21. 1915

No. 48 of 1914.

In the Privy Council

On Appeal from the Supreme Court of Canada

BETWEEN

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,

(Defendants) APPELLANTS,

AND

ALBERT NELSON ROBINSON,

(Plaintiff) RESPONDENT.

Record of Proceedings.

BATTEN, PROFFITT & SCOTT,

13 Victoria Street, Westminster, S.W.,

Solicitors for Appellants.

RECORD.

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AND

ALBERT NELSON ROBINSON,
(Plaintiff) RESPONDENT.

RECORD OF PROCEEDINGS

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In the Court of Appeal for Ontario

BETWEEN :

ALBERT NELSON ROBINSON,

(Respondent) PLAINTIFF,

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,

(Appellants) DEFENDANTS.

RECORD

In the Court of Appeal for Ontario.

No. 1 Statement of Case

STATEMENT OF CASE.

This is an action brought by Albert Nelson Robinson claiming $10,000.00
10 damages for injuries received while travelling on a train of the Defendant Company in charge of a horse. The case came on for trial before the Honourable Mr. Justice Latchford at Parry Sound on the 6th day of May, 1912, judgment being reserved. Judgment was pronounced on the 6th day of June, 1912, in favor of the Plaintiff for $3,000.00 and costs.

From this judgment the Defendant Company now appeal to the Court of Appeal for Ontario.

In the High Court of Justice

BETWEEN :

ALBERT NELSON ROBINSON

Plaintiff,

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA

Defendants.

Writ issued the 4th day of March, 1912.

STATEMENT OF CLAIM.

RECORD

In the High Court of Justice for Ontario.

No. 2. Statement of Claim.

1. The Plaintiff is a filer residing at the village of South River, in the district of Parry Sound. 10

2. The Defendants are carriers of passengers upon a railway from Milverton to South River and between numerous other points in the Province of Ontario for reward.

3. In the month of November, 1911, the Plaintiff, at the request of one Dr. R. J. McCombe of South River aforesaid, did agree to take charge of a mare from Milverton aforesaid to South River aforesaid whilst being transported over the Defendants' line of railway and did travel to Milverton for the aforesaid purpose.

4. On the 30th day of November, 1911, the Plaintiff was received by the Defendants as a passenger in charge of the said mare, to be by them safely 20 and securely carried upon their railway from Milverton to South River aforesaid for such reward as aforesaid.

5. The Defendants did not safely and securely carry the Plaintiff from Milverton to South River aforesaid, but so negligently and unskilfully conducted themselves in carrying the Plaintiff on the journey aforesaid and in managing the said railway and carriage train in which the Plaintiff was then being carried by the Defendants that the said carriage train on the 1st day of December, 1911, whilst standing on the railway track near the village of Burks Falls, in the district of Parry Sound, was violently collided with by a freight train, and the car in which the Plaintiff was then being carried was wrecked and shattered. 30

6. The Plaintiff was thereby violently thrown from the said car in which he was so being carried on to the lands of the Defendants abutting said line of railway, and did thereby sustain severe injuries, to wit, injuries causing paralysis of the left arm and part of the hand; severe bruises over the ribs; and other injuries, and his whole nervous system received a severe shock.

7. The Plaintiff has in consequence suffered great pain and may be permanently injured, and has been put to great expense for medical attendance, nursing and otherwise, and extra food and nourishment, and will be put to further like expenses in endeavouring to cure himself of his said injuries, and has been and is still prevented from pursuing his occupation, and has lost and will lose the salary which he otherwise would have earned.

THE PLAINTIFF THEREFORE CLAIMS $10,000 damages and his costs of this action.

DELIVERED this 29th day of March, A.D. 1912, by Walter L. Haight, 10 of the Town of Parry Sound, in the District of Parry Sound, Solicitor for the Plaintiff.

In the High Court of Justice

BETWEEN :

ALBERT NELSON ROBINSON,

Plaintiff,

—and—

THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

Defendants.

STATEMENT OF DEFENCE.

RECORD

In the High Court of Justice for Ontario.

No. 3. Statement of Defence.

1. The Defendants deny the several statements and allegations contained in the Plaintiff's Statement of Claim, and put the Plaintiff to the strict proof thereof.

2. At the time of the occurrence complained of the Canadian Classification 10 Number Fifteen was in full force and effect, and all freight contracts were made having reference to its provisions, to which Classification the Defendants for greater certainty and particularity crave leave to refer, and also the order of the Board of Railway Commissioners for Canada relating thereto, made under the statute in that behalf when produced.

3. On the twenty-ninth day of November, 1911, one F. Parker, agent of the consignee, made and entered into a special contract with the Defendants for transporting one horse at a rate of freight reduced from the authorized tariff, and in accordance with the said classification as to rates and weights for the shipment of one horse at owner's risk, subject to the terms and conditions of said special live stock contract, as also the Plaintiff in charge from 20 Milverton, Ontario, to South River, Ontario, and by said contract it was agreed, in consideration of the reduced rate of freight charged and granting to the shipper or his nominee or agent, a privilege at less than full fare to ride on the train in which the horse was carried, for the purpose of taking care of the same while in transit and at the owner's risk, the Defendants should not be liable beyond a certain fixed price as to the horse, and the Defendants, as to the Plaintiff so travelling in charge, be entirely free from liability in respect to his death, injury or damage, and whether it be caused by the negligence of the Company or its servants. The Defendants for greater certainty and particularity crave leave to refer to the said Contract and also the order of the Board of Railway Commissioners for Canada relating thereto and made under 30 the statute in that behalf when produced, and which said contract is binding upon the Plaintiff.

4. The Defendants further say that the said horse, as also the Plaintiff in charge, were accepted and received for carriage upon and subject to all the terms, conditions and provisions of said contract, and the provisions of the

official tariffs, classifications and rules in effect, and the Plaintiff accepted the said contract and was carried thereon as the drover or man in charge of said horse on the journey and upon no other terms or conditions whatsoever.

5. That in the ordinary course of said transportation the said horse was being conveyed over the Defendant's line of railway, as was contemplated and necessary under the said contract, the Plaintiff also being carried in the caboose or van at the rear of the train in which the said horse was in the course of transmission to South River aforesaid in pursuance of the terms of the said contract.

10 6. The said train was not a passenger train, but an ordinary freight train operated in the ordinary way, and without any negligence on the part of the company, its servants, or those in charge of same, and upon which no passenger is allowed by the Defendants to travel save and except upon a special contract that such journey is at the sole risk of the passenger who may be permitted to journey thereon, of all of which the Plaintiff was well aware.

7. The Defendants for the reasons above set forth submit that this action should be dismissed with costs.

DELIVERED this 10th day of April, A.D. 1912, by W. H. Biggar, Room 56, Home Life Building, City of Toronto, County of York, Solicitor
20 for the Defendants.

In the High Court of Justice

BETWEEN :

ALBERT NELSON ROBINSON,

Plaintiff,

—and—

THE GRAND TRUNK RAILWAY COMPANY OF CANADA

Defendants.

RECORD

In the High Court of Justice for Ontario.

No. 4. Joinder of Issue.

JOINDER OF ISSUE

The Plaintiff joins issue with the Defendants on the Statement of Defence of the Defendants delivered herein.

Delivered this eighteenth day of April, 1912, by Walter Lockwood Haight, 10 of the town of Parry Sound, Solicitor for the said Plaintiff

In the High Court of Justice

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10 BETWEEN :

ALBERT NELSON ROBINSON,

Plaintiff,

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,

Defendants.

RECORD

In the High Court of Justice for Ontario.

No. 5. Jury Notice.

TAKE NOTICE that the Plaintiff requires that the issue herein be tried by a jury.

20 DATED the 16th day of April, A.D. 1912.

W. L. HAIGHT, Esq.,
Solicitor for the Plaintiff.

To W. H. BIGGAR, Esq.,
Solicitor for Defendants.

In the High Court of Justice

BETWEEN :

ALBERT NELSON ROBINSON

Plaintiff, 10

—and—

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,

Defendants.

Tried at Parry Sound by His Lordship Mr. Justice Latchford and a Jury, Monday, May 6th, 1912.

COUNSEL:
MR. HAIGHT, K.C., for Plaintiff.
MR. MCCARTHY, K.C., and MR. FOSTER, for Defendants.

RECORD

In the High Court of Justice for Ontario.

No. 6. Evidence at Trial Albert Nelson Robinson. Examination.

HIS LORDSHIP: After reading these pleadings, is there any doubt about the facts? 20

MR. MCCARTHY: No, my Lord; no doubt the plaintiff was injured.

HIS LORDSHIP: Is negligence admitted?

MR. MCCARTHY: Negligence is admitted, but not liability.

HIS LORDSHIP: Then the question is as to the amount of damages?

MR. MCCARTHY: Yes, my Lord.

HIS LORDSHIP: And the question of the contract is one for me?

MR. MCCARTHY: Yes, my Lord.

(MR. HAIGHT then addressed the Jury).

EVIDENCE

ALBERT NELSON ROBINSON, sworn, examined by MR. HAIGHT: 30

Q. Your home is at what place? A. South River.

Q. How long have you been living there? A. About 18 years.

Q. What has your occupation been latterly? A. Well, contracting—making lath in sawmills.

Q. Chiefly for what firm? A. For J. B. Smith & Sons, of Callendar.

Q. Had you worked at Callendar—or where had you been working for them, at South River or at Callendar? A. At Callendar.

Q. Under what circumstances were you working for them? A. Under contract; making lath by the thousand. 40

Q. What was the price paid you? A. For 48-inch lath I get 65 cents a thousand, and for 32-inch lath I get 55 cents a thousand, and one inch 40 inches long I get 55 cents a thousand.

Q. Did you look after your help? A. Yes.

Q. You paid your own help out of that? A. Yes.

Q. Who looked after your business interests, kept your books and the accounts of these transactions? A. That was done in the Company's office, through the time I put in for the men.

Q. What was the procedure; in paying you, for instance, how did you get 10 your money and how was your help paid? A. I would give a man an order on the office, put their time in first up to the first of each month, and then the Company would pay the men, and I would get the balance that was left.

Q. When did you start to work with them under this contract? A. I started in 1907 with the Smiths.

Q. During your last season what was the net result of that contract, in profit, to you? A. The net result was somewhere about $1,200.00

Q. How much did you say? A. About $1,200.00; I just forget the exact figures.

Q. And that appeared, according to the statement furnished by John 20 B. Smith & Sons? A. Yes.

Mr. McCarthy: Q. $1,213.23, Mr. Smith tells us? A. That is correct.

Mr. Haight: Q. In addition to that, had you any other means of earning the money? Well, in the winter time I had other ways. The contract with Smith & Sons only lasted for the summer season. Last winter I had rented a skating rink at South River as a winter prospect, and had been doing work on the rink getting it ready, up until the time I went down after this horse and got in the railway accident—the wreck.

Q. Have you any means of knowing what profit you would have made 30 on the handling of the Skating Rink? A. I figured it from what I heard from other people, that there was between $300.00 and $400.00 for the season, if properly managed.

Q. Had you had any previous experience at all in regard to the work or any part of it? A. Not in the management part of it.

Q. But as to any part of it? A. Yes, I had had a little.

Q. What happened to that contract? A. I turned the contract over to another man.

Q. Why? A. On account of the injuries I had I could not take care of it—my arm.

Q. What became of your contract with Smith & Sons? A. I had not 40 taken out a new contract with them yet.

Q. Why? A. I have not been in a position to do it.

Q. Fully complete your answer. A. If I took the contract at Callendar in the mill, which I had been following, I could not handle the saws and do my own filing and look after my own machines, and this hand and arm won't stand to lift anything; it won't stand any more than to carry it around; the power is not there to do the work.

Q. Make it clear, please; you speak of looking after your own saws;

RECORD

In the High Court of Justice for Ontario.

No. 6
Evidence at Trial
Albert Nelson Robinson.
Examination.
—*continued*

is that part of your own work? A. Yes. I do my own filing, which is a very important part.

Q. That is a very important part of your work? A. Yes.

Q. And up to the time of this action being brought and until now, are you in a position to undertake that work? A. Not the same as I have been.

Q. Supposing you had taken that contract, what would it have necessitated your doing? A. It would have been necessary for me to have got a man to do the saw filing and look after the machines.

Q. And what would that cost you? A. Nothing less than $3.00 a day, I would not think.

Q. Coming down to the time you went down to Milverton, tell us the circumstances preceding your trip there. A. I left South River to go to Milverton to bring up a horse which Dr. Parker was purchasing there for Dr. McCombe, and I went there and saw Dr. Parker, and we drove out and saw several horses. Dr. Parker purchased a horse, and we loaded it on the car, and I left Milverton with the horse in the car for home. 10

Q. For your home? A. For my home.

Q. Did you have anything handed to you? A. I had nothing. Well, I had a shipping bill handed to me.

Q. And that is what has been referred to, and will be referred to as this contract, this special contract? A. I believe so.

Q. What did you do with it? A. I did not know it by that name. I put it in my pocket. 20

Q. Did you do anything with it before putting it in your pocket? A. I did not.

Q. How was it handed to you? A. It was handed to me by Dr. Parker; I would not swear just to be sure that it was Dr. Parker, or the agent, but I think it was Dr. Parker.

Q. In what shape? A. Folded up.

Q. You did what when it was handed to you? A. Put it in my pocket.

Q. When did you first see that contract after that time? A. It was about a week after I was home, and I was running through my pockets one day and thought Dr. McCombe should have had that, as he was shipping the horse, and I sent it down to Dr. McCombe. 30

Q. Did you look at it then? A. Yes.

Q. And read it? A. I read it.

Mr. Haight: I am putting in as an Exhibit the statement between John B. Smith & Sons and the Plaintiff.

His Lordship: You have it down as $1,213.23; you do not need to put that in.

Mr. McCarthy: I admitted that it was $1,213.23.

Mr. Haight: Q Is this (shows to witness) the document you refer to as the shipping bill? A. Yes, sir. 40

Q. That is the one? A. That is the one.

(Marked as Exhibit 1).

Q. As to the accident you tell us about; leaving Milverton, you came along as far as Burk's Falls in safety? A. Yes.

Q. What time did you arrive there? A. I think it was about 3.30 or 3.35.

Q. Of what date? A. December 1st.

Q. How long had you been there; where were you, first? In what part of the train? A. I was in the van.

Q. You were in the van? A. I was in the van.

Q. Alone in the van? A. Alone in the van.

Q. How long an interval elapsed between the time of the train pulling up at Burk's Falls and the collision? A. About five minutes.

10 Q. Tell us the character of the collision? A. I was in the van, about half lying down on the cushion, and the first I heard was just a few puffs of a locomotive coming at a high speed, and then the crash came and I landed over by a fence, inside the fence—pretty near over to the fence in the right of way of the Grand Trunk Railway. I picked myself up and looked around, and noticed just above me a locomotive over on its side, or partly over, and several cars wrecked, split up and smashed; I stood around there a few minutes, and Conductor Robinson came back—the conductor I was running with—and said "My God, Nelson."

His Lordship : Q. Tell us how you were injured? A. I went up to 20 the station just after that, and I found my side and arm getting sore and stiff; I laid down for about an hour; the train men came up to the station, and we went down to the hotel and had breakfast, and about twelve o'clock a train came and took the balance of our train to South River, and I went to bed; Dr. McCombe came down, and Dr Porter, and they examined me and attended to me.

Mr. Haight : Q. What was the character of your injuries ; what was the nature and extent of them? A. My left side, my seventh and eighth ribs, I understood them to say were broken, and there was skin knocked off, and several bruises down my left side and left arm, my left elbow was very sore, and a few days after it had blacked from the elbow to the shoulder, and it was 30 discolored (the elbow), and the doctors say the nerve has been bruised or cut, and that is what is causing the crippling of the two fingers.

Q. Did you notice any injury to the nick in the arm that the nerve runs through? A. I saw there was a little cut there.

Q. When? A. A few days after the accident.

Q. Your chest and ribs were strapped up? A. My chest and ribs were strapped up.

Q. Have you suffered any inconvenience from the injury to your ribs? A. Yes, I have.

Q. In what way? A. In the soreness, the pain.

40 Q. Is that passing away gradually? A. It is passing away gradually. It is not near as bad as it was.

Q. Respecting the injury to your arm; how has that affected you; first, how did it affect you? A. My arm was sore in my elbow, and it partly paralyzes those two smallest fingers; there was never one night for two months I did not have to get up and put it in a jug of cold water to keep the fever and the heat and the pain down.

Q. What do you have to do in the daytime? A. In the daytime it was not so bad as at nights; I had to cool it off in the daytime, but not the same as at nights. I was up and down during the daytimes.

RECORD

In the High Court of Justice for Ontario.

No. 6
Evidence at Trial
Albert Nelson Robinson
Cross-Examination.

Q. Is it sensitive to cold? A. Yes; if there is a cool breeze at all I have to cover it.

Q. How does it affect your grasp? A. I have no power in the fourth and fifth finger, or scarcely any power.

Q. Is there any discomfort in addition to the loss of grasp you have suffered? A. There is this. There is the checky feeling, or pain; it feels like a current of electricity going down the arm and into part of the hand and through the back of the hand.

Q. Is that intermittent or persistent? A. It is persistent.

Q. Is there anything else you have to say with regard to the nature of 10 that injury—any discomfort, pain or anything else that it has occasioned you? A. The worst there is about it, outside of the two fingers, is the rest of my nerves; none of the nerves in my whole system are the same as they were before—none of them.

Q. How does that affect you? A. It affects me that I take shivering streaks, and mostly when I go to bed at nights to lie down it will start the flesh of my back just moving and quivering and trembling, and after a while it will pass away and ease down.

Q. Have you any apprehensions of any other kind—any nervousness—does it affect you any in that way? A. Any sharp noises will startle me 20 and cause me to jump.

Q. How about travel; does it affect you in that way, to any extent? A. It affects me when I get on the train.

Q. In what way does it affect you there? A. It is a peculiar kind of feeling; it would be pretty hard to describe; it is just the kind of a feeling as though you were scared and on the watch for something to occur.

Q. A feeling of apprehension? A. Yes.

CROSS-EXAMINED by Mr. McCarthy:—

Q. You went by arrangement with Dr. McCombe? A. Yes. 30

Q. To go and bring a horse back? A. Yes.

Q. The horse that Dr. Parker and he had been corresponding about? A. Yes.

Q. He wanted to get the horse, and you volunteered your services to go and bring the horse back? A. Yes.

Q. That is a fair way of putting it, without going into the whole details; he gave you some money to go and pay part on the horse? A. Gave me money to buy a ticket and pay some on the horse, for Dr. Parker did not have sufficient to cover it.

Q. And with that understanding you started off and bought your ticket 40 with the money he gave you? A. Yes.

Q. And you bought the horse? A. I did not buy the horse.

Q. Where was it bought? A. Near Milverton; right close to Milverton.

Q. What sort of a ticket did you buy? A. A single from South River to Toronto.

Q. And from Toronto to where? A. To Guelph Junction.

Q. And from Guelph Junction? A. On to Milverton.

Q. A single ticket? A. A single ticket.

Q. Then the horse was bought and you were present when the horse was bought, and you helped to bring him into Milverton? A. Yes.

Q. Were you present when the horse was loaded? A. Yes.

Q. Did you assist in loading him? A. Yes.

Q. This bill that has been referred to (Exhibit 1), was that made out before, or after, the horse was loaded? A. After the horse was loaded.

10 Q. Was the agent present when the horse was loaded? A. No, I do not think he was. I do not remember seeing him.

Q. Was Dr. Parker present? A. Dr. Parker was present.

Q. Any of the yard men? A. No, I don't think there was any of the men; there were two men that Dr. Parker sent down to board off half of the car, and some hay.

Q. The car was placed at the ordinary place for loading? A. Yes; the horse was in the shed.

Q. And Dr. Parker and the two men loaded him? A. Yes.

Q. You went back to the agent? A. Yes.

20 Q. With Dr. Parker? A. Yes.

Q. Dr. Parker signed the shipping bill? A. Yes.

Q. And the other man as agent? A. Yes.

Q. W. F. Burgman? A. Yes.

Q. He was in the station, as agent? A. Yes.

Q. Did Dr. Parker sign this in your presence? A. I was standing right there, alongside Dr. Parker.

Q. What did Dr. Parker say after he had signed the contract? A. He folded the contract up and said he would send that to Dr. McCombe by mail, and "it will be there before you will be there," and he says "No, you must

30 give it to this man, he must carry it with him, and it shows that he is travelling with this car." They just handed it to me, and I put it in my pocket.

Q. And you never discovered it until after the accident? A. No.

Q. You did not read it? A. No, sir, not until after the accident.

Q. You paid no fare on the train going with the horse? A. No.

Q. That is all you know of the transaction; you stayed with the horse all the way? A. I travelled with the horse all the way.

Q. And the horse was on the same train as you were at the time of the accident? A. Yes, sir.

Q. You were not asked for any fare by the trainmen? A. No.

40 Q. And you were recognized as travelling with the horse? A. Certainly.

Q. You were in charge of the horse, looking after it from time to time? A. Yes, at times.

Q. The way-bill showed you were in charge of the horse? A. I don't know anything about that.

Q. You did not see the way-bill? A. I would not say that I did not see it. I saw the conductor in the caboose with several bills.

Q. Did he ask you were you the man in charge of the horse? A. No.

Q. You were the only man there? A. I was the only man there?

Q. And the only horse? A. Yes.

RECORD

In the High Court of Justice for Ontario

No. 6. Evidence at Trial Albert Nelson Robinson. Cross-Examination. —*continued.*

Q. I presume he looked upon you as in charge of the horse? A. I presume so.

Q. You have told us what your arrangements were with the J. B. Smith Company? A. Yes.

Q. And what you made last year? A. Yes.

Q. You were talking by the account with J. B. Smith & Sons for last year? A. I wrote and told them that if it was satisfactory to them I would take the contract, if they were satisfied for me to put in an assistant, that is, if my arm got along and got better. That was in January or February some time.

Q. You have been in communication with them recently? A. Yes, sir; I was talking to James H. Smith not a great while ago. 10

Q. Am I correct in saying that you are going to take the contract over with them this year? A. I have not vouched for that; I have not made any conditions except if my arm got along and I got a man suitable to assist me I would take it, otherwise I would not.

Q. Have you a man yet, suitable to assist you? A. No.

Q. Have you succeeded? A. No.

Q. So you are still on the lookout for a man suitable? A. If I ran across the right kind of a man I would.

Q. You are on the lookout for the right kind of a man? A. Yes. 20

Q. So if you succeed in getting the right kind of a man you will take up the contract with the J. B. Smith Company? A. I may.

Q. It is open to you? A. It was, the last time I heard of it.

Q. Have the prices for this year been discussed? A. Not at all.

Q. You have not discussed with them the prices they shall allow you for lath this year? A. No, sir.

Q. They have not discussed that with you? A. They have not discussed that with me.

Q. So that whether you will be able to continue this year depends upon yourself, and as to whether you satisfy yourself in getting a man that can fill the bill; you think there is no trouble as far as J. B. Smith & Sons are concerned? A. They have not consented to that; that mill is liable to be going any day; it may be going now—they may have a man now. 30

Q. You do not say that they have? A. I can't say.

Q. When did you see Mr. Smith last? A. I saw Mr. James H. Smith ten days ago, I should judge.

Q. Had they a man then? A. No.

Q. Was he willing that you should take it over, then? A. He said I did not have to take it over right away.

Q. He was willing you should take it over then? A. He was satisfied, if I was. 40

Q. You have never been in the rink business until last winter? A. No.

Q. What have you done in former winters? A. A year ago last winter I was foreman in the Standard Chemical Company's mill.

Q. At South River? A. Yes.

Q. And a year back of that? A. The year before that I was up at Sellwood until about the first of the year.

Q. Where is that? A. On the C.N.R., north of Sudbury, for Millman, in a sawmill there.

Q. You apparently have no steady occupation for the winter months, doing sometimes one thing and sometimes another? A. Whatever I can get.

Q. The rink venture was a new venture? A. Yes.

Q. An open or a closed rink? A. A closed rink.

Q. What were you to pay for it? A. $135.00 for the season.

Q. That gave you all the privileges? A. Certainly.

Q. How many men did you contemplate employing? A. I did not con-
10 template employing any except myself. I might at an odd time have to use an extra man.

Q. You would have to have a man to flood it and a man to sell the tickets? A. One man could do that; it is just the matter of an odd time I would need an extra man.

Q. Is it a board floor or an earth floor? A. It is an ice rink to run in the winter time.

Q. Has it a board floor or an earth floor? A. An earth floor.

Q. What is the population of South River? A. About 500.

Q. What do you charge, as a rule; do you know what the average charge
20 is; what is a season ticket? A. For a gentleman, $3.00, and for a lady, $2.50.

Q. And the ordinary admission? A. 10 cents.

Q. You were compelled, owing to the accident, to sell your rights; you sold them for how much? A. $100.00.

Q. Who took it over? A. Mr. McKenney.

Q. Is he here? A. I believe he is.

Q. He perhaps can tell us what he made out of it? A. Yes.

Q. Who had it the year before? A. Mr. Stewart.

Q. Is he here? A. He was here; yes, he is here.

Q. He can tell us what he made, do you know what he made? A. I
30 don't.

Q. On what did you base the idea that you could clear up $300.00 or $400.00? A. I based it on figures that if it was properly managed for the season it would do that.

Q. But you must have had something to go upon as to what they had done other years? A. I heard it said that they had cleaned up $300.00 or $400.00.

Q. Who? A. The South River Brass Band had it one winter; they had it two seasons; it was the band that rented the rink.

Q. And they cleaned up how much? A. I heard they cleaned up $400.00.

40 Q. Which goes to the band? A. I don't know where it goes.

Q. The band would be an attraction? A. Certainly it would.

Q. If you wanted to get the band there you would have to pay for it? A. I would have other music outside of the band.

Q. The band were supplying the music to the rink, and putting the proceeds in their own pockets? A. I don't know what they were doing.

Q. So that any other person would have to pay for the band, or the music? A. Yes.

RECORD

In the High Court of Justice for Ontario

No. 6. Evidence at Trial Albert Nelson Robinson Cross-Examination. —*continued.*

Q. Did anybody else have it besides the band? A. Yes, a man by the name of Bell had it the year before Stewart had it.

Q. What about him? A. His tender for the rink was $200.00 and something; I don't know what he made on it.

Q. If they came down from $200.00 to $135.00, it could not have been a very paying proposition? A. I don't know about that?

Q. If money could have been made on it at $200.00, they could not have come down to $135.00? A. They advertised for tenders, and the highest tender got it. 10

Q. Did you tender? A. Yes.

Q. Yours was the highest? A. Yes.

Q. And after you got it, although you might make $300.00 or $400.00 out of it, you let it go at $100.00? A. Yes.

Q. Going into the matter of your injuries, you told us you had two ribs broken: they have knitted since? A. I believe they have.

Q. You are not feeling any inconvenience from them at the present time? A. I am.

Q. When do you feel it? A. If I go to move, or twist, or make any strain on that side I will have a pain. 20

Q. But have they knitted? A. I am not supposed to know whether they have knitted or not.

Q. The doctors have not told you? A. I have not been examined for quite a while.

Q. Does it hurt you when you breathe? A. No, not now; it used to.

Q. So it may not be the ribs you feel? A. It may not be.

Q. It may be some muscular trouble? A. It may be.

Q. Then you suffered inconvenience from soreness, of course; all the injuries apparently were on the left side? A. All on the left side. 30

Q. The greatest injury is the injury to the elbow? A. Yes.

Q. It is commonly called a knock on the funny bone? A. The feeling in it has been more or less like that.

Q. You know what an injury to the funny bone is ? A. Yes.

Q. The feeling you say you have now is the same as you have when you get caught on the funny bone? A. It is more like electricity. That is the nearest I can compare it to. The nerve has been injured in some way.

Q. The doctors will be able to tell us better than you can ? A. Yes.

Q. The accident happened in December last? A. In December last.

Q. You have suffered from nervous shock, which is not uncommon in cases of that kind; it was a pretty sudden surprise to you? A. It certainly was. 40

Q. You suffered from a nervous shock for a time? A. Yes.

Q. How is your appetite? A. It does not suffer any.

Q. Do you sleep all right? A. No.

Q. How does it affect you; how much sleep do you lose; you have not been very active since? A. No.

Q. That possibly might affect your sleeping? A. It might.

Q. Is it an occasional waking, or starting up? A. An occasional waking or starting up. The first is to get to sleep.

Q. You say that when you are travelling there is a nervous apprehension that something may happen? A. Yes, there is.

Q. Is that getting better or worse since the accident? A. I have not been doing much travelling, to judge.

Q. A noise or anything like that is liable to bother you? A. Yes.

Q. The quivering on the skin is of the nervous system; I suppose the doctors have told you that; the doctors have seen you from time to time, 10 and will be able to tell us more about your nervous condition, from a scientific standpoint, than you can? A. Yes, very likely.

Q. You yourself can tell us more about how you feel? A. Yes.

No. 6. Evidence at Trial. Albert Nelson Robinson. Cross-Examination. —*continued.*

RE-EXAMINED by MR. HAIGHT:—

Q. In regard to the patrons of your rink, my learned friend asked you as to the inhabitants of South River; were you depending upon that community alone for your patronage? A. No. We have hockey matches and carnivals that bring in as much as $65.00 in one night from a hockey match. We have 20 hockey matches with Burk's Falls, Sundridge, Powassan, and from Callendar.

Q. All on the line of this road? A. Yes, all on the line of this road. We were central for those.

FREDERICK PARKER, sworn. Examined by MR. HAIGHT:—

Q. You are the Doctor Parker that has been mentioned by the Plaintiff? A. Yes.

Q. Your home is at or near Milverton? A. Yes.

Q. You are the person who bought the horse for Dr. McCombe? A. 30 Yes.

Q. Tell us shortly the circumstances surrounding the shipment? A. I was instructed by Dr. McCombe to buy a certain kind of horse for him, which I proceeded to do. He told me to hunt up a man in Milverton to go up with it, or in the event of his finding one around South River first he would notify me and send him down to take the horse up. In the meantime I, not having shipped horses before, and knowing nothing much about it, consulted a friend of mine who did a good deal of that sort of thing, and he advised me it was not necessary to send a man. I was going to notify Dr. McCombe that I was not going to send a man, and I went down to the agent at Milverton to find 40 out when I could get a car, and he asked me who was going with the horse. I says, "I am not going to send anybody." He says, "We won't accept it unless you do, the rules of the company demand that a horse going over 100 miles, a person will have to accompany it." I said, "That is a horse of a different color," and a day or two afterwards I urged him to bring things to a head because I wanted to get away on some business, and he wired me that he was going to send a man down. It was loaded up and you know the rest.

No. 6 Evidence at Trial. Frederick Parker. Examination.

Q. You had no previous experience in shipping horses? A. No.

Q. What did you do? A. I took the advice of this fellow who had experience.

RECORD

In the High Court of Justice for Ontario.

No. 6. Evidence at Trial. Frederick Parker. Examination. —*continued.*

Q. But what did you do? A. I got a man to board off the end of the car for hay and that sort of thing. I was very well acquainted with Mr. Burgen, a reputable citizen, and I took his advice and did everything he advised me to do. In regard to the bill in question, there is a statement here that my name is signed to it. I remember signing some document, and as the Plaintiff has said, Mr.Burgman folded it up and shoved it across on the counter and says, "That is yours." I folded it up and said, "I had better mail this to Dr. McCombe," and he says, "No, better give it to this gentleman, for he will need it to indicate that he is accompanying the horse," and I gave it to him, and that is the last I saw of it until to-day. 10

Q. Speaking generally of this man's injuries, what have you to say in regard to the character of the injury he has sustained—is it likely to be a permanent injury? A. I can only speak generally. I know nothing of it but what they tell me. Dr. McCombe and I were formerly partners together, and I got a description of the case from him, and also the Plaintiff, and evidently there is no doubt that he has had a severe contusion of the ulnar nerve.

The Plaintiff tells me that he has had an X-ray sciagraph taken of it, which indicates that there is a splinter of bone thrust through the nerve, 20 and that he ought to have it removed. If it is only a contusion, with an inflammatory thickening, it is a matter that no man can answer whether he will ever get better of it or not. Any inexperienced man could take hold of those fingers and see that there is an atrophy, a deteroriation of the muscular tissues owing to malnutrition, poor nerve supply, and that will go on from bad to worse unless it takes a notion to get better.

Q. Having regard to the man's occupation, is it a serious injury? A. Certainly; being a laboring man, it is certainly a serious matter.

Q. Having regard to the Plaintiff's testimony, what have you to say 30 as to the resultant shock—the nervous shock? A: Professionally, I may say I have had many cases of runaway accidents, explosions, dynamite explosions, and I know of many cases, and that nearly all of them have a certain amount of contusional nervous manifestations afterwards; some of them, if they are weak-constituted people—like women—would become nervously prostrated, become hysterical, and you would not be able to get them on a train or into a buggy behind a horse for some time afterwards. We have to take his own words for it, to a large extent, and cannot say how many pounds or inches of depression, but I believe he has some nervous shock.

Q. Would that generally result in an impairment to his general health? 40 A. Not necessarily his general health; his appetite and digestion may be all right, but it would interfere—for instance, if he had any intentions of working in a factory where there was machinery it would be scarcely safe for him to be around, or where there was a lot of machinery, in case some shock would occur and he would get into mischief; he would not have confidence in himself; that is what I am trying to get at.

CROSS-EXAMINED by MR. MCCARTHY:

Q. When you speak of a severe contusion of the ulnar nerve, ordinary people would call it a bad blow on the funny bone? A. Yes.

Q. You think it would be that—a bad blow on the funny bone? A. I don't know but it might be.

Q. Would he get that tingly feeling if there was a severing of the nerve? A. He would, from an irritation.

Q. Would that go on as long as this? A. Yes; go on forever. You 10 can amputate a man's arm at the shoulder, and he will feel his fingers.

Q. When did you learn of the sciagraph? A. To-day.

Q. Did you see it? A. No.

Q. If it does indicate that there has been a small piece of bone broken off, and which has got into the nerve, would that account for everything he says? A. Yes.

Q. And it would be a comparatively simple operation to remove it? A. Not necessarily so.

Q. Why do you say that? A. Because you may not be able to repair the damage done to the nerve sheath if you did remove it. What good 20 would removing it do, if you could not remove the difficulty?

Q. But it is a comparatively simple operation to remove the piece of bone? A. It is a simple enough operation.

Q. Can you say, after it is removed, whether the nerve would recover its functions again? A. I could not say.

Q. As a matter of fact I suppose it would have been better, if that bone is there, if it had been removed many months ago? A. Naturally it would be.

Q. That is dead by irritation of the sheath of the nerve, which will prevent a speedy recovery? A. It may be an actual mutilation of the nerve tissue.

30 Q. If there is no mutilation of the nerve tissue it will get right? A. Certainly; if there is nothing of that kind there is nothing wrong.

Q. And if it is simply caused by bone in there, and that is removed and there is no mutilation, there is no reason why he should not get the use of those fingers? A. Yes.

Q. If you restore the nerve nutrition, the muscles gradually restore their functions? A. Yes.

Q. And no one can say until the bone is removed whether he will recover or not? A. If there is bone there.

Q. Have you any reason to disbelieve the X-rays? A. No.

40 Q. It would account for the very thing he describes? A. Yes.

Q. If that bone can be removed by a simple operation, and there has been no injury, there is no reason why he should get the use of his arm again? A. No reason beyond the mutilation.

Q. You say you remember signing that contract? A. Yes.

Q. That is your signature? A. Yes, that is my signature.

Q. And that is Mr. Burgman's signature? A. That is Mr. Burgman's signature.

Q. Signed in your presence. A. Yes.

RECORD

In the High Court of Justice for Ontario.

No. 6. Evidence at Trial. Frederick Parker. Cross Examination. —*continued.*

Q. That was handed to you? A. Yes, it was addressed like that and he folded it up and shoved it across.

Q. Did you open it? A. No, I did not open it after he handed it over.

Q. Did you read it before you signed it? A. No.

Q. Was an opportunity given to you to read it if you had wanted to? A. I suppose so.

Q. The plaintiff said, as I understand, that you said you would send it to Dr. McCombe by mail? A. Yes. 10

Q. And the Agent said, "No, give it to this man, to show that he is travelling with the horse"? A. Yes.

Q. And the Agent handed it to him? A. No, I handed it to him.

Q. You did not see what he did with it? A. I guess I saw, but I forget.

ROBERT JAMES McCOMBE, sworn. Examined by Mr. Haight:

No. 6. Evidence at Trial. Robert McCombe. Examination.

Q. You are a physician practising at South River? A. Yes.

Q. You were the first person to whom the Plaintiff applied for medical treatment? A. Yes. 20

Q. How did you find him when you first saw him? A. Physically, do you mean?

Q. Yes. A. I saw him get off the van and walk up the track. I was over to meet the train when it came in, and he was carrying his left arm like this (imitates), and on further examination at his house I found a severe contusion over the ulnar nerve, at the elbow, and slight abrasion of the skin over that area, and one broken rib, with an abrasion over that; in fact, the abrasion was, as near as I can remember, about 3 inches by 2 inches over the 7th and 8th ribs, one over the 6th, and one over the 10th. There was a swelling over the left muscle, known medically as the triceps muscle, on the shoulder, and 30 he looked as if he had been generally shaken up.

Q. Did he appear to be suffering from the shaking up he had got? A. He was not in any agony, but he was certainly suffering pain; at the time I examined him in his house he was suffering a good deal of pain. The pain became more severe the longer the thing went on.

Q. You have had him under treatment for some time? A. Well, Dr. Porter really had him under treatment, and I was the auxiliary man.

Q. Did you give him any advice with reference to the proposed operation for the relief of this difficulty? A. In agreement with Dr. Porter of Powassan we advised him to go to Toronto and have an X-ray made, and then, of 40 course, I at that time would have fallen in with any suggestion the surgeon who made the X-ray examination proposed, but since the X-ray examination has been made I don't know as I would fall in, because I do not believe there is any bone broken off.

Q. Did you advise against his submitting to the operation? A. No, I did not advise against it.

Q. Do you think the course he has pursued is quite consistent with his own welfare as submitting to the operation? A. I think so, so far as the present is concerned.

Q. Why do you say that? A. Because the trouble is right at the joint, and we all know that operating on a joint is a very serious matter, on account of the possibility of double infection from the joints, and as it is now he has his arm and the use of his elbow and can move it, and probably if he lets it go long enough he might get better, and might not; if he does not, he can have an operation then if it is necessary.

Q. Would an operation necessarily prove an absolute measure of relief?
10 A. No, I do not think it would, by any means.

Q. Would there be any attendant danger to the man from having an operation, beyond what you have said? A. An anaesthetic is certainly dangerous.

Q. Assuming that the condition was not as reported upon by the X-rays man, and an operation were not successful, would it leave his arm in any worse condition than it is now? A. It might.

Q. This is your bill, which you have put in, at $11.25? A. It looks like it.

MR. MCCARTHY: It is admitted.

20

CROSS-EXAMINED by MR. MCCARTHY:

Q. You went down to meet the horse, did you? A. I went down to meet the horse.

Q. You paid for the horse? A. How do you mean?

Q. You paid for the horse travelling? A. I paid the freight and the man's passage together.

Q. How much did you pay? A. I paid the freight, and the fare for the man's passage.

30 Q. Do you know how much you paid in all? A. About $14.45, I think.

Q. How much was the freight, and how much was the man's passage? A. The freight came to $10.00 and something, and the man's passage was the rest.

Q. Did you get a receipt for it? A. I did.

Q. $10.80 for the freight, and $3.65 for the man's fare? A. Something like that, as far as I can remember.

Q. Half fare for the man in charge? A. I don't know what it was.

Q. Then in regard to this man's injuries, you attended him for how
40 long, first? A. I did not really take the case at all; I saw him that first day and the accident had been telegraphed to headquarters some place.

Q. You saw him? A. I saw him, the first day.

Q. How often? A. Several times. Do you mean the first day?

Q. Yes. A. I don't know how many times; three times, perhaps.

Q. Three times the first day, and during the month of December you paid a visit to him from time to time? A. Yes.

Q. But you were not in charge of the case? A. No.

Q. What was the object of your visits? A. Sometimes Dr. Porter was a busy man; I really went out of "Good and Welfare,"

Q. Because the man was bringing your horse back? A. Yes.

RECORD

In the High Court of Justice for Ontario.

No. 7. Evidence at Trial Robert James McCombe Cross-Examination. —*continued.*

Q. You never rendered him an account? A. No, I did not render Robinson an account except that.

Q. This was just got out for the trial? A. They asked me for my bill.

Q. You had no intentions of rendering him an account? A. I certainly did after the thing was over.

Q. After what was over? A. After this trouble was over; after he recovered.

Q. You intended to present a bill for what you did, notwithstanding that he was bringing your horse up? A. Well, I did not do very much, 10 but I had other items charged against him.

Q. When did he go and have the X-rays taken? A. I cannot tell you that when that was made.

Q. Within the last month? A. No, it was not within the last month.

Q. Cannot you give us an idea? A. Well, I cannot.

Q. Who made the X-rays? A. Dr. Cummings.

Q. Dr. Cummings has gone away? A. Not that I know of. He was hurt in an accident shortly after he made the X-rays examination.

Q. He is supposed to be one of the best X-rays men in Canada? A. One of the best in Canada. 20

Q. Did you see one of the sciagraphs? A. No.

Q. Did Dr. Cummings make a report to you? A. No.

Q. How did you get the idea that Robinson had a bone splint in his nerve? A. He told Mr. Robinson.

Q. Dr. Cummings did? A. Yes.

Q. Have you any reason to disbelieve the sciagraph. A. I have.

Q. You think your diagnosis is more correct than the sciagraph? A. If that is the case, I do.

Q. You will back your opinion against the sciagraph? A. Not by what I can see, but by what I can feel. 30

Q. The indications are that there is a splinter of bone there? A. So Dr. Cummings told Robinson.

Q. If there is, it should be removed? A. Yes.

Q. And if there is not, you do not want to take the chance of opening up the elbow? A. No.

Q. And if you are right, he goes around with a splinter of bone for the rest of his life? A. No, because I would send to another man.

Q. You speak of the danger of an operation ? The amount of anæsthetic a man would have to take would be a very serious matter in a case of that kind? A. It would. 40

Q. Have you tested his heart to see if it was weak? A. Yes.

Q. Is it weak? A. Not particularly.

Q. Have you any reason to believe that he would not come out of an anæsthetic? A. Yes, I have; he is pretty pleuritic, and I think he has something in the nature of Bright's disease.

Q. All these symptoms you speak of are consistent with Bright's disease? A. Not that I know of.

Q. You think there is a possibility of an infection in the joint: what reason have you to think that, in modern surgery? A. Every reason in the world.

Q. You think in careful surgery there is danger of infection? A. Yes. It depends upon who does it.

Q. If a good doctor did it there would be less danger than if a poor doctor did it? A. It does not always work out that way; some men are careless, and some are not. There is always danger in an operation, especially in an hospital, where there are germs flying around. They have to be more careful in the operating room than in the country.

10 Q. You think there is more danger in the operating room than in the country? A. There is every precaution taken, but there are more germs and more dangers.

Q. You would not care to send them to the hospital? A. There are some hospitals I would not send them to.

Q. How long have you been practising? A. Eight years. I was house surgeon in the General, and I know pretty nearly what it is like.

ALFRED S. PORTER, sworn, examined by Mr. Haight:

20 Q. This is your bill (shows to witness) for some services you rendered Mr. Robinson? A. Yes.

Q. Arising from injuries received in this wreck? A. Yes.

Q. $50.50? A. Correct.

Q. You are the surgeon for a certain division of the Grand Trunk? A. I am.

Q. You know the Plaintiff? A. Yes.

Q. He is a comparatively near neighbour of yours? A. Yes

Q. You practice at Powassan, and he lives at South River? A. Yes.

Q. I understand you were called in to look after his injuries, the first medical man to be in charge? A. Not personally; the call came in to my 30 office, and my assistant attended him in the first instance.

Q. Did you make an examination of his injuries, in the first instance? A. Not in the first instance. My assistant did

Q. Were they as described by the last witness? A. As far as the permanent injuries are concerned; of course the other injuries had been pretty nearly healed up before I saw him. I have a report from Dr. Morrison, my assistant, as to his first injuries.

Q. His arm has been under treatment for some considerable time? A. Yes.

Q. You know the condition he is in now? A. Yes.

40 Q. What does that indicate? A. Paralysis of the ulnar nerve, with a consequent loss of power, and partial loss of sensation.

Q. And in its later stages, and in its present stage, for instance, is it a serious matter for a man who makes use of his arm in his daily occupation? A. It certainly is.

Q. And is that injury likely to be permanent? A. It may be.

Q. Do you think the Plaintiff would be justified in declining to submit to an operation, in the present condition of his arm? A. Well, under certain circumstances I would. I would not say that I would unqualifiedly.

Q. Might not greater damage result from an unsuccessful operation than the man finds himself subjected to now? A. Quite possibly.

RECORD

In the High Court of Justice for Ontario.

No. 6. Evidence at Trial. Alfred S. Porter. Cross-Examination.

Q. Having regard to what Dr. McCombe has told us, what do you say as to his being apprehensive of submitting this man to an anæsthetic? A. I cannot say, because I am not acquainted with Mr. Robinson's past history; he has not been a patient of mine. If, as Dr. McCombe stated, he has symptoms of Bright's disease, an anæsthetic would be very dangerous—or anything wrong with his heart. There is a danger even for a perfectly healthy man.

CROSS-EXAMINED by Mr. McCarthy: 10

Q. You said a certain element of danger for a healthy man? A. Yes.

Q. What is the percentage of healthy people who die under an anæsthetic? A. It is very small.

Q. You know nothing of what we might call the minor injuries? A. Not any more than what my reports from Dr. Morrison say.

Q. Did you suggest the X-ray examination of his elbow? A. I did.

Q. Do you know when it took place? A. I cannot say just the exact date. It was some time, I think, in February, may be later; I am not sure.

Q. Well, he came back and reported to you what Dr. Cummings had 20 said, that there was a splinter of bone in the nerve? A. Yes.

Q. That would account for his present condition? A. If it was there.

Q. It would also account for the abrasion or contusion of the ulnar nerve? A. Yes

Q. If the X-ray says there is a splinter of bone there, would you contradict it? A. I would be inclined to. The very fact of a small splinter of bone being there would have manifested itself long before, apart from the pressure.

Q. You think a splinter of bone would have indicated its presence there? A. Yes.

Q. And that is the reason you think it would not be there? A. That is 30 one reason, not the only reason.

Q. If it is a bruising of the nerve—these nerve tissues do heal? A. Depending upon the size of the adhesion.

Q. Can you tell me what the extent of it is, here? A. You can, by the result of the injury.

Q. What would you say of an injury of this kind? A. I should say that in my opinion there have been extensive adhesions, possibly a severing of the nerve. I cannot say, except by opening it, what the injury has been to the nerve.

Q. If there has been an ordinary bruising, there is no reason why it should 40 not heal in time, unless there are adhesions? A. Yes.

Q. And if there is a splinter, the only way of getting rid of it is by opening up the ulnar? A. The theory of bone splinter I entirely discredit.

Q. You have not advised him to see any one else? A. I said I thought possibly it would be better to see a more reliable man.

Q. Than Dr. Cummings? A. Yes.

Q. You did not say it to Dr. Cummings? A. I did not say it to Dr. Cummings, but I don't know that I would if I saw him ; he would have to show me the sciagraph.

Q. I understood he is one of the most capable men in the profession? A. I am not acquainted with Dr. Cummings.

Q. You have as high an opinion of the medical men in Toronto on the X-ray as Dr. McCombe has? A. No, it is more the result of his finding; I dispute that fact in spite of the X-ray.

Q. Dr. Cummings is not responsible for the X-ray? A. No, he is not.

Q. Any more than the photographer is for the photograph he takes?
10 A. No.

RE-EXAMINED by MR. HAIGHT:

Q. You were going on to give another reason why you discredit that theory? A. I think I said in regard to the manifestations other than the permanent injury to the nerve.

Q. What would have been the ordinary process if a splintered bone had been there, to have made itself felt; how would it have come along? A. More or less of an inflammatory action; in that time it would have gradually set up such inflammation as to cause suppuration and in time to work out
20 itself.

Q. That is the report?

MR. MCCARTHY: That is not evidence.

HIS LORDSHIP: Do not put it that way ; it is not evidence.

Robert J. Kenney, called to the witness box by Mr. Haight but not sworn,

MR. HAIGHT: I will ask this witness to stand aside, to call Dr. Beam.

MR. MCCARTHY: I object.

HIS LORDSHIP: If it is on a question of fact.———

MR. MCCARTHY: If it is fact, it is all right.

MR. HAIGHT : This is on a report, my lord. Would you say that Dr.
30 Parker's evidence is expert evidence ?

MR. MCCARTHY: You asked an opinion.

HIS LORDSHIP: I will not prevent you as to a fact, but as to an opinion you have exhausted your number.

SYDNEY B. BEAM, sworn. Examined by MR. HAIGHT:

Q. You are a medical practitioner? A. Yes.

Q. Duly qualified? A. Yes, sir.

Q. Have you made an examination of this man? A. Yes, sir.

Q. What is he suffering from just now?

40 MR. MCCARTHY: That must be an opinion?

HIS LORDSHIP Q. What did you find? A. I found the man with a hand unnatural looking, the skin over the inner side of the hand and two fingers closed, and having an edematous look, though they were not edematous, and on examination of the elbow I found an enlargement of the inner condyle and a somewhat enlarged ulnar nerve, and a very great tenderness in that locality. I also found him suffering from anæsthesia of the parts supplied by the nerve, that is, a certain amount of atrophy or wasting of the muscle.

RECORD

In the High Court of Justice for Ontario.

No. 6. Evidence at Trial Sydney B. Beam. Examination. —*continued.*

HIS LORDSHIP: Q. Edema, on to atrophy? A. Edema means a swelling which you can pit with your finger, on which you can make an impression and, which will remain there when you take your finger away. That is about as near as I can give it. It is an unnatural swelling which will pit on pressure, and which will not disappear immediately. The inner is the projection of this bone of the arm, and inside of the elbow joint—that is the inner. Atrophy simply means the wasting of any part—a muscle or a nerve, or any part at all—a smaller condition of that organ than there should be naturally.

MR. MCCARTHY: I have no questions to ask. 10

No. 6. Evidence at Trial. Robert J. McKenny. Examination.

ROBERT J. McKENNY, sworn. Examined by MR. HAIGHT:

Q. You are the lessee of the skating rink at South River? A. Yes.

Q. During what season? A. 1911-1912.

Q. Have you made up a statement showing your net profits from the operation of the rink during that season' A. I have

Q. Have you the statement? A. Yes.

Q. What does it show? A. $268.29.

Q. Made up roughly?

HIS LORDSHIP: Are we concerned with that? 20

MR. MCCARTHY: Perhaps he ran a lunch counter there.

CROSS-EXAMINED by MR. MCCARTHY:

Q. Will you let me see the statement? A. Yes. (Produced)

Q. Rink alone, $203.49? A. Yes.

Q. Refreshments, $61.80; you ran a refreshment booth? A. Yes.

Q. Last season? A. Yes.

Q. A pretty good season? A. I don't know. It is the first time I have ran a rink—except to skate on one. 30

Q. What is the last item? A. I ran the lunch counter for 41 evenings; I started on the 31st of January and ran the lunch counter, and that is the estimate of the first thirty days of the season.

Q. It was a pretty long season? A. I only had two days in the last of December.

Q. It ran along pretty well? A. I ran it, with a little exertion, up to the 13th of April.

Q. Did you run it all yourself? A. No, I had to get a little help occasionally.

Q. Did you have the benefit of the hockey matches? A. I did not 40 have the full benefit of the hockey matches; all excepting one match I got fifty per cent; all except one game they got fifty per cent, and one game they got sixty per cent.

Q. You paid $100.00, to be deducted from the $265.00? A. $203.00 from the rink and the other was from the refreshment counter.

ALBERT NELSON ROBINSON, recalled, examined by MR. HAIGHT:

Q. You went to Toronto and had an examination at the hands of Dr.

Cummings; in addition to your railway fare what did you pay him? A. I paid Dr. Cummings $25.00.

RECORD

In the High Court of Justice for Ontario.

CROSS-EXAMINED by MR. MCCARTHY:

No. 6. Evidence at Trial. Albert Nelson Robinson. Re-examined.

Q. Dr. Cummings told you there was a piece in there? A. Yes.

Q. Did he show you the sciagraph, or a photograph? A. He held it up between me and the window, and says "You see that?" And he says there was a piece of bone there; I did not see it, though.

Q. You did not bring the sciagraph home? A. No, he would not give it to me, and would not give me a receipt for the $25.00 for quite a while after I paid it to him. That is the kind of man Dr. Cummings is.

CASE FOR THE PLAINTIFF RESTS HERE.

MR. MCCARTHY: I do not offer any evidence on the medical branch of the case. I will just call the agent to prove the receipt.

DEFENCE.

JOHN CAREY, sworn, examined by MR. MCCARTHY:

No. 6. Evidence at Trial. John Carey. Examination.

Q. You are the agent for the Grand Trunk Railway, where? A. At South River.

Q. Do you remember the occasion of this accident to Mr. Robinson? A. I do.

Q. And the horse? A. I do.

Q. Is that (shows to witness) the receipt issued by you for the payment? A. Yes.

Q. For man in charge, half fare? A. Yes.

Q. $10.80 freight on the horse? A. Yes.

Q. And charged Dr. McCombe $3.65 for the man? A. Yes.

Q. That is in accordance with the shipment? A. That is in accordance with the shipment of live stock.

Q. This comes from your custody? A. Yes; that is the original bill on which the car travelled.

Q. And this is the bill which came from the horse? A. Yes.

Q. And Dr. McCombe paid you this money? A. Yes.

Q. Had you learned of the accident at that time? A. Yes.

Q. Had Dr. McCombe spoken of it? A. I can't just remember.

Q. The way-bill I am putting in was carried by the conductor? A. Yes.

Q. And then handed over to you? A. Yes.

Q. And you delivered the horse up? A. Yes.

Q. And you collected the money? A. Yes.

(Papers marked Exhibits 2 and 3; Certified copy of order of Board of Railway Commissioners, marked Exhibit 4.)

CASE FOR THE DEFENDANTS RESTS HERE.

No evidence offered in reply. Counsel for both parties then addressed the Jury.

JUDGE'S CHARGE.

10

RECORD

In the High Court of Justice for Ontario

No. 7. Charge to Jury.

LATCHFORD, J.—Gentlemen of the Jury: The question you are to dispose of can be put in two words—"How much?" And yet it is not very easily disposed of, because there are certain elements which enter into the answer which are not easily determined in dollars and cents. And your answer must be given in dollars and cents—in dollars anyway.

That the Plaintiff has suffered damage is beyond any question. Now, certain elements of that damage are fixed and certain. There can be no question about them. The amounts paid to the physicians; the amount paid for the X-ray examination in Toronto; the amount (if you choose to estimate 20 it) which he must have paid going to Toronto—because we have no evidence that he went to Toronto at the expense of the defendants. As I recall it, there was $11.25 paid to one doctor, $50.50 paid to another, $25.00 to another, making between $80.00 and 90.00, plus the fare to Toronto and back—if you choose.

It has not been claimed, but it necessarily follows from the fact that the Plaintiff went to Toronto to have the examination made, which cost him $25.00. We have then something in the vicinity of $20.00 cash out of pocket.

Then we have another element—the amount he lost during last winter by not having the use of his hand. The profit made by the person who took 30 the rink over from the Plaintiff was a little over $200.00—$203.49 as I recall the evidence.

Assuming (and it is fair to assume) that the Plaintiff would have done as well as McKenny, that would be the amount which he would have made, and the amount which he lost because he was unable to carry on that work during the winter.

Then the Plaintiff paid $135.00, as I recall the evidence, for the rental of the rink for last winter, and received but $100.00; so that, in addition to the $203.49 you may add as a fixed amount the $35.00 which he also lost.

You have then these items beyond question—the amounts paid to the 40 doctors, plus the expense to Toronto, the amount lost by his not running the rink, $238.49.

Then there is also the possibility that during the present summer he may not—he will not, if you believe his evidence, and it is not contradicted—make as much in his contract if he takes it. And it would appear that he had the opportunity to have taken it if he had wished. That he will not make as much as he made last year—which was something over $1,200.00, the difference being, as far as we can estimate it (but that is a matter for you) what he will have this summer if he can get a competent filer to do the work which he did himself, to pay that competent filer $3.00 a day for the season.

How long the season will last you know better than I do. How much, in your judgment, is he likely to realize in the present year if he takes that contract and has to pay a filer $3.00 a day. You can doubtless from your practical experience calculate that. Form the best estimate you can, fairly—and you must act fairly—that is what you have sworn to do. You must not act unfairly because you have on the one side a poor workingman, and on the other side a rich corporation, or presumably a wealthy one. That 10 is not the way you are to approach a consideration of this case. Approach it as though one neighbour of yours had a dispute with another neighbour and you were called in to ascertain what damage one neighbour had sustained by the negligent act of the other neighbour.

Now, you have these certain or approximately certain damages fixed. But these are not the only damages you are at liberty to give the Plaintiff. Upon the evidence before us, he has been severely injured; not that he was laid up for any length of time in bed, or anything like that; but he has nevertheless suffered severe injury. It has been detailed over and over again by himself and the Doctors, and I shall not dwell upon it. But for that injury you are 20 entitled to make him a fair allowance. And in that allowance two elements may enter. You may allow him what you think proper for the pain and suffering he has undergone. I cannot, by any suggestion of mine, help you in arriving at that sum. You have to do it, because you have to endeavour to make this Plaintiff compensation for that as well as the other elements of damage he has suffered. In money, then, how much do you think you should allow him for the pain and suffering he has undergone? He tells you that for months at night the pain in his hand was so intense that he was obliged from time to time to place his hand in cold water with a view to relieving the pain, and that he has some trouble still; that if he turns suddenly now his side 30 is painful, to some slight extent. Taking the financial loss, taking what you may think proper to allow him for his pain and suffering, there is the further element of what you think you should give him for the injury, apart from the pain and suffering. And you have to consider whether the injury which he suffers from now is likely to continue or not. If you consider it likely to continue for a long time, then you can allow him larger damages than if you think it is liable to continue for only a short time, and—I think it is fair to say to you— that if you consider that an operation (as operations are carried on now) would be likely to result in relief, and the Plaintiff does not choose to have an operation performed, you should not assess the Defendants in damages 40 because of that. However, the man is not obliged to undergo the risk of his life or the loss of his limb in order to be cured. You have heard the evidence of the Plaintiff's medical attendants, that he may completely recover the use of his hand without an operation.

I do not know that I should say anything more. You are the absolute judges in this case, upon the evidence of what damages the Plaintiff has sustained. I think I have gone over the elements of damage to you. Both counsel have ably put the case to you, and I think I cannot usefully add anything more.

Is there any objection to a sealed verdict being handed to the Sheriff, so that the jurors, if they reach a verdict before eight o'clock, might disperse?

RECORD

In the High Court of Justice for Ontario.

No. 7. Charge to Jury.—*continued.*

MR. McCARTHY: No, my Lord.

MR. HAIGHT: I think not, my Lord.

HIS LORDSHIP: Gentlemen of the jury, if you will state upon paper, which will be furnished to you by the Sheriff or his deputy, the amount at which you fix the damages, and seal it in an envelope and direct it to me, you may then disperse and get your supper, returning here at eight o'clock. I shall end pretty much as I began, by asking you to be fair between these two parties in estimating the damages. You are not to go too high, you are not 10 to go too low; you are to act fairly, as you have sworn to do, between these parties, the Plaintiff on the one side, and the Defendants on the other, in determining the damages the Plaintiff has sustained by the act of the Defendants.

Have you any objections to make?

MR. HAIGHT: In regard to the fixed damages, I think your Lordship should in fairness say that this man was entitled to the additional sum of $65.00 which arose as an incidental profit from the refreshment booth at the skating rink.

MR. McCARTHY: Your Lordship gave him $35.00 extra. It is too 20 small to quarrel over, my Lord; I do not mind.

HIS LORDSHIP: As my attention has been called to it, I may point out to you, gentlemen of the Jury, that Mr. McKenny made $65.00 from the lunch room privilege which he conducted during the winter and after the rink had closed. That is a matter in evidence before you, and you can deal with it as you please.

MR. McCARTHY: Your Lordship should tell the Jury that the question is not what they would take and suffer the same injury, in a case of this kind.

MR. HAIGHT: Under the circumstances in which that was said, I don't think my learned friend has any cause to quarrel with it. 30

HIS LORDSHIP: Mr. McCarthy has discussed that with the Jury. I don't think I need say anything more.

You will return at eight o'clock this evening. Your verdict will be handed to the Sheriff before you disperse.

(Court adjourned at 6.45 p.m. until 8.00 p.m., and then resumed. Sealed verdict handed to the Sheriff.)

HIS LORDSHIP: This is what the jury have returned:

"Parry Sound, May 6th, 1912.

Jury's Finding.

"We the jury in the case of Robinson V. G. T. R. beg to award the 40 Plaintiff the following sums: $1,000 for loss of time and expenses, and $2,000 damages."

You mean a total of three thousand dollars; you mean two thousand dollars in addition to the amount awarded him for his loss of time and expenses?

THE FOREMAN: Yes, sir.

HIS LORDSHIP: Or a total of three thousand dollars ?

THE FOREMAN: Yes, sir.

HIS LORDSHIP: So say you all?

THE JURY: Yes.

HIS LORDSHIP: You are now discharged until nine o'clock to-morrow morning.

What about the legal aspect of this, Mr. McCarthy?

MR. MCCARTHY: The legal aspect of this is covered by the case of Goldstein v. C. P. R., a case reported in 21 O. L. R. at page 575. The only difference in that case was that apparently the men were travelling in charge of horses which were shipped by Shepard & Burns, of Toronto; there was apparently no contract with them; they just got on board of the cars; one was injured and one killed. Mr. Justice Teetzel's decision is given at the
10 place I have mentioned, and then a settlement was made, and the only reason it was carried further was that it was between Shepard & Burns and the Company. In the Court of Appeal the Judges expressed some surprise that a settlement had been made and expressed an opinion opposed to that of the trial Judge. They thought the men were there as trespassers or entitled to ride under contract, and if entitled to ride under contract the terms of the contract would apply and the Company would be relieved from liability.

HIS LORDSHIP: This man was there under contract?

MR. MCCARTHY: Yes, my Lord.

HIS LORDSHIP: The doctor must be taken to have known the terms of
20 the contract; as I recall the case where a man has signed a contract of that kind, he must be taken to know its contents.

MR. MCCARTHY: That is as I understand it. It was decided also in Taylor v. Grand Trunk, a case where a man got on the train without reading the conditions of his contract. That case is reported in 4 O. L. R. I fancy your Lordship will have to go through both of those decisions.

HIS LORDSHIP: Possibly I will have to look at them. Is there anything else?

MR. MCCARTHY: Then the more recent case of Heller v. G. T. R. reported in 25 O. L. R. ,page 117, and in appeal 21 O. W. R., at page 219.
30 Then there is the case of Bicknell v. G. T. R., in 26 A. R., which follows the English case of Hall v. North Eastern, Law Reports 10 Q. B., at page 437. Those are the only cases. The whole subject is in those three cases.

MR. HAIGHT: There is the case particularly of Goldstein v. C. P. R., upon which I rely; the Heller case cites this case of Goldstein v. C. P. R. apparently with approval, although the cases do not turn upon the same point.

I call your Lordship's attention to the point that there was absolutely no privity of contract between this man and the railway corporation, that there was no possibility of him knowing the contents of the contract. He
40 was put aboard the train, the doctor described the manner in which the man got the pass called a live stock contract, I think it is not clear, upon the authorities and the regulations of the Railway Board of Canada, that it is an absolute necessity that the person must sign his name. As your Lordship will see, there is no attempt made to show that it was brought to this man's knowledge even.

HIS LORDSHIP: Dr. Parker was the shipper.

RECORD

In the High Court of Justice for Ontario.

No. 7. Argument —*continued.*

MR. McCARTHY: True, my Lord.

HIS LORDSHIP: Your client was the servant or agent of Dr. Parker to transport that horse from Milverton to South River. The horse could not be shipped unless the shipper placed someone in charge of it. That is the evidence. Then the person whom the shipper placed in charge of the horse was the plaintiff. The contract was made between the shipper and the Defendants, and the shipper, having that contract, having the right to send a man at half fare with the horse, hands the contract to the Plaintiff. These 10 are facts which are beyond dispute. If Dr. Parker is bound by the contract (and I think beyond question he is), is not the Plaintiff also bound as one under Parker? That, it seems to me, is your difficulty.

MR. HAIGHT: If Dr. Parker was acting in any capacity at all it was as agent for Dr. McCombe.

HIS LORDSHIP: That may be.

MR. HAIGHT: The horse was bought, the freight paid by Dr. McCombe. It is in evidence to-day that he paid not only the freight, but paid the car fare.

HIS LORDSHIP: Quite true, but does that help you? 20

MR. HAIGHT: I submit it does.

HIS LORDSHIP: I cannot see it. Dr. Parker was acting for Dr. McCombe, and acting for Dr. McCombe in the shipment of the horse. Did Dr. McCombe appoint this man Robinson to take the horse?

MR. HAIGHT: He was already appointed; he went there as an authorized agent.

HIS LORDSHIP: He went there to bring the horse back; he might have brought it back by somebody else; he need not accompany the horse; he accompanied the horse because the regulations required that a person should accompany a horse on a journey of more than one hundred miles in length. 30 Dr. Parker acting for himself or for Dr. McCombe— it does not matter which —put the plaintiff in charge of the horse.

MR. HAIGHT: I submit that the facts are that Robinson came there with a certain well-defined mission.

He went there to approve of the purchase of the horse; that having been done, he was there only as an intermediary, as a friendly helper.

HIS LORDSHIP: He had authority to purchase and ship?

MR. HAIGHT: No, my Lord.

HIS LORDSHIP: Who had to ship?

MR. HAIGHT: It was up to Robinson to do that. 40

HIS LORDSHIP: But you have the fact that Dr. Parker did ship, beyond doubt.

MR. HAIGHT: He went down with the man to the station and signed something without reading it.

HIS LORDSHIP: He must be taken, as I understand the decisions, to have known the contents of the document. Have you Volume 25 of the Ontario Law Reports.

MR. HAIGHT: I have not got it, my Lord. I am relying on the case of Goldstein v. C. P. R. and the cases referred to there, and the cases referred to in the case of Heller v. G. T. R. I think your Lordship will find that

we are within the reasoning of both those cases and within the judgments in both those cases.

HIS LORDSHIP: Maybe, I know there is a decision upon this point recently. I shall have to consider the question.

MR. HAIGHT: The contract clearly states that the person in charge of the horse must sign; that is the only condition upon which———

HIS LORDSHIP: ———the liability touches?

10 MR. HAIGHT: Yes, my Lord, I think in some of the judgments the names of persons are pointed out who are entitled to a free pass or reduced fare in charge of these consignments. Then it goes on "Agent"— not agents—"must require those entitled to free passes."

HIS LORDSHIP: Not free passes. Those entitled to half fare.

MR. HAIGHT: Or reduced fare in charge of live stock under this contract to write their own name on the lines above. Conductors may, when they have reason to believe that contracts have been transferred require their names to be written, or the holder thereof"———

HIS LORDSHIP: That is for the purpose of identification.

20 MR. HAIGHT More than that, I think, my Lord.

HIS LORDSHIP: Maybe, but that is the way it strikes me at the present moment.

Have you anything to add, Mr. McCarthy?

MR. MCCARTHY: No, my Lord.

HIS LORDSHIP: Then I will consider this matter.

Certified correct,

JOHN BUSKARD,

Official Reporter, H. C. J.

EXHIBIT No. 1.

(F-1-11)

GRAND TRUNK RAILWAY SYSTEM

LIVE STOCK SPECIAL CONTRACT

(Form 77)

Nos. of Cars.
G. T. R.
6783

Milverton Station Nov. 29 1911

The GRAND TRUNK RAILWAY COMPANY has received from Dr. F. Parker

the following property 1 Mare

consigned to Dr R. J. McCombe South River

to be transported over the GRAND TRUNK RAILWAY. (and if necessary over its connections) and delivered at South River Station at the rate of

under the terms of this SPECIAL CONTRACT.

The Company being willing to undertake the transportation of the said property as aforesaid either at the said rate on the condition that its liability shall be restricted as hereinafter mentioned, or at a higher rate without its liability being restricted, the shipper hereby elects to have it carried under this Contract at the said lower rate, and on the said condition, and he declares that, of the property covered by this Contract, no horse or mule exceeds one hundred dollars in value, no head of cattle fifty dollars in value, no other animal ten dollars in value, and that the contents of no car exceed *twelve hundred dollars in value.*

RESTRICTIONS OF COMPANY'S LIABILITY.

The Company shall not be liable for any loss or damage in respect of the said Live Stock by reason of delay of trains, or of escape or loss of any stock from cars, or injuries to animals arising from the bruising or wounding themselves or each other, or from crowding in the cars, or by reason of the manner of loading or unloading of the said stock, or of any other injuries happening to said stock while in any Railway car except such as may arise from a collision of the train or the throwing of the cars from the track during transportation; and shall in no case be responsible for an amount exceeding one hundred dollars for the loss of any one horse or mule, fifty dollars for any one head of cattle, ten dollars for any one other animal and twelve hundred dollars for the contents of any one car, or a proportionate sum, in any one case for injuries to same.

Said stock is to be loaded, unloaded, fed, watered, and while in the cars, cared for in all respects by the shipper or owner, and at his expense and risk. In case any of the Company's employees load, unload, feed, water or otherwise care for said stock, or assist in doing so, they shall be treated as the agents of the shipper or owner for that purpose, and not as the agents of the Company.

The Company is not to be liable for anything done or omitted to be done off the lines of the Railway operated by the Company on its own account; and where the destination to be reached is not on the lines which it is so operating on its own account the Company is to act only as the agent of the owner or shipper in handing over the said stock to connecting carriers, without being in any way answerable for any of their acts or omissions; and all connecting carriers taking charge of, or transporting the said stock towards its destination, shall be entitled to the benefit and protection of the provisions of this Contract.

In case of any loss or damage arising for which said Company shall be liable, the same shall be computed and paid on a basis of the actual value of the stock at the place of shipment under this Contract, but not exceeding in any case the respective sums above mentioned; and the Company shall not be liable for any loss or damage which may happen to the said stock, even while on the Railway operated by the Company, unless a written notice with the full particulars of such loss or damage and of the claim to be made in respect thereof is delivered to the Station Agent of the Grand Trunk Railway at or nearest to the point where the said goods or property were delivered or handed over to the connecting carrier, within twenty-four hours after the said property or some part of it has been delivered.

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 respect of his death, injury, or damage, and whether it be caused by the negligence of the Company, or its servants or employees or otherwise howsoever.

It is further agreed that under no circumstances shall any officer, Agent or employee of the Company, waive verbally or otherwise the provisions of this Contract or any of them.

W. F. Burgman *Agent.*

The shipper declares that he fully understands the meaning of this special Contract.

F. Parker *Shipper.*

Pass man in charge half fare.
Fed and watered at noon, loaded at 4 p.m. Nov. 29

READ THIS SPECIAL CONTRACT

H. C. J.
Exhibit 1.
Def.
Robinson vs. Grand Trunk
This exhibit put in at trial
the 6 May. 1912.
E. Jordan,
L. R.

Grand Trunk Railway System

LIVE STOCK
TRANSPORTATION CONTRACT

From ....

To ....

Date 19

Shipper ....

Names of persons entitled to a free pass or reduced fare in charge of this consignment

....

....

....

....

.... Agent.

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.

Conductors may, in cases where they have reason to believe contracts have been transferred, require the holders to write their names hereon to compare signatures. This contract must be punched by Conductors of each Division.

EXHIBIT No. 2.

This freight remains here at owner's risk, and is subject to storage for shed goods at Company's rate for such storage. The tolls prescribed by the Canadian Car Service Rules shall be payable upon any car held beyond the free time allowed and, together with the freight charges, shall be a lien upon the contents of the car. The property will be delivered only on presentation of this bill.
See Bill of Lading for conditions of carriage.

CONSIGNEE AND DESTINATION

Dr. R. J. McCombe

South River, Ont. Station Dec. 1 1911

In Pro. No. 298 Customs Report No. .... Sheet No. ....

To the **GRAND TRUNK RAILWAY SYSTEM** Dr.

For Transporting the undermentioned Freight billed from Milverton

Date of W. B. .... W. B. No. .... Out. Pro. No. .... Car No. 6783 Initial ....

Sender	No. of Pkgs.	ARTICLES	Weight	Rate	Net Freight		Advances		Total	
	1	mare	2000	54	10	80				
		man in charge	hffare		3	65			14	45

Received Payment,

Date Dec.4 1911

J. J. Carey Agent

ALL CHEQUES to be ACCEPTED BY BANK and MADE PAYABLE TO GRAND TRUNK RAILWAY SYSTEM, UNLESS CHARGES ARE PAID TO CARTAGE AGENT

2
H. C. J.

Robinson vs. G. T. R.
put in at trial 6 May, 1912

E. JORDAN, L.R.

RECORD
—
In the High Court of Justice for Ontario.
—
No. 8.
Exhibit No. 2.

RECORD — *In the High Court of Justice for Ontario.* — No. 8. Exhibit No. 3.

EXHIBIT No. 3.

(1-6-12-09-100m).

Weighed at..................

Date ....19....

Gross Weight ....lbs.

Tare, ...lbs.

........lbs.

Allowed, ...lbs.

Net Weight, ...lbs.

Way-Bill " . ...lbs.

Undercharge, ...lbs.

Overcharge, ...lbs.

GRAND TRUNK RAILWAY SYSTEM LOCAL LIVE STOCK & PERISHABLE FREIGHT WAY-BILL

Inwards Prog. No. 298

Form 1307

Billed by	Station No.	FROM (State or Province)	TO (State or Province)	DATE (Month in full)	Car Initials & No.	W. B. No.	Out. Pro. No.
B	597	Milverton, Ont.	South River, Ont.	29 Nov. 1911	6783		222

Capacity lbs.	Length of Car Feet & in.	WEIGH THIS CAR AT	TRANSFERRED AT	TRANSFERRED AT	TRANSFERRED AT

STOP THIS CAR AT	FOR	DATE	Car Initials & No.	DATE	Car Initials & No.	DATE	Car Initials & No.

CONSIGNOR Connecting Line Reference, Original Car, Way-Bill Number and Point of Shipment.	CONSIGNEE AND DESTINATION	DESCRIPTION		WEIGHT IN LBS.	*Rate and Authority	NET FREIGHT		ADVANCES		PREPAID		TO COLLECT		Foreign Roads Prepaids and Customs Charges		REMARKS
	Dr. R. J. McCombe					$	c.	$	c.	$	c.	$	c.	$	c.	Fed and Watered
Dr. F. Parker		1	mare									Coll.				at noon
				2000	54	10	80									loaded
	South River		Half	fare		3	65									at 4 p.m.
Agent at destination will stamp herein the date received.						14	45					14	45			Nov. 29
	(Pass man in charge	half	fare)													

* When a through rate is used and shipment is to be re-way-billed en route, subdivisions must be shown in rate column in road order, noting opposite each proportion the initial of the road to which it accrues.

3
H. C. J.
Robinson vs. G. T. R.
put in at trial 6 May, 1912
E. Jordan,
L.R.

EXHIBIT No. 4.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Meeting at Ottawa

WEDNESDAY, 17 OCTOBER, A.D. 1904.

10

PRESENT:

THE HON. A. G. BLAIR, P.C., K.C., LL.D.,

Chief Commissioner.

THE HON. M. E. BERNIER,

Deputy Chief Commissioner.

20 JAMES MILLS, ESQ., M.A., LL.D.,

Commissioner.

IN THE MATTER OF

The application of the Grand Trunk Railway Company, the Canadian Pacific Railway Company, the Canadian Northern Railway Company, and the Pere Marquette Railroad Company, for the approval of the Board of Railway Commissioners of their forms of bills of lading and other traffic forms, 30 in compliance with section 275, sub-sections 1 and 2 of the Railway Act.

The above named companies are the only railway companies in Canada which have up to the present moment complied with the requirements of section 275; and in respect of these so far received it may be remarked that there is much diversity in the forms of the several railways. The whole subject is of very great importance and will require that much circumspection should be exercised in examining into the contracts and forms which the Board hereafter has to approve; and also into the question of limitation of liability on the part of the carriers.

In view of these facts, and that the railways generally have not submitted 40 their forms for approval, the Board does not deem it advisable to make any final or definite Order upon the subject at present, but is of opimion that an Interim Order might properly be made, permitting such railways as have made application therefor to continue the use of their present forms until the Board shall otherwise prescribe and order.

IT IS THEREFORE ORDERED

That the above mentioned applicants do severally have power to use the forms submitted, and they are hereby legally authorised so to do until this Board shall hereafter otherwise order and determine.

RECORD

In the High Court of Justice for Ontario.

No. 8. Exhibit No. 4. —*continued.*

And the Board further requires that a select Committee be formed of the legal and traffic officers of the several railway companies named, and others who may hereafter submit their applications, to meet the Board at Ottawa, on a date to be hereafter announced, for the discussion of the said forms and contracts, both freight and passenger, at a session of the Board to be called for such purpose.

(Sgd.) AND. G. BLAIR, 10

Chief Commissioner,
Board of Railway Commissioners for Canada.

BOARD OF RAILWAY COMMISSIONERS FOR CANADA.
Examined and certified as a true copy under Section 23 of "The Railway Act."

(SEAL)

A. D. CARTWRIGHT
Secy. of Board of Railway Commissioners for Canada. 20
Ottawa, 26th day of April, 1909.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

I, Alexander Dobbs Cartwright, of the City of Ottawa, in the County of Carleton, and Province of Ontario, Secretary of the Board of Railway 30 Commissioners for Canada, DO HEREBY CERTIFY, pursuant to the provisions of Section 69 of the Railway Act, R. S. C. 1906, Chap. 37, that the document hereto attached and marked "A" is a true and correct copy of the original on file with the Board.

In witness whereof I have hereunto set my hand and affixed the official Seal of the Board at Ottawa this FOURTEENTH day of September, A.D. 1909.

A. D. CARTWRIGHT,
Secretary, 40
Board of Railway Commissioners for Canada.

(SEAL)

"A"

(F-1-11) (Form 77)

GRAND TRUNK RAILWAY SYSTEM

LIVE STOCK SPECIAL CONTRACT

Nos. of Cars.

.... Station 190

The GRAND TRUNK RAILWAY COMPANY has received from ....

....

the following property .... "A"

.... O.K.

.... G. A. B.

consigned to 9/14/09

....

to be transported over the GRAND TRUNK RAILWAY. (and if necessary over its connections) and delivered at .... Station, at the rate of

....

under the terms of this SPECIAL CONTRACT.

The Company being willing to undertake the transportation of the said property as aforesaid either at the said rate on the condition that its liability shall be restricted as hereinafter mentioned, or at a higher rate without its liability being restricted, the shipper hereby elects to have it carried under this Contract at the said lower rate, and on the said condition, and he declares that, of the property covered by this Contract, no horse or mule exceeds one hundred dollars in value, no head of cattle fifty dollars in value, no other animal ten dollars in value, and that the contents of no car exceed *twelve hundred dollars in value.*

RESTRICTIONS OF COMPANY'S LIABILITY.

The Company shall not be liable for any loss or damage in respect of the said Live Stock by reason of delay of trains, or of escape or loss of any stock from cars, or injuries to animals arising from the bruising or wounding themselves or each other, or from crowding in the cars, or by reason of the manner of loading or unloading of the said stock, or of any other injuries happening to said stock while in any Railway car except such as may arise from a collision of the train or the throwing of the cars from the track during transportation; and shall in no case be responsible for an amount exceeding one hundred dollars for the loss of any one horse or mule, fifty dollars for any one head of cattle, ten dollars for any one other animal and twelve hundred dollars for the contents of any one car, or a proportionate sum, in any one case for injuries to same.

Said stock is to be loaded, unloaded, fed, watered, and while in the cars, cared for in all respects, by the shipper or owner, and at his expense and risk. In case any of the Company's employees load, unload, feed, water or otherwise care for said stock, or assist in doing so, they shall be treated as the agents of the shipper or owner for that purpose, and not as the agents of the Company.

The Company is not to be liable for anything done or omitted to be done off the lines of the Railway operated by the Company on its own account; and where the destination to be reached is not on the lines which it is so operating on its own account the Company is to act only as the agent of the owner or shipper in handing over the said stock to connecting carriers, without being in any way answerable for any of their acts or omissions; and all connecting carriers taking charge of, or transporting the said stock towards its destination, shall be entitled to the benefit and protection of the provisions of this Contract.

In case of any loss or damage arising for which said Company shall be liable, the same shall be computed and paid on a basis of the actual value of the stock at the place of shipment under this Contract, but not exceeding in any case the respective sums above mentioned; and the Company shall not be liable for any loss or damage which may happen to the said stock, even while on the Railway operated by the Company, unless a written notice with the full particulars of such loss or damage and of the claim to be made in respect thereof is delivered to the Station Agent of the Grand Trunk Railway at or nearest to the point where the said goods or property were delivered or handed over to the connecting carrier, within twenty-four hours after the said property or some part of it has been delivered.

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 respect of his death, injury, or damage, and whether it be caused by the negligence of the Company, or its servants or employees or otherwise howsoever.

It is further agreed that under no circumstances shall any officer, Agent or employee of the Company, waive verbally or otherwise the provisions of this Contract or any of them.

.... *Agent.*

The shipper declares that he fully understands the meaning of this special Contract.

.... *Shipper.*

READ THIS CONTRACT

Grand Trunk Railway System

LIVE STOCK TRANSPORTATION CONTRACT

From ....

To ....

Date ....

Shipper ....

Names of persons entitled to a free pass or reduced fare in charge of this consignment.

....

....

....

....

.... Agent.

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.

Conductors may, in cases where they have reason to believe contracts have been transferred, require the holders to write their names hereon to compare signatures. This contract must be punched by Conductors of each Division.

4

H. C. J.

Robinson vs. G. T. R.

Put in at trial the 6th May, 1912.

E. Jordan,
L.R.

IN THE HIGH COURT OF JUSTICE.

HONOURABLE MR. JUSTICE LATCHFORD.

THURSDAY, the 6th day of June, 1912

BETWEEN:

ALBERT NELSON ROBINSON,

PLAINTIFF,

—and—

THE GRAND TRUNK RAILWAY COMPANY OF CANADA

10 DEFENDANTS.

This Action having come on for trial before this Court at the Sittings holden in the District of Parry Sound, at the Town of Parry Sound, on the 6th day of May, A.D. 1912, for the trial of Actions with a jury, in presence of all parties, and the Jury having found a verdict for the Plaintiff for three thousand dollars ($3,000) damages. This Court was pleased to direct this Action to stand over for judgment, and the same coming on this day for judgment.

20 1. THIS COURT DOTH ORDER AND ADJUDGE that the said Defendants do pay to the said Plaintiff the said sum of three thousand dollars ($3,000).

2. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the said Defendants do pay to the said Plaintiff the costs of this Action forthwith after taxation thereof.

Entered in J. B. No. 2, folio 27,
this 15th August, A.D. 1912.
30 E.J.

E. JORDAN,
Local Registrar.

RECORD

In the High Court of Justice for Ontario.

No. 10. Reasons for Judgment of Trial Judge.

REASONS FOR JUDGMENT OF TRIAL JUDGE.

LATCHFORD, J:

That the Defendants caused injury to the Plaintiff by their negligence was formally admitted at the trial, where the damages which the Plaintiff thus sustained were fixed by a jury at $3,000.

10 It is, however, contended on behalf of the Defendants that they are relieved from liability by the terms of a contract made between them and one Dr. Parker, who shipped a horse in charge of the Plaintiff from Milverton, in the county of Perth, to South River, in the district of Parry Sound. Dr. Parker had purchased the horse for his friend, Dr. McCombe, of South River; and at the latter's request the Plaintiff proceeded to Milverton to bring up the horse; the rules of the Defendants requiring that live stock shipped more than a hundred miles should have a man in charge.

The Plaintiff accompanied Dr. Parker to the railway station, and was present when the shipping bill and special contract upon which the defendants rely was signed by the agent and by Dr. Parker, who thereupon, at the instance 20 of the agent, handed it folded to the Plaintiff. In the margin of the contract is written "Pass man in charge at half fare." The Plaintiff did not open or read the contract. Its purport was not made known to him by anyone, nor was he required by the agent (as the form directs) to write his name upon it. He paid no fare, and was asked for none. Half fare for him was, however, charged in the bill rendered to Dr. McCombe at South River for the carriage of the horse, and both charges were paid by Dr. McCombe. During the transit a rear-end collision negligently occurred at Burk's Falls, and the plaintiff sustained serious injury.

The contract under which the horse was carried was before the Board 30 of Railway Commissioners of Canada for approval on the 17th October, 1904, upon the application of the three great railway systems of the Dominion and of the Pere Marquette Railroad Company. An order was thereupon made which, after referring to the matter as one of great importance, "requiring that much circumspection should be exercised in examining into the forms which the Board hereafter has to approve and also into the question of limitation of liability on the part of the carriers," empowered and authorized the applicants to use the forms submitted "until the Board shall hereafter otherwise order and determine."

The form signed by Dr. Parker is identical with that then temporarily 40 authorized by the Railway Commissioners; and, though nearly eight years have elapsed, no further or other order has been made in a matter so seriously affecting the relations between the principal railways of the country and the shippers of live stock. The important provision is as follows:

> "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 respect of his death, injury or damage, and whether it be caused by the negligence of the company, or its servants or employees or otherwise howsoever."

In view of the decisions of Bicknell v. G. T. R. (1899), 26 A. R. 431, and Sutherland v. G. T. R. (1909), 18 O. L. R. 139, it cannot be doubted that the contract was binding upon Dr. Parker. That point, however, is not in-
10 volved in the present case. Here the question is this: Is the Plaintiff bound by a contract made between the shipper and the carrier to which the Plaintiff was not a party and of the terms of which he had no knowledge? I have been referred to no case which decides this affirmatively.

In Goldstein v. C. P. Ry., and in Robinson v. C. P. Ry. (1911), 23 O. L. R. 536, the carriers appear to have recognized their liability for negligence causing damage to persons accompanying live stock under a contract identical with that made between Dr. Parker and the Defendants. The contract bore the same "Note" as here; and in both cases, as here, the men accompanying the stock were not required to sign or endorse the contract. Unlike the
20 present case, the relation of master and servant—if that is at all material—existed between the shippers and the men accompanying the stock. The question before the Court for decision was the right of the carrier to recover from the shippers the amounts paid by the railway company to Robinson, who was injured, and to the personal representatives of Goldstein, who was killed. Garrow J., in his judgment (p. 540), says.:

"No trial having taken place, it is now quite impossible accurately to ascertain what the Defendants feared or exactly why they settled; the only really material fact appearing so far as the third parties (the
30 shippers) are concerned being that before doing so the Defendants took the precautions of obtaining from them the undertaking not to dispute the liability of the Defendants to the Plaintiffs or the amounts at which it was proposed to settle."

The learned Judge then proceeds to say that the question before the Court was merely the right of the railway to indemnify for the amounts so paid; and, applying the rule that generally the right to indemnify unless expressly contracted for must be based upon a previous request, express or implied, to do the act in respect of which indemnity is claimed, the learned
40 Judge held that in the circumstances there was no express covenant or contract of indemnity and that it would be impossible in law to imply one. The case against the third parties was therefore dismissed.

In my opinion, I am not bound by the opinions expressed by Meredith J. in his judgment (pp. 542 and 543) as to the right or absence of right on the part of those injured by the carriers, arising out of the contract made between the shippers and the railway company. These opinions are, I think, mere dicta, not necessary to the determination of the question of indemnity which was before the Court.

I am firmly of the opinion that Robinson's common law rights against the Defendants were not taken away by the contract made between the

Defendants and Dr. Parker. Any other view appears to me necessarily to imply that by a contract to which he was not a party, under which he derived no benefit—the reduction in fare benefiting only the consignee—and of whose terms he had neither notice nor knowledge, his right to be carried without negligence on the part of the Defendants was extinguished, and they were empowered, without incurring civil liability, to maim and almost kill him while he was lawfully upon their train. If such can possibly be the effect of the special contract a higher court must decide. 10

I direct that judgment be entered for the Plaintiff for three thousand dollars and costs. There may be a stay of thirty days.

IN THE HIGH COURT OF JUSTICE.

RECORD

In the High Court of Justice for Ontario.

No. 11.
Consent to Appeal to Court of Appeal for Ontario.

BETWEEN:

ROBINSON,

Plaintiff,

—and—

THE GRAND TRUNK RAILWAY COMPANY,

10 Defendants.

I HEREBY CONSENT on behalf of the above named Plaintiff to an appeal being taken direct to the Court of Appeal for Ontario.

W. L. HAIGHT,
Sol'r for Plaintiff.

RECORD

In the High Court of Justice for Ontario.

No. 12. Notice of Appeal to Court of Appeal for Ontario.

IN THE HIGH COURT OF JUSTICE 10

BETWEEN:

ALBERT NELSON ROBINSON,

Plaintiff,

—and—

THE GRAND TRUNK RAILWAY COMPANY OF CANADA, 20

Defendants.

TAKE NOTICE that the above named Defendants intend to appeal and hereby appeal from the judgment of the Honourable Mr. Justice Latchford herein given on the 6th day of June, 1912, direct to the Court of Appeal for Ontario.

DATED at Toronto this 19th day of June, 1912. 30

W. H. BIGGAR,
D. L. McCARTHY,
Solicitors for Defendants.

To W. L. HAIGHT, Esq.
Solicitor for Plaintiff.

10 IN THE COURT OF APPEAL FOR ONTARIO

BETWEEN:

ALBERT NELSON ROBINSON,

(Respondent) Plaintiff,

RECORD

In the Court of Appeal for Ontario.

No. 13. Notice of Security for Costs.

20 —and—

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,

(Appellants) Defendants.

TAKE NOTICE that the above named Defendants have this day paid into Court the sum of $200.00 as security for costs herein on appeal to the Court of Appeal for Ontario.

DATED at Toronto this 21st day of June, 1912.

McCARTHY, OSLER, HOSKIN & HARCOURT,
Defendants' Solicitors.

To W. L. HAIGHT, Esq.,
Plaintiff's Solicitor.

RECORD

In the Court of Appeal for Ontario.

No. 14.
Reasons for Appeal.

IN THE COURT OF APPEAL FOR ONTARIO

BETWEEN:

ALBERT NELSON ROBINSON,

(Respondent) Plaintiff,

—and— 10

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,

(Appellants) Defendants.

REASONS FOR APPEAL

1. This action was tried before the Honourable Mr. Justice Latchford and a Jury at Parry Sound on the 6th day of May, 1912. The only question 20 which was left to the Jury was the question of damage, it being conceded that the other questions involved in the action, being questions of a legal nature, should be disposed of by the learned Trial Judge. From the Jury's assessment of the damages there is no appeal.

2. On the 6th of June, 1912, the Honourable Mr. Justice Latchford handed out Judgment in favor of the Plaintiff for the amount of damages as assessed by the Jury, viz. $3,000.00 and from his judgment the Defendant Company now appeal.

30

3. The Plaintiff in this case agreed with Dr. McCombe, of South River, to go to Milverton and take charge of a horse for Dr. McCombe and travel with the horse over the line of the Defendant Company's railway, from Milverton to South River, as the man in charge.

4. Dr. Parker, a friend of Dr. McCombe's, had apparently purchased the horse for him and met the Plaintiff at Milverton. A car had previously been ordered and was placed by the Defendant Company for the reception of the horse, Dr. Parker and the Plaintiff superintending the shipping. After the horse had been loaded Dr. Parker and the Plaintiff went to the agent's 40 office where a shipping bill and special contract was made out and signed by the agent of the Defendant Company and by Dr. Parker who apparently handed on the contract to the Plaintiff. The Plaintiff did not open or read the contract, nor did he write his name upon it as required by the form, but he travelled with the horse with the contract in his pocket and was upon the train of the Defendant Company when a collision occurred at Burk's Falls, the collision occurring through the failure of one of the employees of the Defendant Company to properly perform his duties with the result that the plaintiff sustained serious injuries.

5. The question to be determined by the learned Trial Judge was whether under the facts as they appear—and they are not in dispute—the Company is liable to the Plaintiff in damages. The man was undoubtedly travelling with the horse and in charge of the horse and by virtue of the special contract and shipping bill which he had with him, he having paid no fare. He travelled apparently in the conductor's van and was recognized by the Company's employees as the man in charge of the horse. The con-
10 tract under which the horse was carried had received the approval of the Board of Railway Commissioners for Canada, and it is conceded by both parties and so found by the Trial Judge that if the Plaintiff was travelling under that contract he cannot recover under the authorities, but the question raised by the learned Trial Judge in his judgment is whether the Plaintiff was travelling under the contract or, as the learned Judge puts it, at common law, that is, whether the rights of the parties were governed by the contract which the Plaintiff had in his pocket or by common law. The learned Trial Judge holds that, not being aware of the conditions of the contract and not having signed the contract, he is not bound by its conditions and that
20 therefore, his rights and remedies must be governed by the common law, but he does not attempt to define what the Plaintiff's common law rights would be under the circumstances or what would be sufficient to render the Company liable under the circumstances as found by him.

6. It is submitted that the Plaintiff's legal rights must be governed by the terms of the contract held by him. He was travelling in charge of the horse; he was allowed upon the Defendant Company's train by virtue of the fact that he had a special contract given him by the agent which entitled him to ride free. Without that contract he would have no right
30 to be there at all. But the learned Judge holds that the Plaintiff was not a party to the contract, the terms of which he had no knowledge, and which he had not signed, and he does not consider the remarks of the learned Judges in the Court of Appeal in the case of Robinson vs. Canadian Pacific Railway, 23 O. L. R. 536, as binding upon him.

7. It is respectfully submitted that the Plaintiff must either have travelled under the contract or have been a trespasser. It is submitted in the first place that he was travelling under the contract, and the mere fact that he was not aware of its terms makes no difference. (See Taylor
40 vs. Grand Trunk Railway, 4 O. L. R. 357.) He knew he was travelling in charge of the horse; he knew that the contract which he had in his pocket entitled him to travel free. The Defendant Company's officers and servants recognized him as the man in charge of the horse, the station agent having told him that he must have the contract, the conductor allowing him to travel on the train as the holder of the contract. But if it be determined that he was not a party to the contract then what was he? He paid no fare; he was not rightfully there, and the mere fact that the conductor by mistake, thinking he was a party to the contract, allowed him to travel, would place him in no higher position than that of a person stealing a ride, in which case the Company owed him no duty. The Plaintiff's right to

RECORD

In the Court of Appeal for Ontario.

No. 14.
Reasons for Appeal.
—*continued.*

recover the amount of damage assessed him by the Jury must depend on his legal rights and the duty the Company owed him. If he was not a party to the contract and had, therefore, no right to be there, what possible duty could the Company owe him?

8. It is submitted that no matter what view the learned Trial Judge takes that the Plaintiff cannot recover. If he was travelling under the contract, the contract is binding upon him; if he was not travelling under any 10 contract the Defendant Company owed him no duty except not to wilfully injure, and there is no suggestion that what took place was a breach of duty that would render them liable.

9. The Defendants, therefore, submit that the appeal should be allowed and the action dismissed with costs.

W. H. BIGGAR,
D. L. McCARTHY,
Of Counsel for the Appellants.

IN THE COURT OF APPEAL FOR ONTARIO.

BETWEEN:

ALBERT NELSON ROBINSON

(Respondent), PLAINTIFF.

10 —and—

THE GRAND TRUNK RAILWAY COMPANY OF CANADA

(Appellants), DEFENDANTS.

REASONS AGAINST APPEAL.

1. In the main the facts are not in dispute in this appeal, except that as
20 a fact Dr. McCombe, on whose behalf the Plaintiff went to Milverton for the horse with which he was travelling subsequently, did pay a fare for the said Plaintiff. He was not travelling without paying a fare, but he was not aware until afterwards what that fare was, neither did he understand the terms of any contract or document which may have been signed by Dr. Parker.

2. The Plaintiff was no party to the contract and could only be bound thereby if he had in fact been asked to sign and did in fact sign the same on the back in the space specially provided and where there is a requisition to all station agents to see that the person to travel in charge of live stock shall
30 so sign.

3. The Plaintiff travelled on the train without any knowledge of the contract made between Dr. Parker and the Company, his fare was charged on the freight account of Dr. McCombe on whose behalf he was working in bringing the horse from Milverton to South River, and that fare was paid by Dr. McCombe.

4. It has been held (Goldstein vs. C.P.R., 23 O.L.R. 536; C.A., 18 O.W.R. 977) in circumstances precisely similar to those existing in this case,
40 that the duty was upon the Company to see that the contract was signed as provided for, and that in the failure to do this they could not ask to be indemnified from a liability which arose by their neglect and carelessness. See also Bate vs. C.P.R. 18 S.C.R. 697; Richardson vs. Rountree 1894, A. C. 217; Henderson vs. Stevenson L.R. 2, S.C. App. 470.

5. It is submitted by the Plaintiff that it was a material step on the part of the defendant Company to see that the contract was signed and that thereby only could their liability be affected and that the failure so to do rendered the contract of no effect so far as the Plaintiff was concerned and he is entitled to recover against the Defendants under his common law rights.

RECORD

In the Court of Appeal for Ontario

No. 15. Reasons against Appeal. —*continued.*

6. It is further submitted that the Plaintiff was in the same position as any ordinary passenger on the Defendant's trains, and had the same full rights as such at common law, and that the Plaintiff was not in any sense subject to a contract signed by some third party without his knowledge and in the belief, as he stated in evidence, that it was the shipping bill. The fact of his lack of knowledge of the contract and its contents would have been answered had he signed the same, and if he had been asked so to do he would then have had an opportunity of refusing to travel under such conditions, and that not having had this opportunity his rights cannot be interfered with because some third person in whom the Plaintiff had no interest whatever chose to sign the contract, under which the Defendants now claim exemption.

7. The Plaintiff was not travelling free on the train as is alleged in the Reasons for Appeal, but a fare was in fact charged against Dr. McCombe and paid after the accident, which goes to show that the Railway Company recognized the right of the Plaintiff to be on the train in question and it was not proved in evidence that he was asked to produce the contract by any person from the time he left the office of the Agent at Milverton to the time he reached South River, after being badly injured in the wreck, and therefore the Company's officials did not know or inquire under what conditions the Plaintiff was so travelling (if any) and allowed him the ordinary rights of movement and otherwise and afterwards accepted payment of his fare as charged in freight bill.

8. The Plaintiff was not therefore a trespasser on the train, neither was he stealing a ride thereon, and it is submitted that the Company, through the neglect of its servants as admitted, were the cause of serious injury being sustained by the Plaintiff which they owed a duty to the Plaintiff to prevent, and that, having failed in that duty, they are liable in damages to the Plaintiff for the same.

9. It is submitted the learned Trial Judge was right in law and that the Plaintiff is entitled to have the judgment of the said Trial Judge sustained.

10. The Plaintiff therefore submits that this Appeal be dismissed and the judgment of the trial be sustained with costs.

W. L. HAIGHT,
Of Counsel for the Respondent.

RECORD.

In the Court of Appeal for Ontario.

No. 16. Formal Order of Court of Appeal.

IN THE COURT OF APPEAL FOR ONTARIO.

The Honourable Mr. Justice Garrow.
10 The Honourable Mr. Justice Maclaren.
The Honourable Mr. Justice Meredith.
The Honourable Mr. Justice Magee.
The Honourable Mr Justice Lennox.

Tuesday, the Nineteenth day of November, 1912.

BETWEEN:

ALBERT NELSON ROBINSON,

(SEAL)

(Respondent) PLAINTIFF,

20

—AND—

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,

(Appellants) DEFENDANTS.

THIS IS TO CERTIFY that the appeal of the above named appel-
30 lants from the judgment of the Honourable Mr. Justice Latchford of the High Court of Justice for Ontario, pronounced on the 6th day of June, 1912, having come on to be argued before this Court on the twenty-sixth day of September, 1912, whereupon and upon hearing counsel as well for the appellants as the respondent, this Court was pleased to direct that the matter of the said appeal should stand over for judgment and the same having come on this day for judgment.

IT WAS ORDERED AND ADJUDGED that the said appeal should be and the same was allowed with costs and that the said action be dismissed
40 with costs to be paid by the respondent to the appellants forthwith after taxation thereof.

Entered O.B. XII.

Issued Jan. 20th, 1912.

"N. F. P"

"N. F. PATERSON,"
Registrar.

RECORD

In the Court of Appeal for Ontario.

No. 17. Reasons for Judgment of Court of Appeal.

C.A.

ROBINSON
v.
GRAND TRUNK R.W. CO.
OF CANADA.

Copy of Judgment of Court of Appeal delivered 19th November, 1912.

GARROW, J. A.:

Appeal by the defendant from the judgment at the trial before Latchford, J., and a jury, in favor of the plaintiff.

The action was brought by the plaintiff to recover from the defendants damages caused to the plaintiff while upon a railway train on the defendants' line of railway. The injury was caused by a collision with another train, and negligence in operating the train is admitted. The jury assessed the damages at $3,000.

The only question upon this appeal arises out of the circumstances under which the plaintiff was upon the train at the time of the injury complained of, which are very similar to those recently before this Court in Goldstein v. C.P.Ry. Co., 23 O.L.R. 536, even to the circumstance that the blank for the signature of the person travelling with the animal had here as there been left unsigned. There is, however, this circumstance which should be mentioned; in the Goldstein case it did not appear that any fare was paid or intended to be paid by the shipper for the carriage of the attendant, while in this case a reduced fare was charged and paid by the consignee.

The view of Latchford, J., is thus expressed: "I am firmly of the opinion that Robinson's common law rights against the defendants were not taken away by the contract made between the defendants and Dr. Parker. Any other view appears to me necessarily to imply that by a contract to which he was not a party, under which he derived no benefit—the reduction in fare benefiting only the consignee—and of whose terms he had neither notice nor knowledge, his right to be carried without negligence on the part of the defendants was extinguished, and they were empowered, without incurring civil liability, to maim and almost kill him while he was lawfully upon their train. If such can possibly be the effect of the special contract, a higher Court must so decide."

In the Goldstein case the main question was as to the right of indemnity which the defendant claimed against the third parties. And in considering that question I incidentally referred to the nature of the contract under which the plaintiff was travelling at the time of his injury, and indicated my opinion of its proper construction as far as the then plaintiff was concerned: see page 539. Further consideration in this case in which the question is of course more directly involved, has only served to confirm what I there expressed, that a person in the position of plaintiff, travelling under such special circumstances, paying no fare himself, and having no other ticket or other authorization entitling him to be upon the train at all cannot be heard to deny that he was travelling under the provisions of the contract in his possession, whether he had taken the trouble to read it or not. And the result would in my opinion be the same whether or not the

signature of such person upon the back of the contract in the blank for that purpose had been obtained. Such signature is clearly not essential to the creation of the contract, its only use being obviously for the purpose of identification and to prevent anyone else from travelling upon it.

I am not quite certain what is meant in the judgment by the "common law rights" of the plaintiff to which the learned Judge thought he might be remitted. He cannot, of course, have meant a common law right to travel free, or at a reduced fare, upon the defendants' railway, for of course no such right exists or ever existed. The only other common law right which 10 occurs to me is the ordinary right of everyone to be protected against negligence. But negligence in such connection does not mean abstract negligence, but negligence under circumstances which imposes upon the negligent one a duty not to be negligent. And the nature and extent of this duty is not a fixed and definite quantity applicable to all alike, but varies according to the circumstances. For instance, a passenger who has paid his fare and has a ticket is legally entitled to assert a higher and more extensive duty in his case than has a mere trespasser who has paid no fare and has no contract. So that the fundamental enquiry into the nature and extent of the duty does not stop short at the point where the plaintiff is 20 merely found to have been upon the defendants' train, but must involve and include the further question of how and by what authority he came to be there, with the inevitable result, as it seems to me, that the contract is thus reached, and must be received and acknowledged as the foundation and the measure of the rights, duties and liabilities of all parties, the plaintiff included. The shipper under such a contract as the one in question may himself accompany the animals, or he may name a person to do so who becomes in the language of the contract his "nominee." No one accompanying the animals is apparently compelled to accept the privilege of travelling under such a special contract at reduced fare, or no fare at all. 30 Instead it is quite open to the person to purchase in the ordinary way the regular ticket, paying the regular fare, in which case he would be entitled to the rights of an ordinary passenger.

But if the travelling is done under special contract, and at the reduced fare, or no fare, as the case may be, its terms must I think be equally binding upon the shipper if he alone accompanies the animals, or upon his nominee if he does not.

And as the contract in question clearly excludes liability on the part of the defendant, "whether caused by the negligence of the company, or its servants or otherwise howsoever," and has been duly authorized by the 40 Railway Board under Sec. 340 of the Railway Act, R. S. C. 1906, Cap. 37, the only remaining question must be the important one whether the Board had authority in the premises.

And that question I would answer in the affirmative.

The language of the section is "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 first been 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."

"Traffic" is interpreted to mean "the traffic of passengers, goods and rolling stock," sec. 2 (30). And "goods" by (10) of the same section, as 10 "personal property of every description that may be conveyed upon the railway, or upon steam vessels or other vessels connected with the railway."

Section 284, which I need not quote at length, should also be looked at. It prescribes for the "accommodations for traffic" and among other things for "with due care and diligence" receiving, carrying and delivering traffic. And sub-sec. 7 gives to every person aggrieved by any neglect or refusal on the part of the company to comply with the requirements of the section, *but subject to this Act*," 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 the negligence or omis- 20 sion of the company, or of its servants. The omission from this sub-section of the word "contract" should also be noted, a word found in sec. 340 in connection with the other words here used, with the additional words "by-law, regulation."

In the well-known Vogel case, 11 S. C. R. 612, two of the learned Judges, Strong J. and Taschereau J., were of the opinion that a similar provision, without the words "subject to this Act" and without any provision, in the legislation as it then stood equivalent to the present sec. 340, did not prohibit a railway company from entering into a special contract limiting its liability even for the consequences of its own negligence. And 30 a similar opinion was expressed in this Court by Burton J., see 10 A. R. 171, 172, and in effect by Patterson J. at page 183. That was before the days of the Railway Board, when efforts to unduly limit their responsibilities as common carriers were not infrequent on the part of railway companies by means of "notices, conditions and declarations" to which it could not be said that the consignors or consignees were parties otherwise than through an often doubtful notice of some kind. See the history of such efforts in the judgment of Strong J. in the Vogel case at page 629, et seq. Now, after the matter had repeatedly arisen in the Courts and formed the subject of much expensive litigation, see among other cases Grand Trunk 40 Ry. Co. v. McMillan, 16 S.C.R. 559; Robertson v. Grand Trunk Ry. Co., 24 S.C.R. 611; St. Mary's Creamery Co. v. Grand Trunk R. W. Co., 8. O.L. R., the policy of the legislation, which received its present form in the year 1903 (see 3 Edw. VII., cap. 58, sec. 275) apparently is to remit the question of what is a fair and reasonable contract between the carrier and the shipper to the Railway Board.

Such a policy tending to secure reasonableness and justice between the parties, as well as definiteness and certainty in contracts which from their former obscurity were so often the subjects of litigation, is I think wise and useful, and entitled to receive a liberal interpretation for the purpose of en-

abling it to accomplish its obvious purpose. And so regarding it I have no hesitation in holding that the contract in question was one the approval of which was well within the powers of the Board.

I would, for these reasons, allow the appeal and dismiss the action with costs.

MEREDITH, J. A.

10

The learned trial Judge thought that the plaintiff might recover upon his common law rights; but has not made it very clear just what common law right he had in mind. Of course, if the plaintiff were within his legal rights in being upon the defendants' property, as he was, at the time of his injury, and if the defendants' "common law" liability were not in any way limited, he would have a right of action. But his rights, however they are put, must be measured by the duty the defendants owed to him: and that duty must depend upon his right to be where he was when injured. If he were a trespasser he would have no right of action; because the defendants would 20 not owe any duty to him in regard to the running of their train; and in the facts of this case, unless he was a passenger under the contract made by his master for his carriage, which contract he carried with him as evidence, and the only evidence, of his right of transportation, he was a trespasser, and cannot recover: and by the explicit terms of that contract the defendants are relieved from liability for the injury sustained, unless the law renders a contract for such relief ineffectual.

So it really all comes back to a question of the contract under which the plaintiff was rightly upon the defendants' property when he was injured.

The contract relieving the defendants from such liability was made in 30 the plaintiff's presence, by his master, and the evidence, in writing, of such contract was then given to the plaintiff and always afterwards retained by him as his authority for being upon the defendants' property and as evidence of his right of transportation. Upon the face of the contract were printed in red ink and in large letters the words "Read this Special Contract"; and in the body of the "contract" the limitations of liability were headed by the words "Restrictions of Company's liability"; under which the defendants were relieved from liability for the injury the plaintiff has sustained, in these plain words: "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 40 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 respect of his death, injury, or damage, and whether it be caused by the negligence of the company, or its servants or employees or otherwise howsoever."

It therefore appears to me to be quite plain that the plaintiff has no legal cause of action against the defendants in this case, unless by law they are prohibited from so limiting their liability; and I am unable to say that they are now so prohibited.

By section 284 of the Railway Act, railway companies are required to,

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In the Court of Appeal for Ontario.

No. 17. Reasons for Judgment of Court of Appeal. —continued.

among other things, "with due care and diligence receive, carry and deliver" all traffic offered for carriage on the railway; and under sub-section seven of that section, "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 servants." 10

Then section 340 of the same Act proceeds to deal with the same subject, in these words: "340. 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 20 under which any traffic may be carried by the Company. 3 E. VII., c. 58, s. 275.

When the present Railway Act was passed the law in this respect was not in a very logical or satisfactory state. The holding of the courts then was that though a railway company might not relieve itself from liability for negligence altogether, it might limit the amount of such liability, speak, of course, in very general terms.

Then when Parliament dealt with the question in passing the present Act, they seem to me, in the two sections from which I have quoted, to have solved the difficulty by leaving it to the Board of Railway Commissioners to 30 determine under section 340, and, until that was done, to keep the old law in force under section 284. Thus reading these enactments gives effect to each, without any clashing in any respect, is in accord with the liberal interpretation, and is just what one might have expected would have been done in the circumstances I have mentioned.

Sub-section seven of section 284 is expressly made "subject to this Act," and so subject to section 340: and was necessary in order to maintain the law as it was, unless or until the Board should act under the latter section; and, generally speaking, putting the duty upon the Board was quite in accord with the purpose of Parliament in creating that Board, and in line with the 40 other duties and powers given to it: see Hayward v. Grand Trunk R. W. Co., 4 W.L.R. 299; Sheppard v. C.P.R. Co., 16 O.L.R. 259; and Sutherland v. Grand Trunk R.W. Co., 18 O.L.R. 139.

And it being admitted that the Board had long before the occurrence in question, acting under section 340, authorized the condition which I have quoted, the respondents' case fails in this respect also.

I would allow the appeal; and dismiss the action.

LENNOX, J.:

I think the appeal should be dismissed with costs.

I cannot agree with the argument so strenuously urged that the plaintiff must have occupied one or other of these alternative positions, namely: he was travelling as a passenger, or, still worse, he was travelling upon and bound by the terms of what is called the "Special Contract."

10 This is not necessarily true. There is possible intermediate ground between these extremes, and in my judgment, the undisputed facts clearly show that the plaintiff occupied this intermediate position, that is, he was "lawfully upon the train"; but he had neither notice, nor knowledge of nor was he bound by the alleged special contract.

Parker, the shipper, swore:—

"I went down to the agent at Milverton to find out when I could get a car, and he asked me who was going with the horse. I says 'I am not going to send anybody.' He says 'We won't accept it unless you do; the rules of the company demand that a horse going over 100 miles, a person 20 will have to accompany it.' I said, 'That is a horse of a different color.' and a day or two afterwards I urged him to bring things to a head, because I wanted to get away on some business, and he wired me that he was going to send a man down. It was loaded up, and you know the rest."

Q. You had no previous experience in shipping horses? A. No.

Q. What did you do? A. I took the advice of this fellow who had experience.

Q. But what did you do? A. I got a man to board off the end of the car for hay and that sort of thing. I was very well acquainted with Mr. Burgen, a reputable citizen, and I took his advice and did everything he 30 advised me to do. In regard to the bill in question, there is a statement here that my name is signed to it. I remember signing some document, and as the plaintiff had said, Mr. Burgman folded it up and shoved it across on the counter and says "That is yours." I folded it up and said "I had better mail this to Dr. McCombe," and he says "No, better give it to this gentleman, for he will need it to indicate that he is accompanying the horse," and I gave it to him, and that is the last I saw of it until to-day.

The defendants, as they have a right to do, insisted upon having a man accompany the shipment, and, in consequence, McCombe sent the plaintiff to Milverton, to bring back the horse.

40 The plaintiff's evidence is:—

Q. Coming down to the time you went down to Milverton, tell us the circumstances preceding your trip there? A. I left South River to go to Milverton to bring up a horse which Dr. Parker was purchasing there for Dr. McCombe, and I went there and saw Dr. Parker, and we drove out and saw several horses. Dr. Parker purchased a horse, and we loaded it on the car and I left Milverton with the horse in the car, for home.

Q. For your home? A. For my home.

Q. Did you have anything handed you? A. I had nothing. Well, I had a shipping bill handed to me.

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In the Court of Appeal for Ontario.

No. 17. Reasons for Judgment of Court of Appeal. —*continued.*

Q. And that is what has been referred to, and will be referred to as this contract, this special contract? A. I believe so.

Q. What did you do with it? A. I did not know it by that name. I put it in my pocket.

Q. Did you do anything with it before putting it in your pocket? A. I did not.

Q. How was it handed to you? A. It was handed to me by Dr. Parker; I would not swear just to be sure that it was Dr. Parker, or the agent, but I think it was Dr. Parker. 10

Q. In what shape? A. Folded up.

Q. You did what when it was handed to you? A. Put it in my pocket.

Q. When did you first see that contract after that time? A. It was about a week after I was home, and I was running through my pockets one day and thought Dr. McCombe should have had that, as he was shipping the horse, and I sent it down to Dr. McCombe.

On cross-examination the plaintiff said:—

Q. Did Dr. Parker sign this in your presence? A. I was standing right there alongside Dr. Parker. 20

Q. What did Dr. Parker say after he had signed the contract? A. He folded the contract up and said he would send that to Dr. McCombe by mail, and "it will be there before you will be there" and he says "No, you must give it to this man, he must carry it with him, and it shows that he is travelling with this car." They just handed it to me, and I put it in my pocket.

Q. And you never discovered it until after the accident? A. No.

Q. You did not read it? No, sir, not until after the accident.

Q. You paid no fare on the train going with the horse? A. No.

Q. That is all you know of the transaction; you stayed with the horse all the way? A. I travelled with the horse all the way. 30

Q. And the horse was on the same train as you were at the time of the accident? A. Yes, sir.

Q. You were not asked for any fare by the trainmen? A. No.

Q. And you were recognized as travelling with the horse? A. Certainly.

Q. You were in charge of the horse, looking after it from time to time? A. Yes, at times.

Q. The waybill showed you were in charge of the horse? A. I don't know anything about that. 40

Q. You did not see the waybill? A. I would not say that I did not see it. I saw the conductor in the caboose with several bills.

Q. Did he ask you were you the man in charge of the horse? A. No.

Q. You were the only man there? A. I was the only man there.

Q. And the only horse? A. Yes.

Q. I presume he looked upon you as in charge of the horse? A. I presume so.

Clearly then whatever may be argued as to his being barred from recovery by the contract signed by Parker, and I will deal with that later, the plaintiff was not a trespasser. On the contrary, the plaintiff accompan-

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In the Court of Appeal for Ontario.

No. 17. Reasons for Judgment of Court of Appeal. —*continued.*

ied the shipment, not only with the knowledge and approval, but at the instance of the company's agent at Milverton—the agent acting in pursuance of the specific rules of the company—and this agent of the company, well knowing the provisions of the agreement, sent him out upon his journey without a suggestion of any kind that the company's liability for negligence was limited or restricted in any way whatever. It is enough in this case that the plaintiff was "rightfully" upon the train—that he was there
10 with the consent of the company. The plaintiff was injured by a collision. It is admitted that this was caused by the negligence of the company's servants. A bare licensee may not recover for negligent omission, or nonfeasance, whereas a baylee for hire or passenger can recover in such a case. The distinction is thoroughly discussed in Blackmore v. The Toronto Street Railway Co. (1876) 38 U. C. R. 172, and the plaintiff claiming damages for the death of a newsboy, a mere volunteer upon the train,failed because there was an absence of what is frequently called "active" negligence; but even in that case it was conceded on all hands that it would have been otherwise had there been any misfeasance causing the accident. At page 210 Haggarty, C. J.,
20 said "It seems to me, with great deference, that in the Court below the distinction has not been sufficiently pressed between an injury arising from such a defect as the want of a step, and an injury from careless driving, or collision, or any other negligence in the act of carrying." That the plaintiff here was accepted as a passenger I consider as beyond question, but there is no object in elaborating this point as there is no distinction in the liability of the company where the negligence is of the active kind. For a direct authority showing that negligence causing a collision is misfeasance, and "active "negligence, see Allen v. The C. P. R. W. Co. (1909) 19 O. L. R. 510, where the English cases are collected, and the same case in appeal (1910) 21 O. L. R. 418. In Meux
30 v. Great Eastern R. W. Co. (1895) 2 Q. B. 387, the contract was with the servant, the plaintiff was his employer, and the livery destroyed was hers—and it was held that the cause of action, as in nearly all these cases, arising ex delicto, and the carelessness of the defendants' servant being shown, it was enough that the plaintiff's goods were lawfully on defendants' premises.

In Marshal v. The York Newcastle and Berwick R. W. Co., 11 C. B. 655, the position was reversed. Here the contract was made with the master, and the servant was injured, brought action and recovered.

Once it is shown that the persons injured or their goods were permitted by the company to be in the place where the injury is sustained and the
40 negligence is of the class here complained of the company is liable. The most direct case I have come upon in our own courts is Jennings V. The Grand Trunk R. W. Co. (1887), 15 O. A. R. 477. This case is important too, as to the effect of an attempt of the employer to bind the employee. At p. 483 Osler, J. A., said:

"We need not, therefore, decide whether notice to the deceased of the terms of the agreement with his employers was essential to be proved in such an action as this, as the learned Chief Justice at the trial held that it was. My present impression is, that if the case turned upon the effect of the agreement of the 1st January, 1874, this ruling was correct.

"There being then, as I hold, no agreement that the deceased should

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In the Court of Appeal for Ontario.

No. 17. Reasons for Judgment of Court of Appeal. —*continued.*

travel at his own risk, it is not material in an action like this, that there was no contract of carriage between him and the railway company. He was lawfully on their train as a passenger with their assent, or under some agreement, express or implied, between them and the express company, and a duty was thereby cast upon the railway company to carry him safely." The learned Judge then points out that there being no contract between the deceased and the defendants—the defendants owed no duty ex contractu, and consequently there could be no cause for action for non- 10 feasance. "But," he adds, "there would be that duty, which the law imposes upon all, namely, to do no act to injure another."

To the same effect are the judgments of Bramwell, L. J., and Baggally, J., in the Metropolitan District R. W. Co., 5 C. P. D. 157; and the decision in Austin v. G. W. R. Co., L. R. 2, Q. B. 442.

In Martin v. Great Eastern Peninsular R.W. Co., L.R. 3 Ex. 9, Baron Channell held that so long as the injury complained of was "in the nature of an affirmative act" the plaintiff was entitled to recover. The contract was with the government and there was a special provision exempting the company from liability for negligence. 20

In Collett v. London & Northwestern R. W. Co., 16 Q. B. 984, the plaintiff was an officer and the contract was with the Postmaster-General.

In Sherman v. Toronto Grey and Bruce R. W. Co., 34 U. C. R. 451, Mr. Justice Wilson put his judgment upon the ground that "he (the deceased) was not there by fraud or as a tresspasser knowingly violating, in the use of the car, the purposes for which the defendants say it was only to be used . . . and he was therefore entitled as a matter of duty to be carried safely and securely by the defendants."

And in delivering the judgment of the Supreme Court of the United States in The Philadelphia and Reading R. W. Co. v. Derby, 14 How. 468. 30 Mr Justice Greer at p. 484 said: "If the plaintiff was lawfully on the road at the time of the collision, the Court were right in instructing the jury that none of the antecedent circumstances, or accidents of his situation, could affect his right to recover." In this case the plaintiff was paying no fare and was riding on the invitation of the manager of the company. Clearly then I think the first alternative is disposed of—the plaintiff was not a trespasser—he was rightfully upon the railway and he is entitled to recover for the class of negligence here complained of unless the defendants have effectively contracted themselves out of liability.

Then taking up the contract. Throughout the argument there seemed 40 to be an undercurrent of suggestion that the plaintiff might in some mysterious way be bound by estoppel. What foundation is there for this? Brought out into the open it means that he was bound by contract—bound by the special contract or he is not bound at all. Here the plaintiff was never asked to make a contract—never authorized the making of one on his behalf, and never knew there was a contract on his behalf. Did he not know or understand that his passage would be arranged for? Yes, but that would be a contract on behalf of McCombe, and, until he was told otherwise, he had no reason to anticipate special conditions or that he was being contracted out of his rights. And a great deal of stress was laid on

the fact that this form of contract was approved by the Board. There is no magic in this. The question is not whether such a contract if made is binding, but whether such a contract, so far as the plaintiff is concerned, was made at all. The Board sanctions certain contracts if made. It does not bring contracts into being, or dispense with the common law essential—communication, knowledge, consent and the like. Are these conditions in evidence in this case? Neither McCombe, who employed the plaintiff, nor his agent Parker, could, without express authority from the plaintiff, trade away his right to be carried safely, or indemnified in case of default; and Parker never bargained, or intended, and the company never asked Parker, to bargain to do so. Parker never read the agreement and no word about reduced rates, option, special terms, or exoneration, was ever uttered to anybody. Indeed, if it were necessary to decide as to the effect of this document, even as against McCombe—for Parker has no interest in it—it might be difficult to determine in favor of its validity, seeing that the initial condition exacted by the Board, namely, an option afforded to the shipper to retain his ordinary remedy against the company if he desired, was entirely ignored—a condition, as I understand it, which must exist as a matter of fact, as a foundation, before such a contract as this can be entered into at all. If McCombe was not bound it could hardly be binding upon the plaintiff. Be this as it may, at all events, to the plaintiff, so vitally interested in the company's proposal, it was never hinted that his rights as a passenger were being affected in any way, although he was within easy reach of the agent, and although the drastic provisions of this contract, and the exceptional risk of travel upon a freight train, must have been present to the agent's mind. Instead, he prevented the possibility of the plaintiff making discovery by neglecting the statutory condition of requiring signature. To the man who already knew of the contents of the contract, the signing might be immaterial, but it is a part of the sanctioned contract, it is to be strictly observed, and when it comes to the case of a man who does not know the facts at all, it cannot be said to be unimportant. It was folded up—the conductor never asked for it—the plaintiff never read it. The agent should have informed him of its contents if he intended him to be bound. There is no special rate filled in, although there is a blank space left for it—the marginal reference to half fare is of the vaguest kind, and on this condition, and finding that there is no entry on the back where the name of the reduced fare passenger, if any, is to appear, if the plaintiff had read this agreement he would be quite likely to conclude, and I think not unreasonably, that no arrangement for reduced fare had been made. He could pay a full fare without the personal loss of a farthing. If either the agent or conductor had done his duty this plaintiff might have been put upon his guard, and if the real situation, proposed, had ever become known to him is it conceivable that he would have bartered away his protection for less than a mess of pottage —in fact have surrendered his rights against the company without advantage of any kind. I am of opinion that the judgment of the learned trial Judge should be affirmed.

RECORD.

In the Supreme Court of Canada.

No. 18. Order as to Security for Costs.

IN THE SUPREME COURT OF ONTARIO.

APPELLATE DIVISION.

Wednesday, the 15th of January, 1913. 10

The Honourable Mr. Justice Maclaren.

BETWEEN:

ALBERT NELSON ROBINSON,

(Respondent) PLAINTIFF,

—AND—

20

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,

(Appellants) DEFENDANTS.

UPON the application of the (respondent) plaintiff in the presence of counsel for the (appellants) defendants for an order allowing the bond of Edward James Vincent, John Gibson Johnston and Albert Nelson Robinson in the penal sum of $500.00 as security for the (appellants') defendants' costs of appeal to the Supreme Court of Canada, upon hearing read the pleadings and proceedings herein, the notice of appeal to the Supreme Court of Canada and the said bond. 30

1. IT IS ORDERED that the said bond filed by the (respondent) plaintiff as security that he will effectually prosecute his appeal and pay such costs and damages as may be awarded against him by the Supreme Court of Canada be and the same is hereby allowed.

2. AND IT IS FURTHER ORDERED that the costs of this application be costs in the said appeal. 40

Entered O.B. XII.

Issued 15th Jany., 1913.

"N. F. PATERSON,"
Registrar.

H. H. R.

IN THE SUPREME COURT OF ONTARIO.

BETWEEN:

ALBERT NELSON ROBINSON,

(Appellant) PLAINTIFF,

10

—AND—

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,

(Respondents) DEFENDANTS.

APPELLANT'S FACTUM.

20 This is an appeal from the Judgment of the Court of Appeal for Ontario pronounced on the 20th day of November, 1912, which judgment reversed the judgment at the trial when the Honourable Mr. Justice Latchford upon the verdict of the jury gave judgment in favor of the plaintiff for the sum of three thousand dollars ($3,000.00) damages. From the judgment of the Court of Appeal dismissing the action with costs, the appellant plaintiff now appeals to the Supreme Court of Canada.

30

PART I.

The appellant Albert Nelson Robinson, who resides at South River, went from South River to Milverton at the request of Dr. McCombe to bring back to South River a horse which Dr. Parker was purchasing in Milverton for Dr. McCombe. The appellant upon arrival at Milverton got into communication with Dr. Parker. Dr. Parker having purchased the horse, it was loaded upon a car of the defendants, running upon the defendants' railway, and the appellant left Milverton with the horse in the car for South River. Dr. Parker, who shipped the horse, signed the special contract which 40 is Exhibit 1 on page 34 of the appeal case. This contract was not signed by the plaintiff. A duplicate of this was folded up, handed to the plaintiff and by him put in his pocket and was not seen by him until about a week after the accident. The evidence of the plaintiff in regard to this, which is not controverted, appears in the case at page 10, line 10, to page 10, line 34, and is as follows:—

Q. Coming down to the time you went down to Milverton, tell us the circumstances preceding your trip there? A. I left South River to go to Milverton to bring up a horse which Dr. Parker was purchasing there for Dr. McCombe, and I went there and saw Dr. Parker, and we drove out

RECORD.

In the Supreme Court of Canada.

No. 19. Appellant's *Factum.* —*continued.*

and saw several horses. Dr. Parker purchased a horse and we loaded it on the car, and I left Milverton with the horse in the car for home.

Q. For your home? A. For my home.

Q. Did you have anything handed to you? A. I had nothing. Well, I had a shipping bill handed to me.

Q. And that is what has been referred to and will be referred to as this contract, this special contract? A. I believe so.

Q. What did you do with it? A. I did not know it by that name. I put it in my pocket. 10

Q. Did you do anything with it before putting it in your pocket? A. I did not.

Q. How was it handed to you? A. It was handed to me by Dr. Parker; I would not swear just to be sure that it was Dr. Parker, or the agent, but I think it was Dr. Parker.

Q. In what shape? A. Folded up.

Q. You did what when it was handed to you? A. Put it in my pocket.

Q. When did you first see that contract after that time? A. It was about a week after I was home, and I was running through my pockets one 20 day and thought Dr. McCombe should have had that, as he was shipping the horse, and I sent it down to Dr. McCombe.

Q. Did you look at it then? A. Yes.

Q. And read it? A. I read it.

At the trial it was admitted at the opening on behalf of the defendants that the plaintiff was injured by the negligence of the defendants, the Grand Trunk Railway Company of Canada. See the opening of the notes of evidence at page 8 as follows:—

His Lordship: After reading these pleadings is there any doubt about the facts? 30

Mr. McCarthy: No, my Lord; no doubt the plaintiff was injured.

His Lordship: Is negligence admitted?

Mr. McCarthy: Negligence is admitted, but not liability.

His Lordship: Then the question is as to the amount of damages?

Mr. McCarthy: Yes, my Lord.

His Lordship: And the question of the contract is one for me?

Mr. McCarthy: Yes, my Lord.

PART II.

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The appellant submits that the judgment of the Court of Appeal is erroneous in holding that the special contract (Exhibit No. 1) exonerates the defendants, the Grand Trunk Railway Company of Canada, from liability for injuries caused by the negligence of the defendant company and in dismissing the plaintiff's action upon that ground. The appellant will urge that the judgment is in error in holding the contract binding upon the appellant, it not having been signed by him or brought to his attention, and there being no evidence of his assent to the special terms thereof. Secondly, it is submitted that the judgment is erroneous in holding that the form of special contract is operative to release the defendants from their

liability to the plaintiff on the ground that the contract was not signed in strict accordance with the form, the blank on the back thereof which constitutes part of the contract as approved by the Railway Board for signature by the party in charge of the consignment, not having been signed by the plaintiff. In the third place, because the contract, in so far as it purports to exempt the defendants from liability, is void under the provisions of Section 284 of the Railway Act and especially sub-section 7 of the said 10 Section 284, the plaintiff contending that Section 340 does not authorize any contract exempting the company from liability where the damage arises through any negligence or omission of the company or of its servants.

PART III.

It being admitted that the accident which occasioned the injury to the plaintiff was due to the negligence of the defendants, the liability of the defendants for the amount of the verdict found by the jury would be unquestionable but for the existence of the special contract set up by the 20 respondents, Exhibit 1, at page 34 of the case. This special contract, the appellant submits, is not in any way binding upon him, it not having been signed or assented to by him. The evidence is very clear that this contract was not at any time prior to the accident brought to his notice as in any way affecting his rights or the liability of the defendants to him. The evidence previously set out shows that this was handed to him as a shipping bill of the horse and that his attention was not in any way drawn to any of the terms of the contract, nor was he in any way advised nor did he know that there was any clause in it that affected himself, much less any evidence of any assent or agreement by him to any such clause.

30 The one-half single fare for the plaintiff was paid by Dr. McCombe, the man to whom the horse was shipped, along with the freight on the horse.

The appellant submits that the action of the appellant as against the defendants is an action founded on tort and does not at all depend upon any contract with the defendants to carry him. It is sufficient that he being lawfully where he was was injured by the admitted negligence of the defendant. The appellant respectfully refers to Marshall vs. York, 11 Common Bench, page 655, the judgment of the Chief Justice Jervis at page 662, judgment of Mr. Justice Williams on page 663, also to the case of Austin vs. Great Western Railway Law Reports, 2 Q.B., page 442; Carpue vs. London 40 & Brighton Railway, 1844, 5 Q.B., 747, and also the decision in Jennings vs. G. T. R. in 15 Ontario Appeal Reports, page 477, the judgment at page 484. This case was affirmed by the Privy Council in 13 Appeal Cases at page 800, but the decision of the Privy Council is on another point, namely, as to the deduction of the proceeds of an insurance policy from the amount of the damages, and does not touch upon this point. See also Harris vs. Perry & Co., 1903, 2 K.B. 219. The appellant respectfully refers to the judgment of Mr. Justice Osler in Ryckman vs. Hamilton, Grimsby & Beamsville Railway, 10 O.L.R. at pages 422 to 424, and the cases therein cited.

It being, the appellant submits, clear that the Respondents are liable to him in tort, the question then arises whether by reason of the existence

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of any special contract binding upon him the Respondents are relieved from such liability.

The only contract which is alleged to exist covering that matter is the special contract Exhibit 1, at page 34 of the case already referred to. The appellant submits that this contract is not binding upon him. In order to bind him by that contract the appellant submits in view of the form that this contract should have been signed by him in the place where indicated appearing on page 35 of the case. This forms part of the form which was approved by the order of the Railway Board. It follows, the appellant submits, that if the contract is to be effectual under the provisions of Section 340 of the Railway Act, to relieve the defendants from liability, then it must be in all respects strictly adhered to. The form contains a place for the name of the person entitled to a free pass or reduced fare in charge of live stock to write his own name on the lines above. There is a peremptory direction that the person being carried at reduced fare, and, therefore subject to the contract, must write his own name thereon, or rather that the agent must see that this is done. The language is peremptory and it is submitted that the failure to obey it and to have the contract completed by the signature of the appellant render the contract inoperative and not binding so far as the appellant is concerned.

Apart from the absence of the signature of the appellant it is, the appellant submits, clear upon principle that he is not bound by this contract. It is clear that no party becomes a party to a contract without his assent thereto being in some manner obtained either expressly or by reasonable implication. In this case it is quite clear that nothing was done to draw his attention to the fact that the contract in any way affected him or his rights or liabilities, that therefore, on principle he is not bound by what was never brought to his attention, let alone assented to by him. The appellant respectfully refers to the cases of Henderson vs. Stevenson, L.R., 2 H.L. Sc. 470, and Parker vs. South Eastern, Law Reports, 1 C.P.D. 618, 2 C.P.D. 416, affirmed and approved of in Richardson vs. Rowntree, 1894, Appeal Cases 217. See also Bate vs. C.P.R., 18 S.C.R. 697, reversing a decision of the Court of Appeal. The appellant submits with deference that the judgment of the majority of the Court of Appeal is erroneous in taking the position that a person in the position of the plaintiff travelling as he was travelling, paying no fare himself and having no other ticket or authorization entitling him to be upon the train, could not be heard to deny that he was travelling under a contract in his possession whether he had taken the trouble to read it or not, and is bound by all the conditions. It is submitted that if this be an absolute statement of the law the cases last referred to of Parker vs. South Eastern, Henderson vs. Stevenson, Richardson vs. Rowntree, and Bate vs. C. P. R., must have been otherwise decided. It is not, the appellant submits, a correct statement of the legal position to assert that the plaintiff is either there under this special contract and bound by all its terms, or a trespasser. On the contrary, there are other positions. It is quite possible for him to be there as a mere licensee. Not infrequently parties may do certain acts in pursuance of what each supposed to be a contract, and when the matter comes to be investigated it has been found that there was no

contract really arrived at by reason of the want of concensus ad idem, a familiar circumstance in legal administration.

No inference should be drawn from the fact that the special contract relating to the carrying of the horse he had in charge was given to him when the evidence shows clearly that not a word was said to in any way draw his attention to the fact that it was a document which gave him his own right to carriage or in any way affected his rights. The evidence as to 10 what was said by the agent is practically uncontradicted, the plaintiff's statement being at page 13 of the case.

Q. Dr. Parker signed the shipping bill? A. Yes.

Q. And the other man as agent? A. Yes.

Q. F. W. Burgman? A. Yes.

Q. Did Dr. Parker sign this in your presence? A. I was standing right there, alongside Dr. Parker.

Q. What did Dr. Parker say after he had signed the contract? A. He folded the contract up and said he would send that to Dr. McCombe by mail, and "it will be there before you will be there," and he said, "No, you 20 must give it to this man, he must carry it with him, and it shows he is travelling with the car." They just handed it to me and I put it in my pocket.

Q. And you never discovered it until after the accident? A. No.

Q. You did not read it? A. No, sir, not until after the accident.

Q. You paid no fare on the train going with the horse? A. No.

Q. That is all you know of the transaction; you stayed with the horse all the way? A. I travelled with the horse all the way.

And the evidence of Dr. Parker at page 18, line 4, which is as follows:

In regard to the bill in question, there is a statement here that my name is signed to it. I remember signing some document, and as the plain- 30 tiff has said, Mr. Burgman folded it up and shoved it across on the counter and says, "That is yours." I folded it up and said, "I had better mail this to Dr. McCombe," and he says, "No, better give it to this gentleman, for he will need it to indicate that he is accompanying the horse," and I gave it to him and that is the last I saw of it until to-day.

The trial Judge expressly found (see page 43, line 20) the plaintiff did not open or read the contract. Its purport was not made known to him by anyone nor was he required by the agent to write his name upon it. He paid no fare and was asked for none. The one-half fare was, however, charged in the bill rendered to Dr. McCombe at South River, and both charges were 40 paid by Dr. McCombe.

The appellant further contends that in so far as the contract purports to exempt the railway company from liability for injuries caused to the appellant by negligence, the contract is invalid, and not binding by reason of the provisions of the Railway Act. The provisions of Section 284, of the Railway Act, Sub-Section 7, Chapter 37, Revised Statutes of Canada, are as follows:

"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

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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."

This section is practically to the same effect as that contained in the former Act, Statutes of 1903—3 Edward VII., Chapter 58, Section 214, Sub-Section 3, the language of which was

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"Every person aggrieved by any neglect or refusal in the premises 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."

The difference, it will be observed, consisting of the substitution of the words "of the company to comply with the requirements of this section" following the word "refusal" in the present section for the words "in the premises" in the former section. The section as it appeared in the Act of 1903 as above 20 stated is exactly the same language as it appeared in the Railway Act of 1888, 51 Victoria, Chapter 29, Section 246, Sub-Section 3. Under the Statute as it appeared prior to 1903, a very considerable number of cases had been decided the more important of which may be siad to be Grand Trunk Railway vs. Vogel, 11 S. C. R. 612, McMillan vs. G. T. R., 16 S. C. R. 543, St. Mary's Creamery vs. G. T. R., 8 O. L. R. at page 1. See also Central Vermont vs. Franchere, 35 S. C. R. 74, judgment of Mr. Justice Killam at page 78.

The result of these cases may be fairly stated to have been that any condition or contract exempting or purporting to exempt from all liability would 30 not be available to exclude the liability where liability arose on account of negligence, and if the contract purported to exempt from or exclude liability for negligence, then the exemption would be void. At this point it may be well to refer to the case of Queen vs. Grenier, 30 S. C. Reports, page 42, in which case it is suggested by the late Chief Justice Strong, adhering to his own dissenting opinion in the Vogel case, that the Vogel case might, if occasion arose, be reconsidered by the Court. The Grenier case has been overruled by the Privy Council in Miller vs. G. T. R. 34 S. C. R. 45, Q. R. 15, K. B. 118, 1906, A. C. p. 187. The legislation in question in the Grenier case is not the same as in the Vogel case, and further under the circumstances 40 the question did not arise. It is submitted that the law as set forth in the Vogel case and treated as being the subsisting law in the case of St. Mary's Creamery vs. G. T. R., also in Fernis vs. Canadian Northern, 15 Man. L. R. 134, was law at any rate prior to the introduction of the section which is now Section 340 in the Act of 1903.

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 here-

inafter 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.

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

The position which Section 340 appears is significant. It is under the heading of tolls, not in any way connected with the section relating to operation, where Section 284 appears to associate with the provisions relating to the fixing collection, etc., of the tolls for traffic, its immediate neighbours being sections relating to the public display of tariffs and the powers of the Railway Board over tariffs.

The appellant submits that the Section 340 set out above does not alter 20 or vary the law as it was decided to exist under the section now Sub-Section 7 of Section 284. It is a well established principle that the two sections should be read, if possible, so as to harmonize them and not to treat one as being inconsistent with the other. Upon an examination of the sections it will be seen that while Sub-Section 7 of Section 284 is express in its enactment that "the company shall not be relieved by any notice, condition or declaration if the damage arose from any negligence or omission of the company or its servants," Section 340 contains no reference to liability arising on account of negligence. It is submitted therefore that full effect is given to Section 340 by reading it as not interfering with the express matter pro- 30 vided for by Sub-Section 7 of Section 284, but reading Section 340 as referred to numerous cases where the company may seek to restrict its liability either in amount as was the case in Robertson vs. G. T. R., 24 O. R. 75, 21 A. R. 204, 24 S. C. R. 611, or to impose some other restriction or impairment such as to relieving from obligation to deliver within a specified time and various other restrictions which it might seek to impose upon its general liability, in effect the liability of an insurer without touching the case where liability was occasioned by negligence. This reading of this section is in accordance with a large number of decisions on bills of lading. and other contracts relating to carriage made prior to the enactment of this section, the effect 40 of which might be stated to be that any condition limiting or relieving the company from liability would not be construed to extend to a case where the loss was due to negligence of the carriers or their servants unless the condition was so worded that express reference was made to negligence. This law is well illustrated by such cases, Mitchell vs. Lancashire Railway, 1875, L. R. 10 Q. B. 265; D'Arc vs. L. & N. W. Ry., L.R. 9 C. P. 325; McCawley vs. Furness, L. R. 8 Q. B. 57; the Xantho, 12 A. C. 503; Hamilton Fraser Co. vs. Pandorf, 12 A. C. 518; Steinman vs. Angier Line, Ltd., 1891, 1 Q. B. D. 619; Sutton vs. Ciceeri & Co., 1890, 15 A. C. 144; Philips vs. Clark, 1857, 2 Q. B., N. S. 156; Fitzgerald vs. G. T. R., 1880, 4 A. R. 601, affirmed in 5 S. C. R. 204; Waikato vs. New Zealand Shipping Co.,

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1898, 1 Q. B. 645, 1899, 1 Q. B. 56; Rathbone Bros. Co. vs. MacIver Sons Co., 1903, 2 K. B. 378; Price vs. Union Lighterage Co., 1903, 1 K. B. 750.

This being the state of the law at the time of the passing of the section it must be assumed that the legislature had this in mind in enacting Section 340, and if it had been intended to authorize a contract which would exempt or relieve from liability for negligence express reference thereto would have been made in the section, particularly when Sub-Section 7 of Section 284 was being enacted without any change in its provisions from the 10 previous legislation so far at any rate as affects this point.

It had been expressly decided in Robertson vs. G. T. R., 24 O. R. 75, 21 A. R. 204, 24 S. C. R. 611, that the carrier under the law existing prior to 1903 was entitled by agreement or contract to limit the amount of his liability upon any shipment and that such a contract was not precluded by the provisions of the previously existing section, now reproduced as Sub-Section 7 of Section 284, and the appellant submits that the whole intent and purpose of Section 340 was to give the Railway Board power to determine under what circumstances and to what extent the liability of the carrying company might be so restricted. An examination of the section, the appellant 20 submits, bears out this contention. Sub-Section 1 of Section 340 is not in any way enabling. It proceeds on the assumption that under the law as previously existing and re-enacted in the preceding Section 284, Sub-Section 7, contracts, conditions, by-laws, regulations, declarations, notices, impairing, restricting or limiting liability might be made by a company and the enactment is that none such shall (except as hereinafter provided) relieve the company from such liability. The proviso which follows this, it is submitted, is simply a saving proviso referring to the subsequent enabling subsection. There is nothing in Sub-Section 1 to say that the contract, condition, or by-law approved by regulation of the Board shall be operative 30 to relieve the company from any liability, such liability, for instance, as is cast upon it by Sub-Section 7 of Section 284, and the effect of the sub-section and its purpose and intention, it is submitted, is that no contract, conditions, etc., limiting, restricting or impairing liability which might validly have been made under the pre-existing state of the law shall be valid unless first authorized or approved by order or regulation of the Board. The two following Sub-Sections 2 and 3 of Section 340, it is submitted, assist this construction, Sub-Section 2 providing that the Board may determine the extent to which the liability of the company may be impaired, restricted or limited, and that Sub-Section 3 may prescribe the terms and conditions under which 40 any traffic may be carried on by the company.

The appellant further submits that the language of Section 340 does not extend to a total exemption from liability. The words used are "impair, restrict or limit." The dictionary meaning of the word "impair" is to make worse, less valuable, to weaken or lessen, to deteriorate. None of these meanings is sufficiently extensive to extend to or include entire exemption fron liability. The appellant submits that the word "impair" in its essential sense when used in reference to anything tangible involves the continuance of the article in some less valuable, depreciated weakened or deteriorated condition. Without entering into a discussion of the propriety

of its use at all in reference to an intangible matter, such as legal liability, if used, it is submitted, must be read in a similar sense, namely, as implying a continuance of the liability in some less comprehensive or less valuable condition. The words "restrict" or "limit" clearly do not apply to total exemption, or total destruction of the liability, and it is submitted, therefore, that Sec. 340 above referred to, a fair reading of the language used would not, if it stood by itself, authorize the Board to approve a contract totally
10 exempting from liability. It is not necessary to point out the additional strong argument in this case which has been already referred to, that reading the section in this way in accordance with the ordinary meaning of the words makes it consistent with Section 284, Sub-section 7.

In none of the cases decided in the Courts of Ontario since the passing of the Act prior to the case of Heller vs. G. T. R., 25 O. L. R., pages 117 and 488, had the question as to the exemption from liability under this special contract come fairly up. In Bicknell vs. G. T. R., 26 A. R. 431, the plaintiff was himself the shipper.

See also Mercier vs. C. P. R., 17 O. L. R. 585; Sutherland vs. G. T. R. 18
20 O L R. 139, a case of stock carried under the special contract expressly entered into by the plaintiff himself and the question was only as to the limitation of liability. See the suggestion of Mr. Justice Osler delivering the judgment in this case at page 147, that notwithstanding Section 340, there is no power to exempt from liability. In Goldstein vs. C. P. R., 23 O. L. R., page 537, the point did not expressly arise. There the railway company had admitted liability and the question was simply as to indemnity.

It is submitted that the trial Judge, the Honourable Chief Justice Mulock, and the Divisional Court, erred in the decision in the case of Heller vs. G. T. R., 25 O. L. R., pages 117 and 488, and that case should be overruled for the
30 reason hereinbefore set out.

The appellant relies upon the reasons contained in the judgment of the trial Judge, the Honourable Mr. Justice Latchford, and the judgment of Honourable Mr. Justice Lennox in the Court of Appeal, concurred in by Mr. Justice Magee.

The appellant respectfully submits that the appeal should be allowed and the judgment of the trial Judge be restored.

ROBERT MCKAY,
W. L. HAIGHT,
40 Of Counsel for Appellant.

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In the Supreme Court of Canada.

No. 20. Respondents Factum.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

BETWEEN:

ALBERT NELSON ROBINSON,

(Plaintiff) APPELLANT,

10

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,

(Defendants) RESPONDENTS.

RESPONDENTS' FACTUM.

PART I.

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STATEMENT OF FACTS.

1. The plaintiff, Albert Nelson Robinson, lives at South River, and in or about the month of November, 1911, was requested by one Dr. R. J. McCombe of the same place to go to Milverton and take charge of a horse which Dr. Parker was purchasing for Dr. McCombe, and which was to be shipped from Milverton to South River. 30

2. In accordance with that arrangement the plaintiff Robinson left South River and went to Milverton, where he met Dr. Parker, who informed him that the horse had been purchased and was ready for shipment. Apparently Dr. Parker had requested the defendant company to place a car for him at the siding for the purpose of loading the horse, and the plaintiff Robinson and Dr. Parker took the horse to the loading platform, loaded him, and after loading Dr. Parker and the plaintiff went to the agent's office of the defendant company, where a shipping bill and special contract were made out, signed by the agent of the defendant company and 40 by Dr. Parker.

3. What actually took place, according to the plaintiff's story, is that he and Dr. Parker went to the agent at the station at Milverton; a shipping bill and special contract were presented to Dr. Parker, signed by the agent and by Dr. Parker in the presence of the plaintiff. Dr. Parker took the contract up and said he would send that to Dr. McCombe by mail and "it will be there before you will be there," and the agent said, "No, you must give it to this man (meaning the plaintiff Robinson); he must carry it with him and it shows that he is travelling with this car." "They just

handed it to me and I put it in my pocket." The special contract appears as Exhibit 1 at page 37 of the case.

4. The plaintiff apparently did not read the contract, but travelled with the horse and was recognized by the train men as travelling with the horse and was allowed by the conductor to remain in the caboose. At Burk's Falls a collision took place and the plaintiff was injured, and this
10 action is brought to recover damages for the injuries which he sustained.

5. The action was tried before the Honourable Mr. Justice Latchford and a jury at Parry Sound on the 6th day of May, 1912, the only question that was left to the jury being the question of damages, and the jury assessed these at $3,000. On the 6th of June the learned Trial Judge gave judgment in favour of the plaintiff. The defendant company appealed to the Court of Appeal for Ontario and judgment was delivered by that Court on the 19th day of November, 1912, allowing the appeal and dismissing the action with costs, Mr. Justice Lennox dissenting. From that
20 judgment the plaintiff now appeals to the Supreme Court of Canada.

PART III.

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ARGUMENT.

1. Appellant was either

   (a) a trespasser,
   (b) a mere licensee or
   (c) one having a right to be conveyed from Milverton to South River.

2. As the Company clearly consented to his being on the train he was no trespasser. It has, however, been considered by one of the learned
40 judges in the Court below that he was not there by virtue of any contract between himself and the company. In other words, that he was a mere licensee.

3. If he was, the company could, notwithstanding the document he had received containing the words "pass man in charge half fare," have revoked the license and removed him from its premises at any stage of the journey. It could hardly be contended that the respondent could have done that, and yet, directly it is prevented from doing so a contract of some kind must exist to prevent it.

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No. 20. Respondents' Factum —*continued.*

4. It is clear that a fare was charged for conveying him and that a ticket—for what is a ticket but evidence that the holder's fare has been paid —was given to him. The fact that the money was paid by someone else makes no difference, for if it did, every passenger could free himself from liability under his contract with a railway company merely by getting a friend to take the ticket for him.

5. The case of Jennings vs. G. T. R. relied on by the learned judge above referred to does not, it is submitted, establish any principal beyond that stated in the headnote.

"Deceased was an express messenger and as such was being carried on the defendants' train at the time of his death, without a ticket or payment of fare under a contract between defendant and the express company. Held that deceased being lawfully on the train defendants were liable for negligence in causing his death."

6. That the deceased was, as appears from the facts, merely carried pursuant to an agreement between the railway and his employers "to furnish the express company with certain facilities for the conduct of their business on through passenger trains." He was a mere licensee who would have had no ground of action if the company had refused to carry him. In the present case it is submitted that once appellant had received that document he was as against the company in a position to claim the right to be conveyed with the horse—in short, his position was similar to that of any passenger whose fare has been paid and whose ticket has been handed to him.

7. The contention that appellant was a licensee would, pushed to its logical conclusion, relieve any railway from liability on a contract with a passenger if it was shown that the money for his fare had been advanced by a third party. The test, it is submitted, is simply whether the person travelling would have an action against the railway if it refused to convey him, and in the present instance the appellant holding the document he familiarly refers to as "a shipping bill" was entitled to demand that the company should carry him as it had agreed to do. If then, the company was bound to him why was he not bound to the company.

8. That the company is under a liability, ex delicto, to persons who are lawfully upon its premises, for damages which they may sustain through its negligence, is admitted, but such liability may be limited by special contract to which the passenger may give an express or implied assent (Parker v. S. E. R. 2 C. P. D. 416; Burke v. S. E. R. 5 C. P. D. 1; Woodgate v. G.W.R. 51 S.T. 826), and appellants' assent in the present case is clearly implied.

9. It can hardly be contended that he was conveyed otherwise than as the "nominee of the shipper" under this contract, or in other words, than as a passenger holding a transferable ticket.

10. Nor can it well be argued that if he had looked at the ticket his attention would not have been drawn to the special contract under which he was to be carried, in which case, had he declined to be bound by it he could, as Garrow, J. A., has pointed out, have paid the fare and assumed the rights of an ordinary passenger.

11. In short the contract to carry the passenger was assignable and 10 appellant accepted an assignment of it without troubling to become acquainted with its terms and, for that reason, claims that they do not bind him.

12. He accepted the benefit of the contract by entering the train and pursuing his journey. As is said by Blackburn J. in Hall v. N. E. Ry. Co. L.R. 10 Q.B. 437, 441:

"It is true the plaintiff did not sign the ticket and he was not asked to do so but he travelled without paying any fare and he must be taken to be 20 in the same position as if he had signed it."

13. Appellant must have known that the company were not carrying him for nothing; that in the ordinary course he would have to hold a ticket to enable him to travel on the company's trains, and in fact, he is inforned that "he must carry it with him and it shows that he is travelling with this car." It was held in Watkins v. Rymil, 10 Q.B.D. 178, that if a document in a common form be delivered by one of two contracting parties to and accepted without objection by the other it is binding upon him whether he informs himself of its contents or not. It is clear that this document is in a 30 form which has been in use for eight years and appellant evidently regarded it as something quite common. See his evidence, p. 10, l. 17.

"Q. Did you have anything handed to you? A. I had a shipping bill handed to me."

14. In Harris v. G.W.R., 1 Q.B.D. 515, the Court again unanimously held that the fact that one party did not read the conditions on a ticket did not free him from their effect. See also Johnson v. Great Southern and Western Ry. Co., 9 I.R.C.L. 108.
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15. The same view of the law has held in this country. In Coombs v. the Queen, 4 Ex. C.R. 321.(affd. 26 S.C.R. 13.), it was held that issuing to the suppliant a ticket with the conditions upon which it was issued plainly and distinctly printed upon the face of it was in itself reasonably sufficient notice of such conditions; and if under the circumstances he saw fit to put the ticket into his pocket without reading it he had nothing to complain of except his own carelessness or indifference.

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In the Supreme Court of Canada

No. 20. Respondents' Factum. —*continued.*

16. There is no hardship on the appellant. In Robinson v. C.P.R., 14 O.W.R. 706, Cartwright, M.C., speaks of this very clause as "the usual clause" and appellant must have known that he would not be carried on half fare on the same terms as a regular passenger. If he did not, notice was given to him and he "had nothing to complain of except his own carelessness or indifference."

17. It has been suggested that Sec. 284 of the Railway Act bars any defence on the ground of contract. Respondent would respectfully adopt the reasons given by Meredith, J. A., in the Court below as an answer to this and in addition would refer to the Queen vs. Grenier, 30 S.C.R. 42, 53, where this Honourable Court is reported to have said..

"The terms of the clause in question in the Railway Acts were taken from the English Carriers Acts and were intended only to preclude the right of carriers by unilateral notices, declarations or conditions to which the owners of goods had not become expressly parties to exclude their liability as carriers. And it was not meant to apply to contracts entered into between the railway carrier and the person whose goods were carried. It certainly had not in the Railway Acts any application to the case of passengers or employees but was restricted to the case of goods traffic."

This case was followed in G.T.R. v. Miller, 3 Can. Ry. Cas. 147, 34 S.C.R. 45.

18. If anything more were required a consideration of the section (284) to a breach of which the action referred to in ss. (1) is confined will show that it refers to goods traffic and it is only by the interpretation clause which makes traffic include passenger traffic "unless the context otherwise requires, that could make this section as drafted appear to apply to passenger traffic. Who, for instance, would speak of "receiving, loading, carrying, unloading and delivering" a passenger? (s. 284 (d).

19. To make "notice, condition or declaration" in sec. 284 include contract while giving the Board power under sec. 340 to "authorize" a contract "impairing, restricting or limiting" the company's "liability in respect of the carriage of any traffic" would be simply to empower the Board to authorize a nullity and absurd.

20. Respondent therefore respectfully submits that the judgment of the Court below is correct and should be affirmed.

W. H. BIGGAR,
D. L. MCCARTHY,
Of Counsel for Respondent.

IN THE SUPREME COURT OF CANADA.

Tuesday, the sixth day of May, A.D., 1913.

Present:—

The Right Honourable Sir Charles Fitzpatrick, G.C.M.G., Chief Justice,
10 The Honourable Mr. Justice Davies.
The Honourable Mr. Justice Idington,
The Honourable Mr. Justice Anglin,
The Honourable Mr. Justice Brodeur.

The Honourable Mr. Justice Duff being absent his judgment was announced by the Right Honourable the Chief Justice pursuant to the statute in that behalf.

BETWEEN:

20

ALBERT NELSON ROBINSON,

(Plaintiff) APPELLANT,

—AND—

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,

(Defendants) RESPONDENTS.

The appeal of the above named appellant from the judgment of the Court
30 of Appeal for Ontario pronounced in the above cause on the nineteenth day of November, in the year of our Lord one thousand nine hundred and twelve, reversing the judgment of the Honourable Mr. Justice Latchford, one of the Judges of the High Court of Justice for Ontario, rendered in the said cause on the sixth day of June in the year of our Lord one thousand nine hundred and twelve, having come on to be heard before this Court on the eighth and ninth days of April, in the year of our Lord one thousand nine hundred and thirteen, in the presence of counsel as well for the appellant as for the respondents, whereupon and upon hearing what was alleged by counsel aforesaid this Court was pleased to direct that the said appeal should stand over for judgment, and
40 the same coming on this day for judgment this Court did ORDER AND ADJUDGE that the said appeal should be and the same was allowed, that the said judgment of the Court of Appeal for Ontario should be and the same was reversed and set aside, and that the said judgment of the Honourable Mr. Justice Latchford should be and the same was restored.

And this Court did further ORDER AND ADJUDGE that the said respondents should and do pay to the said appellant the costs incurred by the said appellant as well in the said Court of Appeal for Ontario as in this Court.

CERTIFIED (Signed) E. R. CAMERON,

Registrar.

RECORD.

In the Supreme Court of Canada.

No. 22. Reasons for Judgment.

ROBINSON v. GRAND TRUNK RLY. CO.

Reasons for Judgment of Supreme Court of Canada.

THE CHIEF JUSTICE :—

I am very clearly of opinion that this appeal should be dismissed. The appellant was travelling on a freight train where he had no right to be except under the special agreement made with respect to the carriage of the horse of which he was presumably in charge. That special agreement contained a limitation of the company's liability in case of accident, and I agree with the judges below who found that the company did everything that was reasonably sufficient to draw the appellant's attention to that limitation.

DAVIES, J.:—

The judgments below proceeded upon the assumption that the plaintiff must either have been travelling under the contract made between the owner of the horses and the railway company and that he was bound by such contract, or that he was a trespasser to whom the company owed no duty.

I think his position was not, under the circumstances of this case, one or the other. I do not think he was travelling under and by virtue of a contract which was made between his master and the company without any knowledge on his part of its conditions which he was not asked to sign or agree to, and which contained special clauses relating to him as man in charge of the horse not called to his attention, and of which he had no knowledge. One of these special clauses printed in the body of the contract declared the company "to be free from liability in respect of his death, injury or damage; and whether it be caused by the negligence of the company or its servants or employees or otherwise howsoever." It was headed "Grand Trunk Railway System." "Live Stock Special Contract." On the margin was written "Pass man in charge half fare." The plaintiff was the man in charge of the horse to be carried by the contract. A special notice on the back required the company's agents to see that such man wrote his own name on the back of the contract. This may have been for the purposes of identification merely; but the evidence is clear that the plaintiff had not his attention called in any way to this clause by which the company attempted to contract themselves out of any liability for damages caused by their own or their servant's negligence.

The plaintiff's position on the car was certainly not that of a trespasser but rather that of a licensee. The contract was not made with him or by him, and he cannot be held bound by provisions of such a startling character as the contractual exemption relied upon here unless his assent had been first obtained by his special attention being directed to the clause affecting him and his acceptance of it either expressly or impliedly.

There was nothing when this Live Stock Special Contract was handed to him to lead him to believe that it contained any such special exemption of liability with respect to his carriage as the one I have cited.

If the plaintiff had been told the substance of this condition respecting

his carriage as man in charge, or had he read the condition and in either case had not objected but had accepted his passage with such knowledge he would probably have been held to have assented to the terms of the condition and been bound by it. But there not being, in my opinion, any obligation on him to read this "Live Stock Special Contract," and he not having, as a fact, read it, or been invited to do so, or had his attention called to the condition with respect to himself, I cannot think he was bound by it.

10 The cases cited of Parker v. South Eastern Railway Co., L.R. 1 C.P.D. 618; and in the Court of Appeal, L.R. 2 C.P.D. 416; and Richardson v. Rowntree (1894), A.C. 217, amply support the conclusion that in a case like the present one, the company has not the right, under such circumstances as are here proved, to invoke a contractual exemption from liability arising out of their own or their servants' negligence, as this contract contains.

They fail because the plaintiff, the man in charge of the horse had no knowledge of the condition they seek to invoke against him and because their servants neglected to do what was reasonably sufficient to bring such notice to his knowledge or attention.

20 I would allow the appeal with costs.

IDINGTON, J.

The appellant was sent by Dr. McCombe from South River to bring him from Milverton a horse purchased there by a friend, Dr. Parker, to be shipped by him from Milverton to South River.

The respondent required as a term of receiving such a shipment for a distance greater than a hundred miles, that the animal shipped should be accompanied by a man in charge of it. Hence the necessity for Dr. McCombe 30 sending appellant to Milverton to take charge of the horse and travel on same train as it did.

Dr. Parker signed a contract of shipment as required by Respondent's Agent in a form which had the approval of the Board of Railway Commissioners. He paid nothing. The charges were to be paid by Dr. McCombe. The form of contract signed by Dr. Parker expressly absolved the Respondent from all liability in case of accident happening the man thus in charge of the horse.

The contract was not read by Dr. Parker, but he had the opportunity to have read it if he chose.

40 The Respondent's Agent was present when it was signed, but nothing was said by any one as to its terms. Dr. Parker had suggested mailing it to Dr. McCombe, but the company's agent said, "No, let the man take it as he might need it for identification by the conductor." Dr. Parker accordingly folded it up and handed it to appellant who put it in his pocket without reading it and never knew what it contained until a week or so after the accident in question.

Dr. McCombe on getting it then from Respondent, paid the charges which consisted of freight for the horse and half fare for the Appellant's transportation.

There was, as result of Respondent's negligence, a collision between

RECORD.

In the Supreme Court of Canada.

No. 22. Reasons for Judgment.

another train and the train on which the Appellant travelled with the horse, whereby the Appellant suffered serious damages for which Respondent would admittedly be liable even if carrying gratuitously unless prohibited by the terms of the contract I have referred to.

There was endorsed on the back of the contract a memorandum which was as follows:—

GRAND TRUNK RAILWAY SYSTEM. 10

LIVE STOCK

TRANSPORTATION CONTRACT.

From...

To...

Date.......................................19

Shipper..

Names of persons entitled to a free pass or reduced fare in charge of this consignment 20

....

....

....

....

....Agent.

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. 30

Conductors may, in cases where they have reason to believe contracts have been transferred, require the holders to write their names hereon to compare signatures.

This contract must be punched by Conductors of each Division.

This was never filled up or signed by any one.

The question raised is whether or not a man occupying the position of the appellant put in charge of the said horse and travelling as its caretaker, is without being made expressly aware of the terms of the contract his em- 40 ployer had entered into, debarred by virtue thereof from all right of recovery for injury suffered by "reason of the negligence of the company's servants or otherwise howsoever," as the terms of exemption I have referred to put it.

In regard to this question there is some similarity between this case and the case of Bate v. C. P. Rly. Co., 18 Can. S. C. R. 697. There the signature of the passenger was got by telling her such signing was necessary for identification. Here no signature or assent of any kind was required, but incidentally to handing respondent the contract instead of mailing it as proposed by Dr. Parker, it was stated in appellant's presence that he might need it for identification. And as it turned out he never needed it for such purpose.

It seems to me the appellant who was not asked to sign anything, but thus thrown off his guard, has quite as much ground to be excused as the plaintiff in that case who was induced to sign what she could not read by reason of sore or defective eyes, but did sign though she might have insisted on the paper being read to her.

Then we have the cases of Richardson, Spence & Co. v. Rowntree (1894), A. C. 217, following Parker v. South Eastern Rly Co., 2 C. P. D. 416, and Henderson v. Stevenson, 2 H. L. Sc. 470, which in principle seem to cover the whole ground involved in the dispute herein by requiring knowledge on the part of those concerned of the conditions pleaded and relied upon. The appellant was invited to trust himself to the care of respondent in discharge of its duty to carry appellant safely, and it pleads something his master, but not he, agreed to.

It seems rather a startling proposition of law that an employer can of his own mere will and motion so contract that his servant shall be treated as of less value than a horse or dog shipped as freight. It seems to me to come to that if we are to uphold the judgment appealed from, for there is no fair ground on the facts to impute to appellant an assent to something he knew nothing of.

If appellant had by his occupation been shewn to be accustomed to undertake such services, there might have been some basis for inferring assent to a something he in fact knew nothing of but ought to have known.

If the principle of identification is to be carried so far, where would it not extend if applied in other relations of contractors with those for whom they undertake something to be done and on behalf of those in their employment presume, without their knowledge or assent, to bind them to assume all risks?

All the appellant was concerned with was that he was to be carried safely and for aught he knew gratuitously if you will.

All he knew was that the railway company needed him to go.

Is there anybody else than railway managers and lawyers who can be conceived of as presuming that a man so sent for and invited by the company to ride upon its car in order to serve its purposes of protecting itself must know that he has agreed without recourse to be killed by the negligence of their servants "or otherwise howsoever." Not only is that to be presumed as part of common knowledge, but also that the horse had to be paid for in such case but not the man. Indeed also he is supposed to know that the Railway Commissioners of Canada were such a set of humourists as to have approved thereof.

The learned trial Judge by what transpired at the trial must be taken to have reserved to himself to dispose of what was not submitted to the jury and he seems to have had no doubt in regard to essential facts which they were not asked in regard to and did not pass upon.

I think the appeal must be allowed with costs throughout and the judgment of the learned Trial Judge be restored.

DUFF, J.:—

The appellant was *de facto* accepted as a passenger on their train by the railway company who thereby *prima facie* incurred an obligation to use reasonable care to carry him with safety. The company says that this *prima*

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In the Supreme Court of Canada.

No. 22. Reasons for Judgment.

facie obligation was limited by the condition in the shipping bill. I do not understand that it was contended on behalf of the company that Dr. Parker, who signed the shipping bill on behalf of the consignee, had authority to bind the appellant by entering into an agreement on his behalf limiting this obligation. I am not required by law to hold that he had such authority and there is no evidence justifying a finding that the appellant had made him (or held him out as) his agent in fact for that purpose. The evidence, moreover, is clear that the condition referred to was not actually brought home to the knowledge of Dr. Parker or of the appellant. In these circumstances the contention of the company is and must be that the company's agent took reasonable steps to notify the appellant that they were accepting him as a passenger on the special terms contained in the shipping bill and that the appellant's conduct in not perusing the bill shewed that he was content to accept the conditions without reading them; and that he must, consequently, in law be held to be bound by it. I think this contention must be rejected. The gist of it is that a normal person in the situation of the appellant would have read the bill unless he was content to abide by any reasonable conditions it might contain. I am not obliged by any rule of law to say that that is so. Treating the question as a matter of fact I think it is not so.

I think the appeal should be allowed and the judgment of the trial Judge restored.

ANGLIN, J.:—

I am unable to discover any distinction in principle between this case and such cases as Richardson, Spence & Co. v. Rowntree (1894), A.C. 217; Henderson v. Stevenson L.R. 2 H.L., Sc., 470; Parker v. South Eastern Rly., 1 C. P. D. 618; 2 C. P. D. 416; and Bate v. C. P. Rly. Co., 18 Can. S. C. R. 697. Upon evidence warranting such a finding the trial Judge held that the plaintiff was unaware of the special conditions contained in the shipping contract under which the defendants claim exemption from liability to him for personal injuries, and, if not expressly, I think impliedly, that neither the circumstances under which he received the contract nor what was done by the defendants' agent, would suffice to convey to his mind (or "to the minds of people in general") the fact that it contained special conditions affecting him or would justify imputing to him notice of them. The learned Judge says that the plaintiff had "neither notice nor knowledge" of the special terms. By this I understand him to have meant that the plaintiff had not notice of any kind, actual or constructive. As put by Mellish, L.J., in Parker v. South Eastern Rly., 2 C.P.D. at p. 423:

> "The proper direction to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the

ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions."

It is this "reasonable notice" that I understand the learned trial Judge to negative in the present case by the word "notice," which he uses in contradistinction to the word "knowledge" by which he negatives actual notice.
10 If, however, the learned Judge did not find that the defendants had failed to do what was necessary to bring the special conditions in the shipping contract to the attention of the plaintiff, treating him as a man of ordinary intelligence and acuteness, the Court of Appeal had power to make that finding (Ont. Jud. Act, s. 53; Ont. C. R., No. 817), and upon my view of the evidence should have made it. Our statutory duty is to render the judgment which the Court of Appeal should have given.

On the single ground that the present case is governed by the authorities above cited, and without expressing any opinion upon the other interesting points taken by the appellant, I would, with respect, allow this appeal with
20 costs in this court and the Ontario Court of Appeal, and would restore the judgment of the learned trial Judge.

Certified a true copy of the reasons for judgment in the case of Robinson v. Grand Trunk Railway Co.

C. H. MASTERS,
Law Reporter S. C. C.

30

RECORD.

In the Supreme Court of Canada.

No. 23. Certificate of Registrar.

IN THE SUPREME COURT OF CANADA. 10

BETWEEN:

ALBERT NELSON ROBINSON,

(Plaintiff) APPELLANT,

—AND—

THE GRAND TRUNK RAILWAY COMPANY OF CANADA, 20

(Defendants) RESPONDENTS.

I, Edward Robert Cameron, Registrar of the Supreme Court of Canada, hereby certify that the printed document annexed hereto marked A, is a true copy of the original case filed in my office in the above appeal, that the printed documents also annexed hereto marked B and C, are true copies of the factums of the appellant and respondents respectively deposited in said appeal, and that the document marked D, also annexed hereto, is a true copy of the formal judgment of this Court in the said appeal. 30

And I further certify that the document marked E, also annexed hereto, is a copy of the reasons for judgment delivered by the Judges of this Court when rendering judgment, as certified by C. H. Masters, Esquire, the Law Reporter of this Court.

E. R. CAMERON,
Registrar.

Dated at Ottawa, this

13th day of June, A.D. 1913. 40

(SEAL)

No. 24. Order granting leave to Appeal.

AT THE COURT AT BUCKINGHAM PALACE.

The 12th day of August, 1913.

PRESENT:

THE KING'S MOST EXCELLENT MAJESTY.

10

Lord President. Sir William Carington.
Mr. Secretary Harcourt. Mr. Fischer.
Sir Louis Mallet.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 4th day of July, 1913, in the words following, viz:—

"Whereas by virtue of His late Majesty King Edward the Seventh's 20 Order in Council of the 18th day of October, 1909, there was referred unto this Committee a humble Petition of the Grand Trunk Railway Company of Canada in the matter of an Appeal from the Supreme Court of Canada between the Petitioners, Appellants, and Albert Nelson Robinson, Respondent, setting forth (amongst other things) that the Petitioners are subject to the provisions of the Railway Act of Canada (Ch. 37 R. S. of Canada 1906) and also subject to the Board of Railway Commissioners for Canada and under the provisions of Section 340 of the said Railway Act are permitted to enter into contracts respecting the carriage of any traffic upon their railway impairing, restricting, or limiting their liability in regard to such traffic provided 30 such contract has received the approval of the Board of Railway Commissioners for Canada: that on the 17th October, 1904, the Board of Railway Commissioners approved of a form of special livestock contract which provides that in the event of the Company granting to the shipper or any nominee of the shipper the privilege to ride free or at reduced fare upon the train in which the livestock is being carried for the purpose of taking care of the same while in transit then as to the person so travelling on such free pass the Company is to be entirely free from liability in respect of his death, injury or damage whether it be caused by the negligence of the Company, its servants or employees or otherwise howsoever: that on the 30th November, 1911, one 40 Frederick Parker being desirous of shipping a horse to one Robert James McCombe applied to the Petitioners for a car on which to ship the horse, it being previously arranged by McCombe and Parker (without the knowledge of the Petitioners) that the Respondent should accompany the horse as the man in charge: that after Parker had loaded the horse upon the car at the loading platform he went with the Respondent to the agent of the Petitioners at the station where the contract, as approved by the Board of Railway Commissioners, was placed before him for his signature as the shipper of the horse: that the contract bears across its face in red letters the words 'Read this Special Contract' and in large black letters 'Restrictions of Company's Liability': that Parker signed the contract without reading the same but he admitted

RECORD.

In the Privy Council.

No. 24. Order granting leave to Appeal. —*continued.*

that he had an opportunity to do so had he so desired: that he then took the contract from the Petitioners' agent and intimated that he proposed to mail it to McCombe when the agent said to him 'No, give it to this man' (meaning the Respondent) 'to show that he is travelling with the horse as man in charge': that thereupon Parker handed to the Respondent the contract, without reading the same over to him and the Respondent took no steps to inform himself of the contents of the contract although he could have had he so desired: that on the journey the Respondent travelled with the horse as man in charge on 10 the contract which he had in his possession and was recognized as such by the men in charge of the train and on the journey he met with an accident by reason of which he sustained severe injuries: that on the 4th March, 1912, the Respondent commenced an Action against the Petitioners claiming damages for the injuries sustained by him while travelling as the man in charge of the horse: that the action came on for trial before Latchford, J., and on the 6th June, 1912, the Trial Judge gave judgment for the Respondent for $3,000 damages being of opinion that the Respondent's common law rights against the Petitioners were not taken away by the contract made between the Company and Parker: that from this judgment the Petitioners appealed to the 20 Court of Appeal for Ontario and judgment was delivered on the 19th November, 1912, allowing the Appeal, Magee and Lennox, JJ. dissenting: that from this Judgment the Respondent appealed to the said Supreme Court and on the 6th May, 1913, judgment was given allowing the Appeal and restoring the Judgment of the Trial Judge the Chief Justice of Canada dissenting: that the questions involved in this Appeal are first as to the power of the Board of Railway Commissioners to authorize the making of a contract exempting a Railway Company from liability for the death of or for injury or damage caused by the negligence of the Company, its servants or employees to the shipper or his nominee while travelling on a pass or at less than full fare upon a train in charge 30 of livestock and secondly in the event of its being held that it is within the power of the Board of Railway Commissioners to authorize the making of the contract is the contract binding upon the nominee of the shipper unless the shipper or the Company have called the attention of the nominee to the terms and provisions of the contract or pass upon which he is travelling? That the effect of the decision of the majority of the said Supreme Court is practically to nullify the livestock contract authorized by the Board of Railway Commissioners because under the conditions under which livestock are shipped in Canada it is practically impossible for the Railway Companies or their agents to come into personal contact with the man in charge of the livestock: that 40 the loading platforms are invariably some distance from the agent's office, sometimes as far as half a mile, and the man in charge of the livestock, the shipper's nominee, remains with his stock at the car or the loading platform, the shipper goes to the agent's office and makes his contract, the shipper then hands his contract to the man in charge which authorizes him as the shipper's nominee to travel free with the stock: that the Company's agents seldom if ever know who the man is to be: that that is left for the shipper to decide (as a matter of fact the shipper may not have selected a man to take charge) and the man in charge simply presents his contract to the conductor in charge of the train who allows him to travel free with the stock on those

conditions: that the question involved is of general public importance not only to the Railway Companies and to shippers of livestock but also to the men who go in charge: that hundreds of shipments are made every day under similar conditions where the shipper nominates the man to take charge: that whether he informs his nominee as to the conditions on which he is travelling is a matter between the shipper and the nominee, and it is of importance to have the point determined as to whether it is the duty of the Railway Company to acquaint 10 the nominee of the conditions under which he is travelling or whether pointing this out to the shipper is sufficient: And humbly praying Your Majesty in Council to order that the Petitioners shall have special leave to appeal from the Judgment of the Supreme Court of Canada, dated the 6th May, 1913, or for such further and other Order as to Your Majesty in Council may appear fit.

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the said humble Petition into consideration and having heard Counsel in support thereof and the Petitioners agreeing by their Counsel to pay the whole of the costs of the Appeal as between 20 Solicitor and Client in any event their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the Supreme Court of Canada, dated the 6th day of May, 1913, upon depositing in the Registry of the Privy Council the sum of £300 as security for costs.

"And their Lordships do further report to Your Majesty that the proper Officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council, without delay, an authenticated copy under the seal 30 of the said Supreme Court of the Record proper to be laid before Your Majesty on the hearing of the appeal upon payment by the Petitioners of the usual fees for the same."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same shall be punctually observed, obeyed and carried into execution.

Whereof the Governor-General, Lieutenant-Governor or Officer administering 40 the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

ALMERIC FITZROY.

In the Privy Council

No. 48 of 1914

On Appeal
From the Supreme Court of Canada

BETWEEN

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,
(Appellants) DEFENDANTS,

AND

ALBERT NELSON ROBINSON,
(Respondent) PLAINTIFF.

RECORD OF PROCEEDINGS

BATTEN, PROFFITT & SCOTT,
13 Victoria St., Westminster, S.W.
Solicitors for Appellants.

UNIVERSITY OF LONDON
W.C.1.
22 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

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