F. W. PIRIE COMPANY LIMITED (DEFENDANT) ..... APPELLANT;

AND

CANADIAN NATIONAL RAILWAY COMPANY (DEFENDANT) AND..... LESLIE F. SIMMONS ET AL. (PLAINTIFFS) ..... RESPONDENTS.

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* Feb. 9, 10, 11.
* Apr. 2.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Contract—Sale of goods—Date of delivery—Common carrier—Bill of lading—Goods "for export"—Place of delivery "West St. John" —Goods remaining at St. John pending instructions from consignee—Non-acceptance by consignee—Liability for damages resulting therefrom—Substantial performance of contract by common carrier—Carrier ready to deliver goods when notified by consignee as to place of delivery—Failure of consignee to give such notice—Practice or method of handling cars from one place to another by means of two railway companies—Practice forming part of contract or tacitly annexed to it—Evidence as to such practice—Admissibility—Not varying but explaining written contract.

The appellant company entered into a contract with the plaintiffs respondents, on October 2nd, 1939, to purchase 5,000 sacks of potatoes, to be delivered on or before the 18th October, 1939. They were accepted for shipment from Prince Edward Island by the Canadian National Railway Company respondent, the destination specified in the bill of lading being "West St. John, for export" with instructions to "notify Furness Withy & Co. Ltd." The Canadian National Railway Company brought the shipment to the end of their railway line in East St. John, on the 16th of October, 1939. To get the cars to West St. John, it was necessary to turn them over to the Canadian Pacific Railway Company to haul them another six miles to West St. John on that company's line. Notice of arrival of the last car was given by the railway respondent to

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

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Furness Withy, the "notify party", on the 17th of October, 1939, which, in turn, at once notified the appellant company. There were many verbal, telephone and wire communications, relating to the delivery of the potatoes, between the appellant company and the two railway companies. Finally on the 30th of October, 1939, the potatoes were refused by the consignee, the appellant, on the ground that they had not been delivered at West St. John, as the contract called for. The evidence established that, for at least twenty years, the method of handling cars brought by the respondent railway at St. John, for export at West St. John, has been to retain them on the tracks of the respondent railway until their contents could be received at West St. John, either for loading on a vessel or for storage in a dock shed; and it was found by the trial judge that such practice was known to both the appellant company and the plaintiffs respondents. The potatoes, after they were refused by the appellant company, were transferred to refrigerator cars and eventually sold at a loss. The plaintiffs respondents brought action against the railway company for damages because of their alleged failure to deliver the potatoes in time, and they joint the appellant company as defendant, claiming, in the alternative, from it the purchase price of the potatoes. The case was tried before Richards J., who found the railway company liable to the vendors, because of its failure to deliver the potatoes in accordance with their contract and dismissed the action against the appellant company. The Appeal Division set aside the judgment against the railway company and directed that judgment be entered against the appellant company in favour of the plaintiffs respondents with costs, including the costs of the railway company. The Pirie Company appealed to this Court.

Held that the judgment appealed from (16 M.P.R. 353) should be affirmed.

Per Rinfret and Taschereau JJ.—The result of the insertion of the words "For export" on the bills of lading was that the goods to be carried and delivered were indicated as intended to be exported by water from Canada, such a purpose entitling the goods to be carried at a lower rate. The indication "West St. John" was a vague description of the territory where the potatoes were to be delivered, and the particular place where the purchaser intended to have the potatoes unloaded and to accept them was unexpressed in the bills of lading. The respondent railway company was at all times able, ready and willing to execute delivery by transferring the cars to West St. John sheds by means of the Canadian Pacific Railway Company and when it accepted to carry the potatoes to their destination, the respondent was entitled, according to usage and practice known to the appellant company, to have a shed indicated to it by the latter as soon as the potatoes had reached the place from which the cars would have to be switched to the exact destination. It was only by failure to give the proper instructions on the part of the appellant company that the respondent railway was prevented from delivering at the exact shed, in West St. John, where the appellant company wished to accept delivery. Both respondents carried out their contract towards the appellant company as far as they were able to do it; and, so far as the latter is concerned, it must be held to the contract exactly as if it had received delivery of the goods.

Per Rinfret and Taschereau JJ.—Under the circumstances, the practice or method of handling cars from St. John to West St. John must be held to have formed part of the terms of the bill of lading and do not come into conflict with any express terms of the contract; the evidence in that respect was both admissible and applicable. The exact place of delivery was unexpressed in the contract, and the practice or usage was not excluded either expressly or impliedly by the terms of the bills of lading. Such custom was not only reasonable but, in fact, necessary. A general usage of that character must be taken to be tacitly annexed to all contracts relating to business with reference to which they are made, unless the terms of such contract expressly or impliedly exclude them. *Metzner* v. *Bolton* (9 Ex. 518 at 521), *Meyer* v. *Dresser* (16 C.B. n.s. 646 at 660) and *Produce Brokers Company Ltd.* v. *Olympia Oil and Cake Ltd.* ([1916] 1 A.C. 314, at 324). In such a case the presumption is that both parties knew of the practice and usage and contracted accordingly.

Per Davis J.—The appellant company must be held liable. It knew perfectly well what it meant by stipulating for "delivery at West St. John", with instructions to notify F. W. & Co. at St. John. Moreover, the evidence as to what was so meant was admissible, not for the purpose of contradicting or varying the written contract, but to explain it: such evidence was relevant to the true meaning and effect of the contract: *Norden Steam Company* v. *Dempsey* (1 C.P.D. 654). The appellant company, at the time it made the contract, intended to sell and export the potatoes from the western harbour of St. John. The vendor substantially performed its part of the contract when the potatoes arrived at the railway terminal in St. John and the shipping agents were notified. It was for the purchaser to arrange for transportation on an outgoing boat and for a berth on the docks or to take delivery at the railway terminal. It did neither, and must take the consequences.

Per Kerwin, Hudson and Taschereau JJ.—The designation of "West St. John" as the place for delivery of the goods under the contract was incomplete. The seller was entitled to assume that it was the intention of the buyer to ship the goods by sea and, therefore, it was necessary for the buyer to specify the ship and the dock in West St. John before delivery could be completed. The buyer was notified of the arrival of the goods in St. John in ample time to have the shipment placed wherever he wished in West St. John within the time specified in the contract. He failed to designate such place and it is not now open to him to complain that delivery was not made as provided in the contract. *Sutherland* v. *Allhusen* (14 L.T. 666) ref.

APPEAL from the judgment of the Supreme Court of New Brunswick, appeal division (1), reversing the judgment of the trial judge Richards J. The trial judge found the railway company respondent liable to the plaintiffs respondents and dismissed the action against the company now appellant. The appellate court allowed the railway company's appeal and set aside the judgment against it,

(1) (1942) 16 M.P.R. 353.

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and directed that judgment be entered against the company now appellant with costs, including the costs of the railway company.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

O. M. Biggar K.C. and *P. J. Hughes K.C.* for the appellant.

I. C. Rand K.C. for the railway company respondent.

R. L. Palmer for the plaintiffs respondents.

RINFRET J. (Taschereau J. concurring).—The appellant entered into a contract with the respondents Simmons and MacFarlane, on October 2nd, 1939, to purchase 5,000 fifty-kilo sacks of potatoes, to be delivered on or before the 18th October, 1939.

This contract was confirmed by a letter, as follows:

SIMMONS & MACFARLANE, October 2, 1939.
FREETOWN, P.E.I.

GENTLEMEN,—

This will serve to confirm the writer's phone conversation with your Mr. Simmons this morning, closing the purchase from you of 5,000 fifty-kilo bags Government certified small-size Green Mountain seed potatoes, delivered West Saint John on or before the 18th day of this month at $1.40 per fifty-kilo sack, and also 2,000 100-lb. sacks Government certified Red Bliss Triumph seed potatoes, delivered West Saint John on or before the 13th instant at the price of $1.50 per 100-lb. sack, you having the right to supply 50 per cent of this quantity in the number one small grade.

Please use the following marks on the Bliss bags:

100 lbs. nett, When packed, Government certified, "Pippin Brand" seed potatoes. F. W. Pirie Co. Ltd., Grand Falls, New Brunswick, Canada.

As for the marks on the fifty-kilo bags, we will wire these through to you promptly, as we have boats coming in on schedule which means that time is the essence of this agreement. You may bill the Bliss cars to ourselves, West Saint John, notifying H. E. Kane & Com., Saint John, sending your drafts and B/L's through to the Royal Bank, Saint John, and forwarding invoices to us here in Grand Falls.

On your cars, loaded with the certified Mountains, bill your cars to ourselves, West Saint John, notifying Furness, Withy and Company, Saint John, sending your drafts and B/L's through the same bank and address your invoices to F. W. Pirie Company, Limited, Grand Falls.

In all probability, we will be wiring you to-day regarding marks to be applied on the fifty-kilo bags and also, regarding a further quantity of Red Bliss Triumphs.

Yours very truly,
F. W. Pirie Company, Limited,
F. W. PIRIE,
President.

The material points to be noticed about this letter are that no mention was made therein of any particular territory where the potatoes were to be purchased by the vendors or from which they were to be shipped; and that the purchasers stated: "as we have boats coming in on schedule which means that time is the essence of this agreement". Moreover, the cars loaded with the certified Mountain potatoes were to be billed to the purchaser, West Saint John, notifying Furness Withy & Company, Saint John.

No difficulty arose with regard to the Red Bliss Triumph seed potatoes, the cars also to be billed to the purchaser, West Saint John, notifying H. E. Kane & Com., Saint John.

The case and the appeal concern only the Green Mountain seed potatoes. The claim on behalf of the appellant was that the latter were not brought to West Saint John until after the 18th October, 1939, and the purchaser, therefore, refused to accept them.

Simmons & MacFarlane brought action against the Canadian National Railway Company for damages because of their alleged failure to deliver the potatoes in time; and they joined the Pirie Company as defendant, claiming, in the alternative, against that company for the purchase price of the potatoes.

The case was tried before Richards J., who found the railway company liable to the vendors in $2,580.26, because of its failure to deliver the potatoes in accordance with their contract, and dismissed the action against the Pirie Company without costs.

The railway company appealed to the Appeal Division of the Supreme Court of New Brunswick. That court allowed the appeal, Baxter C.J., dissenting, set aside the judgment against the railway company and directed that judgment be entered against the Pirie Company with costs, including the costs of the railway company.

The Pirie Company now brings this appeal against that judgment.

There are two distinct claims involved in this suit; and, at the outset, a question might have been raised as to whether they could be joined together. The claim against the railway company is for failure to deliver as required by the bills of lading. The claim against the Pirie Company is for the price of 5,000 sacks of Green Mountain

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potatoes. In truth, they are two distinct actions; but, at this late stage, they must be discussed together, as they were in the two courts in New Brunswick.

The plaintiffs-respondents, when they brought this action, must have known that they could not recover against both defendants. If the goods were delivered as required by the bills of lading, the claim against the railway company had to be dismissed. If the goods were not delivered to the Pirie Company, as required by the contract of October 2nd, 1939, the claim against the Pirie Company must be dismissed.

As it turned out, the plaintiffs succeeded against the railway in the King's Bench Division, and against the Pirie Company in the Appeal Division.

This Court has to decide which of the two judgments should prevail. It might have happened that the plaintiffs-respondents could obtain judgment against neither of the defendants; but, at the argument, it was made clear that they were entitled to the amount of $2,580.26 (which amount is not in dispute); and that the real controversy was as to which of the defendants should be condemned to pay it to the plaintiffs.

The potatoes were shipped by Simmons & MacFarlane in the Canadian National Railway Company's cars from Prince Edward Island. There were eleven carloads of potatoes; and for them the railway company issued eleven bills of lading.

The following may be taken as typical of the several bills issued:

Form of straight bill of lading approved by the Board of Railway Commissioners for Canada by order No. 7562 15th July, 1909.

Form 7000 Canadian National Railways

Revised 6-23

Straight bill of lading—original—not negotiable

Shipper's No.....

Agent's No.....

Received, subject to the classifications and tariffs in effect on the date of issue of this original bill of lading, at Freetown, P.E. Island, Oct. 7, 1939, from Simmons & MacFarlane the goods described below in apparent good order, except as noted (contents and condition of contents and packing unknown), marked, consigned and destined as indicated below, which said Railway 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 goods 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 goods, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The rate of freight from ..... (Sailing Oct. 18/39 to ..... is in Cents per 100 lbs.

If .. Times Lst	If .. Class	If .. Class	If .. Class	If .. Class	If .. Class	If .. Class	If special per

Consigned to (Mail address—Not for purposes of delivery)
F. W. Pirie Co. Ltd. Notify Furness Withy & Co. Ltd.
Destination West St. John Province or state of County of Saint John

Route For Export Car Initial C.P. Car No. 246803 (Sailing Oct. 18)

No. pkgs.	Description of articles and special marks	Weight (Subject to correction)	Class or rate	Check column	If charges are to be prepaid, write or stamp here
500	Sax small certified Green Mountain Seed potatoes 111 lbs.	55,500	14		"To be prepaid."
					Prepaid
			Received $70.70 to apply in prepayment of the charges on the property described hereon.		
	Shippers load and count Owner's risk deterioration		Agent of cashier Per..... (The signature here acknowledges only the amount prepaid.) Charges Advanced: $.....		

Simmons & MacFarlane, shipper.
Per R. S. M.

C. B. Matheson,
Agent.
Per.....

(This bill of lading is to be signed by the shipper and agent of the carrier issuing same.)

To this bill, conditions are attached containing eleven sections, of which sec. 2 only need be set out here:

Sec. 2. In the case of shipments from one point in Canada to another point in Canada, or where goods are shipped under a joint tariff, the carrier issuing this bill of lading, in addition to its other liability hereunder, shall be liable for any loss, damage or injury to such

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goods from which the other carrier is not by the terms of this bill of lading relieved, caused by or resulting from the act, neglect or default of any other carrier to which such goods may be delivered in Canada, or under such joint tariff or over whose line or lines such goods may pass in Canada or under such joint tariff, the onus of proving that such loss was not so caused or did not so result being upon the carrier issuing this bill of lading. The carrier issuing this bill of lading shall be entitled to recover from the other carrier on whose line or lines the loss, damage, or injury to the said goods shall have been sustained, the amount of such loss, damage or injury as it may be required to pay hereunder, as may be evidenced by any receipt, judgment, or transcript thereof. Nothing in this section shall deprive the holder of this bill of lading or party entitled to the goods of any remedy or right of action which he may have against the carrier issuing this bill of lading or any other carrier.

All the bills of lading were similar, except that in two of them the words "For export" appear under the description of the goods, while in all the others they appear above it.

These words "For export" were material. The appellant intimated that they should not have been inserted in the bills of lading; and, as they were not parties to the bills, they were not bound by the terms thereof.

We think, however, that Simmons & MacFarlane were justified in having them inserted in the bills of lading, in view of the statement made by the Pirie Company, in the confirmation letter of October 2nd, 1939, "as we have boats coming in on schedule which means that time is the essence of this agreement".

The result is that, by the terms of the bills of lading, the goods to be carried and delivered were indicated as intended to be exported by water from Canada to one or more countries specified in the tariffs. Such a purpose entitled the goods to be carried at a lower rate than if they had not been so destined.

The delivery as provided by the tariffs was to be made by placing the goods in a shed on the docks on the west side of the harbour of Saint John. There are twenty such sheds; and, by the regulations of the National Harbours Boards, no unloading of goods into the sheds is permitted, except for the purpose of transferring them into a vessel then, or about to be, ready for loading or for storage; permission in either case must be obtained from the Harbour's Board.

Delivery "For export" meant delivery at one of the sheds on the dock; and, moreover, it meant delivery to

the appellant, or someone acting on its behalf (in the present case, presumably, Furness Withy Company), who would accept the goods and take charge thereof.

The appellant has been in the business for a long time and was well aware of the practice and of the conditions implied in the bills of lading.

As it was, the evidence showed that the intention of the appellant was to export the Green Mountains to Argentine, on the ss. *Northern Prince,* the agents for which were Furness Withy & Company. That vessel arrived at Saint John about October 16th and sailed on the 21st. The Green Mountains arrived at Saint John (Union Station) on or before the 16th of October and notices of arrival at that point were immediately given by the railway company to Furness Withy & Company which, in turn, at once notified the appellant. The latter informed the local manager, at Saint John, of Furness Withy & Company, Mr. D. W. Leddingham, that it had not sold the potatoes and could not forward them on the ss. *Northern Prince.*

From the 16th to the 21st October, Mr. Leddingham kept in close touch with the appellant, as he was anxious to put the potatoes on his vessel; but, for the reason mentioned, his endeavours were unsuccessful and the vessel sailed without them.

About three days later, on October 24th, the local agent of the railway company at Saint John wired the appellant that arrangements would have to be made at once to give the Green Mountains protection from frost. Mr. Pirie, on the same day, called the agent on the telephone, was told where the potatoes were and what was needed. He replied that he would get in touch with a Mr. Elliot, representative of the Canadian Pacific Railway. On October 25th, H. E. Kane, a witness at the trial and an officer of the H. E. Kane Company Ltd., on instructions from Mr. Pirie, communicated with the Canadian Pacific Railway, with a view to having it accept the cars from the respondent railway company and switch them to West Saint John, and with the National Harbours Board to obtain space in the potato warehouse on the dock for storing the Green Mountains until they could be disposed of. The Canadian Pacific Railway replied that it could not accept the cars until arrangements had been made to receive the potatoes at Saint John, either for export or

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for storage; and the National Board answered that, until the previous year's account of some ninety dollars odd was paid, it would not allow Mr. Pirie's potatoes to be stored at the potato shed at West Saint John. All this information was conveyed to Mr. Pirie by telegram on October 25th; but it was only on October 30th that, in reply to a telegram of the same date from the respondent railway agent at Saint John, Mr. Pirie, for the first time, took the position that, as the potatoes had not been delivered at West Saint John as the contract called for, he had no further interest in them.

By arrangement between the respondent railway and Simmons & MacFarlane, the potatoes were transferred to refrigerator cars, and, about November 6th, sent over to the potato shed at West Saint John, where, under agreement with the National Harbours Board, they were stored until sold. The sale resulted in a loss in relation to the original contract of sale, for the amount of which the action was brought.

"West Saint John" is a descriptive term applied to that portion of the city, in New Brunswick, which lies on the western side of the harbour of Saint John. There are extensive docks along the waterfront and much the greater portion of the export from the port is carried on there. These docks and warehouses are under the control and administration of the National Harbours Board. The respondent railway does not extend much beyond the joint passenger station (Union Station) on the western side of the harbour. The Canadian Pacific Railway connects with the respondent railway near the joint station, passes over the Saint John River and, through the suburb of Fairville, reaches the docks on the west side of the harbour. As already stated, before goods can be unloaded into any shed on the docks, either the vessel on which they are to be exported must then be, or about to be, moored at that shed, or permission to store the goods to await export must be obtained by the owner from the Harbour Commission. In other words, delivery by unloading is to be made immediately to the owner wherever he may be on the docks, and without instructions from the owner as to the particular dock and shed to be used delivery cannot be made.

The evidence has shewn that, for at least twenty years, the method of handling cars brought by the respondent railway at Saint John, for export at West Saint John, has been to retain them on the tracks of the respondent railway until their contents could be received at West Saint John, either for loading on a vessel or for storage in a dock shed. It was found by the trial judge that such practice was known to both the appellant and the respondents Simmons & MacFarlane.

The respondent railway was at all times able, ready and willing to transfer the cars of Green Mountains to West Saint John docks or sheds by means of the Canadian Pacific Railway; and the latter was at all times able, ready and willing, on behalf of the respondent railway, to accept, to place and to unload the cars whenever the appellant, itself or through its agent, had signified that it was ready to accept them, either for export at once or for storage pending export.

The trial judge held that there was no question as to the existence of the practice and that it had been in effect for many years, and also, as already stated, that both the appellant and Simmons & MacFarlane had knowledge of the practice.

Under the circumstances, such a practice must be held to have formed part of the terms of the bills of lading. The evidence in that respect was both admissible and applicable. That point has now been settled by a long line of cases.

The learned trial judge, referring to 10 Halsbury, pp. 39 and 42, stated that the essential characteristics of a usage or practice were notoriety, certainty, reasonableness and validity. He added that the first two features seemed to be established; and he proceeded to consider the other two.

He said:

> The strongest point against the Pirie Company seems to be that, knowing the practice, having accepted and acted in accordance with the practice for several years; in fact, having accepted one shipment of potatoes part of the same contract, moved in accordance with the practice, it neglected or refused to accept the practice in respect of this particular shipment. The evidence does not disclose any real explanation. But whatever may be the explanation of this attitude or the view respecting it, it cannot affect the legal position. The practice has now been challenged and it must be considered upon its merits. In my opinion it cannot be justified; it cannot be regarded as necessary, reasonable or legally valid.

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The apparent reason of the learned trial judge for reaching that conclusion seems to have been that under the *Sales of Goods Act*, s. 24:

> It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract.

He said the destination indicated in the bills of lading was " West Saint John "; and it was the duty of Simmons & MacFarlane to deliver the potatoes in question at West Saint John.

" Usage may explain ", said the learned trial judge, " may introduce what is unexpressed; it may not violate established rules of law ". In the present case, in the view of the learned trial judge, " the practice seems to be in direct violation of an established principle of common law ". For that reason, the learned judge refused to admit the practice as forming part of the contract.

I regret to have to disagree with those views, and more particularly, in the premises, with the assertion that the practice, in the present case, came into conflict with some express terms of the contract.

In my view, the exact place of delivery, in this case, was unexpressed in the contract, as has been shown by the evidence. The practice or usage was not excluded either expressly or impliedly by the terms of the bill of lading.

On the evidence, " West Saint John " was only a vague indication of the territory where the potatoes were to be delivered. " The usual place of delivery at said destination ", as stipulated in the bills of lading, and as further indicated by the addition of the words " For export ", meant that the responsibility of the respondent railway was to deliver the goods at the particular berth or shed on the docks which would be designated by the consignee as the place where he intended to have them unloaded and to accept them. That particular place was unexpressed in the bills of lading. The respondent railway, when it accepted to carry the potatoes to their destination, was entitled, according to usage and practice, to have that berth or shed indicated to it by the consignee as soon as the potatoes had reached the place from which the cars would have to be switched to the exact destination. The respondent railway was justified by the practice and usage or by the local custom regulating delivery, which formed

part of the contract of shipment, to let the goods at Saint John until instructions were obtained, so that the goods could at once be switched to the designated berth.

Not only, in my view, was the custom reasonable, but it was, in fact, necessary. And there was nothing illegal about it, because the railway company was entitled to assume that the contract of carriage had been entered into with the understanding that the acknowledged practice and usage was to supplement the terms, otherwise incomplete, of the contract.

The learned trial judge said:

> I recognize that, according to the practice, the term "For export" has been regarded as information and authority to the Canadian National Railway to deal with the goods according to that practice. But I see no reason why it should be so.

With due respect, a general usage of that character must be taken to be tacitly annexed to all contracts relating to business with reference to which they are made, unless the terms of such contract expressly or impliedly exclude them (*Metzner* v. *Bolton* (1), by Parke B.).

Earle C.J., in *Meyer* v. *Dresser* (2), says:

> In the case where such usages are imported into a contract, it is because they tacitly form part of it, like those contracts where we find the words "and other usual terms". They then form part of the contract itself. The contract expresses what is peculiar to the contract between the parties and usage supplies the rest.

These passages of Parke B. and Earle C.J. were quoted with approval in *Produce Brokers Company Limited* v. *Olympia Oil and Cake Co. Ltd.* (3).

In such a case, the presumption is that both parties knew of the practice and usage and contracted accordingly.

For all intents and purposes, therefore, the arrival of the cars at Saint John's Terminal Station of the respondent railway, on the 16th of October, and the immediate notice to Furness Withy & Company, in accordance with the terms of the bills of lading, that they had arrived at that station, together with a request for instructions as to the particular shed at the dock, at West Saint John, where the cars were to be switched, was, according to the local usage and practice, an effective carrying out of the railway's obligations under the contract. It was only by failure to give the proper instructions on the part of the appellant

(1) (1854) 9 Ex. 518, at 521. (2) (1864) 16 C.B. n.s. 646, at 660.
(3) [1916] 1 A.C. 314, at 324.

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that the railway was prevented from delivering at the exact berth or shed, in West Saint John, where the appellant wished to accept delivery—without which instructions it was impossible for the respondent railway to do anything further. The appellant must bear the consequences of the conduct which it elected to adopt in the circumstances.

It follows that both respondents carried out their contract towards the appellant so far as they were able to do it and that they were prevented from doing any more on account of the strange decision of the appellant to withhold the instructions which it was bound to give under the well-established practice, of which it had full knowledge.

So far as the appellant is concerned, it must be held to the contract exactly as if it had received delivery of the goods.

I think, therefore, that the judgment of the Appeal Division ought to be confirmed in this Court.

The respondent railway company is entitled to its costs of the trial and of both appeals against the respondents Simmons & MacFarlane.

In the Appeal Division, the formal judgment ordered the appellant to pay the costs of the respondents Simmons & MacFarlane, the latter to be entitled " to add the plaintiffs' costs of trial and appeal as against the defendant Railway Company ". This was objected to by the appellant at the hearing before this Court; but no sufficient reason was brought to show that such an order was contrary to ordinary practice in the New Brunswick courts. I do not think the order on this point should be disturbed here; and, following such a practice, I think a similar order should be made in this Court, to the effect that, after the respondents Simmons & MacFarlane have paid the respondent railway's costs in this Court, it should be entitled to recover them from the appellant.

At the close of the hearing in this Court, application was made by the appellant to file a time-table and a certain classification.

This was strenuously objected to by the respondents. It was pointed out that the railway time-table, as such, could never be accepted in the record and that the certificate of classification tendered was not admissible and, at

all events, without any further explanation, would undoubtedly be misleading. We do not think, in any aspect of the case, that either document, without more, could be held to be admissible in evidence; but, under section 68 of the *Supreme Court Act,* as amended by the statute 18-19 Geo. V, c. 9, s. 3, the Court may, in its discretion, on special grounds and by special leave, receive further evidence upon any question of fact; and we can see here no special grounds upon which the Court may exercise its discretion in giving special leave to allow the evidence tendered in the circumstances.

The application is, therefore, refused.

DAVIS J.—In a written contract for the purchase of large quantities of potatoes from Prince Edward Island, the purchaser, an exporter in New Brunswick, stipulated for delivery at "West Saint John" (New Brunswick), with instructions to "bill your cars to ourselves, West Saint John, notifying Furness, Withy & Company, Saint John". Some of the potatoes arrived in due course and were accepted and paid for by the purchaser. Subsequently the balance of the contract, eleven carloads, arrived over the Canadian National Railway at its terminal in the city of Saint John well within the time limited for delivery, and the railway at once notified Furness, Withy & Company. It was the intention of the purchaser to export the potatoes to Argentina on the ss. *Northern Prince,* the agents for which were Furness, Withy & Company. But something appears to have happened in the meantime and it is perfectly plain that the purchaser did not want to accept delivery of this large shipment when it arrived at Saint John. There is no difficulty on the evidence in finding that the place of delivery named in the contract, "West Saint John", is the western docks of the Saint John Harbour, some distance outside the municipal boundaries of the city. On the docks are berths for goods ready for shipment when the boats come in. An export shipper arranges for transportation on a particular outward-bound boat and for a particular berth on the docks. The Canadian National Railway terminal is in the centre of the city proper—the Canadian Pacific Railway alone has a line out to the western docks of the harbour, and the purchaser's stipulation to notify Furness, Withy & Company

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(as was done) ordinarily results in the giving to the railway company of instructions for delivery at a particular pre-arranged berth on the docks. The Canadian National Railway then, as part of its carriage contract, gets the Canadian Pacific Railway to switch the cars down to the docks to the berth arranged for. The distance of the switching operation is some six miles.

Mr. Pirie, the president of the appellant company, who in all matters relating to this controversy represented the appellant company, plainly decided to find some means to refuse to accept delivery, so he sat down and did nothing —that is, when the shipping agents, Furness, Withy & Company, advised him that the eleven cars of potatoes had arrived at the Saint John terminal of the Canadian National Railway—he deliberately refrained from giving to the railway company any instructions to put the shipment down on the docks. His idea was that he then could refuse to accept the shipment on the ground that delivery had not been made at " West Saint John " as stipulated for in the contract. One need not attempt to characterize commercial conduct of that sort. The potatoes being refused, the vendor resold at a loss and sued the purchaser for the loss.

I do not see how the purchaser (appellant) can escape liability. The evidence as to what was meant by delivery at " West Saint John " and notifying Furness, Withy & Company at " Saint John " was admissible, not for the purpose of contradicting or varying the written contract, but to explain the contract. This evidence was relevant to the true meaning and effect of the contract. In *Norden Steam Company* v. *Dempsey* (1), the contract was to carry the cargo to " Liverpool ". That was the place of discharge, but the question was, What was the meaning of " Liverpool "? Lush J., the trial judge, refused to admit evidence as to that on the ground that it tended to contradict or vary the contract, but an order *nisi* for a new trial was made absolute by a Common Pleas Divisional Court composed of Lord Coleridge C.J., Brett and Lindley JJ., in order to allow in the rejected evidence as to what under the circumstances was meant by discharge of the cargo at " Liverpool ".

(1) (1876) 1 C.P.D. 654.

In the case before us the purchaser knew perfectly well what it meant by stipulating for "delivery at West Saint John", with instructions to notify Furness, Withy & Company at Saint John. At the time it made the contract it intended to sell and ship these potatoes to the Argentine from the western harbour at Saint John. The vendor substantially performed its part of the contract when the potatoes arrived at the railway terminal in Saint John and the shipping agents were notified. It was for the purchaser to arrange for transportation on an outgoing boat and for a berth on the docks or to take delivery at the railway terminal. It did neither, and must take the consequences.

The appeal should be dismissed with costs.

The case was complicated by the fact that the vendor as plaintiff in the action not only sued the railway company for damages for failure to deliver but in the same action joined the purchaser, as a party defendant, claiming in the alternative against it the same amount of damages for non-acceptance of the goods. The consequence of this joinder of parties was that a mass of evidence was given at the trial, some of it only relevant to one issue and some of it only relevant to the other issue. Two separate and distinct causes of action against two different defendants went down to trial together. Each of the causes of action rested on a separate contract. It is quite a different thing from a joinder of parties in an action for tort where not infrequently until all the evidence is in it is difficult if not impossible to say which of two or more defendants was responsible for the wrongful act. No objection however seems to have been taken to the joinder in this case. The court of appeal of New Brunswick, while holding the present appellant (purchaser) liable and dismissing the action against the railway company with costs, directed that the plaintiff in turn could add the costs it had to pay to the railway company to its own costs against the purchaser. While I cannot appreciate the justification for such an order in a case such as this where the joinder is of different parties on claims under separate and distinct contracts, we should not interfere with an order as to costs in the Court below if we are otherwise affirming the judgment.

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When the purchaser appealed to this Court the respondent (plaintiff) served a notice on the railway company that in the event of the appeal being allowed it would then appeal from the judgment of the Court below in so far as it had dismissed the action against the railway company. That notice of appeal was contingent upon the appellant succeeding in this Court, which it has not done. The plaintiff ought therefore to pay the costs in this Court of the railway company.

HUDSON J.—Kerwin and Taschereau JJ. concurring).—The judgment prepared by my brother Rinfret which I have had an opportunity of reading has a full statement of the facts in this case.

Upon these facts it seems to me that the designation of "West Saint John" as the place for delivery of the goods under the contract was incomplete.

The seller was entitled to assume that it was the intention of the buyer to ship the goods by sea. The statement in the appellant's letter that

> we will wire these through to you promptly as we have boats coming in on schedule which means that time is the essence of this agreement

is sufficient to indicate this. If it was the intention to ship by sea, then it was necessary for the buyer to specify the ship and the dock in West Saint John before delivery could be completed.

If, on the other hand, the plaintiff desired instead of shipping by sea to ship by rail, then it seems to me that it was his duty to so advise the seller.

The buyer was notified of the arrival of the goods in Saint John in ample time to have the shipment placed wheresoever he wished in West Saint John within the time specified in the contract. He failed to designate such place and I do not think it is now open to him to complain that delivery was not made as provided in the contract.

The facts resemble the circumstances in the case of *Sutherland* v. *Allhusen* (1), the head-note of which is:

> Assumpsit on a contract for the sale of fifty tons of bicarbonate of soda * * * ; free on board, to be delivered in equal monthly quantities during April, May and June, 1865. Averment, that defendants

(1) (1866) 14 L.T. 666.

duly delivered divers portions of the goods according to agreement, and that plaintiffff was not required by defendants to accept delivery of the residue. Plea, that defendants were ready and willing to deliver the said residue according to the agreement, whereof plaintiff had notice, and that plaintiff was not ready and willing to accept, and would not accept, and did not require delivery of the same:

Held (on the authority of *Armitage* v. *Insole* (1), that before the defendants were bound to deliver the goods, the plaintiff was bound to name the ship or the place where he desired the goods to be delivered, and that a tender of the goods by the defendants was not a condition precedent to their delivery, or to the ship or place being named by the plaintiff.

The statement of Chief Baron Pollock at page 667 seems to me to be applicable to the facts here. It is as follows:

The action is upon a contract and the expression "free on board" does not necessarily import that the goods should be put on board ship; it would be competent to the parties to prove that the goods were to be delivered somewhere else. The buyer may have them on board a ship or may have them at a railway station, or may have them at any other place pointed out by him. The only question here is, was it incumbent upon the defendants to tender the goods, or was it incumbent on the plaintiff to tender the ship or point out the place where they were to be delivered, and, if on board ship, to specify the ship by description and name? It has been decided, in a case where the expression "free on board" was used, that it is the duty of the person who seeks to have the goods to point out the ship, or specify the place where they are to be delivered, before he can complain that the goods are not on board the ship. I think the spirit of that decision clearly applies in omnibus to the present case, and that the plaintiff was bound, if he meant these goods to be delivered on ship board, to name the ship, and, if elsewhere, he was bound to name the place where he desired them to be delivered, and that it was not necessary for the defendants to tender the goods, as a sort of condition precedent to their delivery or to the ship being named, or the place being designated by the plaintiff.

To the like effect are the statements of Baron Martin and Baron Bramwell.

Baron Martin:

Therefore, what the vendee, that is the plaintiff, contracted for was, that there was to be delivered to him fifty tons of bicarbonate of soda * * * "free on board in the Tyne", at a certain price. One's common sense, therefore, would point out that before the party can complain of the non-delivery of those goods the vendor ought to be told where on the Tyne, or on what ship on the Tyne side, they were to be put. The case cited seems to me directly in point.

Baron Bramwell:

I am of opinion that this rule should be made absolute. The contract being to do a certain thing, the defendants were not bound to

(1) (1850) 14 Q.B. 728.

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deliver till the plaintiff told them where they were to deliver. The plaintiff did not tell them where they were to deliver before the day of delivery arrived, and consequently the defendants never were bound.

Although the contract in the present case was not stated to be an f.o.b. contract, it is substantially the same. The reasoning of these very learned Barons of the Exchequer seems to me directly applicable in the present case.

I agree with Mr. Justice Rinfret that the plaintiff is entitled to succeed.

As the plaintiff succeeds against the defendant, F. W. Pirie Co. Ltd., he is entitled to his costs against such defendant throughout. The Canadian National Railway Company, having succeeded, is also entitled to its costs throughout. The only question is by whom and how these costs should be paid.

The general principle of costs in a case of this kind is stated in the Annual Practice 1941, page 1415, as follows:

> In a proper case, however, there is jurisdiction to order the plaintiff to pay the costs of a defendant against whom the action has failed and recoupment of such costs to the plaintiff by a defendant against whom the action has succeeded.

This jurisdiction extends to contracts as well as to tort. The costs are normally paid to the plaintiff as trustee for the successful defendant. It is said, however, that such an order is not proper where the plaintiff's doubt is as to law and not as to facts but, in general where the plaintiff sues two defendants, each of whom throws the blame on the other, the unsuccessful defendant should pay the costs incurred by the plaintiff and by the successful defendant to them direct (see *The Esrom* (1)).

In view of the fact that the plaintiff succeeded in the first instance against the Canadian National Railway, I do not think that it can be said that its action in joining that company was unreasonable. In fact, as remarked by Mr. Justice Fairweather in the court of appeal:

> There is no question at that stage but that the plaintiffs were entitled to the payment of the damages as assessed by the trial judge, and the only question to be determined was which of the two defendants were responsible at law for the payment of the amount.

(1) [1914] W.N. 81.

Under these circumstances, I do not think that this court should interfere with the order made in the court below. For these reasons, I would dismiss the appeal with the same order as to costs as was made in the court below.

Appeal dismissed with order as to costs as made in the court below.

Solicitor for the appellant: *Peter J. Hughes.*

Solicitor for the respondent, Canadian National Railway Company: *T. J. Allen.*

Solicitors for the plaintiffs respondents: *Robinson & Palmer.*