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June 9.
June 20.

ADA SHERLOCK (PLAINTIFF).....APPELLANT;

AND

THE GRAND TRUNK RAILWAY COMPANY (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Statute—Application—Railway Company—Carriage of traffic—Personal baggage—Limitation of liability—Powers of Board of Railway Commissioners—Railway Act R.S.C. [1906] *c.* 37, *s.* 340.

By sec. 340 of the Railway Act a railway company cannot, by contract or otherwise, limit its liability in respect to the carriage of traffic unless authorized by the Board of Railway Commissioners; the Board may, by regulation, determine the extent to which the liability may be limited (s.s. 2), and it may prescribe the terms and conditions under which any traffic may be carried.

Held, affirming the judgment of the Appellate Division (48 Ont. L.R. 237) that a regulation, providing that a carrier shall not be liable for loss of or damage to personal baggage caused by negligence or otherwise to an amount greater than one hundred dollars unless greater values are declared and extra charges paid at time of checking, is *intra vires* of the powers of the Board.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), affirming the judgment at the trial (2), in favour of the respondent.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 48 Ont. L.R. 237. (2) 47 Ont. L.R. 473.

The appellant is a commercial traveller residing in the City of Hamilton, and on the 7th day of May, 1919, she purchased a ticket from Hamilton to Toronto, which ticket was the ordinary ticket issued by the respondent, and contained no conditions or restrictions whatever either on its face or back. After she had purchased her ticket, the appellant went to the baggage office and checked her trunk containing her wearing apparel and personal belongings and received in return a check. There was nothing said to her by the clerk who handed her the check to draw her attention to the fact that this check was anything more than a mere receipt for the trunk and the plaintiff herself did not notice that the check contained thereon any terms or conditions whatever.

The trunk was lost on the journey and has not yet been recovered, and the appellant brought this action for the value of same. The respondent paid the sum of one hundred dollars into court but denied further liability, relying on the terms and conditions which were printed on the back of the check and pleaded that the said conditions were authorized by and contained in General Order 151 of the Railway Board of Canada, dated the 8th day of November, 1915, and that said order was duly published in the Canada Gazette and had therefore the same effect as if contained in the Railway Act. The substance of this order is given in the above head-note.

The case was tried before the Honourable Mr. Justice Rose and judgment was delivered on the 4th day of May, 1920, giving effect to the respondent's contention and dismissing the appellant's action with costs. This judgment was affirmed by the Appellate Division.

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Hellmuth K.C. and *J. Y. Murdock* for the appellant. The relation of passenger and agent entitles the passenger to have his luggage transported without additional charge. *Spencer* v. *Canadian Pacific Ry. Co.* (1); *Carlisle* v. *Grand Trunk Ry. Co.* (2).

No limitation of the carrier's liability would have effect unless it is shown that it was read by the appellant or her attention was called to it when the check was delivered. *Lamont* v. *Canadian Transfer Co.* (3); *Spencer* v. *Canadian Pacific Ry. Co.* (1).

D. L. McCarthy K.C. for the respondent. The appellant must be deemed to have had knowledge of the limitation of liability. See *Grand Trunk Ry. Co.* v. *Robinson* (4).

THE CHIEF JUSTICE.—I think this appeal fails and should be dismissed with costs.

The action was brought by a passenger claiming the value of the contents of a trunk checked as personal luggage and lost by the company. The question to be determined was whether the liability of the company is limited in the matter of a passenger's personal baggage by General Order No. 151 of the Board of Railway Commissioners dated November 8th, 1915. The order was duly published in the Canada Gazette and by sec. 31 of the Railway Act, R.S.C. 1906, c. 37, if there was power to make it, it has, while it remains in force, the like effect as if enacted in the Act itself.

I concur in the reasons for his judgment of Mr. Justice Rose, the trial judge, which judgment was unanimously confirmed by the Second Divisional Court of the Appellate Division of the Supreme Court of Ontario and to which I have nothing to add.

(1) [1913] 29 Ont. L.R. 122.
(2) [1912] 25 Ont. L.R. 372.
(3) [1908] 19 Ont. L.R. 291.
(4) [1915] A.C. 740.

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IDINGTON J. The appellant sued the respondent for damages arising from its having lost her baggage for which it has given her a check on presentation of an ordinary ticket as a passenger entitled to travel on its train.

It was assumed on argument that there was no condition expressed on the ticket as to the terms upon which her baggage was to be carried.

On the check for baggage there was expressed something which it is said by respondent should have informed her that she was only entitled to claim, in case of loss, one hundred dollars, unless she had declared on getting the check the value of the baggage beyond that sum and paid an increased charge for such excess in value.

The counsel for appellant argues that the basis of the liability is contract and that, he submitted, was contained in the ticket.

I am afraid the reasoning is rather technical and omits reading into the contract what the law nowadays imputes as knowledge of all implied in a mere ticket, by virtue of the regulation No. 151 of the Board of Railway Commissioners, and imputes to her knowledge thereof and all else that ensued, or was to ensue, before she had got a check for her baggage, and all inscribed on such check hence part of the contract. These several imputations of knowledge of what her ticket implied, and especially the rights thereby acquired to get her baggage carried, cannot be overlooked, and she got a check for same so inscribed which she must be held in law to have known and assented to.

If any one doubts these several imputations of knowledge let him read the facts set out in my judgment in the case of *Robinson* v. *The Grand Trunk Railway* Co. (1), as well as what is said therein by my brother judges.

(1) 47 Can. S.C.R. 622.

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I refer to my own because it appears therein that the form never was filled up, yet the court above reversed us and the decision of that case as reported in (1), binds us.

Surely it goes much further in imputing knowledge than anything required herein to bind the appellant thus presumed in law to have had knowledge of the condition and to have given her assent thereto by accepting the check inscribed as above stated.

In regard to the validity of the regulation as part of a contract so interpreted, there is no question but the appellant must fail herein.

Apart from all that, can it be said that the power of the Board to fix tolls for any and every service by a railway does not cover the case of baggage?

And does not section 340 give the Board almost unlimited powers in the way of impairing, restricting or limiting the liability of a railway company within its jurisdiction?

It reads as follows:—

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.

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.

The exact thing in question herein seems within these powers, or some one of them, and I need say no more in regard thereto.

(1) [1915] A.C. 740.

The framing of Rule No. 151 which I think was intended to be an exercise of the power it was asked by the railway company to exercise, may be open for the criticism that it might have been better expressed if intended to reach the understanding of ordinary people, but its legal import, assuming what was done in way of its publication was all that the Act requires to give it vitality, seems clear.

I am almost tempted to suggest that contract as a basis for such dealings as in question is fast becoming a fiction of law.

I think this appeal should be dismissed with costs.

DUFF J.—It was competent, in my opinion, to the Board, acting under section 340, subsection 3, to limit the value of the personal baggage or other property to be carried on a passenger train for a passenger and to require a declaration by the passenger as to the value of his baggage in excess of $100.00 and further that the charges for such declared excess should bepre paid. Where the value of the passenger's baggage exceeds the sum mentioned and no declaration is made in respect of it then, as the company is under no obligation to receive such baggage for carriage and does not knowingly consent to carry that which it is not bound to carry, I am unable myself to understand upon what foundation the responsibility of the company for such baggage can be based. I do not think section 284, subsection 1 applies to such case nor do I think subsection 7 applies.

If such excess baggage were accepted knowingly by the company's servants without declaration and without payment of tolls a very different situation

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would arise; but where there is no declaration and the company is ignorant of the facts the company's responsibility is, in my judgment, neither more nor less than its responsibility in respect of property wrongfully placed in one of the company's cars.

If this be the correct view the basis of Mr. Hellmuth's argument fails because the order does no more than declare the legal consequences of the conditions laid down and validly laid down in respect of the reception of such "traffic."

ANGLIN J.—The question for determination on this appeal is whether the Board of Railway Commissioners has the power by general regulation to relieve a railway company from liability consequent upon loss of, or damage or delay to, personal baggage ascribable to negligence of its servants for any amount exceeding a stated sum, unless such baggage has been declared to be of greater value and extra charges therefor, according to a tariff approved by the Board, paid at the time of delivery to the company for checking. The Board passed such a regulation (No. 151) on the 8th of November, 1915, restricting the value of baggage entitled to free carriage to the sum of $100. The governing statute is the Railway Act of 1906 (R.S.C., c. 37) and amendments thereto made prior to the year 1919.

The plaintiff sues to recover damages for loss of personal baggage valued by her at $2,000. The existence of the conditions limiting the company's liability to $100, if the impugned regulation be valid, is admitted; if it is invalid the company's liability for damages beyond that sum, to be assessed on a reference, is conceded.

Sec. 283 of the Railway Act requires every railway company to check each parcel of baggage equipped with suitable means for attaching a check to it which is delivered by a passenger for transport and provides for the collection by the company of such tolls for excess baggage as may be authorized. By sec. 284 the company is required to receive, carry and deliver all traffic offered without delay and with due care and diligence (s.s. 1) and any person aggrieved by any breach of that duty is given a right of action from which the company cannot relieve itself by any notice, condition or declaration where the damage arises from its negligence or omission or that of its servants (s.s. 7). This right, however, as is pointed out in *Robinson* v. *Grand Trunk Railway Co.* (1), at page 744, is explicitly made "subject to this Act."

By sec. 340 any contract, condition, by-law, regulation, declaration or notice purporting to impair, restrict or limit the company's liability in respect of the carriage of any traffic is declared ineffectual unless of a class authorized or approved by order or regulation of the Board of Railway Commissioners (s.s. 1); the Board is empowered to determine the extent to which the company's liability may be so impaired, restricted or limited (s.s. 2); and, by regulation, to

prescribe the terms and conditions under which any traffic may be carried by the company (s.s. 3).

By sec. 30 the Board is empowered to make orders and regulations governing a number of enumerated matters and, *inter alia*,

(h) with respect to any matter, 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.

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It is apparent, therefore, that the Board's powers are very comprehensive. By sec. 31 it is provided that any regulation, etc., of the Board shall when published for three weeks in the Canada Gazette have the like effect as if enacted in the Railway Act. Due publication of regulation No. 151 is admitted.

I think it is unnecessary to determine whether personal baggage of such weight and dimensions as would, under the regulation of the Board, entitle the passenger owning it to have it carried free may properly be classified as "excess baggage" within section 283 because its value exceeds a sum fixed by regulation of the Railway Commissioners as that of baggage which a passenger is entitled to have carried free. Whether that section does or does not apply, it is in my opinion within the competence of the Board under section 340 (3) to prescribe the terms and conditions under which baggage may be carried by railway companies—that if under a certain weight, of less than fixed dimensions and of value not exceeding a stated sum (all to be prescribed by the Board) it shall be carried free, and that if not within the limits set in any one or more of these particulars, tolls according to approved tariffs shall be paid for its carriage. I find nothing to preclude the Board ordering that in the event of the passenger failing to declare the value of his baggage, if it exceeds the amount within which he is entitled to have it carried free, and to pay or tender the approved toll in respect of such excess when presenting it to be checked, his right of recovery under section 284 (7) in respect of it shall be limited to the amount prescribed by the Board as the value up to which he was entitled to have it carried free. That seems to me to be nothing more than fixing

terms and conditions under which (this) traffic may be carried by the company

as authorized by sec. 340 (3). Notwithstanding the presence in s.s. 2 of the word "so," which I read as intended merely to carry into it the words "in respect of the carriage of any traffic" found in s.s. 1, rather than to restrict the application of s.s. 2 to cases in which the company, proceeding under s.s. 1, should attempt to impair, restrict or limit its liability by contract, condition, by-law, regulation, declaration or notice, I incline to think that regulation No. 151 may also be sustained as an exercise of the power which that subsection confers. Sec. 340 is one of the provisions of the Act to which s.s. 7 of s. 284 is made subject. The impeached regulation was therefore in my opinion *intra vires* of the Board and effectual to limit the respondent company's liability to the appellant.

The appeal fails and should be dismissed with costs.

BRODEUR J.—I concur with my brother Anglin.

MIGNAULT J.—I think the regulation relied on by the respondents was within the power of the Board of Railway Commissioners under subsection 3 of section 340 of the Railway Act (R.S.C. [1906] ch. 37). That the liability of the railway company can be restricted by order of the Board, even where the damage arises from the negligence or omission of the company or of its servants, notwithstanding subsection 7 of section 284, which, however, is stated to be "subject to this Act," is shewn by the decision of the Judicial Committee in *Grand Trunk Railway Co.* v. *Robinson* (1). This removes the doubt which I otherwise would have felt, and I therefore concur in the judgment dismissing the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Holden & Murdock.*
Solicitor for the respondent: *W. H. Biggar.*

(1) [1915] A. C. 740.