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*Feb. 18, 19
*Apr. 11.

BENJAMIN BODNOFF (PLAINTIFF) .... APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT.

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

Railway—Carrier—Live Stock Special Contract—Negligence—Shipment of horses—Mare found lying sick during trip—Shipper's attendant not there—Railway or stock yard's employees erecting gate partition —Mare and another horse found dead later on—Claim for damages by shipper—Clause in contract that shipper should provide attendant —Carrier not liable—Failure of attendant, to "care for" and "attend" the mare, cause of the accident—Railway's or stockyard's employees to be treated as agents of the shipper and not of the carrier— "Owner's Risk"—Articles 1675 and 1681 C.C.

The appellant shipped eighteen horses from three points in Saskatchewan to be delivered at Montreal under a contract with the respondent railway, known as Live Stock Special Contract, approved by the Board of Transport Commissioners of Canada. The shipper, as he agreed to do under the contract, sent a person to accompany and care for the shipment on his behalf, but the evidence is not clear at what exact point the attendant boarded the train. When the horses were unloaded for feeding and watering at Saskatoon, it was found that a bay mare was lying on the floor, bruised and unable to rise to its feet. The appellant's attendant was not there at that time. After examination by a veterinary surgeon, a special gate partition was erected either by the railway's or by the stock yard's employees for the purpose of separating the bay mare from the rest of the horses. On arrival at Wynyard, Saskatchewan, a gelding which had travelled with the other horses in the main body of the car was found over the partition, and both it and the mare had died from suffocation. The appellant claimed from the respondent $227.98 for damages through non-delivery and loss of the two animals. The trial judge maintained the action, but the appellate court, by a majority, reversed that judgment.

Held, that, under the circumstances, the respondent railway should be relieved of any responsibility and, therefore, the appeal should be dismissed.—If the appellant's attendant, while performing his duty as he was bound to do under the provisions of the Special Contract, had been there at the relevant time when the mare was found lying sick, it would have been his responsibility to "care for" and to "attend it", and he would have done what was necessary in the circumstances. As the attendant was not there, either the railway's or stock yard's employees had to "care" for the live stock, but, in erecting the gate partition, they should be treated as agents of the shipper for that purpose and not as agents of the carrier. Such

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

employees may have been negligent in "otherwise" caring for the horses or the partition may be found to have been insufficient, but, in the events that happened, the real cause of the accident was the failure of the shipper to carry out his obligation.

Per The Chief Justice and Taschereau J.:—The shipper had the option of asking for a straight bill of lading whereby the shipment would have been at carrier's risk or for a special contract under which the shipment is made at owner's risk. In this case, the horses were carried at owner's risk according to the usual acceptation of the term and the carrier was relieved from liability for damages even resulting from its negligence or that of its employees, provided it was consistent with the terms and conditions of the Special Contract. No restriction is found in that contract limiting the "owner's risk" condition, and the respondent therefore should not be held responsible for the accident complained of by the appellant.—Under article 1681 C.C. the provisions of article 1675 C.C. are superseded by the rules provided by the *Railway Act.—Canadian National Ry.* v. *Harris,* reported *ante* p. 352.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing by a majority the judgment of the Superior Court, Duclos J. and dismissing the appellant's action for $277.98 damages. Leave to appeal to this Court was granted by the appellate court.

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

L. G. Prévost K.C. and *J. E. Paradis* for the respondent.

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

THE CHIEF JUSTICE:—In this case the appellant claimed $277.98 for damages suffered through non-delivery and loss of two horses out of a shipment of eighteen from three points in Saskatchewan to be delivered at Montreal.

The appellant alleged that the horses were shipped under a contract with the respondent, known as "Live Stock Special Contract" approved by the Board of Transport Commissioners for Canada; and that the respondent agreed to deliver the two horses in question at the point of destination.

The respondent denied being responsible under the terms of the contract and the Freight Classifications and Tariffs.

No issue is raised as to the quantum of damages.

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The action was maintained by the judgment of the Superior Court, Duclos J.; but that judgment was reversed by the Court of King's Bench (appeal side), Mr. Justice Francœur dissenting.

The evidence discloses that when the horses were unloaded for feeding and watering at the Union Stockyards at Saskatoon, it was found that a bay mare was lying on the floor, bruised and unable to rise to its feet.

A veterinary surgeon was called to examine the horse and, after examination, a gate partition (4 ft. 7 ins. high) was erected with the intention of separating the bay mare from the rest of the horses.

On arrival at Wynyard, Sask., a gelding which had travelled with the others in the main body of the car was found over the partition, and both it and the mare had died from suffocation.

The learned trial judge held that the burden was on the respondent to establish that the loss of the horses was in no way due to its fault, negligence or want of proper precaution and that it failed to do so; that the partition used was insufficient to properly separate the horses; that in virtue of the Live Stock Special Contract, the shipper consented only to limit the carrier's liability in case of loss to $200.00 per horse; and that, even if in erecting the partition the employees of the respondent acted as agents for the shipper, they were bound to execute such duty in a proper and safe manner and their failure to do so would bind the respondent company.

According to the learned trial judge, the probable explanation of the accident was that the united weight of the sixteen other horses, pushing against the partition, might well have forced the gelding over it during shunting of the car or starting or stopping of the train, and that a higher partition would have prevented the accident.

In the Court of King's Bench, it was found *inter alia* that the partition used to separate the horses was standard equipment; that the respondent's employees in the handling of the car-load and the erection of the partition had acted "en bons pères de famille" and that, moreover, in erecting the partition, the respondent's employees were acting as the agents of the appellant.

In this Court, the substance of the appellant's argument was briefly that the responsibility of the respondent as a carrier, so far at least as the present case is concerned, is the agreed responsibility imposed by the Civil Code subject only to such modification thereof as may be expressly stated in the contract between the parties; and that, by force of article 1675 of the Civil Code, the respondent could only escape liability by proving affirmatively that the damage occurred by "fortuitous event or irresistible force or * * * a defect in the thing itself" or by one of the exculpatory causes set out in section 6 of the contract, which are similar in character; that the respondent has failed to prove that the cause fell within one of these exculpatory provisions; and that therefore, the appellant's action must succeed.

I have already given out, in my reasons for judgment in the case of *The Canadian National Railways* v. *Harris,* (1) where judgment is to be rendered at the same time as the present one, my views on the question of the responsibility of a railway company towards the shipper under the Live Stock Special Contract; and, for that reason, I do not feel that I need repeat here, except in substance, an elaborate opinion in the matter.

Under article 1681 of the Civil Code,

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

To my mind, that means that article 1675 of the Civil Code is superseded in the present case by the rules provided in the Federal Act respecting railways.

The Live Stock Special Contract, in this case, is in standard form approved by the Board of Transport Commissioners for Canada, by Order No. 298, dated the 2nd day of June, 1920; and by force of section 348 of the Dominion *Railway Act,* the contract in question is valid; it is not only the agreement whereby the parties are bound, but, in a certain sense, it is really the law governing the relationship of all shippers and railway carriers to such an extent that it would not be open in the premises, for either the appellant or the respondent, to relieve themselves of the stipulations of such a contract.

(1) Reported *ante,* p. 352.

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Moreover, under section 9 of the contract, the shipper acknowledged that he had the option of shipping his live stock at a higher rate of freight than that payable under the special contract, and according to the classifications and tariffs of the carrier, the effect of which the shipper understood, would be to remove the limitation on the amount of damages for which the carrier might be liable as thereunder provided,

and the shipper had voluntarily elected to accept the limitation of liability therein contained, to enable him to obtain the reduced freight rate mentioned in the contract.

(See the judgment of this Court in *Ludditt* v. *Ginger Coote Airways Ltd.* (1))

The special contract governing the parties starts by stating that it is made subject to the classifications and tariffs in effect on the date of its issue (except when inconsistent with the contract itself); and it follows that the live stock to be carried thereunder was subject to these classifications and tariffs.

Under these classifications and tariffs, we are dealing with a carload shipment; therefore, the rates and weights were at "owner's risk". I repeat that the shipper had the option of asking for a straight bill of lading whereby the shipment would have been made at carrier's risk and the special contract under which the shipment was made is at owner's risk.

In the present case, the horses were being carried at "owner's risk" according to the usual acceptation of the term, and the carrier was relieved from liability for damage even resulting from its negligence and that of its servants, provided it was consistent with the terms and conditions of the Live Stock Special Contract. (Refer to Rules and Conditions 2 and 3 at page 21 of the Tariff).

It follows that unless we find in the special contract a restriction limiting the owner's risk condition, the respondent in the present case cannot be held responsible for the accident complained of by the appellant.

The contract states that the respondent agreed to carry the carload of horses to its place of delivery at destination

(1) [1942] S.C.R. 406.

and that it was mutually agreed that every service to be performed thereunder should be subject to all the conditions therein mentioned.

This was accepted for himself by the shipper, the appellant herein.

The appellant agreed to load, unload, reload the live stock at his own risk;

feed, water and attend same at his own expense and risk while in transit, except as provided in sub-section 5,

in the event of delay, which does not arise in the present case.

Section 4 of the contract further stipulates that

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 will 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.

Under sub-section 3 of section 4 of the contract, 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.

Under sub-section 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 any loss or damage caused by defects therein.

Under section 6,

the carrier is not to be liable for loss or damage to any of the live stock 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 * * * and the burden of proving freedom from such negligence shall be on the carrier.

In the present instance, the shipper, or the appellant, did send a person to accompany and care for the shipment throughout the journey on his behalf. It is not clear at what exact point this person boarded the train. It would seem that he was not there when the horse was found lying in the car at Saskatoon.

The special partition appears to have been put up by the employees of the shipyards, and not those of the respondent at Saskatoon.

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At all events, it is not necessary to ascertain the exact situation in that respect, for it was the undeniable obligation of the appellant to accompany and care for the shipment throughout the journey, either by himself or by some person on his behalf. If the attendant was there when the horse was found lying sick, it was his responsibility to "care for" and to "attend" it at the shipper's "risk while in transit". If the attendant was not there, the employees of the respondent were to "care" for the live stock, but then they would be "treated as agents of the shipper for that purpose and not as agents of the carrier".

Attending the live stock, caring for it, or "properly and securely place" it in the car would all be part of the obligations of the appellant under section 4, sub-sections 1 and 3, and under section 5 of the contract. And it is particularly stipulated in sub-section 4 of section 4, that

> 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.

So that whether the accident was caused through the lack of attendance or care of the live stock, or through the insufficiency of temporary partitions or decks, in either case it was caused by the failure of the shipper to carry on his obligations under the special contract.

It seems evident that when the horse was found sick in Saskatoon, it became the duty of the person who was to "attend" it or to "care for" it to do what was necessary in the circumstances. And when the partition was put up, it was for the purpose of protecting it and therefore included in the carrying out of the obligations to "attend" or to "care for".

On the other hand, if we limit the question to the fact of having erected a temporary partition in the car, that was also part of the obligations of the shipper "to properly and securely place" the stock in the cars; it was indeed, under sub-section 4 of section 4, a temporary partition put up by the shipper, since in doing so, the employees were to be "treated as agents of the shipper for that purpose and not as agents of the carrier."

In either case, what was done cannot be traced back to the responsibility of the respondent who, in such a case, (under sub-section 4),

shall not be responsible for the sufficiency thereof or for any loss or damage caused by defects therein.

No partition was necessary for the other horses. It was put there only because the mare was sick in order to protect it; it was part of the care due to the mare and entirely part of the obligations of the shipper under the contract.

It was also the conclusion arrived at by St.-Jacques J. in the Court of King's Bench with whom Prévost J. and Stuart McDougall J. agreed, and with whom MacKinnon J., writing separately, agreed.

I find myself fully in accord with these conclusions and for these reasons, I would dismiss the appeal with costs.

KERWIN J.:—The Live Stock Special Contract upon which this action is based was in a form approved by the Board of Transport Commissioners under section 348 of the *Railway Act*. The contract states that there was

Received, 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.

a number of horses from different places in Saskatchewan for delivery to the appellant in Montreal. The particulars as to what occurred to a bay mare and a gelding appear elsewhere. Suffice it is to say that the action is brought to recover the agreed valuation of each animal, which action was contested by the respondent on several grounds.

In my view it is not necessary to consider more than one such ground. By section 5 of the Special Contract:—

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.

It is uncertain when any attendant joined the train.

By sub-section 1, section 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 as provided in sub-section (5) of this

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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 will 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 seems to me unquestionable that the appellant did not "attend" the horses at the relevant times and that in the events that happened, even if the employees of the respondent were negligent in "otherwise" caring for them, they must, under sub-section 1 of section 4 of the Special Contract, be treated as agents of the appellant. Therefore, assuming that the trial judge was right in finding such negligence, this sub-section serves to relieve the respondent from any liability. I say nothing as to the effect of anything in the classification and tariffs except to point out that, by the opening words of the Special Contract, nothing therein contained could apply where it was inconsistent with the terms of the Special Contract.

The appeal should be dismissed with costs.

HUDSON J.:—The facts giving rise to this controversy are set forth in the judgment of my Lord the Chief Justice, which I have had an opportunity of reading.

The condition of the plaintiff's mare when the car arrived at Saskatoon was such as demanded the care and attention of those in charge. The occasion called for a decision as to what should be done. Neither the plaintiff nor any attendant representing him was there to act. As a consequence, after the mare had been examined by a veterinary, it was decided by the employees of the company and two employees of the stock yard that a partition should be erected separating the mare from the other horses in the car and that she should then be allowed to proceed on the journey. A partition was erected and the car proceeded on the journey.

The only fault attributed to the defendant is that the partition was insufficient for the purpose and the subsequent death of the animal arose therefrom. The learned trial judge so found but a different view prevailed in the court of appeal.

It appears from a perusal of the evidence that there were different opinions on the question of the sufficiency of this partition among men engaged in the shipping of live stock. It does appear, however, that none of them had known of a case where an injury had occurred under circumstances at all similar to those of the present case.

The contract of shipment provides:

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 will be treated as agents of the shipper for the 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.

* * *

(4) If temporary partitions or decks are put in the cars by the shipper, the carrier shall not be responsible for the sufficiency thereof, nor for any loss or damage caused by defects therein.

5. If the destination of the shipment of said live stock is more than one hundred and fifty 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.

It appears that an attendant of the plaintiff was on the train but never gave any attention to the animal in question until after her death. Under these circumstances, I do not think that it lies in the mouth of the plaintiff to complain of any provision that was made for the care of his animal.

In my opinion, the employees of the defendant could not have been guilty of more than a lack of judgment and it is peculiarly a case for application of the provision that defendant's employees should be treated as the agents of the shipper himself. For this reason, I would dismiss the appeal with costs.

KELLOCK J.:—Under the terms of section 5 of the Live Stock Special Contract here in question, the shipper, or some person on his behalf, was obliged to accompany and care for the horses throughout the journey. It is apparent from the evidence that although the Special Contract between the Railway Company and the attendant in

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charge was not signed, nonetheless an attendant did in fact accompany the shipment, although he did not board the train at Rutland, the original shipping point. After the train had left Wynyard, the attendant was found asleep in the car provided for shippers' attendants.

Again under the provisions of sub-section 1 of section 4, the obligation to load, unload and reload the horses, to feed, water and attend the same while in transit, was placed upon the appellant. In the attendant's contract there is the following provision:

> 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.

Accordingly, when the horses arrived in Saskatoon, had the appellant's attendant performed his duty, he would have seen the condition of the horse which was there found to be down, and he would have been under obligation to take the proper steps to see that this horse was protected from the other animals for the remainder of the journey if its condition required this. When the stock yard employees put in the partition, which in their judgment was called for in the circumstances, I think they were acting as the appellant's agents in accordance with the provisions of the contract and the appellant, having failed in the obligation which lay upon him, cannot be heard to say that what was done was not done on his behalf. In my opinion the provisions of sub-section 4 of section 4 contemplate the very situation that arose. I think that the temporary partition was put in on behalf of the appellant and its insufficiency is not something for which the respondent is responsible.

The appellant's own witness, Arnold, gave the following evidence:

> Q.—Have you ever shipped horses on the Canadian Pacific Railway?
>
> A.—I ship them all the time.
>
> Q.—Have you ever seen any other type of gate used than this one which is shown as exhibit D-3?
>
> A.—No. Not provided by the C.P.R. But generally two gates are used or the gate is raised up. It is raised up two or three feet, and it is cleated. You put cleats on the side or you supplement it with a plank on top.

Q.—Have you ever done it yourself?
A.—Yes, often. Practically every week. Continually.
Q.—But it has not been done by railway employees?
A.—Well, sometimes it is, *if we ask them to*. It has been done.

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I think, therefore, that the loss complained of in this action was a loss for which the appellant himself was responsible.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

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

Solicitor for the respondent: *L. G. Prévost.*