

21, 1915

In the Privy Council.

No. 48 of 1914.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE GRAND TRUNK RAILWAY COMPANY

OF CANADA (Defendants) Appellants,

AND

ALBERT NELSON ROBINSON (Plaintiff) Respondent.

RESPONDENT'S CASE.

1. This is an appeal by special leave from the judgment of the Supreme Court of Canada—Davies, Idington, Duff, Anglin and Brodeur JJ. : Fitzpatrick C.J. dissenting—given the 6th May, 1913, reversing the judgment of the Court of Appeal for Ontario—Garrow, Maclaren and Meredith JJ.A. : Magee and Lennox JJ.A. dissenting—given the 19th November, 1912, and restoring the judgment of Latchford J. given the 6th June, 1912.

Record.
p. 81.
p. 55.
p. 43.

2. The Respondent's action was to recover damages for personal injuries sustained, through the Appellant Company's negligence, while travelling in the Appellant Company's train on the 1st December, 1911. At the trial the Appellant Company admitted negligence, but denied liability on the ground of a special contract authorised by the Railway Board. The jury assessed the damages at \$3,000.

pp 2-3.
p. 8, l. 24.
p. 30, l. 40.

3. The Respondent, a sawmill employee residing at South River in the District of Parry Sound, was requested by Dr. McCombe to travel by the

p. 8, l. 32.
p. 12, l. 30.

RESPONDENT'S CASE.

Record. Appellant Company's railway from Milverton to South River in charge of a mare which Dr. Parker had purchased on behalf of Dr. McCombe and was to ship and consign to him.

p. 17, l. 41. 4. The Appellant Company required as a term of receiving such a shipment for a distance greater than 100 miles that the animal should be accompanied by a man in charge.

p. 85, l. 21. 5. The Respondent was not by way of occupation a drover or accustomed to undertake the service of accompanying live stock on trains.

p. 35. 6. On the 29th or 30th November, 1911, the mare was shipped and the Respondent and Dr. Parker went to the Appellant Company's agent's 10 office in the station at Milverton and Dr. Parker and the Appellant Company's agent Burgman signed a document (Exhibit 1), described as a "Live Stock Special Contract."

p. 13, l. 27.
p. 18, l. 5.
p. 10, l. 16
et seq. 7. The Appellant Company's agent said that the Respondent might require the document to indicate that he was accompanying the mare, whereupon Dr. Parker handed the document folded up to the Respondent who put it in his pocket, without reading it or knowing of its contents, not accepting it as, or understanding it to be, a contract. The Respondent's attention was not in any way drawn to the contents or effect of the document.

8. On the document there was printed a condition purporting to exclude 20 the liability of the Railway Company in case of injury being caused to the man in charge of live stock by the negligence of the Railway Company's servants.

The condition was as follows:—

p. 35. "In case of the Company granting to the shipper or any nominee
"or nominees of the shipper a pass or a privilege at less than full fare
"to ride on the train in which the property is being carried, for the
"purpose of taking care of the same while in transit and at the owner's
"risk as aforesaid, then as to every person so travelling on such a pass
"or reduced fare the Company is to be entirely free from liability in 30
"respect of his death, injury, or damage, and whether it be caused by
"the negligence of the Company, or its servants or employees or other-
"wise howsoever."

p. 44, l. 22. 9. The Respondent's attention was not drawn to this condition, he did not notice it or read it, and he did not know of or suspect its existence.

p. 18, l. 14. 10. Neither was the Respondent required by the agent to sign the document in accordance with the instructions on the back of it, nor did he sign it.

11. The instructions printed upon the back of the document were :— Record p. 36.
 “Note.—Agents must require those entitled to free passage or
 “reduced fare in charge of live stock under this contract to write
 “their own name on the lines above.”

12. The Respondent never in any way authorised either Dr. Parker p. 86, l. 1.
 or Dr. McCombe to make any contract on his behalf.

13. A condition exempting the Appellant Company from liability for
 negligence is, it is submitted, in conflict with Section 284, Subsection 7 of
 the Railway Act of Canada (Revised Statutes 1906, Ch. 37).

10 Section 284 is as follows :—

“The company shall, according to its powers :—

“ (A) furnish, at the place of starting, and at the junction of
 “ the railway with other railways, and at all stopping places
 “ established for such purpose, adequate and suitable accommoda-
 “ tion for the receiving and loading of all traffic offered for carriage
 “ upon the railway ;

“ (B) furnish adequate and suitable accommodation for the
 “ carrying, unloading and delivering of all such traffic ;

20 “ (C) without delay, and with due care and diligence, receive,
 “ carry and deliver all such traffic ; and

“ (D) furnish and use all proper appliances, accommodation
 “ and means necessary for receiving, loading, carrying, unloading
 “ and delivering such traffic.

“ 2. * * * * *
 “ 3. * * * * *

“ 4. Such traffic shall be taken, carried to and from, and delivered
 “ at the places aforesaid on the due payment of the toll lawfully payable
 “ therefor.”

Subsection 7 is as follows :—

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

14. Section 2, Subsection 31 of the Railway Act is as follows :—

“ (31) ‘ Traffic ’ means the traffic of passengers, goods and rolling
 stock ” ;

40 15. The form of Special Contract in question was, on the 17th October, pp. 39-42.
 1904, approved by an order of the Board of Railway Commissioners for
 Canada.

Record.

16. Section 340 of the Railway Act does not, it is submitted, give the Board of Railway Commissioners power to authorise any contract or condition which conflicts with the provisions of Section 284, Subsection 7 of the Act.

Section 340 is as follows :—

“ No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board.

“ 2. The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited.

“ 3. The Board may by regulation prescribe the terms and conditions under which any traffic may be carried by the company.”

p. 13, l. 39.

17. The Respondent was accepted as a passenger by the Appellant Company's servants and travelled in charge of the mare upon the train with the consent and approval of the Appellant Company's servants. 20

p. 11, l. 8.

18. At Burk's Falls, owing to the Appellant Company's negligence, a rear end collision occurred causing the Respondent to suffer the severe personal injuries in respect of which he brought his action.

pp. 44-46.

19. Mr. Justice Latchford, in the High Court, was of opinion that the Respondent's right to be carried without negligence was not taken away by the special contract between the Appellant Company and Dr. Parker to which the Respondent was not a party, under which he derived no benefit and of the terms of which he had neither notice nor knowledge, and accordingly judgment was directed to be entered for the amount of damages assessed by the jury. 30

pp. 56-60.

pp. 61-65.

20. In the Court of Appeal the majority of the judges (Garrow, MacLaren and Meredith, J.J.A.) considered that unless the Respondent was merely a trespasser he was bound by the terms of the special contract and that the Railway Board had power under Section 340 of the Railway Act to authorise the contract in question. In the opinion of Lennox, J. (with which Magee J. appears to have concurred) the Respondent was rightfully upon the train, and having neither notice nor knowledge of any special contract, was not bound by its terms. He considered that the Appellant Company could not invoke the drastic provisions of the special contract without obtaining the signature of the person to be carried in accordance with the authorised form or at least drawing attention to the special terms.

21. In the Supreme Court of Canada the majority (Davies, Idington, Duff, Anglin and Brodeur JJ.), restoring the judgment at the trial, held that the Respondent's common law right, which he undoubtedly had, to be carried with reasonable care was not taken away by a contract made between the Company and Dr. Parker since the Respondent in no way gave his assent to it and never authorised Dr. Parker to enter into it as his agent; that as regards the special condition in the contract the Respondent was under no obligation to read it and his attention was not drawn to it, so that, on the authority of *Parker v. South Eastern Railway Co.*, L.R., 2 C.P.D. 416, ¹⁰*Henderson v. Stevenson*, 2 H.L. Sc. 470, and *Richardson v. Rowntree* (1894) A.C. 217, he was not bound by it. The Chief Justice dissented on the ground that the Respondent was bound by the terms of the special contract exempting the Appellant Company from liability for negligence and his attention was sufficiently drawn to it.

Record.
pp. 82-87.

22. The Respondent respectfully submits that the appeal should be dismissed for the following, among other,

REASONS.

- 20 1. Because the Appellant Company committed a breach of the duty which at common law they owed to the Respondent who was lawfully upon the Appellant Company's train and accepted by the Appellant Company as a passenger.
2. Because there was no contract between the Appellant Company and the Respondent depriving him of his rights at common law upon which he relies.
3. Because no contract between a third party and the railway company could deprive the Respondent of his rights at common law unless either he gave his consent to it, or the third party was his agent authorised by him to make such a contract on his behalf.
- 30 4. Because neither Dr. Parker nor Dr. McCombe was the Respondent's agent.
5. Because the Respondent never gave his consent to any special contract entered into by Dr. Parker, either at all or in the only way he could, so as to make himself a party to it, viz., by signing it according to the instructions upon its back in the space provided.
- 40 6. Because if there was any contract between the Respondent and the Appellant Company it was an implied contract by which the Appellant Company undertook to carry the Respondent safely and with reasonable care.

7. Because, in any case, the Appellant Company, having failed to obtain the Respondent's signature to the alleged special contract as required by the form authorised by the Railway Board, cannot claim exemption from liability thereunder.
8. Because, even if the Respondent made himself a party to or is bound by the alleged contract, he was not deprived of his rights by the special condition which he never in any way consented to or accepted as part of the contract so as to be bound by it. 10
9. Because any such condition is invalid by Section 284, Subsection 7 of the Railway Act of 1906.
10. Because upon a correct construction of the Railway Act, Section 340 does not authorise the approval by the Railway Board of any form of contract in conflict with the provisions of Section 284, Subsection 7 or absolving the Appellant Company from liability for negligence.
11. Because the reasons given by the Judge at the trial, the minority of the Court of Appeal for Ontario, and the majority of the Supreme Court of Canada are correct. 20

E. E. A. DU VERNET.
W. L. HAIGHT.
T. H. WILLES CHITTY.

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BLAKE & REDDEN,

17, Victoria Street, S.W.