains it. To prevent that it is necessary that these casks should be all glued inside before the oil is put into them. The effect therefore of exposing them to the hot sun is to melt this glue, and the oil, though the cask may be apparently tight, will lose largely by absorption. The parties who undertake to carry articles of that kind are to be presumed to carry them in a way that they will not be necessarily injured. The oil in this instance was stipulated to be carried in covered cars, so as to be kept from the action of the sun. That is evidence of the necessity of carrying it in

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that way. I think the parties entered into an implied contract to carry it in cars, by which the casks would be protected from the effects of the sun. I am of opinion that, notwithstanding the conditions, that is a part of their contract The written condition that oil and molasses were to be carried at the owner's risk would not apply to that portion of the risk which was to be provided for by the undertaking to furnish covered cars. Carriers are bound as part of their contract to provide proper means of transportation, and the party dealing with them says, "you have undertaken to furnish proper means of transport I will run the other risks." It was no part of the risk therefore, under that condition, that the casks of oil should be subjected to the rays of the sun, by which great damage was done, and loss incurred. I am of opinion, that that was a part of the original contract independently of the special contract made with the agent. Now, it has been objected, that the agent had not the authority to enter into that contract because he had private instructions against it. The public know nothing of those private instructions, and the rule is, where one man authorizes another, and holds him out to the world as his agent to carry on any particular kind of business, there is an implied authority on his part to do everything within the compass of his authority to carry on the business. Parties outside know nothing about private instructions, and are not governed by them. If they had known of the private instructions in this case, the parties, it is clear, would not have sent the oil in that way, and it would be unjust in the extreme that they should suffer loss by private instructions given to agents of which they knew nothing.

I am of opinion, that the agent had full authority to

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enter into that contract, and I can see nothing that at all militates to alter or vary the written contract. The latter provides only for the carrying without any particular mode or means; the other is additional to the contract. The shipper says: "I will enter enter into that contract with you provided you will carry the oil in covered cars." He undertakes to do so. The other party agrees to it. It would be a fraud, then, upon the man who was induced to enter into the contract, to allow the parties to say that there was a variation, or that the one contract was not supplementary to the other. I think it is, and the parties are responsible for the contract made by the agent. There is no doubt about the damage being done through the wilful misconduct of the servants of the company, but independently of that wilful misconduct, independently of negligence, I hold it is part of the contract, that the company is answerable for it, on the principle that every one who undertakes to perform a service for another undertakes to perform it by proper and ordinary means. If he does not do so the contract fails, and I think they might as well ask to be held harmless in this case, for no better reason than they would if they put quarters of fresh beef beside a hot stove and kept them there for days, or put eggs in an ice box. In those cases there is no question it would be gross and wilful misconduct, and even if the shippers did undertake to run the risk in shipping eggs, they would only run the risk of being broken or injured in the usual manner; but certainly it is not to be imagined that running the risk includes that for which the other parties would be answerable, and through their improper conduct caused damage. I think therefore this case is as strong as that. This oil was shown to have been for days and days left at different stations on the

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road exposed to the operation of the sun's rays, the very thing that the party undertook to guard against, and for which, we have reason to suppose, he paid extra. Under all the circumstances the merits are all in favor of the respondent, and law in his favor, and therefore I think the appeal should be dismissed with costs.

GWYNNE, J.:—

I should not think it is necessary to add anything to what appears in the judgment of the Court of Common Pleas, if it were not that some observations made in the judgment of the Court of Appeal for *Ontario*, calculated to throw doubt upon the applicability of *Malpas* v. *L. & S. W. Railway* (1) to the determination of this case, if not also upon the soundness of the judgment in that case, seem to me to call for remark. The principle upon which that case proceeded, in my opinion, plainly justified the reception in this case of oral evidence, to shew that the contract entered into between the parties was for the carriage of the oil in covered cars. Such evidence, not being in contradiction of anything in the delivery bill, but an addition to it, and indeed relating to matter not necessary to be in a delivery bill, was clearly admissible, and equally so whether the oil was intended to be forwarded in one, two, or more carloads. The result is, that the conditions endorsed on the delivery bill could only be applied to qualify the liability of the defendants conditional upon their carrying the oil in covered cars, in accordance with the essential term of the contract, upon the faith of which alone they were given the oil to carry.

*Appeal dismissed with costs.*

Solicitor for appellants: *John Bell.*

Solicitor for respondents: *W. W. Fitzgerald.*

(1) L. R. 1 C. P. 336.