THE LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY (DEFENDANTS)..... ..... APPELLANTS;

1896

*Oct. 21.
*Dec. 9.

AND

SALES & HALLIDAY (PLAINTIFFS)...RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Co.—Carriage of goods—Connecting lines—Special contract—Loss by fire in warehouse—Negligence—Pleading.

In an action by S., a merchant at Merlin, Ont., against the Lake Erie and Detroit River Ry. Co., the statement of claim alleged that S. had purchased goods from parties in Toronto and elsewhere to be delivered, some to the G. T. R. Co., and the rest to the C. P. R. and other companies, by the said several companies to be, and the same were, transferred to the Lake Erie &c. Co. for carriage to Merlin and that on receipt by the Lake Erie Company of the goods it became their duty to carry them safely to Merlin and deliver them to S. There was also an allegation of a contract by the Lake Erie for storage of the goods and delivery to S. when requested, and of lack of proper care whereby the goods were lost. The goods were destroyed by fire while stored in a building owned by the Lake Erie Co. at Merlin.

Held, reversing the decision of the Court of Appeal, that as to the goods delivered to the G. T. R. to be transferred to the Lake Erie as alleged, if the cause of action stated was one arising *ex delicto* it must fail as the evidence showed that the goods were received from the G. T. R. for carriage under the terms of a special contract contained in the bill of lading and shipping note given by the G. T. R. to the consignors; and if it was a cause of action founded on contract it must also fail as the contract under which the goods were received by the G. T. R. provided among other things, that the Co'y. would not be liable for the loss of goods by fire; that goods stored should be at sole risk of the owners; and that the provisions should apply to and for the benefit of every carrier.

Held further, that as to the goods delivered to the companies other than the G. T. R. to be transferred to the Lake Erie, the latter company was liable under the contract for storage; that the goods were in its possession as warehousemen, and the bills of

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

1896

THE LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY v. SALES.

lading contained no clause, as did those of the G. T. R., giving subsequent carriers the benefit of their provisions; and that the two courts below had held that the loss was caused by the negligence of servants of the Lake Erie, and such finding should not be interfered with.

Held also, that as to goods carried on a bill of lading issued by the Lake Erie Co., there was an express provision therein that owners should incur all risk of loss of goods in charge of the company, as warehousemen; and that such condition was a reasonable one as the company only undertakes to warehouse goods of necessity and for convenience of shippers.

It is highly improper, in a statement of claim, to anticipate and reply to matters of defence.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment for the plaintiff at the trial.

The facts of the case are sufficiently set out in the above head-note, and more fully in the judgment of the court.

Riddell for the appellant. The defendant can take advantage of the terms and conditions of the contract made with the several companies to whom the goods were first delivered. *Bristol & Exeter Railway Co.* v. *Collins* (1); *Richardson* v. *Canadian Pacific Railway Co.* (2).

The defendant had possession of the goods as a gratuitous bailee and is not liable for their loss in any event. *Lord* v. *Midland Railway Co.* (3); *Giblin* v. *McMullen* (4).

Thomson Q.C. (*Tilley* with him) for the respondents. An action may be brought against a second carrier directly. *Hooper* v. *London & North-Western Railway Co.* (5).

The trial judge found that the goods were destroyed by negligence of defendant's servants. That finding

(1) 7 H. L. Cas. 194.
(2) 19 O. R. 369.
(3) L. R. 2 C. P. 339.
(4) L. R. 2 P. C. 317.
(5) 50 L. J. 103.

1896

THE LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY v. SALES.

Gwynne J.

was affirmed by the Court of Appeal and cannot now be disturbed.

The defendant cannot raise new issues not contained in the pleadings. *Collette* v. *Goode* (1).

The judgment of the court was delivered by:

GWYNNE J.—This action is brought by the respondents as plaintiffs against the defendants for the loss of goods alleged to have been entrusted to them and charging them both in their character of carriers and of warehousemen. The statement of claim does not in terms allege that the goods were entrusted to them as common carriers, but sets forth the facts which are relied upon by the plaintiffs in a special manner, leaving it to the court to determine what is the liability of the defendants to the plaintiffs, if there be any, which these facts if established disclose. The plaintiffs sue both as consignees of the goods and also in right of the consignors under an assignment from them of all their rights and causes of action. The cause of action alleged against the defendants as carriers is contained in the first nine paragraphs of the statement of claim. After alleging themselves to be general merchants carrying on business at the village of Merlin in the county of Kent in Ontario, and that the defendants are *carriers of goods for hire* whose line of railway passes through the said village, the plaintiffs in the third paragraph of the statement of claim allege that, between the months of November, 1894, and February, 1895, they purchased certain goods for the purposes of their business from the persons and firms thereinafter mentioned, *and directed the said persons and firms to ship such goods to them by the respective routes thereinafter mentioned, including in each case transit for part of the distance over the defendants' line of railway, to the end*

(1) 7 Ch. D. 842.

1896

THE LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY v. SALES.

Gwynne J.

that such goods might be delivered by the defendants to the plaintiffs at the said village of Merlin. In the fourth paragraph the plaintiffs then allege the purchase by them of several parcels of goods from divers persons and firms trading at divers places in the province of Ontario, which goods were by such respective persons and firms at divers dates, stating the respective dates, *delivered*, some to the Grand Trunk Railway Company, some to the Michigan Central Railway Company, some to the Canadian Pacific Railway Company, some to the Erie and Huron Railway Company, and were subsequently by such respective railway companies *delivered to the defendants*, and that a small parcel of goods of the value of $10 was delivered by the persons from whom such goods were purchased to the *defendants themselves* at the city of London. The plaintiffs in another paragraph allege that

by reason of the purchase by the plaintiffs of the said goods from the said respective persons and firms, and by reason of the delivery thereof as aforesaid, the same became and were the property of the plaintiffs and the defendants became and were liable to the plaintiffs for the carriage and delivery thereof to the plaintiffs.

And in another paragraph they allege that

The said respective companies to whom said goods were originally delivered as aforesaid issued their bills of lading or receipts to the consignors of the said goods respectively, and the said bills of lading or receipts were indorsed and delivered in the ordinary course to the plaintiffs, *and by reason of such indorsement and delivery the said goods became and were the property of the plaintiffs.*

Then in another they alleged that

by certain indentures of assignment, made and executed *before the commencement of this action*, the said consignees duly assigned, transferred and set over to the plaintiffs all rights they respectively had against the defendants in, under and by virtue of the said bills of lading or receipts or otherwise in respect of the said goods.

Then the statement contains a paragraph, apparently framed with the intention of serving either as an aver-

ment of a contract for carriage in fact entered into by the defendants, or as a statement of what in the opinion of the plaintiffs was the contract and the duty to be implied in law from the facts stated, as follows:

Upon the delivery of the said goods to the defendants as aforesaid, *the same being duly consigned and addressed to the plaintiffs at the said village of Merlin*, it became and was the duty of the defendants to safely and securely carry the said goods at reasonable speed to the said village of Merlin and there deliver the same to the plaintiffs within a reasonable time, *and the said defendants received the said goods and undertook to carry and deliver the same as aforesaid for reward to the defendants.*

The cause of action against the defendants in their character of carriers concludes with an averment that the defendants have wholly neglected and refused and still neglect and refuse to deliver the said goods to the plaintiffs.

The plaintiffs then in the 10th and 11th paragraphs of their statement of claim insert allegations which constitute no part of the province of a statement of claim, that is to say, allegations by way of anticipation of a defence which might or might not be set up, in order to state what, if set up, the plaintiffs would have to say in answer to it, after the manner of the old inconvenient system of pleading in chancery by charges and counter-charges; such matter constitutes matter of replication only and should never be inserted in a statement of claim, as having a tendency to entrap the defendant into believing it was intended as a statement of facts to be answered, which it is not; it might also embarrass the plaintiff himself, if because of his having inserted in his statement of claim his answer to the defence suggested by anticipation he should neglect to reply it to the defence if set up. The insertion of such matter in a statement of claim is emphatically condemned by the Court of Appeal in Chancery in England in *Hall* v. *Eve* (1), and in *Dawkins* v. *Lord Penrhyn* (2).

(1) 4 Ch. D. 345, 347.

(2) 6 Ch. D. 324.

1896

THE LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY v. SALES.

Gwynne J.

No objection however having been taken by the defendants to this mode of pleading, and they having answered the statement of claim as it is in all its material parts, I only mention the matter lest it should be supposed that if passed over without notice this species of allegation in a statement of claim is approved of by the court. We must deal with the issues as raised upon the record so as to avoid as best we can either party being now prejudiced by the improper insertion of this matter in the statement of claim.

The plaintiffs then in the 12th and 13th paragraphs of their statement of claim allege a contract of bailment made and entered into between the plaintiffs and defendants upon which, as is alleged, the defendants received and held the goods for storage for the plaintiffs and for delivery thereof to the plaintiffs when requested, for reward to the defendants, and by way of breach of that contract the plaintiffs allege that the defendants so neglected to keep the said goods securely that they suffered them to be lost and destroyed through negligence and the lack of proper care of the defendants and their servants. The plaintiffs have also inserted a paragraph containing a claim for the conversion of the said goods by the defendants to their own use.

To this statement of claim the defendants plead as follows:

1st. They deny the allegations in the statement of claim and put the defendants to proof thereof.

2nd. They say that they did not contract as alleged in the plaintiffs' statement of claim either with the plaintiffs or their assignors (the consignors of the said goods) for the carriage or safety of the goods in question while in transit or otherwise.

3rd. They say that they carried the goods in question, the said goods were transported safely to their desti-

nation and the plaintiffs were duly notified of their arrival, or were aware of the same, and neglected to remove the said goods, *but left them in the defendants' hands at the plaintiffs' own risk.*

4th. They say that if the said goods were destroyed as alleged in the plaintiffs' statement of claim such destruction arose without any negligence on the part of the defendants.

Upon this statement of defence the plaintiffs joined issue.

The issues so joined came down for trial before a judge without a jury, and the whole burden of proving every material fact alleged in their statement of claim was by the form of the first paragraph of the defendants' statement of defence cast upon the plaintiffs. At the trial the plaintiff Sales, having been called as a witness on behalf of the plaintiffs, produced a paper which shewed the names of the several persons and firms from whom the plaintiffs purchased the respective goods, and the dates of such purchases and the value of the said several parcels of goods respectively, amounting on the whole to $2,880.80; this paper was marked at the trial as ex. 4. He also produced instruments under the seals of the said respective persons, consignors of the said goods, whereby they respectively assigned and transferred to the plaintiffs all their respective rights, claims and demands against the defendants in any way arising out of the shipment of the said goods, or for the failure to deliver the same or for the loss of the said goods or any of them, but the plaintiffs did not produce any of the bills of lading or receipts issued and delivered to the consignors by the railway companies other than the defendants, through whose railways respectively the goods were shipped to the plaintiffs. The witness then proceeded to shew that the plaintiffs had received

1896

THE LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY v. SALES.

Gwynne J.

from the defendants notice of the arrival at the station at Merlin of almost if not of all of the said goods.

Evidence was then largely entered into, given by the witness Sales and several other witnesses, for the purpose of establishing that the goods were wholly destroyed while in the possession of the defendants after their arrival at Merlin by a fire caused, as the plaintiffs contended, by the negligence of the defendants. No evidence was offered of any express contract entered into between the plaintiffs and the defendants as to the warehousing of the goods after their arrival at Merlin. The goods were not shewn to have been in the possession of the defendants after their arrival at their station at Merlin other than as having been carried by them on their railway to Merlin; they remained in their possession subject to their lien for the cost of carriage, although no longer liable as carriers but as warehousemen. At the close of the plaintiffs' case counsel for the defendants having insisted that there was no evidence competent to charge the defendants *as common carriers*, and that there was no evidence of any privity of contract between the plaintiffs and the defendants, the learned judge expressed the opinion that there would be such a contract if the defendants received the goods to carry them to their destination from the companies who originally had received them, they acting as agents of the plaintiffs, and he asked if the bills of lading or receipts issued by those companies shewed that the goods were received to be forwarded from the terminus of the railway of such companies, whereupon, those bills of lading not having been produced by the plaintiffs, it was agreed that the defendants should put in a form of each of the bills of lading issued by the several companies to whom the goods had been delivered by the respective consignors.

The defendants thereupon entered into evidence by way of answer to the plaintiffs' evidence as to the negligence charged by them to have been the cause of the fire by which the goods had been destroyed; upon the close of their evidence the hearing of the cause was postponed to a future day, when, the said forms of railway bills of lading having been furnished as agreed, the case was heard by the learned judge, who held that as to the goods delivered by the consignors to the Michigan Central Railway Company and as to a small parcel delivered to the Canadian Pacific Railway Company on the 24th June, 1895, the defendants were not liable for the reason that there was no privity of contract between the plaintiffs and defendants as to these goods, it appearing by the form of the bill of lading issued by the said respective companies for those goods that the said respective companies made a through contract for the conveyance of those goods to their destination at Merlin. With these bills of lading or the goods covered by them we have nothing to do on this appeal. As to the residue of the goods he held first that, all those which were delivered by the Grand Trunk Railway Company to the defendants, the defendants received them *as common carriers without any special contract*, and subject therefore to the common law liability of common carriers, but he further held that as to these goods and as to the residue of the goods, no matter in which capacity the defendants were in possession of them at the time of the fire, namely, whether as carriers or as warehousemen, the defendants were liable, for that he found as a matter of fact that the fire was occasioned by their negligence. In order to prevent a reference to the master to ascertain the value of the goods destroyed by the fire in accordance with this finding of the learned judge the parties agreed that in the event of the defendants being ulti-

1896

THE LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY v. SALES.

Gwynne J.

mately held to be liable, the values as stated in the exhibit four at the trial should be accepted as correct. The total value of the goods so agreed upon is $2,280.80, for which judgment was rendered against the defendants, and an amended exhibit four, showing only the goods covered by such judgment and their value, and the railway company to which each parcel of such goods was delivered and the *date of the form* of the bills of lading issued by the said respective companies for the carriage of such goods, was agreed upon by the parties as being correct and is in the case presented to us on this appeal. Upon appeal to the Court of Appeal at Toronto that court affirmed the judgment of the learned trial judge, and held that the cause of action stated in the statement of claim was one charging the defendants as common carriers, with an alternative statement charging that if they had become warehousemen of the goods they were liable as such for the loss of the goods by negligence of the defendants, their servants and agents, and that the defendants, not having pleaded any exemption from liability for negligence, if such a defence had been open to them, could not be heard to say that they were exempt from liability for the negligence which they considered to have been fully established by the evidence.

If the statement of claim does state a cause of action against the defendants upon their common law liability apart from any contract, and if the evidence shews the goods to have been received by them to be carried subject to such liability, and that the goods were destroyed by fire while in the possession of the defendants after they carried the goods to their destination and their common law liability *as common carriers* had been determined, then no doubt the only question would have been whether or not the evidence relied upon as the cause of the fire was sufficient to charge

1896

THE LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY v. SALES.

Gwynne J.

the defendants with the loss in the character of warehousemen, but the contention of the defendants is that no cause of action against the defendants upon their common law liability as common carriers is stated in the statement of claim, but on the contrary that the only cause of action stated therein is one founded on contract and that on an absolute contract, and that no such, nor any contract between the defendants and the plaintiffs, is proved. The statement of claim does not allege that the goods were delivered to and received by the defendants to be carried by them subject to their common law liability *as* common carriers and yet an allegation that they had been so delivered and received seems to be *the material fact* necessary to be alleged in order to fix the defendants with such liability. The statement of claim however omits, and as it would seem designedly omits, this material allegation; and such material fact not having been alleged we can not, I think, say that upon the face of the statement of claim the cause of action stated is one against the defendants upon their common law liability *as* common carriers. While there is no such allegation in the statement of claim there is the allegation that upon delivery of the said respective goods to the defendants, they "undertook to carry and deliver the same as aforesaid for reward to the defendants," words which are certainly open to the construction that the defendants contracted with the plaintiffs to carry and deliver the goods to them for reward to be paid by them to the defendants, and so a sufficient averment of a delivery of the goods to the defendants and the receipt thereof by them upon an express contract for their carriage to their destination; and as this statement of claim cannot be construed as containing two distinct causes of action in respect of the carriage and non-delivery of the goods, but only one cause of

1896

THE LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY v. SALES.

Gwynne J.

action, whatever that may be, it does seem to be more susceptible of the construction that the cause of action alleged is one arising out of an express contract, and not one founded upon receipt of goods by the defendants *as* common carriers and upon their common law liability as such. But the plaintiffs having alleged that the defendants duly received the goods by delivery to them from other railway companies, who had received them under contracts alleged to be in the plaintiffs' possession, it is obvious that until those contracts should be produced it would be quite impossible for a court to say that the defendants had incurred any liability whatever to the plaintiffs. This was the view which was entertained by the learned trial judge also, as appears by his having made the inquiry as to their contents above stated when it was agreed that forms of the bills of lading upon the terms of which the several goods were received by the railway companies to whom they were delivered by the consignors should be supplied instead of the originals in the plaintiffs' possession but not produced by them. It was upon perusal of these forms that the learned trial judge held that as to the goods delivered to the Michigan Central Railway Company and the small parcel delivered to the Canadian Pacific Railway Co. on the 24th January, 1895, the defendants had incurred no liability whatever to the plaintiffs' while upon his construction of the bills of lading issued by the Grand Trunk Railway Co. he was of opinion that the receipt of those goods by the defendants from the Grand Trunk Railway Co. was a receipt by them for the carriage of the goods by the defendants *as* common carriers apart from any contract.

Now the goods received by the defendants from the Grand Trunk Railway Co., as appears by the plaintiffs' amended exhibit four, amount in value to $1,866.83, or four-fifths of the amount for which judgment has been

rendered against the defendants; all of the goods to the above value were received by the company upon contracts in the terms contained in the bills of lading issued therefor respectively, whereby the Grand Trunk Railway Co. acknowledged the receipt by them of the several goods addressed to the plaintiffs at Merlin aforesaid and *to be sent* by the said company *subject to the terms and conditions* on the said bills of lading respectively mentioned, all of which are agreed to by the shipping note delivered to the company at the time of giving this receipt therefor as a special contract in respect of such property.

Upon these bills of lading were indorsed conditions *subject to which* the contracts contained in the bills of lading were made, among which were conditions to the effect following:—1. That the company should not be liable for damages occasioned by, among other things, wet, fire, heat, frost, &c. 2. That goods consigned, whether on a through rate or otherwise, to a place beyond the line of the Grand Trunk Railway Co., should, if a connecting carrier be named (which is the present case) be handed over to the carrier so named and that in such case the Grand Trunk Railway Co., in handing over the goods should be held to be agents of the owners, and should not be liable for any future loss or damage whatever. 3. That goods unloaded by owners should not be stored on the railway premises without the station agent's permission, and whether unloaded by owner or carrier, the goods stored on the railway premises should be subject to storage charges *and should be at the sole risk of the owners as to any damage to them by fire however caused* and to every loss or damage whatsoever, and should be removed from the railway premises forthwith upon notice.

And finally it was expressly provided that "all the provisions of this contract shall apply to and for the

1896

THE LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY v. SALES.

Gwynne J.

benefit of every carrier" to whom goods might be delivered under it as fully as to the company.

This form of contract appears to have been prepared for the express purpose of providing for the transport of goods received under bills of lading in this form to their final destination, over, it may be, many connecting lines, upon the terms contained in the bills of lading issued by the company first receiving the goods, while relieving that company and each carrier in succession from liability for loss or damage not occurring while the goods should be in their own possession, thus obviating the consequences of the judgments in *The Bristol and Exeter Railway Co.* v. *Collins* (1); *Coxon* v. *Great Western Railway Co.* (2); and cases of that class. The true construction of the contracts appears to me to be that thereby the consignors, whether on their own behalf or as agents of the plaintiffs matters not, undertook and agreed that delivery of the goods by the Grand Trunk Railway Co., (they acting as the plaintiffs' agents) to the defendants, while relieving the former from all liability for future loss or damage, should be taken and held to be a delivery of the goods to the defendants to be carried by them upon the special terms contained in the bills of lading issued by the Grand Trunk Railway Co. The contracts were in substance severally one for the transport of the goods to their final destination, for part of the distance by the Grand Trunk Railway Co. and for part by the defendants, but in both cases subject to the terms and conditions mentioned in the bills of lading issued by the Grand Trunk Railway Co. The goods therefore amounting in value to $1,866.83, which were received by the Grand Trunk Railway Co. under bills of lading in the form which has been produced

(1) 7 H. L. Cas. 194; 5 Jur. N. S. (2) 5 H. & N. 274.

1367.

as introduced into use by them in 1892, must be held to have been received by the defendants not *as* common carriers apart from any contract, but under a special contract. If then the statement of claim can be construed as the statement of a cause of action arising *ex delicto* apart from any contract the plaintiffs must fail as to those goods, for the evidence shows that the defendants received them for carriage under the terms and provisions of a special contract; if the statement of claim is to be construed as a statement of cause of action founded upon contract, the contract so alleged being an absolute contract unqualified by any conditions, then as to the above goods the plaintiffs still must fail for the contract proved is a special contract creating only a limited liability, in which case there was no occasion for the defendants to plead specially the terms which showed the contract to be of a limited character and not the absolute unconditional one stated in the statement of claim. The authorities upon this point are numerous. *Latham* v. *Rutley* (1); *White* v. *Great Western Railway Co.* (2); *York, Newcastle & Berwick Railway Co.* v. *Crisp* (3); *Walker* v. *York & North Midland Railway Co.* (4); *Austin* v. *Manchester, Sheffield, &c. Railway Co.* (5); *Shepherd* v. *Bristol and Exeter Railway Co.* (6).

In this country, where railway companies receive goods for the purpose of being conveyed to places very remote and over many independent but connecting lines, contracts in this form seem to be necessary and to be framed as well in the interest of the owners as of the carriers. The owners thereby secure a continuous and speedy conveyance of their goods to their final destination, while they can have no

(1) 2 B. & C. 20.
(2) 2 C. B. N. S 7.
(3) 14 C. B. 527.
(4) 2 E. & B. 750.
(5) 16 Q. B. 600.
(6) L. R. 3 Ex. 189.

1896

THE LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY v. SALES.

Gwynne J.

difficulty in determining which carrier of several is the one to be charged with a loss or damage occurring during the transit of the goods, for as the first receiving carrier is made liable until he can prove his delivery of the goods to the next, so each carrier in succession upon delivery of the goods to the next will take the receipt of the latter for his own security and discharge from liability under the contract

As to the goods covered by the bills of lading issued by the Canadian Pacific Railway Co., in the form in use in the year 1882, amounting in value to $190.85, and as to the amount covered by their bills of lading introduced into use in 1894 amounting in value to $38.74, and as to the goods covered by the bills of lading issued by the Erie and Huron Railway Co., amounting in value to $169.98, and the small parcel covered by the bill of lading in the Grand Trunk Railway Co's. form of 1889 amounting in value to $4.31, these call for different considerations. There is no substantial difference in the terms of these several bills of lading as to the question under consideration. The above respective companies received the goods covered by these several bills of lading, to be sent to the address of the plaintiffs at Merlin, a point upon the railway of the defendants', *subject to* the terms and conditions stated in the said respective bills of lading "and agreed to by the shipping note delivered to the company at the time of giving this receipt therefor," and there is no such special agreement as that contained in the before considered bill of lading of the Grand Trunk Railway Co., namely, that "all the provisions of this contract shall apply to and for the benefit of every carrier to whom goods shall be delivered under it as well as to the company." Among the conditions however to which the contract contained in the said bills of lading are made subject are the following:

5th. In all cases where herein not otherwise provided the delivery of the goods shall be considered complete and the responsibilities of the company shall terminate when the goods are placed in the company's sheds or warehouse if there be convenience for receiving the same at their final destination, or when the goods have arrived at *the place to be reached by the said company's railway*. The warehousing of all goods will be at the owner's risk and expense, and if the company are unable to store or warehouse goods received by them they shall have the right to place such goods in any warehouse that may be available at the risk and expense of the owner of the property so stored, and all charges for storing, warehousing and conveyance shall form an additional lien on said goods.

10th. That all goods addressed to consignees at points beyond the places *at which the company have stations*, and respecting which no direction to the contrary shall have been received *at those stations*, will be forwarded to their destination by public carrier or otherwise as opportunity may offer without any claim for delay against the company for want of opportunity to forward them, or they may at the discretion of the company be suffered to remain on the company's premises or be placed in shed or warehouse (if there be such conveniences for receiving the same) pending communication with the consignees, at the risk of the owners as to damage thereto from any cause whatsoever. But the delivery of the goods by the company will be complete and all responsibility of the said company shall cease when such carriers shall have received notice that the said company is prepared to deliver to them the said goods for further conveyance ; *and it is expressly declared and agreed* that the Canadian Pacific Railway Company shall not be responsible for any loss, mis-delivery, damage or detention that may happen to goods sent by them, if such loss, mis-delivery, damage or detention occur after the said goods arrive at said stations or places on their line nearest the points or places which they are consigned to or beyond their said limits.

13th. Storage will be charged on all freight remaining in the company's sheds or warehouses over twenty-four hours after its arrival.

A comparison of these conditions with the conditions in *Collins* v. *Bristol and Exeter Railway Co.*, to be found set out at large in 3 Jur. N. S. 141 and in Lord Chancellor Chelmsford's judgment in that case in the House of Lords (1), will shew that, whatever may have been the intention of the framer of these bills of lading, there is no great difference between them, so

(1) 5 Jur. N. S. 1374.

1896

THE LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY v. SALES.

Gwynne J.

little indeed as to make it a question of great nicety to determine whether the present case, if the loss had occurred while the goods were *in transitu*, should or should not be governed by *Bristol and Exeter Railway Co.* v. *Collins* (1). The question appears to me to be so nice that I do not propose to determine it in the present case inasmuch as it appears to me to be clear that all of the goods covered by these bills of lading now under consideration had arrived at their final destination on the defendants' railway, and at the time of their loss were in the possession of the defendants under the liability of warehousemen, their liability *quâ* carriers being determined. The question as to these goods therefore can be determined upon the contract of bailment for storage declared upon in the statement of claim, and as there are no conditions in the bills of lading covering these goods similar to those in the Grand Trunk Railway Co.'s bills of lading in the form of 1892 already dealt with, providing that all the conditions in the bills of lading should apply to and for the benefit of all subsequent carriers of the goods equally as to the first receiving carrier, we must, I think, hold that after the arrival of the goods now under consideration at the defendants' station at Merlin the defendants held them thenceforth in their possession subject to a liability for all loss or damage occasioned by their negligence, just as they would have in the case of goods carried by them to their destination upon a bailment for carriage *as* common carriers; and it having been found by two courts and the judgment of five judges that the goods while in such possession were destroyed by a fire occasioned by the negligence of the defendants, with which finding I do not think we should interfere, our judgment must be against the defendants for the sum of $403.88, the value of those goods.

(1) 7 H. L. Cas. 194.

As to the small parcel of goods of the value of $10 covered by the bill of lading issued by the defendants themselves at London we must, I think, hold the defendants not to be liable upon the ground that the contract contained in that bill of lading expressly provided that the owners should incur all risk of loss of goods in the charge of the defendants as warehousemen after the arrival of the goods at their destination. It is very natural that railway carriers, whose proper business is not that of warehousemen and who only undertake that business as it were of necessity and for the convenience of the plaintiffs, although for reward, should limit their liability as to goods so left in their possession by a condition of this nature.

The result will be that the appeal must be allowed in part and that the judgment be ordered to be entered for the defendants in the court below as to the goods of the value of $1,866.83 covered by the bills of lading of the Grand Trunk Railway Co. in their said form of 1892, and as to the parcel covered by the bill of lading issued by the defendants themselves, and upon the issues joined in respect of the cause of action stated in the first nine paragraphs of the statement of claim as to carriage of the goods, but for the plaintiffs for the sum of $403.88 in respect of the residue of the goods upon the contract of bailment for storage in the statement of claim pleaded. The appeal is allowed with costs in this court and in the Court of Appeal in Ontario.

Appeal allowed with costs.

Solicitors for the appellants: *Patterson, Leggatt, Murphy & Sale.*

Solicitors for the respondents: *Thomson, Henderson & Bell.*