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CANADIAN NATIONAL RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

JOSEPH HARRIS (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Railway—Carrier—Contract—Negligence—Shipment of horses—Shorn of their tails when delivered at destination—Claim for damages by shipper—Live Stock Special Contract—Construction of its terms—Liability of railway company—Negligence of railway company or shipper—Exemption of railway company from liability—"Carrier's risk" or "Owner's risk"—Clause in contract that shipper should provide attendant—Whether failure to do so caused or contributed to damage—Burden of proof as to when, how and by whom mutilation took place—Whether onus is on the railway company or the shipper—Articles 1672, 1675 and 1681 C.C.—Railway Act, R.S.C., 1927, c. 170, ss. 312, 348.

The respondent, a horse dealer doing business in Montreal, shipped eighteen horses over the appellant railway from points in Saskatchewan, the shipment being consigned to the Bodnoff Horse Exchange at Montreal, under a contract with the appellant company, known as a "Live Stock Special Contract", approved by the Board of Transport Commissioners for Canada under section 348 of the *Railway Act*. At the time of shipment, the horses were in good condition, but when they reached their destination and were delivered to the respondent, sixteen of them were mutilated and disfigured by being shorn of their tails. The respondent claimed that delivery in such a condition did not constitute valid delivery under the terms of the contract and that the disfiguration had caused damages amounting to $886.79. The appellant railway contended that the shipment was carried in conformity with the conditions of the contract signed by the respondent both as shipper and as attendant in charge of the horses, that the loss did not arise directly from the performance by the appellant of its contract of carriage and that whatever damage was caused resulted from the respondent's failure to provide an attendant to accompany and care for the horses en route as required by section 5 of the contract. The trial judge maintained the respondent's action and assessed the damages at $200; the judgment was affirmed by the appellate court and the appellant railway appealed to this Court. Leave to appeal was granted by the appellate court.

Held, The Chief Justice and Taschereau J. dissenting, that this appeal should be dismissed and the respondent's action maintained.—It was not the intention of the contract that the shipper or his representative should at all times be present with the horses to act as a guard, but only at such times as it might be expected that the horses would require care and attention. It was common ground that neither the

*PRESENT:—Rinfret C.J. and Hudson, Taschereau, Kellock and Estey JJ.

respondent, nor anyone on his behalf, accompanied the shipment. There is no liability, however, upon the respondent on that account, as there has been no evidence that failure to provide an attendant caused or contributed to the loss or damage suffered by the horses.—As a result of the terms of the contract and upon a proper construction of the relevant provisions of the freight classification referred to in the contract and of the tariff applicable to the shipment, the onus of establishing the cause of the loss or damage was upon the appellant railway and the latter has failed to adduce sufficient evidence to satisfy such onus.

Per The Chief Justice and Taschereau J. (dissenting)—The appellant railway should not be held responsible for the loss or damage suffered by the respondent. The Special Contract is valid and binding and its terms and conditions are determinative of the issue. One of its relevant provisions is that the live stock to be carried thereunder was received subject to the Classification and Tariffs in effect on the date of its issue, under which the rates and weights may be either at "carrier's risk", subject to the terms and conditions of the bill of lading issued by the originating carrier or at "owner's risk" subject to the terms and conditions of the Special Contract signed by the shipper or his agent. The shipper of live stock may thus choose how and to what extent he wishes to be protected by the carrier against loss or damage which may occur to his shipment in transit. In the present case, the respondent could have had the carriage performed at carrier's risk, through the terms and conditions of a standard bill of lading and by paying double the rate he paid, but he executed the Special Contract, whereby he agreed to ship at his own risk, upon whose terms and conditions the carrier's obligations and its liability were restricted and under which the rate applicable was lower. The shipment was thus carried at owner's risk and the carrier was relieved from liability for damage even if resulting from its negligence and that of its servants, such conclusion not being inconsistent with the terms and conditions of the Special Contract. Therefore, the respondent agreed to assume the risk of loss or damage to his horses during the journey, unless he could establish that such loss or damage was due to the non-fulfilment of the appellant's obligations under the contract. The respondent has failed to do so or to prove any negligence of the appellant railway, which was not even alleged. Moreover, the damage, in any event, was attributable to the respondent's failure to accompany, attend to and care for his shipment during the journey, as he was bound to do under the contract.—By force of article 1681 C.C., the special regulations made in accordance with the *Railway Act* must be recognized and applied in preference to article 1675 C.C., which is thereby superseded, and, therefore, the Special Contract in this case and the "owner's risk" clause forming part of it clearly eliminated the presumption created by article 1675 C.C.

Per Hudson J.:—The Special Contract itself does not contain any direct reference to the shipment being made at "owner's risk", as contended by the railway appellant; but it is expressed to be subject to the classification and tariff in effect on the date of the issue of the bill of lading. Upon a proper analysis of the provisions of the contract, the classification and the tariff, the shipper accepted the terms of

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the special live stock contract and nothing else. None of the causes of loss, other than failure to provide attendant, from which the carrier may be relieved from liability under section 6 of the contract, apply to the facts of this case, and the *Railway Act* does not give the appellant railway any immunity beyond that expressed in the contract, which was in a form approved of by the Board of Transport Commissioners.

Per Kellock J.:—The result of the various provisions of the contract, the classification and the tariff is that the shipment was carried "at owner's risk subject to the terms and conditions of the special live stock contract", under which the appellant railway agreed to carry the shipment to destination. The terms "owner's risk" cannot be construed here, as contended by the appellant railway, as throwing upon the respondent all risks including risk of loss or damage from negligence of the carrier, except wilful neglect or misconduct of the carrier. More particularly, section 6 of the contract presupposes that the appellant is liable as common carrier with some additional exceptions to that liability. Delivery of the horses in their mutilated condition was not a compliance with this underlying obligation resting upon the appellant, and it lay upon the latter, who contended that the loss fell within either one of two of those exceptions, namely "the act or default of the shipper" or "causes beyond the carrier's control", to adduce evidence bringing the case within the one or other of those exceptions. The appellant adduced no evidence to enable a finding to be made as to how the loss occurred, and it is insufficient to prove something equally consistent with the loss having been due to the respondent's default or to the default of the appellant railway.

Per Estey J.:—The provisions of the Special Contract were approved by the Board of Transport Commissioners pursuant to section 348 of the *Railway Act*. The phrase "its liability" as used in that section refers to the liability of the carrier at common law and under the Act, and, except as this liability may be impaired, restricted or limited under a contract, the liability of the carrier remains as determined by the common and statute law. In the determination of the rights of the parties under the present contract, the meaning to be ascribed to the phrase "owner's risk" is not that the entire risk is assumed by the shipper except only as that risk may be by the contract imposed upon the carrier. Such meaning would appear contrary to the plain intent of section 348 of the statute, and moreover, contrary to the form and phraseology of the subsequent sections of the contract itself. Sections 1, 4, 5, 6 and 9 of the contract deal with limitation of liability and liability for negligence on the part of the carrier, assumption of risk by the shipper and a list of specific causes from which if loss or damage result the carrier is liable. The "terms and conditions" of these sections are somewhat "impairing, restricting or limiting its (carrier's) liability" as contemplated by section 348, but they are not written on the basis that, if these conditions were not here, all the risk would be upon the shipper nor that the carrier is liable for only "wilful neglect or misconduct or unreasonable delay". A study of the contract, classification and the statute indicates that the Board of Transport Commissioners intended that the phrase "owner's risk" as used in the contract was, as

expressed in rule 25 of the classification, "intended to cover risks necessarily incidental to transportation, but no such limitation * * * shall relieve the carrier from liability * * * from any negligence or omissions of the company, its agents or employees". The injury suffered in this case in no sense can be regarded as a risk "necessarily incidental to transportation." Such loss or damage was caused by the deliberate act of a third person and no evidence has been adduced on the part of the carrier to indicate that it was covered by the provisions of the contract nor to establish on behalf of the appellant that it comes within any of the exceptions from liability at common law.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Tyndale J. and maintaining the respondent's action.—Damages awarded were for an amount of $200, but leave to appeal to this Court was granted by the appellate court.

Lionel Côté K.C. and *C. Perrault* for the appellant.

J. A. Mann K.C. and *K. H. Brown* for the respondent.

The judgment of the Chief Justice and of Taschereau J. (dissenting) was delivered by

THE CHIEF JUSTICE:—The respondent is a horse dealer at Montreal. On March 18, 1941, he shipped by rail from North Battleford and Maymont, Saskatchewan, 13 and 5 horses from each point respectively, the shipment being consigned to the Bodnoff Horse Exchange at Montreal under a contract with the appellant, approved by the Board of Transport Commissioners for Canada and known as a "Live Stock Special Contract".

At the time of shipment the horses were in good condition and of normal appearance, but when they reached their destination 16 of the 18 horses were mutilated and disfigured on account of the loss of their tails in transit. The respondent claimed that delivery in such a condition did not constitute valid delivery under the terms and conditions of the Special Contract and that the disfiguration had caused them damages amounting to $886.79.

To this action the appellant pleaded that the shipment was carried in conformity with the terms and conditions of the Live Stock Contract signed by the respondent, both

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as shipper and as attendant in charge of the horses, and that whatever damage was caused resulted from the respondent's failure and neglect to properly attend to and care for the horses en route and that the loss did not arise directly from the performance by the appellant of its contract of carriage.

The judgment of the Superior Court rejected the appellant's contention that the juridical basis of the relationship between the parties was to be found exclusively in the express terms of the Live Stock Contract as supplemented by the "Owner's risk" provision of both the Tariff and Classification incorporated therein by reference, and that this provision had the effect of placing the burden of proof upon the respondent who could not succeed without allegation and proof of negligence on the appellant's part.

Briefly the learned trial judge held that the respondent apparently had based his action upon article 1675 of the Civil Code, because he had not alleged negligence, but that he had invoked the Live Stock Contract and all the conditions therein contained and implied; that the terms of the Live Stock Contract alone governed the issue and nothing else, and that the "Owner's risk" clause of the Classification and Tariff was without effect. From some indirect evidence that was made and on the balance of probabilities, the learned trial judge inferred that the missing tails were removed from the horses while they were in the car and while the car was stationary at some undetermined point. He further inferred, as the most reasonably probable conclusion, that the removal of the tails was performed by some unauthorized person or persons who gained access to the car while the latter was in the appellant's care, and this because the slats of the car were sufficiently wide apart to allow the operation in question to be performed presumably from outside the car. Moreover, the learned judge exonerated the respondent from any liability for his failure to accompany and care for the shipment in transit and, having referred to the appellant's obligation to provide suitable equipment under sec. 4 (2) of the Live Stock Contract, he concluded from the above inferences that the loss was attributable

to the appellant's failure to provide suitable equipment and to prevent the access of unauthorized persons to the car, which failure, he held, constituted a breach of the contract as invoked by the respondent.

The damages were assessed at $200.00 at the rate of $12.50 per horse for the 16 horses affected. The appellant does not dispute the quantum of the damages as fixed, its appeal being restricted to the question of liability.

On appeal to the Court of King's Bench (appeal side) the judgment of the Superior Court was affirmed with costs. Walsh and St. Jacques JJ. agreed with the finding of the learned trial judge that there was a breach of the contract as alleged by the respondent. Francoeur J. thought the presumption of article 1675 of the Civil Code governed and that the Live Stock Contract only restricted the liability as to the damages to be paid and he found that there was a breach of the contract. Marchand J. concurred with Bissonnette J. who rendered the judgment for the Court and gave very elaborate reasons on the case. Bissonnette J. disagreed with the inference made by the learned trial judge that the trimming of the tails was done while the horses were in the car by someone operating from outside the car, through the slats, because he thought the presumptions which would lead to that conclusion were not sufficiently weighty, precise and consistent to permit such an inference. He expressed the view that, under the provisions of the *Railway Act,* the appellant could restrict its liability contrary to article 1675 of the Civil Code, but he found that the provisions of the Live Stock Contract, as supplemented by the terms and conditions of the Classification and Tariff, have not destroyed the presumption created by that article of the Code and that the appellant had the burden of proof. He agreed that under the contract the shipper would have to bear the damage to his live stock resulting from his neglect to care for the shipment, but that, as to any other damage not related to the duties of the attendant on board the train, the carrier is presumed liable and he has the burden of showing that such damage did not result from his fault or that of his employees. Further, he said that the evidence was

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such that he could not draw any conclusion as to how and under what circumstances the damage to the respondent's horses was caused and that, in order to invoke its non-liability clause and destroy the presumption of liability created by article 1675 of the Civil Code, the appellant had to adduce sufficient evidence on that point, which it had failed to do, and, therefore, it had to bear the loss.

The appellant is subject, for the carriage of traffic, to the provisions of the Dominion *Railway Act*. Moreover, the Civil Code of the province of Quebec provides that:—

> Art. 1681. The conveyance of persons and things by railway is subject to certain special rules provided in the Federal and Provincial Acts respecting railways.

In my view, to determine the liability in the present instance, consideration must be given to the special rules provided in the Federal Acts with respect to railways.

Under section 348 of the *Railway Act*, a contract impairing, restricting or limiting the liability of the railway company in respect of the carriage of any traffic must be authorized or approved by order or regulation of the Board of Transport. In this case the appellant had such authorization, or approval, for its Live Stock Special Contract. Under the circumstances, this contract was valid and binding in conformity with the decision of the Privy Council in the case of *Grand Trunk Railway Co.* v. *Robinson* (1). (See also the decision of this Court in *Ludditt* v. *Ginger Coote Airways, Ltd.* (2).

I think that the terms and conditions of the Live Stock Special Contract executed by the parties are determinative of the issue. I may add, moreover, that under the *Railway Act* (sections 52 and 348) the Board is the sole and exclusive judge of the reasonableness of the terms and conditions contained in that contract. One of the relevant provisions of the contract is that the live stock to be carried thereunder is received subject to the Classification and Tariffs in effect on the date of its issue, except where inconsistent therewith.

Freight classification no. 19 in effect on the date of shipment of this carload of horses, March 18th, 1941, received the approval of the Board and the tariff applicable was Eastbound Tariff No. 116-A, which was then in full

(1) [1915] A.C. 740. (2) [1942] S.C.R. 406.

force and effect. By force of article 1681 of the Civil Code, the special regulations made in accordance with the *Railway Act* must be recognized and applied in preference to article 1675 of the Civil Code, which is thereby superseded.

In classification no. 19 the rating and regulations applicable are items 4 to 9 inclusive and, as we are dealing with a carload shipment in the present case, the rates and weights may be either at "carrier's risk", subject to the terms and conditions of the bill of lading issued by the originating carrier, or at "owner's risk", subject to the terms and conditions of the Live Stock Special Contract signed by the shipper or his agent.

The general rules (p. 163, item 3 (b)) provide that when the distance to be travelled by the shipment is in excess of 150 miles, the owner or his agent must accompany the shipment and, 3 (d), that the owner or his agent in such cases shall be carried free of charge.

The shipper of live stock may choose how and to what extent he wishes to be protected by the carrier against loss or damage which may occur to his shipment in transit.

In the present instance, if the respondent had wanted the protection afforded by the terms and conditions of a standard Bill of Lading under which the carriage is performed at Carrier's Risk, he could have had that protection by executing the straight Bill of Lading and paying double the rate he paid. Moreover, if he had wanted the additional protection of the carrier assuming liability for an amount in excess of $200.00 per horse, he could also have protected himself in that respect by paying the premium applicable in such a case, as determined by the provisions of item (1) (9), which deals with the transportation of high-priced animals. But in the present case the respondent executed the Live Stock Special Contract, as a result of which he agreed to ship at his own risk under the terms and conditions of that contract and the classification therein referred to, which restrict the carrier's obligations and its liability in many respects, apart from the limitation resulting from the agreed value. He agreed, on signing the contract, that the horses had a maximum

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value of $200.00 each and that they were to be carried at Owner's Risk, subject to the terms and conditions of the Live Stock Contract.

The difference as between a shipment at Carrier's Risk, under the straight Bill of Lading, and that at Owner's Risk, under the Live Stock Special Contract, are that the conditions of carriage vary according to the contract authorized in each case and that under the Live Stock Contract the rate applicable is lower.

As a result, the shipment in the present case was being carried at Owner's Risk, according to the acceptation of the term; the carrier was relieved from liability for damage resulting from its negligence and that of its servants, provided this was consistent with the terms and conditions of the Live Stock Special Contract. (See Rules and Conditions (2) and (3), at p. 21 of the Tariff.)

We may now turn to the Live Stock Contract and see whether there is in it any restriction limiting the "Owner's Risk" condition and which would, notwithstanding that condition, make the appellant liable in the case of loss or damage resulting from its negligence or that of its servants or employees.

The contract begins by stating that the appellant agreed to carry the carload of horses to its usual place of delivery at destination, and that it was mutually agreed that every service to be performed thereunder should be subject to all conditions therein contained; this was accepted for himself by the shipper, the respondent herein. The shipper agreed to pay all charges at a stated rate which is the

lower published tariff rate, and is based on the express condition that the carrier shall in no case be liable for loss or damage or injury to said live stock, in excess of the agreed valuation, upon which valuation the rate charged is based, and beyond which valuation neither the carrier nor any connecting carrier shall be liable in any event, whether the loss, injury or damage occurs through the negligence of the carrier or any connecting carrier, or their or either of their employees, or otherwise. (Sec. 1)

The shipper agreed to load, unload or reload the live stock at his own expense and risk; feed, water and attend the same at his own expense and risk, while in transit. Moreover, in case any of the employees of the carrier should

load, unload, reload, feed, water or otherwise care for the said live stock, or assist in doing so, it was agreed that they should be treated as agents of the shipper for that purpose and not as the agents of the carrier. There is an exception to that stipulation—when these things are occasioned by some act or default of the carrier itself.

The carrier agreed to provide proper loading, unloading or reloading facilities and suitable equipment with secure car door fastenings for the transportation of said live stock.

The shipper agreed to properly and securely place all said stock in cars, and, except in case where the shipper or some person on his behalf accompanies the live stock, the carrier shall keep the doors securely locked or fastened until placed for unloading. (Sec. 4)

If the destination of the shipment of live stock is more than 150 miles from the point of shipment, the shipper or some person on his behalf (not an employee of the carrier) must, unless special arrangements are otherwise made in writing, accompany and care for the shipment throughout the journey. (Sec. 5)

The carrier shall not be liable for loss, damage, or delay to any of the live stock herein described caused by the Act of God, the King's or public enemies, riots, strikes, defects or inherent vice in the live stock, heat, cold, the authority of law, quarantine, the act or default of the shipper, or causes beyond the carrier's control, etc.

Except in case of the negligence of the carrier, (and the burden of proving freedom from such negligence shall be on the carrier) the carrier shall not be liable for loss, damage or delay occurring while the live stock is stopped and held in transit upon the request of the party entitled to make such request. (Sec. 6)

In the contract the shipper acknowledged that he had the option of shipping the live stock at a higher rate of freight than that payable under the Live Stock Special Contract, and according to the classification and tariffs of the carrier, or connecting carriers, the effect of which the shipper stated he understood, would be to remove the limitation on the amount of damages for which the carrier or the connecting carriers might be liable,

and the shipper has voluntarily elected to accept the limitation of liability herein contained to enable him to obtain the reduced freight rate above mentioned.

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Then on the reverse side of the contract form we find a special contract for the attendant in charge of the live stock, which is also signed by the respondent:—

I agree to give the live stock included in this shipment all care and attention needed en route. If anything goes wrong in connection with the shipment, or if it needs any care or attention that requires the help or co-operation of the train crew, I will promptly notify the conductor in charge.

It is common ground that the destination between the shipping point and destination in the premises much exceeded 150 miles, the actual distance by rail being 1,926 miles.

Therefore, by accepting and signing the special contract, the respondent consented to the appellant's limitation of liability, but more particularly he agreed to assume the risk of loss or damage to his horses during the journey unless he could establish that such loss or damage was due to the non-fulfilment of the appellant's obligation under the contract.

This special contract, and the Owner's Risk clause forming part of it, clearly eliminated the presumption created by article 1675 of the Civil Code. The fact that under sections (1) and (9) of the Contract the liability of the carrier in no case was to exceed $200.00 per horse, whatever may have been the cause of the loss, carrier's negligence or otherwise, does not affect or destroy the special stipulations of the contract, the effect of which was to place the burden of proof upon the shipper. If the latter wished the carrier to be liable, he had the option of asking for a standard Bill of Lading and paying a higher rate. The fact that a shipment under the Live Stock Special Contract is declared to be at the Owner's Risk clearly establishes that there was no intention that the carrier should be presumed liable and that the burden of proof should be on it. Indeed the contract itself contains specific provisions to that effect whenever it was intended that the carrier should assume that burden.

Canadian jurisprudence has fairly well settled the meaning of the words "Owner's Risk" when used in a

Carrier's Contract. (See *Brown* v. *Dominion Express Co.*, Court of Appeal in Ontario, where, at p. 332, Maclaren J.A., refers to a decision in the case of *Dixon* v. *Richelieu Navigation Co.* (2), which decision was affirmed by this Court (3) and the following cases: *Mason & Risch Piano Co.* v. *Can. Pac. Ry. Co.* (4), *Hotte* v. *Grand Trunk Railway* (5), *Turner* v. *Can. Pac. Ry. Co.* (6), (Alberta court of appeal); *Bayne* v. *Canadian National Ry.* (7) (Saskatchewan Court of Appeal); *Benoit* v. *Can. Pac. Ry.* (8) and *McCawley* v. *Furness Rly. Co.* (9).

In Elliott on Railroads, 3rd edit., vol. IV, no. 2338, at p. 837, the governing rule is stated as follows:—

> The correct rule in such cases, therefore, is that the burden of proof is upon the plaintiff to show that a breach of duty upon the part of the carrier caused the injury or loss, and if the carrier is liable only for negligence, the burden is upon the plaintiff to show such negligence.

Now the first consideration, I repeat, is that the respondent here has failed to prove negligence and has not even alleged it. On that score, therefore, I fail to see how the exception contained in section 6 of the Special Contract can be taken into consideration for the decision of the present case and the question of negligence of the carrier does not come up for discussion at all. (*Canadian National Steamships Co. Ltd.* v. *Watson* (10))

But in addition to the above reason, it seems to me inescapable that the damage in any event was attributable to the respondent's failure to accompany, attend to and care for his shipment during the journey. Had the respondent accompanied the shipment, as he was bound to do under the contract, and guarded and protected against intrusions of "unauthorized persons", surely the damage would have been avoided.

Section (5) of the Special Contract provided specifically that, as the destination of the shipment was more than 150 miles from the point of shipping,

> the shipper or some person on his behalf (not an employee of the carrier), must, unless special arrangements are otherwise made in writing, accompany and care for the shipment throughout the journey.

(1) (1921) 67 D.L.R. 325.
(2) (1888) 15 Ont. A.R. 647.
(3) (1890) 18 Can. S.C.R. 704.
(4) (1908) 8 Can. Ry. C. 369.
(5) (1912) 18 R. de J. 320.
(6) (1922) 66 D.L.R. 31.
(7) (1933) 42 Can. Ry. Cas. 340
(8) (1937) Q.R. 75 S.C. 334.
(9) (1872) L.R. 8 Q.B. 57.
(10) [1939] S.C.R. 11.

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There were no special arrangements in writing or otherwise and, therefore, the shipper completely failed to carry out his obligations under section (5) "to accompany and care for the shipment throughout the journey". It is not, as can be seen and as appears to have been assumed in the courts below, the mere obligation of accompanying the shipment, but the obligation to attend to and to "care for" it. It is evident that what happened to the horses is due to the lack of attention and of care and, as such care was the obligation of the shipper, the loss or damage is attributable to him. There is clearly a relation of cause and effect between the respondent's neglect and the loss he has suffered. (*Chemin de fer du Midi* v. *Delcros Frères,* Cour de Cassation in France, (1).)

The respondent's contention that the appellant waived that condition of the contract, by accepting the live stock while the respondent failed to accompany it or to put some of his employees in charge of it, cannot be accepted in view of the stipulations of the contract itself. The contract made it compulsory upon the respondent to load, unload or reload the live stock at his own expense and risk and to feed, water and attend the same, also at his own expense and risk, while in transit; and it also provided for the case where the respondent failed to carry out that obligation and it stated that if he failed to do so the employees of the carrier would do it and otherwise care for the live stock and under such circumstances

> they shall be treated as agents of the shipper for that purpose and not as agents of the carrier.

It followed that there was no waiver on the part of the appellant since the contract itself provided for whatever had to be done in case the shipper elected not to accompany and care for the horses during the journey.

Then section (6) of the contract expressly stipulated that the carrier was not to be liable for the loss or damage caused by "the act or default of the shipper".

The consequence is that, on the whole, the appellant cannot be held responsible for the loss or damage suffered by the respondent in the present case.

(1) Gazette du Palais, 1938, vol. 2, p. 683, at 684.

The appeal should, therefore, be allowed and the action dismissed with costs in the Superior Court and in the Court of King's Bench (appeal side). However, the appeal only came to this Court from that Court on the ground that the question to be decided was of general importance, and there is no question that it is so. On the other hand, it would not be just for the respondent personally to bear the costs incurred by reason of the fact that this important question was carried to this Court, and, for that special reason, I would think the respondent should not be called upon to pay the appellant his costs in this Court.

HUDSON J.:—The respondent shipped eighteen horses over the defendant's railway from points in Saskatchewan, consigned to Montreal. In due course these horses arrived at Montreal but when delivered to the plaintiff sixteen of them had been shorn of their tails. Just when, how or by whom this mutilation took place was not clearly established in evidence by either party.

The plaintiff brought this action to recover for the loss sustained and at the trial before Mr. Justice Tyndale was awarded a verdict of $200.00. This was affirmed on appeal and the appellant now comes to this court by special leave.

The pleadings of both parties referred to the contract of shipment which is in a form approved of by the Board of Transport Commissioners and governs the case in so far as it applies.

The appellant seeks to avoid liability on two grounds:

In the first place, it is said that the respondent's loss was due to his failure to provide an attendant to accompany and care for the horses, as required by the contract of which section 5 provides:

> If the destination of the shipment of said live stock is more than one hundred and fifty (150) miles from the point of shipment, the shipper or some person on his behalf (not an employee of the carrier), must, unless special arrangements are otherwise made in writing, accompany and care for the shipment throughout the journey.

Section 4 (1) provides:

> The shipper agrees to load, unload or reload said live stock at his own expense and risk; feed, water and attend same at his own expense and risk while in transit, except as provided in subsection 5 of this Section. In case any of the employees of the carrier load, unload, reload, feed, water or otherwise care for the said live stock, or assist in doing so,

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they shall be treated as agents of the shipper for that purpose and not as the agents of the carrier; except when such loading, unloading, reloading, feeding or watering is occasioned by some act or default of the carrier.

It is admitted that the destination of the shipment was more than 150 miles from the point of shipment and that neither the respondent himself nor anyone on his behalf accompanied the shipment. Whatever care and attention the horses received on the journey was provided by the appellant's employees.

The contract does not contemplate the continuous presence of an attendant, but only at such times as it might be expected that the horses would require care and attention, that is, loading, unloading, feeding, illness, etc.

The attendant was not required to be a watchman; in fact his movements were considerably restricted by a special collateral contract relieving the company from liability in case of personal injuries. It is certain that there were long periods of time on the journey when the train was stationary, other than those during which the horses would be expected to receive personal attention.

No explanation is given on behalf of the appellant of how and when the horses' tails were removed. It is possible that this was done at a time when the respondent or his agent should have been in attendance, but there is no evidence to justify a presumption that such was the case. What is certain is that it was brought about by the wilful and deliberate act of some human agency while the animals were in the sole possession of the appellant and its employees. It seems very strange indeed that an operation of this sort could be carried on without the knowledge of some of them.

The second contention of the appellant is that the shipment was made at "owner's risk". The contract itself does not contain any direct reference to the term "owner's risk", but it is expressed to be subject to the classification and tariffs in effect on the date of the issue of the bill of lading "(*except when inconsistent herewith*)."

The Canadian Freight Classification approved of by the Board of Transport Commissioners, rule 25, sec. 1, provides:

> Articles specified in this Classification to be carried under Owner's Risk conditions, shall, unless otherwise required by the shipper, be carried at Owner's Risk as so specified and defined, and special notation to that

effect is not necessary on the bill of lading. These conditions are intended to cover risks necessarily incidental to transportation; but no such limitation, expressed or otherwise, shall relieve the carrier from liability for any loss or damage which may result from any negligence or omission of the company, its agents or employees.

But by section 4 of this rule it is provided:

This rule will not apply to live stock which will be carried only on the terms and conditions specified in the Classification.

In the detailed Classification under the heading "Live Stock" it is provided that live stock will be carried either (*a*) at carrier's risk, or (*b*) at owner's risk, as shipper may elect * * *

In carloads, at the undermentioned rates and weights:

(*a*) At carrier's risk:

Subject to terms and conditions of the bill of lading issued by the originating carrier.

(*b*) At owner's risk:

Subject to the terms and conditions of the special live stock contract signed by the shipper or his agent.

The tariff setting forth rates from different points applicable to this particular shipment is preceded by a number of rules and conditions, rule 2 being:

Rates named herein only apply when live stock is shipped at owner's risk, subject to the terms and conditions of the special live stock contract signed by the shipper or his agent.

The learned trial judge, after a careful analysis of the provisions of the contract and of the classification and tariff, came to the conclusion that the shipper accepted the terms of the special live stock contract and nothing else.

With this view I agree. Apart from statute, there is no generally accepted definition of the term "owner's risk". In the present case the only consideration for a limitation of the carrier's liability is a reduced freight rate and that consideration is exhausted by the limitations incorporated in the contract itself. This is made clear by the language used in sections 1 and 9. Section 1 provides that:

The shipper agrees to pay, if required, before delivery, all lawful and proper charges as well as freight thereon to the carrier at the rate of . . . . . per one hundred pounds, which is the lower published tariff rate, *and is based on the express condition that the carrier shall in no case be liable for loss of or damage or injury to said live stock, in excess of the following agreed valuation,* or a proportionate sum in any one case, *upon which valuation the rate charged for the transportation of the said live stock is based,* and beyond which valuation neither the carrier

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nor any connecting carrier shall be liable in any event, whether the loss, injury or damage occurs through the negligence of the carrier or any connecting carrier, or their or either of their employees, or otherwise, viz.—

Horses or mules * * * not exceeding $200.00 each.

Section 9:

The shipper hereby acknowledges that he has the option of shipping the above described live stock at a higher rate of freight than that payable hereunder, and according to the classifications and tariffs of the carrier, or connecting carriers, the effect of which the shipper understands would be to remove the limitation on the amount of damages for which the carrier or the connecting carriers might be liable as herein provided, *and the shipper has voluntarily elected to accept the limitation of liability herein contained to enable him to obtain the reduced freight rate above mentioned.*

The general limitation of liability is contained in section 6 as follows:

The carrier shall not be liable for loss, damage or delay to any of the live stock herein described caused by the Act of God, the King's or public enemies, riots, strikes, defects or inherent vice in the live stock, heat, cold, the authority of law, quarantine, the act or default of the shipper, or causes beyond the carrier's control; nor when caused by changes in weather or delay resultng therefrom, except such delay is due to the carrier's negligence, and the burden of proving freedom from such negligence shall be on the carrier; nor for loss or damage caused by fire occurring after cars have been placed for unloading at point of destination.

Except in case of the negligence of the carrier, (and the burden of proving freedom from such negligence shall be on the carrier), the carrier shall not be liable for loss, damage or delay occuring while the live stock is stopped and held in transit upon the request of the party entitled to make such request.

The only "act or default of the shipper" alleged is his failure to provide an attendant for the horses and, as already stated, there is no evidence here to afford any presumption that this caused the loss. None of the other causes of loss from which the carrier is relieved from liability by this section apply to the facts in this case.

The appellant, as a common carrier, is subject to the liabilities attached to anyone carrying on that occupation, unless otherwise provided by the *Railway Act* or a valid contract between the parties.

Section 312 of the *Railway Act* provides that the company shall

without delay and with due care and diligence, receive, carry and deliver all * * * traffic,

and subsection 7 of that section provides that:

Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant.

Section 348 prohibits contracts restricting or limiting the company's liability in respect of the carriage of any traffic unless said contract is first authorized or approved by order or regulation of the Board.

The contract between the parties here was in a form approved of by the Board. The statute then does not give the appellant any immunity beyond that expressed in the contract.

The action was brought in Quebec and it has been recognized by both parties that the laws of Quebec should apply, subject to the provisions of the *Railway Act* and any valid contract subsisting between the parties.

The Civil Code of Quebec provides by articles 1672, 1675 and 1681:

1672. Carriers by land and by water are subject, with respect to the safekeeping of things entrusted to them, to the same obligations and duties as innkeepers, declared under the title Of Deposit.

1675. They are liable for the loss or damage of things entrusted to them, unless they can prove that such loss or damage was caused by a fortuitous event or irresistible force, or has arisen from a defect in the thing itself.

1681. The conveyance of persons and things by railway is subject to certain special rules, provided in the Federal and Provincial Acts respecting railways.

In Mignault, vol. 7, p. 383, it is stated:

Notre article consacre la règle du droit commun qui met à la charge de la personne qui l'invoque la preuve du cas fortuit ou de la force majeure (Art. 1200). Donc dès que la chose confiée au voiturier est avariée ou perdue, la faute du voiturier est présumée, et il lui incombe de repousser cette présomption, en prouvant que la perte ou avarie a été causée par cas fortuit ou force majeure ou provient des vices de la chose. C'est l'application au voiturier du principe de la faute contractuelle.

The common law liability of a common carrier is, I think, authoritatively stated in 4 Halsbury, at p. 12 and following pages:

A common carrier is responsible for the safety of the goods intrusted to him in all events, except when loss or injury arises solely from act of God or the King's enemies. He is therefore liable even

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where he is overwhelmed and robbed by an irresistible number of persons. He is an insurer of the safety of the goods against everything extraneous which may cause loss or injury except the act of God or the King's enemies.

It is noteworthy that this article in Halsbury is contributed by Lord Wright.

A case which has been cited on numerous occasions and the decision accepted as good law by all courts is that of *Curran* v. *Midland Great Western Co.* (1). In that case the plaintiff shipped some pigs from Sligo to Manchester. The special conditions of contract were as follows:

The Company undertakes the conveyance of animals at the reduced rate stated above solely on the condition that they shall be free from all liability (including liability for loss, injury or delay) whether in the loading, unloading, transit, or conveyance of animals, or while in the vehicles of the Company, or on their premises, unless such injury or delay shall be occasioned by the intentional and wilful neglect or misconduct of their servants acting within the scope of their authority.

When the shipment arrived at Manchester the number of pigs was short and the plaintiff claimed for the value. Palles C.B. gave the judgment of the court and stated the principle at p. 188:

I have considered the question according to the strict principles of the law of evidence; and, applying one well-known doctrine, that is, that a state of facts once proved to have existed is presumed, in the absence of evidence to the contrary, to continue, I have arrived at a clear opinion that the above question must be answered in the negative. I view the matter in this way; the pigs, notwithstanding their delivery to the defendants, remained the property of the plaintiff, and continued to be his, unless and until some event happened, such as their absolute destruction by fire or otherwise, or the sale of them in market overt, or some other act which would have divested the property. All these events are such as are not to be presumed without evidence; and the evidence of any of them, if any such be relied upon, ought to come from the defendants.

I say, therefore, that we have evidence here from which we may presume that at the time at which the defendants refused to deliver the pigs, they were in existence in rerum naturâ, and were the property of the plaintiff.

Next, the pigs having been received into the possession of the defendants, there is a prima facie presumption that they continued to be in their possession until the contrary is shown, or until a different presumption arises from the nature of the subject—neither of which states of fact exists here.

Lastly, the defendants failed to deliver some of the pigs, and allege no excuse.

These circumstances, in my opinion, are evidence from which a jury would be warranted in holding as matter of fact that the defendants had the pigs in their possession. If that inference in fact were drawn,

(1) [1896] 2 Ir. Rep. 183.

then I hold as matter of law that their unaccounted-for refusal to deliver them, so continuing in their possession, upon the plaintiff's demand for them at the place and time at which they ought to have been delivered—of which there is ample evidence—amounted to wilful misconduct, for which this action will lie.

Upon this short ground, I am of opinion that there is evidence of the defendants' liability in respect of the non-delivered pigs.

It is to be understood that I do not express any opinion as to the extent of the explanation which, in such cases as the present, it is incumbent on the Company to give.

The present case is not a case of injury or loss through direct negligence, or accident, or fortuitous event. There was here not merely an injury to the horses but an abstraction and non-delivery of part of the property shipped, i.e. the horses' tails. It was in evidence that the hair had a commercial value.

In essentials the reasoning of Chief Baron Palles in the *Curran case* (1) applies here. The onus is on the appellant and, for this reason, I would dismiss the appeal with costs.

KELLOCK J.:—This is an appeal from a judgment of the Court of King's Bench, appeal side, province of Quebec, pronounced the 29th day of December, 1944, dismissing an appeal by the present appellant, the defendant in the action, from a judgment of the Superior Court, dated the 6th day of April, 1943, in favour of the respondent for damages with respect to certain horses shipped by the respondent from Saskatchewan to Montreal.

Eighteen horses had been shipped by the respondent on the terms of what is known as a Special Live Stock Contract, dated the 18th of March, 1941, thirteen of the horses having been loaded at North Battleford, and the remaining six at Maymont, both in the province of Saskatchewan. On arrival, sixteen of these horses had had their tails cut off in a rather ragged manner close to the tail bone, and it was established that this loss had occurred after shipment. The learned trial judge was of the opinion and so found that the loss had been occasioned by the act of some unauthorized person and that on the

(1) [1896] 2 Ir. Rep. 183.

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balance of probabilities the loss had happened while the horses were in the car and when the car itself was stationary.

The Special Contract, which was in a form approved by the Board of Transport Commissioners, provided that where a transit involved a journey in excess of 150 miles, the shipper, or some person on his behalf must, unless special arrangements were made in writing to the contrary, accompany and care for the shipment throughout the journey. In fact, no one on behalf of the respondent did accompany the horses which were unloaded for rest and feeding at three stations en route; namely, Saskatoon, Saskatchewan; St. Boniface, Manitoba, and Hornepayne, Ontario.

The car in question was an ordinary live stock car with open spaces between the boards or slats and it appears from the evidence that some of these spaces were capable of being enlarged, by movement of the slats over the original spacing at the time of the construction of the car, and the learned trial judge's view was that the damage had been done by a person outside the car working through the space between the slats. He also held the appellant guilty of a breach of contract in failing to provide proper equipment as he considered the spaces between the slats constituted the car an improper one. The learned trial judge was also of opinion that the failure of the respondent to have any one accompany the horses on his behalf as required by the contract had not been shown to have in any way been a contributing factor in connection with the loss and that the onus of showing this was upon the appellant.

On appeal to the Court of King's Bench, appeal side, the majority concurred in the view of the learned trial judge as to there being a breach of contract but all the members of the Court disagreed with the inference drawn by the learned trial judge that the trimming of the tails was done while the horses were in the car by someone operating from outside the car through the slats for the reason that the evidence was not sufficient. The Court held that the onus was upon the appellant to show that

the loss arose from circumstances for which it was not responsible under the contract, which included the onus of showing that it arose from failure on the part of the respondent to have someone accompany the shipment. As the appellant had failed to adduce sufficient evidence to satisfy this onus, it was held that it must bear the loss.

Under the provisions of the contract itself, the appellant acknowledged receipt,

subject to the classification and tariffs in effect on the date of issue of this original live stock Bill of Lading (except when inconsistent herewith).

of the live stock described in the contract

which the said company agrees to carry to its usual place of delivery at said destination.

The document then proceeds as follows:

the live stock of the kind and number, and consigned and destined as indicated below, which the said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed as to each carrier of all or any of said live stock, over all or any portion of said route to destination, and as to each party at any time interested in all or any of said live stock, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained, and which are agreed to by the shipper and accepted for himself and his assigns.

The contract then sets out particulars of the car number, the consignee, the destination, the number of animals and the instructions for feeding and watering and completion of loading.

The document then continues:

1. The shipper agrees to pay, if required, before delivery, all lawful and proper charges as well as freight thereon to the carrier at the rate of ————per one hundred pounds, which is the lower published tariff rate, and is based on the express condition that the carrier shall in no case be liable for loss of or damage or injury to said live stock, in excess of the following agreed valuation, or a proportionate sum in any one case, upon which valuation the rate charged for the transportation of the said live stock is based, and beyond which valuation neither the carrier nor any connecting carrier shall be liable in any event, whether the loss, injury or damage occurs through the negligence of the carrier or any connecting carrier, or their or either of their employees, or otherwise, viz.—

Horses or mules .....not exceeding $200.00 each
Colts, under one year of age.....not exceeding $100.00 each
Cattle (except calves).....not exceeding $150.00 each
Hogs .....not exceeding $ 40.00 each
Other Domestic Animals
(including calves 6 months old and younger) not exceeding $ 20.00 each

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If, upon inspection, it is ascertained that the live stock shipped is not as described in this Live Stock Bill of Lading, the freight charges must be paid on the live stock actually shipped, with any additional charges lawfully payable thereon.

2. No carrier is bound to transport said live stock by any particular train, or in time for any particular market, or otherwise than with reasonable dispatch, unless by specific agreement endorsed hereon. Every carrier, in case of physical necessity, shall have the right to forward said live stock by any railway or route between the point of shipment and point of destination.

3. By this contract the carrier agrees to transport only over its own line, and acts only as agent with respect to the portion of the route beyond its own line, except as otherwise provided by law; no carrier shall be liable for damage or injury not occurring on its portion of the through route, nor after the stock has been delivered to the next carrier, except as such liability is or may be imposed by law. Unless a different agreement is made with connecting carriers, in respect to transportation on their respective lines, the terms and conditions hereof shall apply to the transportation by each carrier on any portion of the route to destination.

4. (1) The shipper agrees to load, unload or reload said live stock at his own expense and risk; feed, water and attend same at his own expense and risk while in transit, except as provided in sub-section (5) of this Section. In case any of the employees of the carrier load, unload, reload, feed, water or otherwise care for the said live stock, or assist in doing so, they shall be treated as agents of the shipper for that purpose and not as agents of the carrier; except when such loading, unloading, reloading, feeding or watering is occasioned by some act or default of the carrier.

(2) The carrier agrees to provide proper loading, unloading or reloading facilities and suitable equipment with secure car door fastenings for the transportation of said live stock.

(3) The shipper agrees to properly and securely place all said stock in cars, and the carrier shall, except in cases where the shipper or some person on his behalf accompanies the live stock keep said doors securely locked or fastened until placed for unloading.

(4) If temporary partitions or decks are put in the cars by the shipper, the carrier shall not be responsible for the sufficiency thereof, or for any loss or damage caused by defects therein.

(5) In the event of delay to said live stock caused by the negligence of the carrier, any consequent unloading, reloading, feeding or watering en route shall be at the carrier's expense and risk; and any expense incurred by the shipper in connection therewith shall be repaid to him by the carrier.

5. If the destination of the shipment of said live stock is more than one hundred and fifty (150) miles from the point of shipment, the shipper or some person on his behalf (not an employee of the carrier), must, unless special arrangements are otherwise made in writing, accompany and care for the shipment throughout the journey.

6. The carrier shall not be liable for loss, damage or delay to any of the live stock herein described caused by the act of God, the King's or public enemies, riots, strikes, defects or inherent vice in the live stock,

heat, cold, the authority of law, quarantine, the act or default of the shipper, or causes beyond the carrier's control; nor when caused by changes in weather or delay resulting therefrom, except such delay is due to the carrier's negligence, and the burden of proving freedom from such negligence shall be on the carrier; nor for loss or damage caused by fire occurring after cars have been placed for unloading at point of destination.

Except in case of the negligence of the carrier (and the burden of proving freedom from such negligence shall be on the carrier), the carrier shall not be liable for loss, damage or delay occurring while the live stock is stopped and held in transit upon the request of the party entitled to make such request.

7. Notice of claim on account of loss, damage or delay must be made in writing to the Agent of the carrier at the point of shipment, or to the Agent of the carrier at the point of delivery; or to a Divisional Superintendent, a District Freight Agent, a Claims Agent, or the General Counsel of the carrier, within thirty (30) days after the delivery of the live stock, or in case of failure to make delivery, then within thirty (30) days after a reasonable time for delivery has elapsed. Unless notice is so given the carrier shall not be liable.

8. No person accompanying the said live stock shall have the right to ride free or at a rate less than full fare in connection with this shipment, unless and until he has signed the special form of contract for such attendants, printed on the back hereof.

The carrier shall not be liable either for loss of life or personal injury to such persons accompanying said live stock, whether such person is being carried free or at a rate less than full fare, unless such loss of life or personal injury is caused by negligence on the part of the carrier, its servants or employees while the said persons are in the caboose or other car provided for their transportation, or while in the car provided for their transportation, or while in the car provided for the transportation of the live stock.

9. The shipper hereby acknowledges that he has the option of shipping the above described live stock at a higher rate of freight than that payable hereunder, and according to the classifications and tariffs of the carrier, or connecting carriers, the effect of which the shipper understands would be to remove the limitation on the amount of damages for which the carrier or the connecting carriers, might be liable as herein provided, and the shipper has voluntarily elected to accept the limitation of liability herein contained to enable him to obtain the reduced freight rate above mentioned.

10. Any alteration, addition or erasure in this Live Stock Bill of Lading shall be signed or initialled in the margin by an agent of the carrier issuing the same, and if not so signed or initialled shall be without effect, and this Bill of Lading shall be enforceable according to its original tenor.

It is the contention of counsel for the appellant that as the result of these terms and of the relevant provisions of the classification and tariffs referred to in the contract, the onus of establishing the cause of the loss was upon the

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respondent and not upon the appellant and that as the cause of the loss was not established, the action should have been dismissed.

It has been held under the provisions of the respective *Railway Acts* then in force that the liability of a railway is that of a common carrier; *Grand Trunk Railway Company of Canada* v. *Vogel* (1) per Strong J. *Grand Trunk Railway Company* v. *McMillan* (2) and *The Queen* v. *Grenier* (3). It has not been argued that there is anything in the provisions of the present statute R. S. C. ch. 170 which produces a different result. Such liability may be affected in accordance with the provisions of section 348 of the Act, which is the provision referred to in the phrase "subject to this Act" in subsection 7 of section 312, *Grand Trunk Railway Company* v. *Robinson* (4). The question in the case at bar is as to the effect of the classification, the tariff and the provisions of the special Live Stock Contract.

Coming to the provisions of the classification incorporated by reference into the contract, this classification begins with a number of "Rules and Conditions of Carriage."

Rule 25 reads in part as follows:

Sec. 1. Articles specified in this Classification to be carried under Owner's Risk Conditions, shall, unless otherwise required by the shipper, be carried at Owner's Risk as so specified and defined, and special notation to that effect is not necessary on the bill of lading. These conditions are intended to cover risks necessarily incidental to transportation; but no such limitation, expressed or otherwise, shall relieve the carrier from liability for any loss or damage which may result from any negligence or omission of the company, its agents or employees.

Sec. 2. Should the shipper decline to ship at "Owner's Risk" as specified and defined in this Classification any article shown as to be so carried, the articles will be carried subject to the terms and conditions of the bill of lading approved by the Board of Railway Commissioners for Canada, in which case twenty-five per cent. over and above the rates which would be payable if such articles were shipped at "Owner's Risk" will be charged.

Sec. 4. *This rule will not apply to live stock which will be carried only on the terms and conditions specified in the classification.*

(1) (1886) 11 Can. S.C.R. 612, at 625.
(2) (1889) 16 Can. S.C.R. 543, at 551.
(3) (1899) 30 Can. S.C.R. 42.
(4) [1915] A.C. 740, at 744.

Under the heading, "Live Stock," it is provided in the Classification itself that

live stock will be carried either (*a*) at Carrier's Risk or (*b*) at Owner's Risk, as the shipper may elect, but in each case the value of the animals must be declared by the shipper or his agent.

Where, as in the case at bar, the value of each animal is declared not to exceed $200.00, the shipment is to be charged for

at the rates and weights and be carried upon the terms and conditions following, that is to say:

In carloads at the undermentioned rates and weights

(*a*) At Carrier's Risk

Subject to the terms and conditions of the Bill of Lading issued by the originating carrier.

(*b*) At Owner's Risk

Subject to the terms and conditions of the Special Live Stock Contract signed by the shipper or his agent.

And where, as in the present case, the shipper elected to ship at "Owner's Risk," the freight rate provided in "9th class" whereas the rate applicable to a shipment at "Carrier's Risk" is double the 9th class rate.

The tariff incorporated by the terms of the contract is "East-bound Tariff No. 116 (a)." Rule 2 of this tariff provides that the

rates named herein only apply when live stock is shipped at Owner's Risk subject to the terms and conditions of the Special Live Stock Contract signed by the shipper or his Agent.

The result of these various provisions is that the shipment here in question was carried "at Owner's Risk subject to the terms and conditions of the special live stock contract." It is the contention of the appellant that the words "owner's risk" are to be construed as throwing upon the respondent all risks including risk of loss or damage arising from negligence of the carrier, the only exception being wilful neglect or misconduct of the carrier and *Dixon* v. *Richelieu Navigation Company* (1) is cited. Counsel argues that the terms of the written contract are to be considered against this background, and when so considered, there is nothing which throws upon the appellant any responsibility or any burden of proof.

It is of interest at this point to refer to a form of contract formerly in use with regard to the shipment of

(1) (1888) 15 Ont. A.R. 647; (1890) 18 Can. S.C.R. 704.

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live stock under which such cases as *Booth* v. *Canadian Pacific Railway* (1) and others were decided. That form of contract provided that the carrier should not be liable for any loss or damage in respect of the said live stock by reason of * * * any other injuries happening to said stock while in any railway car, except such as may arise from a collision of the train, or the throwing of the cars from the track during transportation * * * said stock is to be loaded, unloaded, fed, watered, and while in the cars cared for *in all respects* by the shipper or owner at his expense and risk.

At the end of what is now section 5 there followed:

and unless the shipment is so accompanied the company shall be relieved from all obligation to carry the same. If the company carry such live stock without it being so accompanied, it shall not be liable for any loss or damage due to the live stock not being so accompanied and cared for.

Whatever may have been the situation under such a form of contract in circumstances such as are here present, the provisions of the contract which have now to be construed are quite different. In view of these provisions, very little of the content contended for with respect to the words "owner's risk," apart from the limitation in the amount of damages, would seem to be left in a case such as the present. The contract, in my opinion, proceeds on the assumption that there is the underlying responsibility of a common carrier to which I have already referred, resting upon the carrier which it restricts and modifies. Section 1 of itself does not impose any liability upon the carrier even up to the amount which it sets. The section assumes that, apart from its provisions, a liability does rest upon the carrier for loss or damage occurring through the negligence of the carrier "or otherwise." That liability the section limits to $200.00.

Section 6 would be largely meaningless apart from such a construction. It presupposes that the carrier is liable as a common carrier with some additional exceptions to that liability. To take the last sentence of section 6 by itself further illustrates the above view. The carrier is to be free from loss, damage or delay occurring while the live stock is stopped and held in transit upon the request of the party entitled to make such request, except in the case of its own negligence. If the shipper, as the appellant now contends, assumed all the risk of carriage, there would be

(1) (1906) 5 Can. Ry. Cas. 389.

no reason for the inclusion of this provision in the contract at all, and the inference from it is that if a stoppage occurs which is not due to a request of the shipper, the risk of loss is upon the carrier. In the case at bar, there was a delay of some twenty-five hours in the transit which is not accounted for.

Delivery of the horses in their mutilated condition was not a compliance with the obligation resting upon the appellant and if, as I think, the terms of the special contract recognize this underlying obligation and provide certain exceptions from it, it lay upon the appellant, (on whose behalf the argument is in essence that the loss fell within either one of two of those exceptions, namely, "the act or default of the shipper" or "causes beyond the carrier's control,") to adduce evidence bringing the case within the one or other of those exceptions; *London and North Western Railway* v. *Ashton* (1). The appellant adduced no evidence to enable a finding to be made as to how the loss occurred. Merely to prove, if it can be said that that has been done in the case at bar, something equally consistent with the loss having been due to the respondent's default or to the default of the appellant is insufficient; *Taylor* v. *Liverpool and Great Western Steam Company* (2)

In my opinion, it was not the intention of the contract that the shipper or his representative should at all times be present with the horses to act as a guard. In fact, the Special Contract required to be signed by the person accompanying the shipment contemplates the contrary. Sections 1 and 5 of that contract read as follows:

1. I will remain in a safe place in the caboose or other car provided for my transportation, or in the car provided for the transportation of the stock, at all times while the train is in motion.

5. I will always bear in mind that freight trains do not stop at stations or places especially prepared for passengers to alight; that freight trains frequently stop on bridges and places along the line where it is not safe to alight; I will therefore not attempt to alight from the caboose or other car, when a train may stop for any purpose, without first making a careful examination, (with a lighted lantern if at night time), and thus ascertaining that it is safe to alight at that point; and I will not omit taking these precautions because of anything said or done by employees of the carrier.

(1) [1918] 2 K.B. 488; [1920] A.C. 84.

(2) (1874) L.R. 9 Q.B. 546.

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It was not shown, therefore, that this default of the respondent was related in any way to the loss and I think the contention of the appellant with regard to this point fails. The contract provisions, as already pointed out, are substantially different in form from the contract under consideration in the cases relied upon by the appellant.

Counsel for the appellant also pointed to the provisions of the ordinary Bill of Lading which would have applied had the respondent shipped at "Carrier's Risk," and paid the higher rate. This Bill of Lading begins:

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

Appellant argues that there is no corresponding provision in the Special Live Stock Contract here in question and that therefore the onus is not thrown upon the Railway Company. For the reasons already given, I do not think this argument entitled to prevail. Much clearer language than is found in the contract here under consideration would be required to effect such a result.

I would therefore dismiss the appeal with costs.

ESTEY J.:—On the 18th of March, 1941, the respondent shipped from North Battleford and Maymont, Saskatchewan, eighteen horses via the appellant railway company for delivery at Montreal. En route sixteen of the horses had their tails cut off at the end of the tail bone, and to recover damages thereby occasioned the respondent (plaintiff) brought this action. He pleaded delivery of the horses to the appellant under the provisions of the Live Stock Special Contract, executed by the parties covering this shipment, and the failure of the appellant to make a valid delivery of the horses at Montreal.

The appellant denied the allegations of the plaintiff; alleged the provisions of the same Live Stock Special Contract; and further that the loss or damage

> did not take place while the horses were on the car and the loss alleged to result therefrom is solely due to plaintiff's neglect and failure to properly attend to and care for said horses, as he was obliged to do.

This is the only allegation of negligence throughout the pleadings.

The car in question left North Battleford on March 18th, and arrived at Montreal on March 24th, a distance of about 1,926 miles. En route the horses were taken from the car at three feeding points: Saskatoon for 7 hrs. and 50 mins., St. Boniface for 24 hrs. and 40 mins., and at Hornepayne for 3 hrs. and 50 mins., a total of 36 hours. There is a further period of 25 hours en route which could not be explained nor accounted for.

That the loss was suffered en route is established, but no evidence is tendered to prove where, when or by what means it was inflicted. The nature of the injury makes it clear that it was the deliberate effort of some person or persons.

The provisions of this Live Stock Special Contract were approved by the Board of Transport Commissioners on the 2nd of June, 1920, pursuant to the provisions of section 348 of the *Railway Act,* 1927 R.S.C., c. 170:

> 348. 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 has been first authorized or approved by order or regulation of the Board.

The phrase "its liability" as used in this section refers to the liability of the carrier at common law and under the *Railway Act.* Except, therefore, as this liability may be impaired, restricted or limited under a contract, such as we are here concerned with, the liability of the carrier remains as determined by the common and statute law.

The first sentence of this contract reads in part as follows:

> Received, subject to the classification and tariffs in effect on the date of issue of this original Live Stock Bill of Lading.

Canadian Freight Classification no. 19, also approved by the Board of Transport Commissioners, was in effect on the date of this contract and a reference thereto will indicate the different basis upon which live stock may be

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shipped. These horses were shipped upon the basis found in the classification under the general heading "Live Stock":

5. In carloads, at the undermentioned rates and weights.

* * *

(*b*) At Owner's Risk:

Subject to the terms and conditions of the special live stock contract signed by the shipper or his agent.

In the determination of the rights of the parties under this contract the meaning to be ascribed to the phrase "Owner's Risk" is of first importance. The appellant carrier contends that:

* * * the shipment in the present case was carried at "Owner's Risk" taken in the ordinary, broad acceptation of the term, even relieving the carrier from liability for damage resulting from its negligence and that of its servants, provided such wider meaning is consistent with the terms and conditions of the Live Stock Contract.

In other words, that the entire risk is assumed by the shipper except only as that risk may be by the contract imposed upon the carrier. This appears contrary to the plain intent of section 348 of the statute, and, moreover, contrary to the form and phraseology of the subsequent sections of the contract itself.

This phrase "Owner's Risk" is familiar to those engaged in the carriage of goods and has been the subject of judicial decision.

It seems conceded that the words "Owner's Risk" alone would protect the carriers against all but wilful neglect or misconduct or unreasonable delay. *Dixon* v. *Richelieu Navigation Co.*, (1)

See also *B. C. Canning Co.* v. *McGregor*, (2); *Brown* v. *Dominion Express Co.*, (3); *H. C. Smith Ltd.* v. *Great Western Ry. Co.*, (4).

A study of the subsequent sections of the Live Stock Special Contract will indicate that the Board of Transport Commissioners have not used the phrase "Owner's Risk" under the heading "Live Stock" in this classification in

(1) (1888) 15 Ont. A.R. 647; (1890) 18 Can. S.C.R. 704.
(2) (1913) 14 D.L.R. 555.
(3) (1921) 67 D.L.R. 325.
(4) [1922] 1 A.C. 178.

the sense or meaning contained in the appellant's submission nor the definition under the above quoted authorities. Section 1 of the contract provides in part:

> Sec. 1. * * * that the carrier shall in no case be liable for loss of or damage or injury to * * * in excess of the following agreed valuation * * * whether the loss, injury or damage occurs through the negligence of the carrier * * * or otherwise.

Section 4 specifically provides that the loading, unloading, feeding and caring for the live stock shall be done at the risk of the shipper unless it is occasioned by some delay caused by some negligence on the part of the carrier.

Section 5 provides that if the destination of the shipment is a distance of more than 150 miles from the shipping point the shipper or some person on his behalf must accompany and care for the shipment throughout the journey.

Section 6 provides as follows:

> Sec. 6. The carrier shall not be liable for loss, damage, or delay to any of the live stock herein described caused by the act of God, the King's or public enemies, riots, strikes, defects or inherent vice in the live stock, heat, cold, the authority of law, quarantine, the act or default of the shipper, or causes beyond the carrier's control; nor when caused by changes in weather or delay resulting therefrom, except such delay is due to the carrier's negligence, and the burden of proving freedom from such negligence shall be on the carrier; nor for loss or damage caused by fire occurring after cars have been placed for unloading at point of destination.
>
> Except in case of the negligence of the carrier (and the burden of proving freedom from such negligence shall be on the carrier), the carrier shall not be liable for loss, damage or delay occurring while the live stock is stopped and held in transit upon the request of the party entitled to make such request.

Section 9 provides:

> Sec. 9. The shipper hereby acknowledges that he has the option of shipping the above described live stock at a higher rate of freight * * * the effect of which the shipper understands would be to remove the limitation on the amount of damages for which the carrier * * * might be liable * * * and the shipper has voluntarily elected to accept the limitation * * *

These sections deal with limitation of liability and liability for negligence on the part of the carrier; assumption of risk by the shipper; and a list of specific causes from which if loss or damage result the carrier is not liable. It is obvious that the "terms and conditions" of these sections are "impairing, restricting or limiting its liability"

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as contemplated by section 348, and they are not written on the basis that if these conditions were not here all the risk would be upon the shipper as the appellant contends, nor that the carrier is liable for only "wilful neglect or misconduct or unreasonable delay" as the phrase "Owner's Risk" is construed under the foregoing decisions.

All of which makes it clear that the Board of Transport Commissioners did not intend to adopt in this classification either the definition of "Owner's Risk" suggested by the appellant or that which obtains under the authorities. If they had so intended these provisions with respect to negligence, and many, if not all, of the others would have been omitted because they would have been entirely unnecessary. The contract would have been written differently both as to form and substance.

A study of the statute, the classification and the contract leads to the conclusion that the Board of Transport Commissioners have used this phrase "Owner's Risk" throughout in the same sense, and that the intention with respect to "Owner's Risk" conditions as expressed in rule 25 of the classification applies, including Live Stock. This rule 25 reads as follows:

Sec. 1. Articles specified in this Classification to be carried under "Owner's Risk" conditions, shall, unless otherwise required by the shipper, be carried at "Owner's Risk" as so specified and defined, and special notation to that effect is not necessary on the bill of lading. These conditions are intended to cover risks necessarily incidental to transportation; but no such limitation, expressed or otherwise, shall relieve the carrier from liability for any loss or damage which may result from any negligence or omission of the company, its agents or employees.

Sec. 2. Where "Owner's Risk" conditions are specified for articles in less than carloads, such conditions will also apply on the same articles in Carloads.

Sec. 3. Should the shipper decline to ship at "Owner's Risk" as specified and defined in this Classification any article shown as to be so carried, the articles will be carried subject to the terms and conditions of the bill of lading approved by the Board of Railway Commissioners for Canada, in which case twenty-five per cent. over and above the rates which would be payable if such articles were shipped at "Owner's Risk" will be charged.

Sec. 4. This rule will not apply to live stock which will be carried only on the terms and conditions specified in the Classification.

It will be observed that rule 25 refers to "Owner's Risk conditions * * * so specified and defined", and then provides that "these conditions are intended to cover

risks necessarily incidental to transportation; * * *"
It includes certain general provisions with respect to less than carload lots and the rates to be charged when the shipper refuses to ship at "Owner's Risk". These latter apply generally throughout the classification but under the heading "Live Stock" they are specifically dealt with. It was prudent, therefore, to include in rule 25 that such should not apply to live stock. Subsection 4 is intended to so provide and avoid any conflict between that rule and the provisions under the heading of "Live Stock". It would appear that it should be so read and construed.

It is significant that this important phrase "Owner's Risk" does not appear in the body of this Live Stock Special Contract and in the classification under the heading "Live Stock" it appears only as above quoted. The foregoing construction of rule 25 explains why it is not used in the contract as it provides "special notation to that effect is not necessary on the bill of lading". If either the meaning contended for by the appellant or that under the above authorities had been intended, one would have expected a special notation to that effect would have been required in the contract. Moreover, if the Transport Commissioners had intended to use "Owner's Risk" in rule 25 in the restricted sense and then in the Live Stock Classification, (and by virtue thereof in the contract),

> in the ordinary, broad acceptation of the term, even relieving the carrier from liability for damage resulting from its negligence * * *

they would have provided for this substantial difference by language clear and specific.

In any event, it appears clear from a study of the contract, classification and the statute that the Board of Transport Commissioners intended that the phrase "Owner's Risk" as used in this contract is, as expressed in rule 25,

> intended to cover risks necessarily incidental to transportation; but no such limitation * * * shall relieve the carrier from liability * * * from any negligence or omission of the company, its agents or employees.

Certainly no other intention is expressed, and apart from the general words in subsection 4, "this rule will not apply to live stock", there is nothing which even suggests this expressed intention should not apply to live stock. On the

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contrary, the statute and the terms and conditions throughout both the classification and the Live Stock Special Contract support this construction.

The injury suffered in this case was obviously the deliberate effort of some person who committed an act in the nature of a theft or of malicious mischief and in no sense can this be regarded as a risk "necessarily incidental to transportation". That which is incidental is something which is usually or naturally associated with or arising out of the work of transportation. It is as the Oxford Dictionary states: "something occurring or liable to occur in fortuitous or subordinate conjunction with something else". The word "necessarily" further limits the word "incidental". It would appear that this general limitation is intended to cover those incidents and that other eventualities should be dealt with under the terms and conditions of the contract or left subject to the statute or common law.

Then when we examine the terms and conditions of the contract itself, this loss or damage is not specifically covered. There are two provisions that should be mentioned and both are in section 6 quoted above. First, "the act or default of the shipper". This shipment was for a distance of over 150 miles and the contract provides that an attendant will "accompany and care for the shipment throughout the journey". The respondent shipper in this case signed another contract entitled "Special Contract with Attendants in Charge of Stock" which requires the attendant to provide "all care and attention needed en route". These contracts must be read and construed together. Section 4 of the Live Stock Special Contract provides specifically the duties of the shipper in this regard:

> Sec. 4. The shipper agrees to load, unload or reload said live stock at his own expense and risk; feed, water and attend same at his own expense and risk while in transit, except * * * in the event of delay * * * caused by the negligence of the carrier.

It is the care and attention of this nature that is involved in the expressions "accompany and care for the shipment throughout the journey" and "all care and attention needed en route". This conclusion is emphasized by those provisions of the Attendant's contract which provide that the attendant

will remain in a safe place in the caboose or other car provided for my transportation, or in the car provided for the transportation of the stock, at all times while the train is in motion.

This does not contemplate that the attendant shall remain in the car with the stock, particularly on a long journey such as this. Furthermore, this contract specifically requires the attendant to use caution in moving about the "track, station or other premises", and specifically provides

I hereby release the said carrier * * * from all liability for any injury or damage suffered by me while violating any of the terms of this agreement.

It would be quite impracticable for the attendant to be at all times with the stock, nor in fact does the contract require that he do so. Moreover, its provisions do not relieve the carrier of its obligations to supervise and care for this freight as it is required to care for freight generally while in transit. It does not relieve the carrier of its responsibilities to carry freight qua freight safely.

There is no question but that the respondent shipper did not carry out the terms of his Attendant's Contract. His default in that regard is relevant in this action only in so far as it caused or contributed to the loss or damage suffered by these horses. Both of the parties hereto had obligations and responsibilities with regard to these horses while en route. The evidence makes it plain that the loss or damage was not a result or consequence of any default or failure to perform the obligations and duties devolving by virtue of the contracts upon the respondent. If it did so other important considerations would arise.

The appellant pleaded that this loss or damage

did not take place while the horses were on the car and the loss alleged to result therefrom is solely due to plaintiff's neglect and failure to properly attend to and care for said horses, as he was obliged to do.

This plea suggests that the appellant was liable while the horses were in the car but when outside thereof they were in the care of the attendant, but the evidence does not establish that the damage took place while the horses were outside the car. In fact one of the appellant's witnesses, when asked as to the possibility of this loss or damage being inflicted while the horses were in the car by one operating outside of the car, replied: "It might

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be done". Another witness for the appellant admitted: "Yes, it was a bum job. It was done by someone who did not know the business". This also suggests the possibility that it might have been done by some person operating under difficulties such as might exist when the horses were within the car. In my opinion, as above stated, the evidence does not establish whether the damage was done while the horses were within or without the car.

Then in the same section 6 there is the phrase "causes beyond the carrier's control". This phrase, as will be observed in the above quoted section 6, follows a rather lengthy list of causes. If this phrase be regarded as a general phrase to be construed according to the well-known ejusdem generis rule, it is obvious that such a loss or damage cannot be included as coming under this heading. If, on the other hand, this phrase be regarded as a separate and distinct category and therefore not subject to the ejusdem generis rule, then the question arises, was this act beyond the control of the carrier?

Whether such an act as that here in question was one beyond the control of the carrier cannot be determined apart from evidence directed to that issue. It has apparently been recognized throughout that the facts of this case do not warrant such a finding. The onus of adducing such evidence rests upon the appellant carrier who invokes the provisions of the contract to relieve it from liability. *London and North Western Rly. Co.* v. *Ashton,* (1); *London and North Western Rly. Co.* v. *Neilson,* (2); *The Canadian Northern Quebec Rly. Co.* v. *Pleet,* (3).

The appellant, while recognizing this general rule and that no specific provision in the contract places the burden of proof upon the shipper, contended

> that *indirectly* with the Owner's Risk clause as part of the contract, it follows that the burden of proof is on the shipper;

and further that the difference in the language used in the "Carrier's Risk" contract and the "Owner's Risk" contract for the shipment of live stock was such that "the risk and

(1) [1920] A.C. 84.
(2) [1922] 2 A.C. 263.
(3) (1921) 26 Can. Ry. Cas. 238

the burden of proof" were placed upon the shipper. The meaning and effect of the words "Owner's Risk" have already been dealt with. These two contracts:

At Carrier's Risk: Subject to the terms and conditions of the bill of lading issued by the originating carrier;

and

At Owner's Risk: Subject to the terms and conditions of the special live stock contract signed by the shipper or his agent,

clearly indicate that these terms "Carrier's Risk" and "Owner's Risk" are in this Freight Classification not used in their literal or precise dictionary meaning but rather as in the classification defined. The law has always placed upon the carrier the burden of proof and if this contract, prepared and approved as above indicated, was intended to shift the burden of proof it would have contained a provision to that effect or used such language as to point directly to that conclusion.

The appellant submitted that the phraseology of the contract did point directly to that conclusion and referred to two provisions in section 6 to support his contention.

The first:

The carrier shall not be liable for loss, damage, or delay * * * when caused by changes in weather or delay resulting therefrom, except such delay is due to the carrier's negligence, and the burden of proving freedom from such negligence shall be on the carrier * * *

The second:

Except in case of the negligence of the carrier, (and the burden of proving freedom from such negligence shall be on the carrier), the carrier shall not be liable for loss, damage or delay occurring while the live stock is stopped and held in transit upon the request of the party entitled to make such request.

This section 6 includes the act of God, the King's enemies and inherent vice; the carrier has always been relieved of liability by establishing one or other of these as the cause of the loss or damage. In effect, this section 6 enlarges the number of such causes that may be so established by the carrier but even with regard to the first three mentioned, and the others under this section would be so treated, the carrier was under an obligation to take reasonable care to avoid loss or damage being suffered therefrom.

With regard to the excepted perils, the carrier must use all reasonable care, skill, and diligence to avoid their consequences; and if damage occurs which is attributable to a breach of this duty, he is liable. 4 Halsbury, p. 13, para. 17.

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If the carrier established one of these causes it would succeed. On the other hand, it is clear that if the evidence indicated that even this consequence could have been avoided by the exercise of due care on the part of the carrier, the carrier would not succeed. In dealing with the provision that the carrier would not be responsible for loss or damage occasioned by the kicking, plunging, or restiveness of the animal, Lush J. stated:

> It cannot, I think, be contended that this condition dispenses with the use of reasonable care on the part of the company in the receiving, carrying, and delivering cattle, any more than the exception of perils of the sea, in a bill of lading, relieves a ship-owner from the obligation to navigate with ordinary skill and care. The exception goes to limit the liability, not the duty. It is the duty of the carrier to do what he can, by reasonable skill and care, to avoid all perils, including the excepted perils. If, notwithstanding such skill and care, damage does occur from these perils, he is released from liability; but if his negligence has brought on the peril, the damage is attributable to his breach of duty, and the exception does not aid him. *Gill* v. *Manchester etc. Rly. Co.*, (1).

See also *The Canadian Northern Quebec Rly. Co.* v. *Pleet*, (2). In the two foregoing provisions the appellant must not only establish in one the delay and in the other the loss, damage or delay occurring, etc., but in order to succeed must go further and establish that it was without negligence on his part. This does not have the effect of placing the onus of proof generally, as contended for by the appellant, upon the respondent.

This particular loss or damage not being covered by the provisions of the contract, it follows "its liability", as that term is used in section 348 of the *Railway Act*, has not been impaired, restricted or limited by the terms of the Live Stock Special Contract. The provisions of the *Railway Act* do not otherwise than under section 348 provide for the alteration of the liability of the carrier with respect to this type of damage and the carrier's liability therefore must be determined at common law.

The doubt expressed in *Grand Trunk Rly. Co.* v. *Vogel* (3) as to whether under the common law animals were included within the definition of goods to be handled by the common carrier has been settled in the affirmative in *Prior* v. *The London & South-Western Rly. Co.* (4); see also

(1) (1873) L.R. 8 Q.B. 186, at 196.
(2) (1921) 26 Can. Ry. Cas. 238.
(3) (1886) 11 Can. S.C.R. 612.
(4) (1885) 2 T.L.R. 89.

Leslie in Law of Transport by Railway, 2nd ed. p. 46. In Canada the matter is determined by section 2 (10) of the *Railway Act* where the definition of goods is sufficiently broad to include horses.

At common law the carrier is liable for all loss or damage to goods in transit, or as it is often stated, the carrier is an insurer of the safe delivery of the goods, except where the loss or damage is caused by acts of God, the King's enemies or the inherent vice of the goods. This deliberate act of some third party does not come within any of these exceptions but is included within the statement:

> The common carrier of goods is an insurer against harm occurring from outside which no care on his part can avert. 4 Halsbury, 2nd ed., p. 16, para. 22.

The appellant is therefore liable at common law for the loss or damage suffered by the respondent.

This action was brought in the province of Quebec and no question of jurisdiction has been raised. In any event, the liability of the appellant as a common carrier appears to be the same in both the provinces of Quebec and Saskatchewan. *The Boston & Maine Railroad* v. *Ratzkowski,* (1); *Bayne* v. *Can. Nat. Ry.* (2).

The loss or damage here inflicted was caused by the deliberate act of a third person and no evidence has been adduced on the part of the carrier to indicate that it is a loss or damage covered by the provisions of the Live Stock Special Contract nor to establish on behalf of the appellant that it comes within any of the exceptions from liability at common law, and therefore the appellant must be held liable.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Côté & Perrault.*

Solicitors for the respondent: *Mann, Lafleur & Brown.*

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(1) (1919) Q.R. 30 K.B. 445.

(2) [1933] 3 W.W.R. 616; 42 Can. Ry. Cas. 340.