1922
*Oct. 10, 11.
*Nov. 27.

PREMIER LUMBER COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

GRAND TRUNK PACIFIC RAILWAY CO. (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Carriers—Railways—Misdelivery—Liability—"Loss"—Meaning—Absence of Notice.

The appellant had purchased at Vancouver lumber from the G.W.M. Co. and had sold it to the U.S.L. Co. of Portland, Oregon. The lumber was shipped from Prince Rupert, B.C. to Minneapolis by the G.W.N. Co., consigned to itself, to be carried by respondent's line of railway to Winnipeg and thence to destination by that of the Canadian Pacific Railway Company. The bills of lading were in the standard form known as a "straight bill of lading" approved by the Board of Railway Commissioners for Canada. Each bill was indorsed as follows: "Deliver to Premier Lumber Company, (sgd.) the G.W.N. Co." The bills of lading were held in Vancouver by the Standard Bank of Canada, from whom the appellant had borrowed money, to be handed over to the purchaser on payment being made. The C.P. Ry. Co. without requiring or obtaining surrender of the bills of lading, allowed possession of the lumber to be taken by, or on behalf of, the U.S.L. Co. The appellant company, not having been paid by the U.S.L. Co. for the lumber seeks to recover the price of it from the respondent company, the original carrier, as being responsible under the conditions of the bills of lading for the fault or misfeasance of the second carrier in wrongfully handing over the lumber. The main defence was the failure of the appellant company to give notice of loss which by the bills of lading was made a condition of the respondent's liability.

Held, that the respondent company was not liable.

Per Davies, C.J. and Duff and Brodeur JJ.—Upon the evidence, the U.S.L. Co. obtained delivery of the lumber, without presenting the bill of lading, to the knowledge and with the consent of the appellant company.

The second section of the conditions indorsed on the bills of lading provided that "the carrier * * * shall be liable for the loss * * * caused by, or resulting from, the act, neglect or default of any * * * carrier * * *."

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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Per Duff J.—Loss by reason of mis-delivery is "loss" within the meaning of section 2 for liability by the initial carrier. Anglin J. *contra.*

The 4th section of the conditions endorsed on the bills of lading provided that "notice of loss, damage or delay must be made to the carrier at the point of delivery, or to the carrier at the point of origin, within four months after the delivery of the goods, or in the case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless notice is so given the carrier shall not be liable."

Per Davies C.J. and Idington, Brodeur and Mignault JJ.—The absence of notice of loss is fatal to the appellant's claim.

Per Duff J.—The notice clause although applicable in the circumstances of the case would afford no defence because after the carrier under a certain clause in the bill of lading had become liable as warehouseman; any "failure to make delivery" could only be a failure after demand by or on behalf of the consignee, and "a reasonable time for delivery" could only mean a reasonable time after demand; there is no evidence of any demand having been made except by the persons to whom delivery was made and consequently the time prescribed never began to run.

Per Anglin J.—"Loss" in sections 2 and 4 means physical loss of the goods as by accident during transit, or through negligence, or by theft, but does not cover non-delivery due to an intentional parting with the goods by the carrier amounting to a wilful misfeasance. The second carrier having wilfully handed over the goods to a party not entitled to receive them, the respondent cannot assert any right to the protection of the notice clause in respect to such an act of misfeasance which did not cause a "loss" within section 2 of the conditions.

Judgment of the Court of Appeal ([1922] 2 W.W.R. 181) affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming the judgment of the trial court and dismissing the appellant's action.

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

Eug. Lafleur K.C. for the appellant.

D. L. McCarthy K.C. for the respondent.

THE CHIEF JUSTICE.—For the reasons stated by my brother Brodeur, in which I fully concur, I would dismiss this appeal with costs.

(1) [1922] 2 W.W.R. 181.

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The Chief Justice

Not only do I think that the action fails because no notice was given to the carrier at the point of origin, namely the Grand Trunk Pacific Railway Company, within the four months prescribed by the bill of lading in order to maintain an action against the carrier for the alleged failure to make delivery, but the evidence and the exhibits disclose to my mind, that a business custom and practice existed between the Premier Lumber Company and the United States Lumber and Box Company and the Soo Railway Company which fully justified the Soo Railway Company, as between it and the Premier Lumber Company, in delivering the five cars of lumber in question to the United States Lumber and Box Company, or their nominees, without the production of the bills of lading. On this point, see specially the letter from the Premier Lumber Company to the United States Lumber and Box Company where the latter company is instructed to communicate directly to the Soo Railway Company the destination to which they were to forward the lumber and mentioning at least two of the cars now being sued for on the ground of misdelivery as awaiting such forwarding instructions.

IDINGTON J.—This is an appeal from the Court of Appeal for British Columbia maintaining the judgment of the learned trial judge who dismissed the action of the appellant against the respondent.

The action was brought by appellant claiming to recover damages for breaches of several contracts to carry a car load of lumber to Minneapolis, Minnesota, each entered into by the respondent with the G. W. Nickerson Co., Ltd., and each evidenced by a bill of lading made pursuant to the form approved by the Board of Railway Commissioners for Canada, by order no. 7562 of the 13th July, 1909, and subject to the conditions indorsed thereon. These were what are known by the terms of said order of the board as straight bills of lading—original—not negotiable.

The said Nickerson Company nevertheless indorsed these several bills of lading to the appellant company, which claims to have bought the lumber in question five or six months before shipment from the said Nickerson Co.

The appellant company in turn, shortly after said purchase, had agreed to sell same to the United States Lumber and Box Company of Portland, Oregon.

These five carloads were but a fractional part of the entire transactions so respectively entered into between the said several parties, for each sale so made covered in all something like two hundred and fifty cars.

As the bills of lading in question were of the kind above described and declared to be not negotiable, I imagine the objection, amongst others, taken in argument herein, that the appellant could not recover is rather a formidable obstacle in the appellant's way of recovery herein; but upon the conclusion I have reached, it is not necessary I should deal therewith.

It is admitted that these five carloads passed, shortly after reaching Minneapolis in July, 1920, into the possession of the said United States Lumber & Box Co., of Portland, Oregon, as did many other like shipments.

The first condition indorsed on each of said bills of lading is as follows:—

> Sec. 1.—The carrier of any of the goods herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

One of these exceptions appears in the 4th condition indorsed, and the part thereof so providing is as follows:—

> Notice of loss, damage or delay must be made in writing to the carrier at the point of delivery, or to the carrier at the point of origin, within four months after the delivery of the goods, or in the case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless notice is so given the carrier shall not be liable.

No such notice was given until the 4th of February, 1921, and the learned trial judge held that the failure to give same was fatal to the claim of the appellant.

There is abundantly well founded inference of fact, to be drawn from evidence in the numerous letters and telegrams adduced in evidence which satisfies me that a reasonable time for delivery had elapsed more than four months before the inquiry, dated the 4th February, 1921, could have reached the respondent at Prince Rupert, B.C., where it was addressed to, from Vancouver, even if that otherwise could be held such a form of notice as required.

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For example, the appellant wrote on the 24th August, 1920, to the United States Lumber & Box Co. that the Canadian Pacific Ry. Co. had advised the appellant that certain cars named had reached destination Minnesota Transfer, and are awaiting instructions, and said,

this also applies to car G.T.P. 312071—shipped July 26th.

This latter is one of the five cars now in question and appears in a list given in a long letter of 16th October, 1920, from appellant to said United States Lumber & Box Co., which list is preceded by the following sentence:—

Now the situation yesterday previous to receiving these remittances from you this morning was that the following cars shew unpaid on our books, that is unpaid for in full, although heavy payment had been made against them by trade acceptances and in various ways.

Cars nos. 23479, 308798 and 207350, which are others of the five sued for, also appear on same list.

This gives rather an unpleasant impression of the honesty of the claim now made against the respondent.

I need not say that that impression is deepened by reading the letter of the 22nd September, 1920, from the said United States Lumber & Box Co. to appellant relative to car no. 708798, and reply by appellant thereto of the 27th September, 1920.

The letter from the United States Lumber & Box Co. to appellant of the 12th September, 1920, relative to no. 87370, one of those sued for and referred to therein and in argument as the "Huttig Car" and the reply thereto by the appellant dated 13th September, 1920, demonstrate how little the latter had to complain of the holding of the courts below, or of anything relative thereto.

The truth would seem to be that the appellant after making claims, possibly unsuccessfully on others, conceived the idea that it could use the possession of respondent's bills of lading as a means of extorting from it what it had looked to others for.

I do not think I need follow out in detail all the inferences to be drawn from these letters or dwell upon the telegrams that it chose to ignore, pretending it did not know who Hodson, wiring on behalf of the Canadian Pacific Ry. Co., was

I think this appeal should be dismissed with costs.

DUFF J.—The first question for consideration is whether or not there was a breach of duty by the Soo Line in respect of which the respondents would be responsible to the appellants, if notice had been duly given.

Under this head I shall consider whether, assuming there was a misdelivery constituting a breach of contract or an actionable wrong on part of the Soo Line, the respondents are responsible for it. By the contract which is called a "straight bill of lading" the respondents undertook to carry the goods shipped to "its usual place of delivery" at the destination mentioned

if on its road, otherwise to deliver to another carrier on the route to said destination.

And it was further agreed by section 2 of the conditions as follows:—

Sec. 2.—In the case of shipments from one point in Canada to another point in Canada, or where goods are shipped under a joint tariff, the carrier issuing the bill of lading, in addition to its other liability hereunder, shall be liable for any loss, damage or injury to such goods from which the other carrier is not by the terms of the bill of lading relieved, caused by or resulting from the act, neglect or default of any other carrier to which such goods may be delivered in Canada, or under such joint tariff, or over whose line or lines such goods may pass in Canada, or under such joint tariff, the onus of proving that such loss was not so caused or did not so result being upon the carrier issuing the bill of lading. The carrier issuing this bill of lading shall be entitled to recover from the other carrier on whose line or lines the loss, damage or injury to the said goods shall have been sustained the amount of such loss, damage or injury as may be required to pay hereunder, as may be evidenced by any receipt, judgment or transcript thereof. Nothing in this section shall deprive the holder of this bill of lading or party entitled to the goods of any remedy or right of action which he may have against the carrier issuing this bill of lading or any other carrier.

By section 6 of the conditions it is also stipulated:—

Sec. 6.—Goods not removed by the party entitled to receive them within forty-eight hours (exclusive of legal holidays) or in the case of bonded goods, within seventy-two hours (exclusive of legal holidays) after written notice has been sent or given, may be kept in the car, station or place of delivery or warehouse of the carrier, subject to a reasonable charge for storage and to the carrier's responsibility as warehouseman only, or may at the option of the carrier (after written notice of the carrier's intention to do so has been sent or given), be removed to and stored in a public or licensed warehouse at the cost of the owner, and there held at the risk of the owner and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

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It is admitted that the goods in question were delivered conformably to the terms of the contract to another carrier (the Soo Line), en route to the destination named in the contract. It is essential therefore to the right of the appellant to recover that the language of section 2 is comprehensive enough to impose upon the respondents liability for "loss" by misdelivery by the Soo Line. Before entering upon a critical examination of section 2 it will be convenient first to notice that by section 6 once a notice of the arrival of the goods at their destination has been given or rather within 48 hours after the giving of such notice, except in the case of bonded goods, the responsibility of the Soo Line for such goods "in car, station or place of delivery or warehouse of" its own is to be measured by the responsibility of a warehouseman. Notice was duly given and the responsibility of the Soo Line therefore was the responsibility of a warehouseman at the time of the misdelivery, which, as above mentioned, I am assuming took place. The responsibility of a railway company as warehouseman for goods received at their destination and held by the company awaiting the consignee's demand for them seems to include responsibility for misdelivery. As Bramwell L.J. said in *Hiort* v. *London & North Western Ry. Co.* (1),

> a misdelivery by a carrier was a conversion. I cannot see therefore why a misdelivery by a warehouseman is not a conversion.

The dictum of Bramwell L.J. is supported by a decision of the Queen's Bench in *Devereux* v. *Barclay* (2). In such circumstances the railway company is not an involuntary bailee responsible only as regards misdelivery for ordinary care on part of its servants. It is an act in breach of its contract of bailment, to deliver possession of the property the subject of the bailment to anybody but the bailor or somebody acting with the authority of the bailor.

Accordingly, on the assumption that there was misdelivery, that is to say, assuming the United States Lumber & Box Company had no right to possession either derivatively from the appellants or otherwise, there was a breach of duty by the Soo Line. Is this a breach of duty in re-

(1) [1879] 4 Ex. D. 188 at p. 194. (2) [1819] 2 B. & Ald. 702.

spect of which a responsibility under the terms of the bill of lading falls also upon the respondent? That depends, as I have said, on the scope and effect of section 2 of the conditions. The precise point is whether there was "loss" by reason of such misdelivery constituting "loss * * * * caused by or resulting from the act, neglect or default" of the Soo Line. "Loss" may mean the being deprived of, or the failure to keep something or the fact that something can no longer be found or, on the other hand, it may mean the detriment or disadvantage involved in being deprived of something, or simply pecuniary detriment or disadvantage. I am giving in substance the pertinent dictionary definitions from the "Oxford Dictionary."

Now it is quite clear that "loss" here means loss of the goods; it does not mean loss in the sense of pecuniary disadvantage sustained by the shipper by reason of the carrier's default. I do not see any reason why it should not be read in the sense of "being deprived of"; and I see no reason why the scope of the phrase should be so restricted as to exclude "loss" in that sense by reason of misdelivery. I think therefore that loss by reason of misdelivery may be "loss" within the meaning of section 2. To hold otherwise indeed would be inconsistent with a dictum of Lord Blackburn and with a decision based upon it as long ago as 1888. In *Morritt* v. *North Eastern Ry. Co.* (1), Blackburn J. (as he then was) had to consider the effect of the exemption in the "Carrier's Act," 11 Geo. IV and 1 Wm. IV, ch. 68, sec. 1, under which no stagecoach proprietors and other common carriers were exempted from liability for "the loss of or injury to" certain enumerated kinds of articles unless certain conditions existed which were not present in that case and at p. 308 he says:—

> It was urged by counsel for the plaintiff that in several cases it had been decided that if a carrier delivered goods to the wrong person by mistake, this was a conversion, and that it followed therefore that the "Carriers Act" did not protect him. I do not think this follows at all. It seems to me that if the Act protects the carrier from loss or injury, it should protect him whether the liability is charged in an action on the case, or in an action of trover, or in an action on the contract. I think this is fortified by considering that he is still liable for anything done feloniously. If it could be maintained that carriers were not protected

(1) [1876] 1 Q.B.D. 302 at pp. 306-8.

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where the act was done negligently so that a railway company were to be answerable if their servant honestly forwards goods to the wrong person, it would be unnecessary to say that they are to be answerable if the servant hands them to another for the purpose of stealing them.

This expression of opinion was followed by a Divisional Court in 1888 (in the case of *Skipwith* v. *Great Western Ry. Co.* (1)). In that case it was held that the railway company having received at its cloak-room a certain bag for safe custody (on the terms that the company was not in certain circumstances to be answerable

for loss or detention of or other injury to any article or property exceeding the value of 5 pounds)

was responsible for the loss occasioned by the delivery of the bag to a person not entitled to receive it. I think therefore that if there is "loss" of the goods in consequence of a misdelivery the respondents are responsible for that "loss" under section 2 of the contract.

An important question arises however whether such "loss" has been proved.

The goods were consigned to Nickerson & Co. who had authorized the appellants to receive them. *Prima facie* the appellants, I agree, proved a case of misdelivery and consequent "loss" (within the sense above mentioned) by proving the failure of the company to deliver on demand coupled with the admission indeed made by counsel that the lumber had been delivered to the United States Lumber & Box Co. *Prima facie* the appellants thereby brought their case within the conditions of liability under the contract.

Other facts, however, developed during the course of the trial, the effect of which it is necessary to consider. The United States Lumber & Box Co. were the purchasers of the goods in question and while as between the railway company and themselves the appellants retained possession of the goods by having them consigned to Nickerson and deliverable to themselves it seems probable that the property had passed to the United States Lumber & Box Co. The five cars in respect of which the dispute arises were only five out of 250 sold by the same shippers to the same purchasers, all of which were delivered by the railway com-

(1) [1888] 59 L.T. 520.

pany to the United States Lumber & Box Co. There is some documentary evidence that with the knowledge and acquiescence of the appellants goods shipped under similar bills of lading were delivered to the United States Lumber & Box Co. without the production of the bills of lading and without any special direction from the appellants. I think the proper inference from the whole of the evidence is that the claim against the railway company followed as a result of unsuccessful efforts to obtain payment from the United States Lumber & Box Co. after possession had to the knowledge of the appellants passed to the purchasers by delivery by the Soo Line. The bills of lading, it must be remembered, are not bills under which the company agreed to deliver the goods shipped to the order of the consignee and in consequence they are not in any sense negotiable instruments. The railway company was entitled to deal with the person entitled to possession of the goods in the absence of notice of some dealing affecting that person's rights.

I think the circumstances in evidence rebut the *prima facie* case made by the appellant because I think they point to the conclusion that assuming there was technically a misdelivery it was a misdelivery from which no "loss" would have resulted within the meaning of the conditions but for the assent of the appellants to what was done.

In this view it is not necessary to consider the question whether the clause in respect of notice applies. But as the other members of the court have dealt with it I shall give my opinion upon it.

The contention grounded upon the principle of *London & North Western Ry. Co.* v. *Neilson* (1), and the decisions of which it is the culmination seemed at first sight well founded but reflection has convinced me that effect should not be given to it. It is always a question whether or not the language employed is sufficiently clear. The exception contained in the contract in question in *Neilson's Case* (1) was to go into effect only when

loss, damage, misconveyance, misdelivery, delay or detention (of the goods) during any portion of the transit or while left in the possession

(1) [1922] 2 A.C. 263.

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of the railway company. The goods were diverted from the course of the agreed transit and the word "misconveyance" was chiefly relied upon. The question was treated in the House of Lords as Lord Sumner observed as "a matter of construction" (p. 279). Lord Dunedin said that the contention of the railway must fail unless the word "misconveyance" was to

> be given a meaning so wide as to override the idea of the agreed transit

(p. 271). The question is here has the word "loss" in the notice clause a meaning wide enough to "override the idea" of the "agreed" delivery to the consignee?

It was argued that here delivery to the consignee or some other person authorized by the consignee to receive the goods is fundamental, is an essential element in the performance of the contract; and that loss by reason of failure in respect of this essential term is not "loss" against which the carrier is protected by the condition. The cases already cited were cases in which in general terms the defendant was protected against liability for "loss" of the goods and loss was considered to include loss in consequence of misdelivery.

Treating the question as a matter of construction, what is the natural meaning of the word "loss" in the notice clause? By the first section the carrier is made liable for "loss or injury to the goods;" the phrase "loss or injury to the goods" is repeated in the second section and more than once through the contract. The first section is an affirmation of the liability of the carrier at common law but it is nevertheless an express declaration of his responsibility and I have the greatest difficulty in holding, indeed I am unable to find any satisfactory ground upon which I can hold, that the word "loss" in the notice clause has a signification less comprehensive than the same word in section 1 and section 2.

A somewhat analogous case is presented in a series of decisions culminating in the decision of the House of Lords in *Atlantic Shipping & Trading Co.* v. *Dreyfus* (1). The

(1) [1922] 2 A.C. 250.

decision of the House of Lords is relevant only as shewing (see the judgments of Lord Dunedin and Lord Sumner) that the House approved of the principle of the judgments in an earlier decision of the Court of Appeal given in *Bank of Australasia* v. *Clan Line Steamers* (2). The dispute arose there with respect to the interpretation of a clause in a bill of lading in these words,

> no claim that may arise in respect of goods shipped by this steamer will be recoverable,

unless made at a stipulated place and within a stipulated time. It is settled that such a stipulation is subject in its operation to the underlying condition of the bill of lading which is that the shipowner shall furnish a ship reasonably fit to perform the contract of carriage, in other words, that stipulation has no application to a claim arising in consequence of damage which is due to the fact of the ship being unseaworthy. This is settled, that is to say, where the claim of the shipper rests upon the condition of seaworthiness attached by law to the bill of lading. The question considered by the Lords Justices was the question whether (the responsibility of the shipowner in respect of unseaworthiness having been explicitly declared in the bill of lading) a claim based upon an allegation of unseaworthiness could be treated as outside the scope of the clause whose construction was in dispute; and the view taken, the view which I have already said was afterwards approved by the House of Lords, was that the clause relied upon must be read as applying to all claims based upon the explicit provisions of the bill of lading. At p. 53 Pickford L.J said:—

> The first part of the clause does not seem to me to do more than express in terms what would be the obligation if it were not there, and it may be said, and it has been said with some force, that that cannot make any difference. If you write in what otherwise must be taken as impliedly written in, it is exactly the same as if you had not written at all. There is great force in that argument, but I do not think it is really sound because I think the effect of writing it in, instead of leaving it to be implied, is that it makes it an express term of the bill of lading which was not so in either of the cases to which I have referred and, making it an express term of the bill of lading, it is more likely that the meaning of the bill of lading exception is that it shall apply to the term which is expressly put into the bill of lading.

(2) [1916] 1 K.B. 39.

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The decision of the Court of Appeal, of course, is not strictly an authority upon the question of the meaning of the bill of lading which it is our duty to pass upon but a similar process of reasoning applied in this case leads to a similar result.

The principal difficulty I have felt with respect to the application of the notice clause arises in this way. The goods in question undoubtedly did arrive at the destination signified. We must assume that notice was duly given within section 6 and after the expiration of 48 hours after notice the carrier became responsible as warehouseman. Any "failure to make delivery" after that could only be a "failure" after demand by or on behalf of the consignee and a reasonable time for delivery could only mean a reasonable time after demand. It seems singular (the goods having arrived at destination, notice having been given of their arrival and demand made by the consignee) that further notice should be required of the fact of non-delivery in consequence of that demand. Still there is no practical difficulty in putting the clause into operation in such circumstances, there is no absurdity, there is no repugnancy and I think one must hold that the clause does apply after arrival at destination and notice to the carrier, in other words, that "delivery" means not delivery at destination but delivery to the party entitled to receive the goods.

In the result the notice clause although applicable in the circumstances of the case would afford no defence because there is no evidence of any demand having been made except the demand by the purchasers and consequently the time prescribed never began to run.

The appeal should be dismissed with costs.

ANGLIN J.—The plaintiff sues as indorsee of five bills of lading issued by the defendant company at Prince Rupert to the G. W. Nickerson Company as shippers and consignees of five cars of lumber to be transported, one to Minneapolis and four to Minnesota Transfer. The cars were hauled by the defendant company to Winnipeg and were there delivered to the Canadian Pacific Railway Company to be taken to their respective destinations.

The plaintiff company had sold the lumber to the United States Lumber & Box Co. but had not been paid for it. The bills of lading were held by the Standard Bank to be handed over to the purchasers on payment being made. The Canadian Pacific Railway Company, without requiring or obtaining surrender of the bills of lading and, so far as the evidence discloses, without any direction either from the G. W. Nickerson Co. or the plaintiff company, allowed possession of the lumber to be taken by, or on behalf of, the United States Lumber & Box Company, who in turn sold it to its customers by whom it was eventually taken over. The plaintiff company now seeks to recover the price of the lumber from the defendant railway company asserting that under section 2 of the conditions of the standard bills of lading it is responsible for the fault or misfeasance of the second carrier which resulted in the wrongful handing over of the goods and the loss to it of the price thereof.

The chief defence made to the action is the failure of the plaintiff company to give the notice prescribed by the following clause in the bills of lading:

> Sec. 4. Notice of loss, damage, or delay must be made in writing to the carrier at the point of delivery, or to the carrier at the point of origin, within four months after delivery of the goods, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless notice is so given, the carrier shall not be liable.

It may be assumed that more than four months after a reasonable time for delivery had elapsed before any notice of loss or claim was given by the plaintiff company. In the trial court and on appeal failure to give this notice was held to afford a complete defence to the action.

It is in my opinion at least very doubtful whether upon the facts of this case it falls within the purview of the clause I have quoted. It is not in respect of every "failure to make delivery" that this clause is applicable, but only where the failure to deliver is due to "loss," total or partial, of the goods. The notice must always be of "loss, damage or delay." There is no suggestion that this case is one of "damage" or of "delay" since under these terms delivery either in an injured state or after an undue lapse of time is contemplated. Here there was no delivery what-

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ever. I have no doubt that "loss" in this clause means physical loss of the goods and not money loss suffered by the plaintiff. It means loss of the goods either by the carrier or to the owner or the person entitled to delivery. If the loss be temporary only, it may result merely in delayed delivery. But I am not satisfied that the case is one of loss within the stipulation for notice, where, as here, the inability of the carrier to make delivery is due to his having by the act of himself, or of his servants acting on his behalf, wilfully divested himself of the charge of the goods. "Loss" within the meaning of the stipulation may occur by accident during transit, or it may happen through negligence from which the element of wilfulness is absent, or even by the theft committed either by employees or by strangers. But I doubt that this term, if fairly construed, covers non-delivery due to an intentional parting with the goods by the carrier or his servants amounting to a wilful misfeasance. The provision under consideration applies alike to the case of loss, damage or delay due to the fault of the original or of a later carrier and both are equally entitled to the benefit of it. I find it very difficult to believe that it was intended to enable a carrier who wilfully hands over freight to a person not entitled to receive it to assert a right to the protection of this notice clause in respect of such an act of misfeasance. Goods which have been thus deliberately disposed of by the carrier and of which the situation after such disposition is fully known would not commonly be spoken of as having been "lost." Bayley J. in delivering the judgment of the Court of King's Bench, so indicated in *Garnett* v. *Willan* (1), determined over 100 years ago. I am by no means convinced that there was a "loss" of the goods here in question within the meaning of the stipulation for notice.

But was there a "loss" of them within the meaning of that term as used in the second section of the conditions indorsed on the bills of lading?

Sec. 2.—In the case of shipments from one point in Canada to another point in Canada, or where goods are shipped under a joint tariff, the carrier issuing this bill of lading, in addition to its other liability here-

(1) [1821] 5 B. & Ald. 53.

under, shall be liable for any loss, damage or injury to such goods from which the other carrier is not by the terms of the bill of lading relieved, caused by or resulting from the act, neglect or default of any other carrier to which such goods may be delivered in Canada, or under such joint tariff, or over whose line or lines such goods may pass in Canada, or under such joint tariff, the onus of proving that such loss was not so caused or did not so result being upon the carrier issuing this bill of lading * * *.

In my opinion this is not a case of "loss" within the meaning of that provision. The preposition "of" has been carelessly or accidentally omitted after the word "loss." I have no doubt that physical loss (in this instance by the carrier) of the goods themselves is the case dealt with and not pecuniary loss sustained by the owner of them. This is a provision which subjects the original or issuing carrier to a greater burden than the common law would impose upon him. Moreover, the section contains an unusual stipulation as to the burden of proof casting not on the plaintiff but on the defendant, the original carrier, the onus, in the case of loss, of proving that it was not caused by the act, neglect or default of any other carrier engaged in the transportation.

Prima facie, in my opinion, the word is here used in the sense of "mislaying" or of "deprivation of possession by misadventure or mere negligence." It may well be that it was thought proper in framing the standard bills of lading which are approved by the Board of Railway Commissioners, to impose on the original carrier liability for loss of the goods in that sense occurring through the fault of the subsequent carrier but not responsibility for the consequences of the latter wilfully parting with the possession of them to a person not entitled to delivery. In construing this clause we should not, I think, treat it as imposing so wide a liability unless upon a fair reading of it the intention to create such an extended responsibility is adequately expressed. In my opinion it is not, and the defendant is on that ground entitled to succeed.

Taking this view of the scope of section 2 does not result in any real hardship to the owner or consignee of the goods. It merely prevents his pursuing an original carrier who has fully discharged his own obligations and leaves unaffected whatever redress the common law may afford him against

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the later carrier to whose fault is attributable the non-delivery of which he complains.

I would, on this ground, affirm the judgment dismissing this action.

BRODEUR J.—In July, 1920, the Grand Trunk Pacific Railway Co. issued straight bills of lading for five cars of lumber consigned to the G. W. Nickerson Company in Minneapolis, Minnesota, or in the Minnesota transfer which is near Minneapolis.

These bills of lading were on forms approved by the Board of Railway Commissioners in 1909.

The routes mentioned in the bills were the G.T.P. and the C.P.R. Soo line.

These bills, though not negotiable, were indorsed by the consignees in favour of the Premier Lumber Co. and were transferred to a bank in Vancouver which seems to have kept them.

It is in evidence that the Premier Lumber Co. had a contract with a United States company called the United States Lumber & Box Co. for a very large number of cars, about 250, and the shipping of these cars was made in different ways. Some were shipped on straight bills of lading not negotiable; some others were carried on order bills of lading negotiable.

The five cars in question in this case were issued on straight bills of lading which should not have been negotiated by indorsement. But they were however transferred to the bank in Vancouver and kept there.

When the cars arrived at the point of destination, the C.P.R., on whose line they were, then notified the Premier Lumber Co. of their arrival and asked for delivery instructions for some of them, if not for all; and the Premier Lumber Co. simply transferred this notice to the United States Lumber & Box Co. which obtained from the railway company the delivery of the cars. Some correspondence was later on exchanged between the Premier Lumber Company and the purchaser of the lumber, the United States Lumber & Box Co., as to some shortage which was found in these cars.

These facts shew very conclusively that the appellant company intended that these cars should be handed over to this United States Company.

Some difficulty arose later on between these two lumber companies as to the payment for these cars. Then the Premier Lumber Co., the shipper, gave, in February, 1921, notice to the G.T.P. that they were holding the bills of lading for these five cars and that they wanted to know what had happened to them. They later on, in September, 1921, instituted the present action against the G.T.P. for the price of these five cars.

The defendant railway company pleaded that they were not liable for the value of these cars, that they were duly delivered to the C.P.R. Co. and that under the bill of lading the plaintiff was bound to give notice in writing for any loss within four months and that their failure to give such notice prevents them from making any claim.

The action was dismissed by the trial judge and his judgment has been confirmed by a majority judgment in appeal.

The case turns largely upon the provision of the bills of lading concerning the notice. This provision reads as follows:—

> Notice of loss, damage, or delay must be made in writing to the carrier at the point of delivery, or to the carrier at the point of origin, within four months after delivery of the goods, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless notice is so given the carrier shall not be liable.

The circumstances of this case are such that the claim made by the Premier Lumber Co. does not look to me as being a very honest claim. They knew that these cars had arrived at destination and it was their duty to take delivery of them from the C.P.R. in presenting the bills of lading if they were negotiable. But though these bills of lading were not negotiable, they had advances made on these bills by their bank. They would have to reimburse the bank for these advances in order to obtain possession of these bills of lading. They virtually suggested to their purchaser, the United States Lumber Co. to obtain delivery of these cars without presenting the bills of lading. Their purchaser obtained delivery to their knowledge and with their

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consent, and several months later they tried, in view of some trouble which arose as to payment of this lumber to claim its value from the original carrier.

If, by the acts of the consignee, the shipper is misled as to the person to whom delivery should be made, the carrier should be excused from liability for a misdelivery caused thereby. Corpus Juris, vol. 10, p. 267.

The railway company is entitled to plead the failure of notice within four months after a reasonable time for delivery has elapsed.

The shipper being aware that the goods had been handed over to his purchaser should have in due time protested against the railway company making delivery of the cars to the United States Lumber Co. But they did nothing of the kind. On the contrary, they concocted plans with their purchaser for deceiving to a certain extent the bank which had made advances on these cars.

They rely on certain decisions in England where the courts had to consider bills of lading in which the carriers endeavoured to limit the general liability cast upon them as carriers by inserting special exceptions; these exceptions were very rigidly construed and, in case of doubt, were construed against the carrier who had stipulated. It is to be noted that in Canada the bills of lading at issue were promulgated by the Board of Railway Commissioners under the authority of the law and should be construed according to the spirit of fairness which the board intended to establish in the relations between the shipper and the carrier.

I do not think then that these English decisions could always be invoked in the construction of the Canadian bills of lading which are the result of a quasi judicial enactment.

The appeal fails and should be dismissed with costs.

MIGNAULT J.—The question here is as to the liability of the respondent on five bills of lading covering the shipment of the same number of cars loaded with lumber and which the appellant alleges were not delivered in accordance with the bills of lading.

The appellant, a company carrying on business at Vancouver, had purchased this lumber from the G. W. Nickererson Company, Ltd., and had sold it to the United States Lumber and Box Co., of Portland, Oregon. The bills of lading were in the standard form known as a "straight bill of lading—original—non-negotiable," approved by the Board of Railway Commissioners for Canada, and they stated that the lumber was shipped from Prince Rupert, B.C., by the G. W. Nickerson Co., Ltd., and consigned to that company. Each bill was indorsed as follows:

Deliver to Premier Lumber Co., Ltd. (Sgd.) the G. W. Nickerson Co., Ltd., M. F. Nickerson.

Four of these cars were to go to Minnesota Transfer and the fifth to Minneapolis, both places in the State of Minnesota, the carriage being by the respondent's line of railway to Winnipeg and thence by what is known as the Soo line of the C.P.R. The appellant had sold and shipped some 200 or 250 cars of lumber to the said United Lumber & Box Co., certain of these shipments having been made on open bills of lading, and the lumber was sent to Minneapolis or to Minnesota Transfer, in order that the purchasers might ship the cars to their customers in different parts of the United States. The bills of lading in question remained in Vancouver and were in the hands of the Standard Bank from whom the appellant had borrowed money, and the appellant expected that the United States Lumber & Box Co. would pay for the lumber there and thus get possession of these bills of lading.

The five cars arrived at their destination in August, 1920, and so far as the record shews they were delivered to the United States Lumber & Box Co. by the C.P.R. without the bills of lading having been obtained and produced by the former company. How and under what circumstances this delivery was made is not disclosed, but I cannot doubt that the appellant was aware of the arrival of the cars, and I also think (as shewn by telegrams and letters received by the appellant from the Lumber & Box Co., complaining of shortage) that the appellant must have known that the United States Lumber & Box Company had obtained delivery of at least two of these cars. Un-

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doubtedly the appellant expected that the latter company would pay for this lumber, but it not having done so, this action was taken against the respondent more than a year after the shipment. The substance of the complaint is that the respondent did not deliver the lumber to the appellant, and the demand is for the value of the goods, to wit, $6,903.54.

The fault here was admittedly that of the connecting carrier, the C.P.R., and the appellant seeks to render the respondent responsible for this fault under section 2 of the bills of lading, the effect of which, in cases where as here the shipment is made under a joint tariff, is to make the initial carrier liable for any loss, damage or injury to the goods from which the connecting carrier is not relieved by the terms of the bill of lading, caused by or resulting from the act, neglect or default of such carrier. And this condition gives the initial carrier the right to recover from the connecting carrier the amount which he may be required to pay for the loss, damage or injury to the goods sustained on the line of the connecting carrier. This liability of the initial carrier for the fault of the connecting carrier is of course in addition to that which he incurs for loss, damage or injury sustained on his own line.

The principal defence is that no notice of loss or failure to deliver in accordance with the bills of lading was given as required by the fourth paragraph of section 4 of the bills of lading which is as follows:—

> Notice of loss, damage or delay must be made in writing to the carrier at the point of delivery, or to the carrier at the point of origin, within four months after delivery of the goods, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless notice is so given the carrier shall not be liable.

This condition is eminently a reasonable one, especially where, as here, the fault is that of the connecting carrier, in view of the liability for that fault of the initial carrier who should have prompt notice thereof in order to secure his right of indemnity against the connecting carrier. And it is obviously important that he should be afforded the opportunity to inquire into the circumstances surrounding

the loss or want of delivery of which he may well have had no knowledge.

But the appellant refers us to a long line of decisions whereby it has been held that the carrier cannot rely on conditions limiting or taking away his common law liability, where he has not carried out the contract of carriage, but the loss was sustained while he was doing something different from what he had contracted to do. The rule may be stated in the language of Scrutton L.J. in the recent case of *Neilson* v. *London & North Western Ry. Co.* (1).

> When a carrier seeks to protect himself by exceptions, unless they are so worded as to indicate clearly a contrary intention, they only apply where the excepted events happen in the course of his carrying out the contract, and do not apply where they happen while he is doing something which he has not contracted to do * * * If a carrier wishes to protect himself from liability for the negligence of his servants, he must do so in clear and unambiguous language.

The cases where the carrier has not been allowed to rely on a notice posted up in his office or a condition of the contract restricting his common law liability are cases of gross negligence or of a departure from the contract of carriage, and no case had been cited where the condition, as here, was not a limitation of the common law liability of the carrier, but merely the requiring of a notice of loss as a condition of a claim against the carrier.

Here the appellant has not shewn under what circumstances the lumber which was carried over the prescribed route to the point of destination, was delivered to the purchasers, so no case of gross negligence or of departure from the contract of carriage is established. And, as I have said, the condition as to notice is not a limitation of the common law liability of the carrier, but a most reasonable requirement of the contract of carriage. If any intimation can be said to have been given to the respondent that the lumber had not been delivered in accordance with the bills of lading, it was only on February 4, 1921, more than four months after the arrival of the goods and a reasonable time for delivery had elapsed, when the appellant wrote to the respondent asking what happened to these cars. This, in my opinion, is a bar to the action of the appellant.

(1) [1922] 1 K.B. 192 at p. 201.

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A question has arisen during consideration of this case whether what happened to these five cars can properly be described as a "loss" of the goods, so as to bring it under the operation of the condition requiring notice. The word "loss" is also contained in section 2 of the bills of lading on which the appellant's action is based, and it would not help the appellant to exclude the condition as to notice, if section 2 would also be inapplicable, by reason of there not having been a "loss" within the meaning of the section. It is difficult to believe that the "loss" contemplated is not of the same nature in the condition requiring notice as in section 2. If I am wrong therefore in thinking that the condition can fairly be applied in this case as a bar to the appellant's action, it would follow that section 2 does not give the appellant the right of action which it has asserted. In any event the appellant could not succeed.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Mayers, Stockton & Smith.*

Solicitor for the respondent: *R. W. Hannington.*