

1920
Dec. 7.

IN THE MATTER of the Petition of Right of
JOSEPH LECLERC..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Common Carrier—Railways—Negligence—Section 20—Exchequer Court Act—Quantum.

On the 30th September, 1919, L. shipped a carload of potatoes from St. Charles, 200 miles from Montreal, by the I.C.R., consigned to one. Gustave Brossard, Viger Station, Montreal. When the railway agent was preparing the bill of lading, L. placed a slip of paper on his desk giving the weight of potatoes and number of the car, and, by error, the agent, entered the weight of potatoes on the bill of lading for the car number, which L. on receiving put into his pocket without looking at it. By reason of this error the car was not found in Montreal till the 15th or 16th of October, when L. was notified, but notice was not received by B. until the 20th, due to the wrong name being placed on the notice. In fact, the car never reached its real destination, as indicated in the bill of lading. B. then refused delivery, the price of potatoes having in the meantime gone down, and, without notice to L. the potatoes were sold, and after deducting demurrage the balance was tendered to L. in settlement. Both L. and B. had made repeated enquiries for the car.

Held: On the facts, that the car did not reach Montreal in reasonable time, that the railway employees were guilty of negligence in the performance of their duty, and that L. should recover the damages suffered by reason of the delay in transportation.

- 2. That the crown is entitled to the benefit of the provision in the bill of lading that "the amount of any loss or damage for which the carrier is liable shall be computed on the basis of the value of the goods at the place and time of shipment under the bill of lading," and the court assessed the damage on the basis of the value at the time and place of shipment.
- 3. That as the petitioner alleged that he suffered damages "par la faute, negligence et imprevoyance" of the employees of the railway, the case came within the operation of section 20 of the Exchequer Court Act, and the Crown was liable thereunder, and without reference to any liability as a common carrier.

Quaere: Can the Crown now be said to be a common carrier, notwithstanding the decisions in the cases of *McLeod v. the Queen* (1), *MacFarlane v. the Queen* (2), *Lavoie v. the Queen* (3).

(1) 8 S.C.R. 1.

(3) 3 Ex. C.R. 96.

(2) 7 S.C.R. 216.

PETITION OF RIGHT seeking to recover \$971, damages suffered by reason of delay in transportation of potatoes from St. Charles de Bellechasse to Montreal.

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November 17th and December 3rd, 1920.

Tried before the Honourable Mr. Justice Audette, at Quebec.

J. A. Gagne, K.C. for suppliant.

A. Sévigny K.C. for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. this (December 7, 1920) delivered judgment.

The suppliant, by his Petition of Right, seeks to recover the sum of \$971 as representing the alleged loss suffered by him in forwarding, by the Canadian Government Railway, a car of potatoes from St. Charles de Bellechasse, P.Q., to Montreal under the following circumstances.

The suppliant having secured a car from the station master at St. Charles, loaded the same at the siding, with 674 bags of potatoes of 90 lbs. each,—each bag being weighed as it went on board. The loading being completed, on the 30th September, 1919, he went, accompanied by witness Lapointe, who had weighed the potatoes, to the station and asked the station master for a bill of lading—and at the same time placed on the agent's desk a slip of paper giving both the weight of the potatoes and the number of the car. The letter "N" on such slip stood before the figures representing the number of the car, and the letter "P" (for poids-weight) stood before the figures representing the weight.

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The agent then prepared the bill of lading, and handed to Leclerc the document filed as Exhibit No. 1, whereby he acknowledged having received the potatoes from Leclerc, at St. Charles, on the 30th September, consigned to Gustave Brossard, with destination to Viger Station, Montreal, and placed upon the bill of lading, Exhibit No. 1, as the number of the car, the figures representing the weight of the potatoes. Hence the present action.

The documents, constituting the contract of carriage in the present case, were prepared by the agent, and when Leclerc was handed exhibit No. 1, he placed it in his pocket without looking at it.

Leclerc contends that having enquired from the agent when the potatoes would reach their destination, he was told that the car *should or* would be in Montreal somewhere around the 3rd of October, and he went to Montreal for that date with the object of taking delivery with his consignee.

However, the agent denies having told him when he thought the car would be in Montreal, and says that Leclerc told him the number of the car and gave him the wrong figures.

Upon this latter point, both Leclerc and Lapointe, the latter a disinterested witness, swear positively that the slip of paper was duly handed to the agent, and I accept their testimony in preference to that of the agent; because, when in the witness box, although showing honesty of design, he disclosed a very bad memory, especially in respect of what I might call the McCarthy enquiries and telegrams.

The car of potatoes left St. Charles on the following day, which was the 1st of October, 1919, and having reached Chaudiere Station, a comparatively short

distance from St. Charles, it remained there according to some evidence until the 6th October, on account of the difficulty resulting from the wrong number on the bill of lading.

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In the meantime Leclerc had gone to Montreal and several times each day had been enquiring at the Place Viger Station, at the freight offices at Bonaventure Station, at the freight offices of the Intercolonial Railway, the Grand Trunk, and the Canadian Pacific Railway, but he could obtain no knowledge of the car in Montreal. He then telephoned from Montreal to the agent at St. Charles de Bellechasse for the right number of the car, and was again given by the telephone the weight number. Leclerc said he knew the right number and took it that the agent was giving the wrong number. He then on the 6th October sent a telegram (Exhibit "A") to the agent asking immediately for the number of the car, and on the 7th the agent sent the right number, and that telegram was received by Leclerc, at Montreal, on the morning of the 8th.

Leclerc then went again to the Place Viger station, to Bonaventure station, etc., but again was told they did not have the car. He and Brossard again and again went to the station and freight offices, and finally on the Saturday, being discouraged, he left for his home, at St. Charles, giving the address of the consignee at the freight office. Leclerc arrived at St. Charles on Saturday, the 11th, in the evening, and next day agent Rheume and Leclerc met at church. The evidence as to how the conversation which then took place arose, is somewhat conflicting, but in the result, it amounts to the agent telling Leclerc he had better take delivery of his car and make a claim if he suffered damages; but Leclerc

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said, I need not bother about it, Brossard, the consignee is in Montreal, and they are going to pay me for that car. His patience by that time had graduated down to its minimum and perhaps not without some justification.

The suppliant says that on the Wednesday or Thursday following (the 15th or the 16th) he was advised by agent Rheaume, at St. Charles, that the car had been traced and that he could find it in Montreal.

Brossard, the consignee of the potatoes, confirms Leclerc as to all of these enquiries at the railway freight offices, but some difficulty appears to have arisen as to Brossard's address—a matter which will be hereafter referred to. Brossard, however, testifies he went to Viger Station every day up to the 20th October.

Then, on the 10th October, witness McCarthy, an employee of the Intercolonial Railway, at Montreal, and agent of the Canadian Northern Railway at Montreal wharf, received the bill of lading or way-bill, and testifies that at the time he received the way-bill he supposed the car was likely at Pointe St. Charles (Montreal) but he did not actually know. Witness McCarthy says he then endeavoured to locate Gaston (not Gustave Brossard) Brossard, the consignee, but seeing he could not succeed, he wired the station agent at St. Charles de Bellechasse (Exhibit "C") for Gaston Brossard's address. After several enquiries Gustave Brossard was found on the 20th, and according to McCarthy he then refused delivery of the potatoes, as endorsed upon the document—because, says Brossard, he did not want to sign before seeing the car, and because the price of potatoes had then gone down. The evidence is conflicting upon this point. The railway official endeavoured in part

to escape liability upon the ground that they could not locate the consignee, but it must not be overlooked that they were trying to find Gaston Brossard and not Gustave Brossard. A messenger had been sent to the place where the consignee was working, and upon enquiry was told they had no Gaston Brossard in their employ. Moreover, as the destination of the car was entered upon the bill of lading, would it not appear, as a primary duty of witness McCarthy, to notify the freight office at Viger station, of the arrival of the car. Had that been done, it is obvious that Brossard would have been notified before the 20th, as he kept enquiring daily at that station, the destination of his car.

Upon Brossard refusing delivery on the 20th October, the potatoes were sold without any notice to the consignor, and the sum of \$517.52 realized by such sale, from which the freight, \$114.20, and demurrage of \$55.00 were deducted, leaving the sum of \$348.32 which was tendered the suppliant in settlement, and he refused it, standing by his rights for the full value of the potatoes.

I must not overlook mentioning that we also had in the case the hyper-expert who testified as to what might have happened, and as to what might not have happened to the potatoes while in transit at that season. However, this speculative evidence has no bearing upon the gravamen of this action.

In the result I must find that the car in question never reached its destination, Viger station, Montreal. It is true witness McCarthy when pressed to locate the car at certain dates, tried to explain that the car might not have gone to Viger station on account of the Canadian Pacific Railway embargo, on account of congestion. From his evidence, however, it must be

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found that while that year there had existed intermittent embargoes, he did not know positively whether the embargo was in force at the very time in question. Moreover, if there was such an embargo, it should have been proved in the regular manner.

The wrong number was placed upon the document prepared by the St. Charles agent, and it was his duty to ascertain the right number before placing it on the bill of lading or way-bill, even if the document had been prepared by the consignor.

The evidence does not clearly disclose at what date the car actually reached Montreal. On the 10th October, witness McCarthy, who received the bill of lading, testified he thought the car was at Pointe St. Charles, but he was not sure,—as he might very well and very likely receive the way-bill or bill of lading even before the arrival of the car. The consignee was only notified on the 20th. On the 15th or 16th October, the consignor was notified at St. Charles de Bellechasse that the car had reached Montreal.

Did this car of potatoes reach Montreal within a reasonable time? What is a reasonable time depends upon the circumstances of each case. It was known to all concerned that the car in question was loaded with perishable goods, and therefore that all due urgency and efforts should have been made by the railway officials to forward the car to its destination with all due speed. Too much seems to have been taken for granted in allowing the car to remain at Chaudiere up to the 6th. If it took all of that time to transport potatoes over a distance of about 200 miles, railways would thus defeat their utility.

The wrong number was placed upon this bill of lading by the railway official, and he admits, in his evidence, it was his duty to corroborate and ascertain

if the number was correct. The name of the consignee on the bill of lading is Gustave Brossard, and it was wrongly placed upon the notice to be served upon him. Gaston Brossard was the person sought, and not Gustave Brossard. The car did not reach Montreal within a reasonable time under the circumstances, and in fact never reached its destination, Viger station, Montreal.

Upon the facts, if the case were one between subject and subject, the respondent would be liable in damages for a breach of the contract of carriage. But in view of the decisions in this court of *McLeod v. the Queen* (1), following *MacFarlane v. the Queen* (2), and *Lavoie v. the Queen* (3), holding that the Crown cannot be a common carrier, it would be necessary for me to consider whether those decisions have not become obsolete before I could find liability in respect of the contract of carriage. (See annotation to report of *Vipond v. Furness Withy Co.*) (4). However, I am relieved from any necessity of considering the case on the theory of carrier's liability by the fact that by his petition the suppliant alleges that he suffers damage occasioned "par la faute, negligence et imprevoyance" of the employees of the railway, and so brings the case within the operation of section 20 of the Exchequer Court Act.

It is mentioned in the evidence that the potatoes cost \$1.25 a bag at St. Charles, and were sold at Montreal for \$1.50. However, under the terms and conditions of the bill of lading, "the amount of any loss or damage for which the carrier is liable shall be computed on the basis of the value of the goods at the place and time of shipment under the bill of lading." *Getty vs. the C.P. Ry. Co.* (5).

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(1) 8 S.C.R. 1.

(3) 3 Ex. C.R. 96.

(2) 7 S.C.R. 216.

(4) 35 D.L.R. 285

(5) 22 Can. R. C. 297.

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The suppliant loaded his car partly with some of his own potatoes and partly with potatoes he had bought at \$1.00 a bag. I will accept that figure.

He also charged for his board at Montreal, but I fail to see the necessity of a consignor following his goods to their destination and therefore disallow such charge.

The suppliant is therefore entitled to recover the sum of \$674, with interest (*St. Louis vs. the Queen* (1) and *Laine vs. the Queen* (2) thereon from the date at which the petition of right was left with the Secretary of State (a date which may hereafter be established by affidavit) to the date hereof, and with costs.

Solicitors for suppliant: *Galipeault, St. Laurent, Gagne, Metayer & Devlin.*

Solicitors for respondent: *Sévigny & Sirois.*

(1) 25 S.C.R. 649 at p. 665.

(2) 5 Ex. C.R. 103.