THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS)..... } APPELLANTS;

AND

FRANKEL BROTHERS (PLAINTIFFS)..RESPONDENTS.

1902
*Nov. 18.
1903
*Feb. 17.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railways—Carriage of goods—Special instructions—Acceptance by consignee—Warehousemen—Negligence—Amendment.

F. Bros., dealers in scrap iron at Toronto, for some time prior to and after 1897 had sold iron to a Rolling Mills Co. at Sunnyside in Toronto West. The G. T. R. had no station at Sunnyside the nearest being at Swansea, a mile further west, but the Rolling Mills Co. had a siding capable of holding three or four cars. In 1897 F. Bros. instructed the G. T. R. Co. to deliver all cars addressed to their order at Swansea or Sunnyside to the Rolling Mills Co., and in Oct., 1899, they had a contract to sell certain quantities of different kinds of iron to the company and shipped to them at various times up to Jan. 2nd, 1900, five cars, one addressed to the Company and the others to themselves at Sunnyside. On Jan. 10th the company notified F. Bros. that previous shipments had contained iron not suitable for their business and not of the kind contracted for and refused to accept more until a new arrangement was made, and about the middle of January they refused to accept part of the five cars and the remainder before the end of January. On Feb. 4th the cars were placed on a siding to be out of the way and were there frozen in. On Feb. 9th F. Bros. were notified that the cars were there subject to their orders and two days later F., one of the firm, went to Swansea and met the company's manager. They could not get at the cars where they were and F. arranged with the station agent to have them placed on the company's siding and he would have what the company would accept taken to the mills in teams. The cars could not be moved until the end of April when the price of the iron had fallen and F. Bros. would not accept them, but after considerable correspondence and negotiation they took

*PRESENT :—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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them away in the following October and brought an action against the G. T. R. Co. founded on the failure to deliver the cars. It appeared that in previous shipments the cars were usually forwarded to the rolling mills on receipt of an order therefor from the company but sometimes they were sent without instructions, and on Feb. 3rd the station agent had written to F. Bros. that the cars were at Swansea and would be sent down to the rolling mills.

Held, affirming the judgment of the Court of Appeal, that the Rolling Mills Co. were consignees of all the cars and that they had the right to reject them at Swansea if not according to contract. Having exercised such right the railway company were not liable as carriers, the transitus having come to an end at Swansea by refusal of the company to receive them.

The Court of Appeal, while relieving the railway company from liability as carriers, held them liable as warehousemen and ordered a reference to ascertain the damages on that head.

Held, reversing such decision, Mills J. dissenting, that the action was not brought against the railway company as warehousemen, and as they could only be liable as such for gross negligence and the question of negligence had never been raised nor tried the action must be dismissed *in toto*, with reservation of the right of F. Bros. to bring a further action should they see fit.

APPEAL from a decision of the Court of Appeal for Ontario setting aside the judgment at the trial which awarded the plaintiffs damages and costs against the defendant company as common carriers and ordering a reference to ascertain the damages against them as warehousemen.

The facts of the case as stated by Armour C. J. O. in the Court of Appeal, will be found in the judgment of Mr. Justice Sedgewick published herewith. They are sufficiently set out also in the above head-note.

Nesbitt K.C. for the appellant. The consignees could accept the iron at Swansea; *London & North Western Railway Co.* v. *Bartlett* (1); and therefore they could reject it there.

On the refusal to accept, the transitus was at an end; *Hudson* v. *Baxendale* (2); and the defendants

(1) 7 H. & N. 400. (2) 2 H. & N. 575.

then became involuntary bailees and not liable except for negligence; *Heugh* v. *London & North Western Railway Co.* (1); or rather for gross negligence; *Giblin* v. *McMullen* (2).

Shepley K.C. and *Baird* for the respondents. The defendant company were agents of the plaintiffs to carry the iron to Sunnyside and could not be relieved of their obligation as carriers without the plaintiffs' consent. See Hutchison on Carriers, 2 ed., sec. 395.

As to the delay being caused by the act of God see Hutchison on Carriers, 2 ed., sec. 174.

TASCHEREAU J.—I am of opinion that the appeal should be allowed.

SEDGEWICK J.—The plaintiffs' (respondents') claim is based upon the alleged failure of the defendants (appellants), to carry five car loads of scrap iron to, and deliver it at Sunnyside, where the mills of the McDonell Rolling Mills Company are situate.

The trial judge, Lount J., held that there had been a breach of the contract alleged and awarded damages, and he dismissed a counterclaim of the defendants for demurrage or car rental claimed by the defendants because of the delay of the plaintiffs in unloading the scrap iron.

The defendants appealed to the Court of Appeal for Ontario, contending that they had performed their contract and that, even if they had not, the damages were assessed upon a wrong basis and that the counterclaim ought to have been allowed.

In the Court of Appeal Maclennan J. A. was of opinion that the appellants had performed their contract and that the action ought to be dismissed. Armour C.J.O. was of the same opinion as regards the

(1) L. R. 5 Ex. 51. (2) L. R. 2 P. C. 317.

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case made on the pleadings, but he thought the evidence justified a judgment in favour of the plaintiffs, (respondents), upon an entirely different claim which he thought ought to be substituted for that set out in the statement of claim. Moss J. A. agreed with Armour C.J.O. and Maclennan J.A. as to the original cause of action, but he also thought that the plaintiffs should succeed on a claim which they had never set up and which he does not state in exactly the same way as Armour C.J.O.

The plaintiffs have never amended, nor asked leave to amend, their pleadings so as to make either the claim suggested by Armour C.J.O. or that suggested by Moss J.A. Osler J.A. agreed with the trial judge that there was a breach of the contract of carriage but he did not agree with his method of assessing damages; on the contrary he joined with Armour C J.O. and Moss J.A. in ordering a reference to ascertain the damages. Lister J.A. who was present when the case was argued in the Court of Appeal, died before judgment was pronounced.

The defendants' appeal from the judgment dismissing the counterclaim was dismissed by the Court of Appeal, no reason being given, and they now appeal to this court.

The facts are stated by Armour C.J.O. as follows:

> The defendants had a station on their line west of Toronto called Swansea, and between Swansea and Toronto, and about a mile east of Swansea, was Sunnyside, where the rolling mills of the McDonell Rolling Mills Company were, but where the defendants had no station, but there was a switch about three hundred feet long running from the main track to the defendants' railway into the rollings mills, and freight for the rolling mills was handled by the station agent of the defendants at Swansea and could be sent to the rolling mills by this switch.
>
> The plaintiffs carried on business in Toronto and were dealers in scrap iron and had been for a considerable time sellers of scrap iron to

the Rolling Mills Company, which they had purchased in different places.

In April 10th, 1897, the plaintiffs wrote to the station agent of the defendants at Swansea: "We authorise you to deliver all cars which may arrive at Swansea addressed to us to McDonell Rolling Mills Co. and oblige." And on December 1st, 1897: "Kindly deliver all cars addressed to our order Swansea or Sunnyside to McDonell Rolling Mills Co., and oblige." And again, on May 11th, 1899, "We have your advice regarding car No. 35,810 ex Belleville. Kindly forward same as usual to McDonell Rolling Mills Co. You are holding a general order to forward such cars to McDonell Rolling Mills Co., and this order is good until cancelled by us."

In October, 1899, a contract was made for the sale of scrap iron by the plaintiffs to the Rolling Mill Company, evidenced by the following document: "October 28th, 1899. McDonell Rolling Mills Co., Sunnyside, Ont.,—Dear Sirs,—We herewith beg to inform you that our tender on scrap iron was accepted and we herewith confirm having sold to you about 400 tons of scrap, consisting of the following: About 100 to 150 tons of ship iron; about 50 to 100 tons of boiler plate which may be soft steel, and about 200 tons of No. 1 collection and piling scrap. Price $23.50 per net ton F.O.B. your works. Terms as usual. Kindly confirm this. Yours truly, Frankel Bros."

In fulfilment of this contract the plaintiffs caused to be shipped the five cars in question in this suit, which were numbered, sent to, and arrived at Swansea as follows:

FREIGHT NOT PAID.

Car No.	Sent.	Arrived.
19496	Nov. 30, 1899.	Dec. 11, 1899.
28610	Dec. 23, 1899.	Jan. 1, 1900.

FREIGHT PAID.

29090	Dec. 27, 1899.	Jan. 15, 1900.
62780	Jan. 4, 1900.	Jan. 15, 1900.
60071	Jan. 2, 1900.	Jan. 17, 1900.

Car No. 62,780 was shipped from Toronto, and by the shipping receipt was addressed "McDonell Rolling Mills, Sunnyside;" all the other cars were addressed "Frankel Bros., Sunnyside, Toronto," except one which was addressed "Frankel Bros., Sunnyside Mills, Toronto."

Notice of the arrival of each of these cars was sent to the plaintiffs and to the Rolling Mills Company.

After two of these cars, numbered 19496 and 28610 had arrived and on the 10th January, 1900, the Rolling Mill Company wrote to the

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plaintiffs as follows: "We beg to notify you that we will not accept delivery of any more scrap iron in cars until further arrangements are made; our agreement with you was for a special lot of about 400 tons composed of strictly No. 1 wrot and a quantity of soft steel boiler plate at the high price of $23.50 per net ton at our works, but the scrap you have been delivering to us in cars is composed of all kinds of mixtures invoiced to us as No. 1 wrot iron; therefore we cannot accept delivery of mixed cars until arrangements are made as to price to be paid for different kinds. The Grand Trunk agent at Swansea informed Mr. McDonell this morning that there were nine cars there loaded with scrap iron under demurrage and subject to your orders and his orders are not to deliver any of those cars until demurrage is paid. We find, on examining the cars at Swansea, they are all loaded with mixed material, which is not included in our agreement with you. Hoping to hear from you in the matter, we remain."

Immediately after the receipt of this letter, according to McDonell, and about the 20th of January, according to Lee Frankel, the latter and McDonell went to see the officials of the defendants respecting the demurrage therein referred to, and the latter represented that, as the cars had not gone to their destination, the rolling mills, demurrage should not be charged, and the claim for demurrage was abandoned.

The station agent swore that McDonell, the manager of the Rolling Mills Company, refused to receive either two or three of the five cars about the middle of January, and that he refused to receive the residue of them before the end of January, and it is plain, from the evidence of McDonell, that before the end of January he had refused to receive the whole of the five cars, and he said that, so far as the agent was concerned, it would have been idle to send them to Sunnyside, and that he would not have taken them if they had been sent without he had made arrangements with the plaintiffs, or without further instructions to the agent, and he never gave such instructions and never countermanded such refusal.

When cars containing scrap iron sent by the plaintiffs to the Rolling Mills Company arrived at Swansea, the station agent generally awaited McDonell's instructions before sending them down to the rolling mills, but sometimes they were sent without his instructions, but, if they contained material not according to contract or not suitable for the purposes of the rolling mills he would refuse to receive at Swansea, if there, or at the rolling mills, if sent down there without his orders, and would notify the plaintiffs of his refusal, and they would sometimes arrange with him to receive the cars and take from them what material suited them and to send the balance back on the cars.

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And with respect to such dealing the station agent of the 3rd of February, 1900, wrote to the plaintiffs the following letter: "Mr. H. E. Whittenberger, our train master, London, was here last week, and informed me that cars that are only partly unloaded at McDonell's and sent back here to finish unloading must be charged haulage for same. I presume the usual charge of $2.50. He told me I should have done so in every case."

In answer to a telephone message from the plaintiffs the station agent at Swansea on the 3rd of February, 1900, sent to them a list of the cars sent by them and then at Swansea, eight in all, including the five in question, with the weights, accompanied by the following letter indorsed thereon: "These cars are all here at Swansea and will be sent down to McDonell's siding in order marked on weighing."

The station agent explained in his evidence that when he said the cars would be sent down to McDonell's siding he said so in anticipation that some arrangement would be come to between the plaintiffs and McDonell by which McDonell would agree to receive them.

On the 4th of February, 1900, the station agent, the cars of which he sent the plaintiffs a list being in the way of the traffic of the defendants' railway, had them run up the belt line to be out of the way of such traffic, and while on the belt line, in a cutting, a thaw set in, and clay from the embankment ran down and covered their wheels up to the axles and then frost setting in froze them fast.

The station agent swore that when McDonell refused to receive the two or three of the five cars about the middle of January, he telephoned the plaintiffs to that effect, and that when McDonell refused to receive the residue of them before the end of January, he again telephoned the plaintiffs to that effect, but it was denied that the plaintiffs ever received such telephones and McDonell said that he did not notify the plaintiffs of his refusal until the 9th of February, when he wrote the following letter to the plaintiffs: "We are in receipt of your invoices for three cars of wrought scrap iron, but we find on examining the cars which are now at Swansea they contain uncut burnt steel boiler plate and steel rails, material we do not use; therefore we must refuse delivery of them, and they remain there subject to your order. The numbers are 19496, 60071 flat cars and 28610 box car; the box car contains the steel rails."

On the 12th or 13th of February, one of the plaintiffs and McDonell went to Swansea, and McDonell's account of what took place did not differ substantially from that of the plaintiff who went with him. He said: "Mr. Frankel and I went and looked at the cars, tried to see them, but we could not get very well into where they were on account of the banks sliding, and we came back to the station and Mr.

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Frankel made arrangements with Mr. Girard (the station agent) to have the cars placed on the siding brought out of the belt line and placed on the Swansea siding. Of course I refused to accept the cars; and Mr. Frankel came to the conclusion that he would team the contents of them down—at least what we would take of the contents—down to our mill; and Mr. Girard and himself and I went over across the tracks and Mr. Frankel pointed out the place where he thought it would be suitable too unload them and Mr. Girard said he would have them placed there.

The cars were not, however, got out until the end of April, 1900, when the plaintiffs were notified that they were got out. A good deal of correspondence and negotiation took place between the parties and it was not until the 22nd of October that the plaintiffs took away the scrap iron and on the 3rd of November, 1900, they brought this action.

There can be no doubt that as to that one of the five cars of scrap iron in question in this suit addressed to McDonell Rolling Mill, Sunnyside, the McDonell Rolling Mills Company were the consignees of the scrap iron contained in it. And I think that, notwithstanding the fact that the other four cars of scrap iron were addressed to Frankel Bros., Sunnyside, the effect of the instructions given to the station agent of the defendants at Swansea from time to time by the plaintiffs by their letters dated respectively the 10th April, 1897, the 1st December, 1897, and the 11th of May, 1899, coupled with the fact that the McDonell Rolling Mills Company were the purchasers of the scrap iron contained in them, was to constitute the McDonell Rolling Milling Company the consignees of such iron as fully to all intents and purposes as if the bills of lading had been indorsed by the plaintiffs to them.

The learned Chief Justice then proceeds to discuss the legal questions involved. He says

it was contended that as to these cars the McDonell Rolling Mills Company were merely the agents of the plaintiffs, but this they were in no sense, but the purchasers of the scrap iron contained in them with the right of inspection and rejection of it.

Being such consignees of the scrap iron, the McDonell Rolling Mills Company had the right to put an end to its transitus by receiving it at Swansea. *L. & N. W. Railway Co.* v. *Bartlett* (1); *Foster* v. *Frampton* (2); *Scothorn* v. *South Staffordshire Railway Co.* (3); *Cork Distilleries Co.* v. *G. S. & W. Railway Co.* (4); *Southern Express Co.* v. *Dickson* (5).

(1) 7 H. & N. 400.
(2) 6 B. & C. 107.
(3) 8 Ex. 341.
(4) L. R. 7 H. L. 269.
(5) 94 U. S. R. 549.

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It follows, I think, that being such consignees, they had the right to put an end to its transitus at Swansea by refusing to receive it.

In an action by the plaintiffs against the McDonell Rolling Mills Company for not accepting the scrap iron, the plaintiffs could not have been prejudiced by the defendants, after the refusal of the McDonell Rolling Mills Company, at Swansea, to receive it, not sending it down to the rolling mills, because such a refusal would have been a waiver by the McDonell Rolling Mills Company of their right to have the scrap iron delivered at the rolling mills; *Cort* v. *Ambergate &c. Railway Co* (1).

The refusal by the McDonell Rolling Mills Company to accept the scrap iron was an absolute one, and it is plain from the course of dealing between the plaintiffs and them and from what took place when one of the plaintiffs and McDonell went to Swansea on the 12th or 13th of February, that the plaintiffs acquiesced in the right of the McDonell Rolling Mills Company to refuse the scrap iron at Swansea.

This conclusion disposes of the case so far as the cause of action set forth in the statement of claim is concerned.

With all this I most entirely agree. The authorities cited shew conclusively that the transitus had come to an end, that the scrap iron was thereafter held by the defendants not as carriers, (and therefore insurers,) but as involuntary bailees or warehousemen, (and therefore only liable for gross negligence). That opinion was, therefore, against the judgment of the trial judge, and the result of it, in ordinary cases, would have been the dismissal of the action. But here the majority of the judges below, in examining the evidence, considered that there was sufficient material upon which still to base a judgment for the plaintiffs, the learned Chief Justice stating that

the defendants became involuntary bailees of the scrap iron and were bound to take reasonable care of it, and were under an implied contract to deliver it to the plaintiffs when they came for it, placing the cars containing it in such a position that the plaintiffs could receive, unload and remove it * * * *

This, in my view is too broad a statement of the law. There is the obligation of reasonable care, as

(1) 17 Q. B. 127.

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well as the obligation to deliver, but all this is subject to the qualification that there has been no negligence. If, without their fault, the defendants were unable to make delivery—if, for example, the goods were accidentally destroyed or were stolen, or were overwhelmed by a landslide or avalanche—there would be no liability. This must be so, even in the case of common carriers. Though generally bound to deliver they are bound to deliver only within a time that is reasonable looking at all the circumstances of the case and they are not responsible for the consequences of delay arising from causes beyond their control. *Taylor* v. *Great Northern Railway Co.* (1)

A common carrier, if the road is obstructed by snow, is not bound to use extraordinary diligence or means involving additional expense for accelerating the conveyance of cattle or goods, though the delay may be prejudicial to the goods or their owner, and though, by extra exertions, they might have been forwarded, and this would apply to other obstructions caused by the act of God. *Briddon* v. *Great Northern Railway Co.* (2)

All this applies with greater force to the case of a warehouseman, who is only bound to act with reasonable care and caution with respect to the custody of the goods. See *Heugh* v. *London and Northwestern Railway Company* (3) and the old case of *Garside* v. *Trent and Mersey Navigation* (4).

It, therefore, is fundamentally necessary in an action for damages of this nature to prove negligence. If there has been due care on the part of the bailee that is sufficient defence.

Now this question, negligence or no negligence, was not tried. It was not set up in the pleadings. It was not raised—it was in express and emphatic terms

(1) L. R. 1 C. P. 385.
(2) 28 L. J. Ex. 51.
(3) L. R. 5 Ex. 51.
(4) 4 T. R. 581.

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repudiated by the plaintiffs' counsel at the trial. The learned trial judge did not consider or make a finding regarding it. No reference to it appears in the plaintiffs' reasons against appeal, nor is there any evidence that at the argument below the point was taken. Notwithstanding this the court below makes a finding upon this crucial point, amends the pleadings, substitutes a new case—a case repudiated by the plaintiffs—and upon that case fixes liability on the defendants without hearing and without evidence adduced for that purpose. One could have understood the allowing of the amendment had a new trial been ordered so that it might be determined by further testimony whether there was care or want of care. I do not know whether there was or was not. I do not even know what is the particular act or fault complained of. It is true the cars were frozen in—that the plaintiffs could not get their goods as soon as they wanted them—but cars are often snowed up without fault anywhere. It is a question of evidence, and all that is wanting here.

I need not not elaborate further because Maclennan J. in his able dissenting judgment in the court below has dealt most satisfactorily with the case as presented before that court.

The appeal, therefore, should be allowed and the action dismissed, the appellants having their costs in all the courts. But inasmuch as the appellants' liability as warehousemen remains now undetermined, the right is reserved and given to the respondents to take such further action as they may be advised upon the alleged liabilitity of the appellants to them as bailees or warehousemen of the goods in question.

GIROUARD and DAVIES JJ. were also of opinion that the appeal should be allowed for the reasons stated by His Lordship Mr. Justice Sedgewick.

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MILLS J. (dissenting.) In this case the respondents brought an action to recover from the appellants, as carriers for hire, damages for not carrying and delivering to them at Sunnyside in Toronto, a place near the defendants' line of railway, five car loads of scrap iron, which the appellants had received from the respondents, and agreed to carry upon terms set out in five separate contracts, dated on the 30th November, 23rd of December and 27th of December, in the year 1899, and on the 2nd of January and the 4th of January, in the year 1900. Two of these cars were forwarded from Levis, in the Province of Quebec, two from the City of Kingston, in Ontario, and the fifth car from another part of the City of Toronto. In the first four contracts the respondents are the consignees, and the iron is consigned to them as follows:—Frankel Bros., Sunnyside, Toronto. By the fifth contract the consignees are the McDonell Rolling Mills Co., Sunnyside. These cars were all sent by the Grand Trunk Railway Company to Swansea, and when they arrived with the scrap iron at that station the company did not at once shunt the cars upon the side track, or spur, which leads to the rolling mills, and which was put there solely for the purpose of enabling the McDonell Rolling Mills Co. to receive the raw material which they required to enable them to carry on their business, and to send away from their mills the finished product. The railway company sent from Swansea to Sunnyside from time to time, as they were required by the Rolling Mills Company, the cars laden with scrap iron, which Frankel Bros. furnished. This track, which extended from the main line of the Grand Trunk Railway to the rolling mills, was about three hundred feet in length, and it seems that nothing was sent over it to the mills to which the manager of the mills, Mr. McDonell, objected. Mr. McDonell in two

communications to Frankel Bros. pointed out to them the character of the scrap iron upon these five cars, which Frankel Bros. intended to deliver at the rolling mills, and he informed them that the quality of the scrap iron was not such as his contract called for, and on the 9th of January, he wrote to Frankel Bros. a letter in which he said :—

We are in receipt of your invoices for three cars of No. 1 wrot iron scraps, but we find on examining the cars which are now at Swansea that they contain uncut burnt steel boiler plate and steel rails, material we do not use ; therefore, we must refuse delivery of them, and they remain subject to your orders.

And on the following day he wrote :

We beg to notify you that we will not accept delivery of any more scrap iron in cars, until further arrangements are made. Our arrangement with you was for a special lot of about 400 tons, composed of strictly No. 1 wrot, and a quantity of soft steel boiler plate at the high price of $23.50 per net ton at our works, but the scrap you have been delivering to us is composed of all kinds of mixtures, invoiced to us as No. 1 wrot iron ; therefore, we cannot accept of these cars until arrangements are made as to the price to be paid for the different kinds.

I am of opinion that the company were not, under these circumstances, required in fulfilment of their contract to send these cars, without further instructions, from Swansea up to the rolling mills.

A contract had been made by Frankel Bros. with the Rolling Mills Company, for the delivery of four hundred tons of a certain kind of scrap at the price per ton of $23.50 at their works. In October' 1899, Frankel Bros. made a tender for the supply of scrap iron under which they proposed to ship this quantity to the mills of the company, 150 tons of which they said were of ship iron, from 50 to 100 tons of boiler plate, which might be of soft steel, and about 200 tons of No. 1 collection and piling scrap, which was to be delivered at Sunnyside, the terms to be as usual in the

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fulfilment of the contract. The cars upon which the scrap iron was shipped, arrived at Swansea with moderate promptness, 11th of December, 1899, and on 1st, 15th and 17th of January, 1900, two of the cars arrived at Swansea on the 15th of January, and on the 9th and 10th of January McDonell had notified Frankel Bros. that he would not accept until arrangements were made as to the price to be paid for the different kinds of material which they contained. These communications were written before three of the cars had reached Swansea, and it is clear that he did not regard the material as of the kind he had contracted for, but of an inferior quality which he was not willing should be sent up to the rolling mills until the price had been agreed upon. It seems to me preposterous to contend that the company were bound to make delivery of this scrap iron at the McDonell rolling mill, in the face of his objection, until an understanding between the parties had been reached, and I think that the subsequent action of Mr. Frankel with reference to the delivery of the scrap iron, shows that he did not expect the railway company, in the face of McDonell's objections, to send the cars from Swansea to Sunnyside, at all events, not until matters were satisfactorily arranged between Frankel and McDonell, and McDonell gave the usual notice to have the cars forwarded.

The railway officials were dissatisfied with the delay which had taken place, and gave notice that the railway company would claim demurrage, which, I think, was not unreasonable under the circumstances, but, after discussing the matter with Frankel and McDonell, they ceased to press this claim, and both Frankel and McDonell were under the impression that the claim for demurrage was abandoned. Mr. Girard, the station agent, went with Frankel and McDonell on

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the 10th of February, and saw the cars containing the scrap iron upon the belt line siding. And then it was that Frankel pointed out a suitable place for unloading, and Mr. Girard agreed, says Frankel, that the cars should be placed at that point immediately, so that they might be unloaded and their freight assorted, in order that it might be sent up to the rolling mills upon waggons. The cars were not brought out from the belt siding to the place which Mr. Frankel had selected. Indeed, at that time, the siding where the cars were placed was covered to a considerable depth with mud which had become frozen, and the cars could not have been removed from where they were standing without some delay, and a considerable expenditure of money, a larger sum than the railway company were willing to make.

When McDonell refused to receive the cars at his siding the company were not, I think, under a legal necessity of sending them away from Swansea station. The carriage must there have ended unless Frankel and McDonell came to a speedy understanding, which they did not, and it is contended that the railway company were, thereafter, but involuntary bailees. Of this, I do not at all feel that the contention is clear beyond question. No doubt they might have become so, but cars, where there is a freight house, are not usually regarded as such, and as long as the freight remains in them it is usually regarded as freight in transit, even though the cars in which it is have reached their ultimate destination. In the case of *Norway Plains Company* v. *Boston and Main Railroad Co.* (1), Shaw C.J. says, after quoting the decisions of *Rowe* v. *Pickford* (2), and *In re Webb* (3):

This view of the law as applicable to railroad companies, as common carriers of merchandise, affords a plain, precise and practical

(1) 1 Gray, Mass. 263. (2) 8 Taunt. 83.
(3) 8 Taunt. 443.

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rule of duty, of easy application, well adapted to the security of all persons interested. It determines that they are responsible as common carriers until the goods are removed from the cars and placed on the platform ; that if, on account of their arrival in the night, or at any other time, when by the usage and course of business the doors of the merchandise depot or warehouse are closed, or from any other cause, they cannot then be delivered ; or if, for any reason, the consignees are not ready to receive them ; it is the duty of the company to store them and to preserve them safely, under the charge of competent and careful servants ready to be delivered, and actually deliver them when duly called for by the parties authorized and entitled to receive them ; and for the performance of these duties, after the goods are delivered from the cars, the company are liable as warehousemen, or keepers of goods for hire.

It was argued in the present case that the railroad company are responsible as common carriers of goods until they have given notice to the consignees of the arrival of the goods. The Court are strongly inclined to the opinion that, in regard to the transportation of goods by railroad, as the business is generally conducted in this country, this rule does not apply. The immediate and safe storage of the goods on arrival, in warehouses provided by the railway company and without additional expense, seems to be a substitute better adapted to the convenience of both parties. Mr. Justice Story, in his work on bailments, says (sec. 445) :—

> The termination of the carrier's risk. As soon as the goods have arrived at their proper place of destination, and are deposited there, and no further duty remains to be done by the carrier, his responsibility as such ceases. His character as carrier is superseded by that of warehouseman, not when the car arrives at the station, but when the crane of the warehouse is applied to raise the goods into the warehouse. *Thomas* v. *Day* (1) and *Randleson* v. *Murray* (2)

Here the scrap iron was allowed to remain in the cars, and the cars were run off the main track into a cutting which was so imperfectly made that the clay from the cut-banks ran down and covered the tracks upon which the cars were standing.

(1) 4 Esp. 262. (2) 8 A. & E. 109.

There can be no doubt that when the cars arrive at their destination the responsibility of the railway company as carriers does not at once terminate. Cockburn C.J., in *Chapman* v. *The Great Western Railway Co.* (1) held that when an interval of time had been allowed to elapse after the arrival of the goods the character of carrier ceased and they had become simply warehousemen. He says that the contract of the carrier being not only to carry but also to deliver, it follows that, to a certain extent, the custody of the goods as carrier must extend beyond as well as precede the period of their transit from the place of consignment to that of destination. First, there is in most instances an interval between the receipt of the goods and their departure—sometimes one of considerable duration. Next there is the time which, in most instances, must necessarily intervene between their arrival at the place of destination and the delivery to the consignee, unless the latter—which, however, is seldom the case—is on the spot to receive them on their arrival. Where this is not the case some delay, often a delay of some hours—as for instance when goods arrive at night, or late on Saturday, or when the train consists of a number of trucks which take some time to unload,—unavoidably occurs. In these cases, while on the one hand the delay, being unavoidable, cannot be imputed to the carrier as unreasonable, or give a cause of action to the consignor or consignee, on the other hand, the obligation of the carrier not having been fulfilled by the delivery of the goods, the goods remain in his hands as carrier, and subject him to all the liabilities which attach to the contract of carriage.

If there had been no disagreement between McDonnell Rolling Mills Company and Frankel Bros., the transitus of these cars would have terminated only when they reached the rolling mills, but, as the spur

(1) 5 Q. B. D. 278.

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of the mill is spoken of by one of the witnesses as the property of McDonell, and not of the railway company, when it was found that McDonell refused to receive the scrap iron in the cars, I think, looking at the facts and the previous practice of these parties, that the compulsory carriage by the company ended at Swansea, and that the further carriage, which they retained the scrap iron on the cars to perform, was a part of the process of unloading, as Mr. Justice Moss says. The notification before the cars were sent up to the mills came from McDonell, and I think the observations of Lord Ellenborough in *Dixon* v. *Baldwen* (1) are fairly applicable to the present case :

> That the goods had so far gotten to the end of their journey, that they awaited for new orders from the purchaser to put them again in motion.

And in the case of *Ex parte Miles ; in re Isaacs*, (2) in respect to goods that were sent to a specified shipping agent at Southampton to be thence shipped to Kingston, Jamaica, the cost of the carriage to Southampton was paid. The commission agent at Southampton was to send them to parties whose agent he was. The court held that, as between the commission agent and the manufacturers, the transit was at an end when the goods arrived at Southampton.

I am of opinion that here, under the circumstances, the transit had ended when the goods reached Swansea. I am of opinion that when the railway company claimed they were bailees of the scrap iron and that these cars in which it was were warehouses and denied any responsibility beyond that of bailees for hire, it was their duty to be in a position to deliver those goods to Frankel Bros. whenever called for, and when this scrap iron was left in the cars instead of being put into a warehouse from which it could be delivered when called for, they made themselves responsible to the

(1) 5 East 175 at p. 186. (2) 15 Q. B. D., 39.

proprietors in damages for the delay which occurred prior to the time when they could make delivery. It is not correct to say that the cars were confined on this side track by the act of God. They were confined in consequence of a defective cutting. If a vessel was so badly constructed that it could not survive an ordinary storm its loss could not be called a loss due to the act of God. If a cutting is not made so as to render the track free from the flow of mud down its sides, the accident is due not to the act of God but to improper construction, and when the railway company ran these cars upon the belt line into this cutting they did this at their peril, and are justly held in damages for all the loss that Frankel Bros. sustained in consequence. I therefore concur in the conclusion reached by the majority of the Court of Appeal.

Appeal allowed with costs.

Solicitor for the appellants: *John Bell.*

Solicitor for the respondents: *James Baird.*