

contract out of the material in stock. So no doubt to a large extent they could, but this would have prevented them from dealing with that store, as they were clearly entitled to do, by sale to other persons, it may be at a better price and under more favourable terms; it is impossible in these circumstances to say that they were not affected parties.

There remains the consideration of the extent to which they were thus affected. The extent was measured by the cut-off of the whole of their future supplies. Had the mine only partially closed, it might be that they would only have been able to excuse delivery to the extent to which such partial cessation of output interfered with their receipts of ore, but as the whole source of their supply was stopped I think they were affected to the whole extent of their contract until such time as the supplies might recommence.

I am therefore of opinion that the judgment of Bailhache, J., and that of the Court of Appeal is perfectly correct, and that this appeal should be dismissed with costs.

LORD PARKER desires me to say he has seen the judgment I have just read and concurs with it.

LORD DUNEDIN—I agree. I need only say I entirely concur in the judgment that has been delivered.

LORD SUMNER—I have had an opportunity of considering the judgment in print and agree with it.

LORD WRENBURY—I also concur.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellants—Sir J. Simon, K.C.—L. Scott—Micklethwait. Agents—Herbert Smith Goss, King, & Gregory, London—Colborne, Coulman, & Laurence, Newport, Mon., Solicitors.

Counsel for the Respondents—Roche, K.C.—R. A. Wright. Agents—Botterell & Roche, London.

HOUSE OF LORDS.

Tuesday, March 13, 1917.

(Before Earl Loreburn, Viscount Haldane, Lords Kinnear, Shaw, and Parmoor.)

GREAT WESTERN RAILWAY COMPANY v. WILLS.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Carrier—Railway—Contract—Goods Carried at Owner's Risk—Short Delivery—Question whether a Consignment has been Delivered when Part of it is Missing.

An owner's risk contract excluded from the exemption from liability conferred on the railway company "the non-delivery of any package or con-

signment fully and properly addressed."

Of 750 carcasses carried by the appellant company fourteen were lost in transit. The respondent claimed the value of the missing carcasses. The appellant claimed to have delivered the consignment, and to be exempt under the contract from damages for short delivery.

Held (dis. Lord Shaw) that short delivery was not equivalent to failure to deliver the consignment under the contract note.

Decision of the Court of Appeal, [1915] 1 K.B. 199, *reversed*.

The facts fully appear from the considered judgments, which were as follows:—

EARL LOREBURN—What alone matters in this case is the construction to be placed on the owner's risk note.

The Railway Company are relieved from liability for loss, damage, misdelivery, delay, or detention, subject to a qualification which does not apply here. But the agreement does not exempt the company "in the following cases of non-delivery, pilferage, or misdelivery, that is to say, the non-delivery of any package or consignment fully and properly addressed."

There is again a qualification which does not apply here, so I omit further reference to these qualifications.

Ordinarily not liable for a loss but liable for non-delivery (which is a loss) when the thing not delivered is a package or consignment fully and properly addressed. That is the general effect of it. You are to distinguish packages or consignments so addressed from other things, no doubt because it is easier to convey them safely if so identified and addressed.

If it is desired the consignor can send each article as a separate consignment fully and properly addressed, and then the Railway Company would be answerable for every single article. Probably this is in many cases practically an impossible thing to do, or it might entail a heavier charge for carriage. But if he does not do that, then in my opinion the question is whether or not the consignment as a whole has been delivered.

It was argued that when you have such a package or consignment the Railway Company is liable unless everything contained in it or of which it consists is delivered—for example, that the loss of one egg out of 500 or of one handle in a piece of furniture amounts to non-delivery of the package or consignment. Subtle arguments might be multiplied on this footing, as all kinds of things are packed or consigned.

In my opinion it is not a question of law but a question of fact in each case whether there has been delivery or non-delivery, which are the antitheses the one of the other. And a judge or jury ought to answer the question—was there in substance and in a business sense delivery or not? They would answer it according to the circumstances, as they would answer about the delivery of a cargo, and would look at the nature of the things packed or consigned.

If they came to a conclusion which a reasonable man could reach on the evidence their finding would be supported.

A court can construe the meaning of words, but I do not think it is a question of construction whether a deficiency in the delivery of a package or consignment amounts to non-delivery of the package or consignment or not. Nor do I think it is possible as a matter of law on this contract to say either that to deliver a consignment means delivering everything that composes it, or to prescribe by percentage or by any other automatic standard what does or does not amount to delivery. I regard it as a question for the jury. We are not assisted by the maxim *de minimis non curat lex*, for that maxim merely applies to negligible trifles. In my opinion the construction is plain. The Railway Company are not relieved from liability where there has been non-delivery of the package or consignment, but the judge of fact or the jury have to say whether or not there has been as a matter of business in substance non-delivery. If there were a considerable shortage and the jury found there had been delivery I should set aside the finding on the ground that there was no evidence to support it, and I do not believe that a court of law can give more assistance to those who have to decide the facts than by saying that.

In the present case the real question was not put by the counsel on either side, and therefore if the parties do not come to a settlement there ought to be a new trial. As all the costs are to be by agreement paid by one of the parties, I should think they will not require that to be done, but I think that should be the order of this House.

You cannot convert a question of fact into a question of law by saying it is inconvenient not to have any certain standard by which you can automatically ascertain liability. The parties here have chosen to make liability depend on the ascertainment of a fact.

VISCOUNT HALDANE—It is after hesitation that I have arrived at a conclusion as to the construction of this consignment note, and that hesitation has not been the less because of the eminence and experience of learned Judges in the Courts below who have taken a different view. But the question is one of the construction of an ill-drawn and obscure document on which those who have to interpret it must form their own opinions.

The consignment note in controversy is framed with the object of relieving the company from liability as common carriers, and under section 7 of the Railway and Canal Traffic Act 1854, a section which prohibits contracting out of the principle it lays down except under conditions which may be adjudged just and reasonable by the Court. In particular cases such conditions may be so adjudged if the goods are carried at a reduced rate and if the stipulations excluding liability are not grossly unfair. I will not read over again the terms of the particular stipulations for carriage at reduced rates under construction in the present case. It is enough that their substance

is that the company is to be free from all liability for loss, damage, misdelivery, delay, or detention, unless, firstly, these are due to the wilful misconduct of the company's servants, or secondly, they fall under certain specified kinds of non-delivery, pilferage, or misdelivery which in the absence of any misconduct of the company's servants would but for this exception come within the sweeping exemption conferred by the main words. Even these specified cases of exceptional liability may be got rid of if the company can prove that they have not been due to negligence or misconduct by themselves or their servants. But if they cannot discharge the burden of proving this, then they are liable if there is non-delivery of any package or consignment fully and properly addressed unless the non-delivery is due to accident to a train or to fire. A second head under which liability is preserved is that of pilferage from properly covered packages, and a third is misdelivery where goods properly addressed are not tendered to the consignee within twenty-eight days after dispatch. This last head points to damage arising from delay caused by goods ultimately delivered to the consignee having previously been wrongly delivered to some other person.

In the conditions annexed to the note there is one in particular, the third, which must be kept in mind in construing the exceptions to which I have referred. It excludes claims in respect of goods for loss or damage during the transit unless made within three days after delivery of the goods, or in case of non-delivery of any package or consignment within fourteen days after dispatch. It will be noticed that in the second of these alternatives the expression "package or consignment" is used instead of "goods" as in the first—a variation which suggests that the non-delivery contemplated is not one arising merely by loss of items during the transit but non-delivery of something which is an entirety. Loss, say, by pilferage or other cause of short delivery, would be literally covered by the words in the first alternative, and is apparently meant to be excluded from the second, which is, I think, directed to absolute non-delivery as contrasted with short delivery. This is not without its bearing on the real question in the appeal, which is the meaning of the expression "consignment" in the first of the exceptions to freedom from liability bargained for in the body of the note. Reading the note and the conditions as a whole I have come, though not with any great degree of confidence, to the conclusion that by "consignment" in the first exception is meant the consignment in its entirety of what is included in a consignment note as distinguished from the items which together make up the consignment. The juxtaposition of "package," which connotes a single whole, with consignment appears to me to point to this interpretation. It seems from the second exception that pilferage is not treated as covered by partial non-delivery, and this indicates that non-delivery of a part is not to be contemplated as within the first exception. As I have already said, there is nothing in the provisions of condition 3, which pre-

scribe the method of claim in all cases, that as I read it conflicts with this construction. I do not find myself in agreement with Buckley and Pickford, L.J.J., in their interpretation of the word "loss" as it occurs in the third condition. I think that "loss" is there meant to include loss by failure to deliver items as distinguished from the entirety.

These considerations dispose of the real question of importance in the appeal; and they seem to me to imply that on the facts as established before the County Court Judge there was a delivery of what was included in the consignment note—a delivery which was short by reason of the loss of certain items at some stage of the transit, but not the less a delivery within the meaning of the condition. This is how I construe his finding, and if I am right in my interpretation of the note itself his judgment was consequently wrong.

LORD KINNEAR—I have found this case to be one of difficulty. But after consideration I am unable to accept the conclusion of the Court below, and I agree with the noble and learned Viscount that the appeal must be allowed. The question before the House, as I understand it, is purely one of construction, since the facts have been ascertained finally and with sufficient precision by the learned Judge of the County Court. I assume therefore, in accordance with his decision, that certain carcasses of sheep and lambs, parts of three separate consignments from one of the appellants' railway stations to the respondent at Bristol, were not delivered, and that although the proportion of the undelivered parts to the entire consignments was in each case small and of no great value in money, there was still an appreciable difference between the quantities delivered and the quantities consigned. The respondent claims the value of the undelivered carcasses, and I apprehend that if the consignments had been made under an ordinary contract of carriage by which the appellants had undertaken to bring the goods safely to their destination or to indemnify their owner for their loss or injury the claim would have been good. But that is by no means the contract between the parties in this case. The appellants like other railway companies allow to traders the option of having their goods carried under one or other of two different arrangements. They may be carried at the ordinary rate, which is not alleged to be excessive, under the ordinary liability of a railway company as fixed by statute, or else they may be carried at a reduced rate, provided the sender undertakes to relieve the railway company from all liability for loss or damage except in certain distinctly specified cases. The respondent adopted the second method, and the consignment note, which is in usual terms and bears to be for "goods to be carried at reduced rates at owner's risk," sets forth that the goods mentioned "are to be carried at the reduced rate below the company's ordinary rate, in consideration whereof I agree to relieve the Great Western Railway Company and all other

companies over whose lines the goods may pass from all liability for loss, damage, mis-delivery, delay, or detention except on proof that such loss, &c., arose from wilful misconduct on the part of the company's servants"; and under the further exception that "Nothing in this agreement shall exempt the company from any liability they might otherwise incur in the following cases of non-delivery, pilferage, or mis-delivery (that is to say)—1. Non-delivery of an ypackage or consignment fully and properly addressed unless such non-delivery is due to accidents to trains or fire." The respondent therefore undertakes for valuable consideration that his goods shall be carried at his own risk and not at the risk of the appellants except in certain specified cases. I apprehend that such exception to be effective must be expressed with explicit accuracy. I do not suggest that the case is governed by any fixed rule of law by which a stipulation of this kind must be construed against or in favour of one party or the other, but still it is for the respondent, who stipulates for an exception in his favour from his own clear obligation, to show clearly that the case falls within the terms of the exception, and in this I think he has failed. The particular exception upon which he relies is that last quoted—"Non-delivery of any package or consignment fully and properly addressed"; and the question to be decided is simply what is meant by consignment. I am of opinion that, taking the words in their ordinary and grammatical meaning, it means the entire consignment, and not any part or parts of it. The subject of the stipulation is not the consignment or any part of it, but the whole consignment, including every part of it. It is regarded as an integral unity. This is in accordance with the assumption on which the pleadings of the parties are stated. They are at one as to the meaning of the word as used in their contract, and there is nothing to suggest that either entertained the slightest doubt as to the identification of the three consignments in question. The respondent does not allege that the consignments have not been delivered, but claims damages for the non-delivery of certain carcasses "which formed parts of three consignments delivered by him to the appellants for carriage" to Bristol, and then sets out that the said shortage "appears in the delivery sheets prepared by the appellants' servants." This is quite in accordance with the ordinary use of language. Non-delivery of a consignment is one thing and short delivery of the same consignment is another and different thing, and when the respondent claims damages in respect of short delivery only he does so in terms. But then his exemption from the general risk he has undertaken does not arise in the case of short delivery but of non-delivery of the entire consignment. It is urged very forcibly that if an appreciable part of a consignment is not delivered the entire consignment is not delivered, and if the thing to be proved were that the appellants had delivered a consignment in terms of a contract to that effect the argument

would be unanswerable. But if the question is whether non-delivery of an entire consignment has been proved, it is irrelevant. It is no part of the appellants' case that they should prove delivery. They have not insured the safe delivery of the goods entrusted to them, and no obligation of theirs comes into consideration at all until the respondent has exempted himself, by force of the special exception, from his general obligation to take the risk of carriage on himself. The affirmative or negative of delivery makes all the difference in the meaning and effect of the stipulation. But it does not alter the thing to be delivered. I agree that if a part is not delivered the consignment cannot be said to be delivered. But for the same reason the non-delivery of a part does not prove the non-delivery of the whole.

I agree with the noble and learned Viscount that this view is confirmed by the terms of the second exception, which deals with pilferage. This would have been altogether superfluous if short delivery or partial non-delivery had been already covered by the first exception. Goods that have been pilfered in transit are not delivered, and it cannot be suggested that if the first exception stood alone short delivery of a consignment would have been covered and short delivery of a package would not. It may be that a package is more obviously a single thing than a consignment, which may be made up of a variety of goods. But each is contemplated as possessing the same degree of unity in this respect that it must be capable of being fully and properly addressed and so being regarded as one definite subject of a particular contract. Moreover the component parts of a package, as of any other consignment, may be disintegrated and scattered in the course of transit. In that case, if any part were missing, there would be short delivery. But the terms of the second exception make it clear that that would not be enough to throw liability on the railway company. For it is only in one particular case, to wit, when the packet has been protected otherwise than by paper or other packing easily removable by hand, that the exception comes into force, and even then it is only allowed subject to a proviso that due notice shall be given to the company's servants. All this is to my mind a very significant indication that the case provided for in exception one is that of a total non-delivery of a definite thing which is assumed to be deliverable once for all, and I think the same inference is to be drawn from the third of the conditions on the back, which has been said to be inconsistent with it. It is not the purpose of this clause to define the grounds on which the company's general exemption from liability may be excluded, but to fix the conditions on which claims against the company may be made, assuming them to be in themselves admissible under the contract. But in laying down these conditions it was necessary to provide for the two different cases which we have been considering. There may have been a partial or insufficient delivery due to the miscon-

duct of the company's servants and involving loss or damage to the owner, and in that case it is provided that notice must be given within a certain time after delivery of the goods. Or there may have been a total non-delivery bringing into force the conditions of exception one, and in that case notice must be given within fourteen days after dispatch. I think with my noble and learned friend that the variation of language in the expression of these alternatives is significant. Throughout the contract the same language is used when it is necessary to distinguish between partial delivery and absolute non-delivery of an entire consignment. I venture to think that the interpretation I adopt is in harmony with the declared object and design of the main contract between the parties. The intention is to relieve the Railway Company of liability for safe delivery in return for a reduced rate. It is not inconsistent with this that the general exemption should be qualified by certain specific exceptions resting upon intelligible grounds. But it ought not in my opinion to be displaced by any exceptional condition which has not been expressed with clearness and certainty.

LORD SHAW—Owing to the difference of opinion among us in this House on the subject of this case I have given a full reconsideration to it. It humbly appears to me that the result reached by all the Courts below is right.

There are really two questions. The first and most important is whether on a sound construction of the contract between the parties a case of non-delivery arises when it is admitted that there has not been delivery of an appreciable part of the goods consigned. The second question is whether non-delivery of a portion of the goods consigned falls within the scope of "loss and damage during the transit."

The claimant (respondent in the appeal) made three consignments of carcasses of sheep and lambs—752 in number—from the appellants' railway station at Avonmouth to himself at Bristol. Each carcass was separately addressed and each was marked. Of the total number twelve were not delivered. It is agreed that the case is not to be determined on any principle of *de minimis*, and that it should be taken on the footing put by the County Court Judge that an appreciable part of the goods consigned was not delivered. It is further agreed that the contract between the parties, which was for carriage at owner's risk, is to be found in the "receive and forward" document addressed by the sender to the Railway Company. On the footing of that agreement the goods were received, and in it the obligations on the subject on forwarding are to be found.

The important part of the agreement for the purposes of the present case is as follows:—After providing for non-liability "for all loss, damage, misdelivery, delay, or detention," except where these are caused by the wilful misconduct of the railway servants, the contract proceeds—"But nothing in this agreement shall exempt the company from any liability they might otherwise incur in

the following cases of non-delivery, pilferage, or misdelivery (that is to say)—1. Non-delivery of any package or consignment fully and properly addressed, unless such non-delivery is due to accidents to trains or fire. 2. Pilferage from packages of goods protected otherwise than by paper or other packing readily removable by hand, provided the pilferage is pointed out to a servant of the company on or before delivery. 3. Misdelivery where goods fully and properly addressed are not tendered to the consignee within twenty-eight days after dispatch: Provided that the company shall not be liable in the said cases of non-delivery, pilferage, or misdelivery on proof that the same has not been caused by negligence or misconduct on the part of the company or their servants."

It could not be disputed that the words "nothing . . . shall exempt from liability" means and can only mean that in the cases not so exempted liability is assumed and undertaken by the company in the specified instances of non-delivery, pilferage, or misdelivery.

Was this then a case of "non-delivery"? That of course depends on what delivery means. I hold it to be free from doubt that delivery means delivery of all and every part of the goods received. These goods, all and every part thereof, received by the carrier, must be handed over to the consignee. Any other rule would be contrary, in my humble opinion, to the most elementary notions as to the carriage of goods. It will not do to say delivery is satisfied if I give the substantial part of what I got. It might as well be maintained that the obligations of payment were satisfied when the substantial part of the account was paid. Business could not be conducted on so loose a footing.

Accordingly if this be the case with regard to delivery, namely, that it means delivery of the whole and every part of the goods consigned, then the negation of that, namely, the case of non-delivery arises when such delivery does not occur. When a part is not delivered, I cannot see how it can be affirmed that the whole and every part has been delivered. In the realm of logic it is inadmissible that a universal affirmative can stand alongside a partial negative. When a partial negative is postulated the universality of the affirmative is destroyed. And in the realm of business the proposition would be repudiated that when a consignment of goods, separately ticketed, addressed, and numbered as here—it may be carcasses as in this case, or it may be articles of great value such as statuary or pictures—fails to reach the consignee in full, then a case of non-delivery has not occurred. As Lord Wrenbury says.—"I am unable to agree that a delivery of twenty-nine is a delivery of thirty." And I do not see my way to introduce or to sanction in the legal construction of this contract a proposition which is inadmissible in logic and would be repudiated in the ordinary practice of business.

The view that the case of non-delivery does not arise unless there is non-delivery of

the entire aggregate of the consignment is defended by a reference to the word consignment—a single substantive. But that substantive either means the act of consigning or the goods consigned; and here it clearly means the latter. And the fact that a "package" is also mentioned and that pilferage therefrom (if securely packed) is provided for, points, by way of contrast, to package being one thing—a unity—forwarded as such, and out of which unity pilfering may take place. But it is not so with a consignment—the consignment may have great variety, it may be forwarded in several lots, in several trucks, or in several trains, and yet may be all under one consignment note covering and meant to cover each and every part of the goods consigned.

Accordingly in the case of a consignment, what is meant by short delivery? Short delivery simply means that there has been delivery of one part of the goods consigned and non-delivery of the other part of the goods consigned. The obligation was to deliver all and every part; where part is delivered, *quoad* that part the contract has been obeyed, and liability is not incurred. Similarly the liability was in respect of all and every part; where part is not delivered, *quoad* that part the contract has not been obeyed and liability is incurred.

Much was made in argument of condition 3, annexed to the contract. That condition, in my opinion, strikingly confirms the view just taken of the rights of parties.

"3. No claim in respect of goods, for loss or damage during the transit, for which the company may be liable, will be allowed unless the same be made in writing within three days after delivery of the goods in respect of which the claim is made, such delivery to be considered complete at the termination of the transit, as specified in condition 6, or in the case of non-delivery of any package or consignment within fourteen days after dispatch."

I am clearly of opinion that the loss or damage here mentioned is loss or damage upon the goods delivered. It is to be observed that the claim is "in respect of goods"—not in respect of a consignment in the aggregate, (2) that the loss or damage is "during the transit"—which must, I think, mean that the damage takes place to part or the whole of the goods in the course of their passage from the consignor to the consignee. But any doubt on this point appears to be removed by this, that (3) the claim is to be intimated "within three days after delivery of the goods in respect of which the claim is made, such delivery to be considered complete at the termination of the transit." The meaning of this appears to me to be that after all the goods are to hand the merchant makes up and within three days presents his claim for any loss or damage that he may have found the goods delivered may have suffered.

The whole of this—the claim in respect of loss or damage which must be claimed for within three days of delivery—is entirely apart from the separate case, "the case of non-delivery," the claim in respect of which is to be made within fourteen days of dis-

patch. Nothing could more clearly show, I venture to think, the differentiation of the case of non-delivery from the case of loss or damage, which loss or damage can only be claimed after delivery. In my humble opinion, both upon this condition and upon the other parts of the contract, "the case of non-delivery" of a consignment has occurred and is the subject of claim when a portion of the goods consigned has not been delivered.

I am accordingly of opinion that the appeal should be disallowed.

LORD PARMOOR—The respondent, who is a meat salesman, claimed damages in the County Court from the appellants for the non-delivery of certain carcasses of frozen mutton, which formed parts of three consignments delivered by him to the appellants for carriage from Avonmouth to Lawrence Hill Station, Bristol, to be delivered thence to his order. The learned County Court Judge found as a fact that the carcasses which had not been delivered formed an appreciable part of each of the three consignments. This finding is sufficient to raise the legal points involved in the appeal and is not open to review. The question in debate before your Lordships depends on the construction of the owner's risk consignment note, on which the consignments were received and forwarded by the appellants.

Up to the year 1854 railway companies had power to act as carriers over their railways, but there was no obligation upon them. When railway companies did undertake to act as carriers it was not unusual for them to attempt to limit their liability by general conditions contained in public notices. In 1854 a new obligation was imposed on railway companies and a duty was imposed on them according to their respective powers to afford all reasonable facilities for the receiving, forwarding, and delivery of traffic upon the several railways and canals belonging to or worked by such companies, and for the return of carriages, trucks, boats, and other vehicles. By section 7 of the same Act railway companies were made liable for the loss of, or for any injury done to, animals or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of the company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability, every such notice, condition, or declaration being declared null and void. It was, however, provided that nothing contained in the Act should be construed to prevent railway companies from making such conditions with respect to the receiving, forwarding, and delivering of animals or goods as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried to be just and reasonable. No question arises in the present appeal as to whether the terms of the owner's risk consignment note are just and reasonable, but this question has been raised in many cases, and it has been decided that it is a matter

wholly for the decision of the Court or Judge although it may involve questions of fact. It is further provided that the special contract shall not be binding upon or affect any party unless the same is signed by him or by the person delivering such animals or things for carriage. In the present case the special contract was signed by the respondent.

Since 1854 goods have been largely carried by railway companies under owner's risk consignment notes, the traders being willing to limit the liability of the railway company in return for being charged at a lower rate. In the present case the consignment note is in the usual modern form and may be found in text-books on railway law. Their Lordships were informed that this form had been generally adopted by the railway companies in order to obtain uniformity and to avoid discrimination between different railway systems. The consignment note commences with the notice that there are two rates of carriage at either of which the goods may be consigned at the sender's option—one, the ordinary rate, when the company take the ordinary liability of a railway company; and the other a reduced rate, adopted when the sender agrees to relieve the company and certain other companies or persons from all liability for loss, damage, misdelivery, delay, or detention, except (1) upon proof that such loss arose from wilful misconduct on the part of the company's servants, (2) in the case of such non-delivery, pilferage, or misdelivery as is hereunder mentioned. It was said that (2) had been added at the instance of the traders, and there is no doubt that owners' risk consignment notes have been held just and reasonable although they protected the railway companies from all liability for loss or damage except upon proof that such loss or damage had arisen from wilful misconduct on the part of the company's servants so long as the sender had the choice of a reasonable alternative ordinary rate.

The note then contains the usual direction to the Railway Company to receive and forward the goods at the reduced rate, in consideration whereof the respondent agrees to relieve the Railway Company and certain other companies and persons from all liability for loss, damage, misdelivery, delay, or detention (including detention of traders' trucks), except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the company's servants. If the note had stopped at this point I think that the word "loss" is applicable both to a case of non-delivery or short delivery, and that the respondent could not have recovered unless he could prove that the loss had arisen from wilful misconduct on the part of the company's servants. I agree with the opinion expressed by Lush, J., that from the point of view of the consignee there is no difference between goods being lost and goods being not delivered. Then follows the paragraph—"But nothing in this agreement shall exempt the company from any liability they might otherwise incur in the following cases of non-delivery, pilferage, or mis-

delivery—that is to say, non-delivery of any package or consignment fully and properly addressed, unless such non-delivery is due to accident to trains or fire: Provided that the company shall not be liable on proof that the same has not been caused by negligence or misconduct on the part of the company or their servants.”

An attempt was made at the trial to prove that the non-delivery had not been caused by the negligence or misconduct of the company or their servants, but this failed. The consignment was fully and properly addressed and the non-delivery was not due to accident to trains or fire. The case therefore turns on the meaning of the words “non-delivery of any package or consignment.” In its ordinary sense “consignment” means the entirety or aggregate of the goods comprised in a consignment note. A consignment is not delivered to the consignee if an appreciable part of the goods comprised in the consignment note have been lost during the transit. The present case illustrates this principle. The consignment was not delivered to the respondent since there was a failure to deliver certain carcasses which on the finding of the County Court Judge were an appreciable part of the consignment. There was only a partial delivery and the respondent framed his claim on this basis. I am unable to hold that the ordinary meaning of consignment is not applicable where the subject-matter is non-delivery, or that in this contract it has any other than its ordinary meaning, the entirety of the goods comprised in the consignment note. No doubt there may be non-delivery of part only of a consignment, just as there may be delivery of part only of a consignment, and in my opinion, on the finding of the County Court Judge, there has been a non-delivery of part of a consignment in the present case. If this is the correct meaning of the term “consignment,” then the question arises whether, to use the words of Bray, J., “the non-delivery of a consignment includes non-delivery of part of a consignment,” or, in other words, whether the condition should be read “non-delivery of any package or consignment or part of consignment.” I cannot think it is right to interpolate the words “part of a consignment” unless the interpolation is necessitated either by a special context or by the terms of the consignment note regarded as a whole. With all respect to the learned Judges who have decided in favour of the respondent, it appears to me that neither the special context nor the terms of the consignment note, regarded as a whole, support the interpolation in the contract of the words “part of a consignment.” It is admitted that package does not include part of a package having regard to condition (2), which exempts pilferage from packages of goods protected otherwise than by paper or other packing readily removable by hand, provided the pilferage is pointed out to a servant of the company on or before delivery. If package does not include part of a package, it would seem to be inconsistent that in the same context consignment

should be construed as including part of a consignment. The words “fully and properly addressed” which follow “consignment” are not applicable to part of a consignment any more than they would be applicable to part of a package; but in any case I am unable to hold that there is anything in the special context which can justify the interpolation of the words “part of a consignment” which the contracting parties have not used. I should come to the same conclusion having regard to the general terms of the contract in the consignment note. Apart from condition (3) of the general conditions, to which I propose to refer later, I think it is difficult to read consistently exceptions (1) and (2) if the non-delivery of a consignment includes non-delivery of part of a consignment. This difficulty was evidently present to the mind of Lush, J. Exception (1) includes under this head loss both in the case of non-delivery and of short delivery, and if exception (2) has the same ambit, then short delivery as well as non-delivery is in substance removed from the operation of exception (1). I do not overlook the limitation that a consignment must be fully and properly addressed, and that the non-delivery must not be due to accident to trains or fire, but in ordinary practice a consignment is fully and properly addressed, and the losses due to accident to trains or fire would be by no means co-extensive with the losses in respect of short delivery, for which under exception (1) the consignee has no claim except upon proof that the loss arose from wilful misconduct on the part of the company’s servants.

Much reliance was placed in the argument on behalf of the respondent on the terms of condition (3) of the general conditions, and there is no doubt that this argument had much weight both in the Divisional Court and the Court of Appeal. I think that, as a matter of construction, if there is any inconsistency between the special terms of the consignment note and the general conditions on the back of the note, the special terms should prevail, but I am unable to find any inconsistency. Condition (3) is a rule of procedure which limits the time within which a claim must be made in respect of goods, for loss or damage during transit. It must be made within three days after delivery of the goods in respect of which the claim is made. Take the instance of a claim for loss from short delivery. It must be made within three days after the short delivery of the goods in respect of which it is made, this being the time at which the short delivery would come to the notice of the trader. It is not necessary in the present case to consider when the short delivery was complete, but the condition provides that delivery is to be considered complete at the termination of the transit as specified in condition (6). Condition (3) further provides “or in the case of non-delivery of any package or consignment within fourteen days after dispatch.” A provision of this character is obviously necessary where there has been a non-delivery of a package or consignment, or,

in other words, where there has been a loss of the whole package or consignment. In my opinion the words "package or consignment" have the same meaning in condition (3) of the general conditions as in condition (1) on the face of the consignment note, and I think that in both cases "consignment" is used in its ordinary sense of the entirety of the goods comprised in the consignment note. If there had been a non-delivery of an inappreciable part of a consignment, I think that the principle *de minimis* would apply, but on this point the finding of the County Court Judge is conclusive.

In my opinion the appellants succeed, but in the Divisional Court it was properly made a condition of giving liberty to appeal that in any event the appellants should pay the costs of both parties.

EARL LOREBURN—The order of this House will be—The parties agreeing to dispense with a new trial and agreeing as to costs, judgment to be entered for the appellants, who have agreed to pay the respondent his costs here and below.

Counsel for the Appellants—Schiller, K.C.—Bernard Campion. Agent—L. B. Page, Solicitor.

Counsel for the Respondent—Rawlinson, K.C.—F. G. Weatherly. Agents—Billing & Company, for Fairfax Spofforth, Bristol, Solicitors.

PRIVY COUNCIL.

Thursday, January 25, 1917.

(Present—The Right Hons. Viscount Haldane, Lords Dunedin, Parker, Buckmaster, and Sir Arthur Channell.)

FRASER AND OTHERS v. CITY OF FRASERVILLE.

(ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC—APPEAL SIDE.)

Property—Sale—Arbitration—Compulsory Purchase—Basis of Valuation.

Where the value of land acquired compulsorily falls to be ascertained by arbiters "the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation, with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case."

The Court of King's Bench of Quebec on 13th November 1915 affirmed decisions of BELLEAU, J., which annulled an award of arbiters certifying the amount of compensation payable by the respondents to the appellants in respect of the expropriation of certain properties at 75,700 dollars.

The facts are given in the opinion (*infra*).

The considered opinion of their Lordships was delivered by

LORD BUCKMASTER—The appellants in this case are the plaintiffs in an action brought by them against the respondent and the defendants in an action brought by the respondent against them.

The object of the appellants' action was to enforce an award of arbitrators dated the 27th November 1911, by which the sum of 75,700 dollars was fixed as the sum to be paid by the respondent to the appellants in full compensation for the expropriation of certain property.

The action by the respondent was to set the award aside. The cases were consolidated at the trial, and the Superior Court by its judgment dated the 14th October 1914 discharged the award with costs and dismissed the appellants' action. The Court of King's Bench for the Province of Quebec (Appeal Side) by two judgments confirmed the Superior Court. The appellants have appealed from these two judgments, and these appeals which have been consolidated constitute the present appeal.

The substance of the dispute is connected with a subject which has not been unfruitful in litigation, namely, the determination of the exact principle upon which prospects and possibilities of future development ought to be taken into account in determining the price to be paid for property compulsorily acquired.

The appellants are the owners of the banks and lands adjacent to the waterfalls of the Rivière du Loup, known as the Grandes Chutes. These falls are within the limits of the jurisdiction of the respondent city, by whom the water-power is required for the operation of a municipal system of electric lighting.

It appears that the value of these falls for industrial enterprise has long been recognised, and as far back as 1881 William Fraser, the predecessor in title of the present appellants, granted a lease of the falls and the adjacent lands to a paper pulp company for twenty years at the rate of 30 dollars per year. This lease was extended from time to time, and in 1896 a final extension was granted to the then holder of the original lease for a period of ten years.

In 1905, one year before the expiration of this lease, the then lessees, who had used the water to carry on a business of electric lighting, sold the lease and the business to the city for the sum of 80,000 dollars. Since that time the electric light system has been operated exclusively by the municipality, who have been in continuous possession of the Grandes Chutes for that purpose.

In 1906 an offer was made by the city to William Fraser for a new lease of twenty-five years, but though this offer was accepted no formal lease was executed, and William Fraser died in 1908 with the matter still in abeyance.

On the 10th July 1907 the respondents adopted a bye-law authorising them to construct a reservoir higher up the river in order to regulate the flow of water and