HOUSE OF LORDS.

Friday, January 30, 1920.

(Before Lords Haldane, Dunedin, Atkinson, Buckmaster, and Phillimore.)

LONDON AND NORTH-WESTERN RAILWAY COMPANY *v.* RICHARD HUDSON & SONS LIMITED.

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

Carrier—Railway—Damage to Goods in Transit—Proper Vice—Terminal Services—London and North-Western Railway Company (Rates and Charges) Confirmation Act 1891, *Schedule, sec.* 4.

The respondents purchased from the Ministry of Munitions twenty-seven bales of calico then lying at the works of Kynochs Limited, Birmingham, and requested Kynochs to forward the bales to them at Manchester, carriage forward. Kynochs consigned the goods already loaded and sheeted by them for carriage by the appellants' railway, and the appellants signed an acknowledgment on the consignment-note that the goods were received in good condition. The appellants delivered the goods, and by an invoice sent to the respondents charged for them at a rate which included the loading and sheeting of the goods. Upon delivery the goods were found to have been damaged during transit by water owing to defective sheeting. The respondents sued in the County Court for £42, the agreed amount of the damage. Under agreement between the appellants and Kynochs the latter undertook the sheeting and loading of goods consigned from their sidings, receiving a rebate of 2s. 3d. per ton. The sheets and trucks were provided by the Railway Company. The respondents were unaware of this agreement. *Held* (Lord Haldane and Lord Phillimore *dis.*) that the appellants were liable to the respondents either as common carriers or under the contract in the consignment-note, and this apart from the agreement between the appellants and Kynochs as to terminal services.

Appeal from an order of the Court of Appeal reversing an order of the Divisional Court and restoring a judgment of the County Court Judge of Lancashire.

The respondents sued the appellants in the County Court for £42, the agreed amount of damage to certain goods carried on the appellants' railway. The learned County Court Judge found that the damage was caused by the use of a defective sheet, and he held that Kynochs in loading and sheeting the goods acted as agents for the appellants and gave judgment in favour of the respondents for the amount of the claim.

The Divisional Court (ROWLATT and SANKEY, JJ.) set aside the judgment, being of opinion that under the contract to load and sheet the only remedy of the respondents was against Kynochs.

The Court of Appeal (BANKES, WARRINGTON, and DUKE, L.JJ.) took substantially the same view of the contract as the County Court Judge, and allowing the appeal restored his judgment in favour of the respondents.

The Railway Company appealed.

Their Lordships' considered judgment was delivered as follows:—

LORD HALDANE—What is difficult in this case is to draw the proper inference from the insufficient materials contained in the only facts which the learned County Court Judge was able to find as to the contract made. Shortly stated, the circumstances which gave rise to the question with which he had to deal were as follows—In August 1917 the respondents bought from the Ministry of Munitions twenty-seven bales of calico goods which were then lying at the Lion Works of Kynochs Limited, a controlled establishment at Birmingham. The respondents requested Kynochs to forward the bales to them at Manchester, the carriage to be paid by the respondents. Kynochs, whose business was that of manufacturers, having to make large and frequent consignments, possessed several miles of sidings connecting with the appellants' railway, and it was their regular practice to load the goods they consigned into trucks on these sidings, and to cover the goods with the sheets requisite for protecting them from rain and dirt when in the trucks. After they had constructed these private sidings and had organised their system of loading, which was in 1903, Kynochs made arrangements with the appellants, with whose railway the sidings were, as I have said, connected, for a diminution of the charges of the latter for carrying in cases where Kynochs had themselves thus loaded the trucks on their own sidings. This arrangement was effected in view of the proviso to section 4 of the schedule of maximum rates and charges to the London and North-Western Railway Company (Rates and Charges) Order Confirmation Act 1891, which provided that where merchandise conveyed in a separate truck is loaded or unloaded elsewhere than in a shed or building of the railway company, the latter may not charge to a trader any service terminal for the performance of any of his said services if the trader has requested the company to allow him to perform the service for himself and the company have unreasonably refused. Since Kynochs, who had made such a request, commenced to perform for themselves the services of loading and sheeting on their private sidings the appellants have not charged them for these services, but have allowed them on this account a rebate of 2s. 3d. per ton from the normal charge for carriage which was inclusive of such services. In respect of the bales, the subject of the litigation, the appellants did no checking and exercised no superintendence while the bales were being loaded and covered on the trucks on Kynochs' siding, and the bales were loaded

and sheeted exclusively by the latter themselves under the arrangement referred to. The practice of the appellants was to supply to Kynochs the trucks and sheets required, but Kynochs had been, at all events during the period of the controversy, in the habit of using trucks and sheets which happened to have arrived on their sidings with inward traffic. In the present case the truck on to which the bales were loaded was one belonging to the North-Eastern Railway Company, and the sheet used was one belonging to the Lancashire and Yorkshire Railway Company. It does not appear that any objection ought to have been taken to the adoption of this course. The probable reason is that under the Government control which obtained in the period of the war the pooling of waggons was a common practice.

Kynochs having acceded to the request made to them by the respondents to forward the bales to Manchester, and having loaded them as described on a truck and sheeted them, directed the appellants to receive and deliver them to the respondents at the address of the latter in Manchester. They gave to the appellants a consignment-note containing this direction, and specifying in a column which contained the number and species of the goods to be forwarded the twenty-seven bales with their marks, and in another column their weight. At the head of these columns there was described the truck on which the goods were loaded, as 38150 North-Eastern Railway, and in yet another column in which the name of the person who was to pay the carriage was to be entered, there appeared the word "Forward," meaning that the charge for carriage was to be paid by the consignees on delivery. At the foot of the consignment-note appeared, with the signature of F. Allen, one of the officials of the appellants, the words "Received in good condition by F. Allen." This consignment-note appears to have been the only document which contained anything in the nature of a contract. The appellants had no instructions about the terms on which they were to convey the goods except from Kynochs.

The bales when they were delivered in Manchester had been damaged by moisture to the extent of £42, 6s. This damage was caused, as the County Court Judge found, by the use of a defective sheet which had been put over the bales by Kynochs' servants when loading them on to the truck. The sheet had parts in it where the waterproof covering had deteriorated and become pervious to moisture, but it is not found that this was in any way known to the appellants.

The appellants delivered the bales to the respondents and collected from them the entire amount of the charge for carriage. They then paid out of it to Kynochs the amount of the rebate due to the latter for the services of loading and sheeting to which I have referred.

The respondents brought an action in the County Court against the appellants for the damage to the bales. The action was tried by the County Court Judge, who decided for the respondents and awarded them damages of the amount stated above. His view apparently was that Kynochs, at the request of the respondents and as their agents, had effected a contract between the appellants and the respondents for the carriage of the bales, but that by a private arrangement with the appellants which did not affect the contract and which was unknown to the respondents, Messrs Kynochs acted as the sub-agents of the appellants in doing the loading and sheeting, for negligence in which the appellants as the principals thus became responsible to the consignees. On appeal to the Divisional Court the learned Judges there, Rowlatt and Sankey, JJ., took a different view; they held that the actual contract entered into by the appellants with the respondents through Kynochs as their agents, was merely a contract to carry the bales as loaded and sheeted by Kynochs, who performed this service on their own account as principals and not as agents for the appellants. Judgment was therefore given for the appellants. The respondents appealed to the Court of Appeal, who reversed the judgment of the Divisional Court. The learned Lord Justices agreed with the County Court Judge in holding that in the loading and sheeting of the truck Kynochs acted in contemplation of law as agents for the appellants. It might have been different if Kynochs had made a contract with the Railway Company for carriage and delivery of the bales for their own account and at their own expense. But that was not the contract made. Kynochs actually requested the Railway Company to carry and deliver to the respondents as the consignee specified in a consignment-note, and they must be taken to have brought about as agents for the respondents a contract by the Railway Company to perform the whole of the services, not the less that a part of these, the loading and sheeting, were to be performed by Kynochs as agents for the company, and were to be paid for by the company out of the amount to be obtained by them for themselves from the consignees.

The question which of these views of the contract is the true one is not an altogether easy question. The reason is the imperfect character of the evidence. It is on this account that it is only after some hesitation that I have arrived at the conclusion that the view taken by Rowlatt and Sankey, JJ., in the Divisional Court was the right one. I think that the determining consideration is to be found in that the Legislature has laid down in section 4 of the Act of 1891, to the terms of which I have already referred. The proviso forbids the Railway Company to make any charge at all for performing such a service as the sheeting and loading by consignors who have properly as in the present case elected to perform it themselves. I am unable to see, having regard to the language of this proviso, how Kynochs can be said to have done what they did excepting on the footing of having done it on their own account and as principals. I cannot think that it makes any difference that they were to be paid by the Railway

Company out of the total sum the latter recovered from the consignees or that the consignees knew nothing of the arrangement. They must at least, having regard to the provisions of the statute, be taken to have known that the arrangement actually made was a possible arrangement, and it does not appear that they gave any special directions to Kynochs how or on what footing the latter were to forward the bales from their premises at Birmingham to the respondents' address at Manchester. Kynochs appear to me to have been free to do the part of the service they performed on their own account if they chose, for the statute had put them in a position to do so, and there was nothing in the least improper in their taking advantage of the power conferred on them to do part of the work themselves which they had undertaken to do or to get done. I do not see why Kynochs should not if they pleased have claimed directly against the respondents for payment for this part. It is true that when anyone who is in Kynochs' position as agent for another person to whom goods are to be carried and delivered directs a railway company to convey the goods to and to obtain payment from him, the consignee may be looked on as a principal brought, through an agent sufficiently authorised for this purpose, into direct contractual relation with the railway company. But the question always remains, what the contract is which the agent has brought about? Here it appears to me that the contract was to take over and convey a truck already loaded and sheeted by Kynochs. The sheet was defective and let in moisture. For this Kynochs may possibly be responsible to the respondents, but I am unable to see how the Railway Company are so. No doubt as common carriers they are insurers. But their liability as insurers is only in respect of what happens during their custody of the goods entrusted to them as bailees for carriage, and against loss or damage to these goods in the condition in which they were when delivered to them to be carried. They are not responsible for the consequences of any latent defect in the subject-matter of their contract of carriage. It seems to me that in the circumstances of the present case all they undertook to do was, in accordance with the provisions of the Statute of 1891, to haul a loaded and sheeted truck. That there was a defect in the sheet was not due to them, but to a cause antecedent to the commencement of their responsibility, and it was the antecedent cause that gave rise to the damage. As was pointed out by Willes, J., in *Blower* v. *Great Western Railway Company* (L.R., 7 C. P. 655), the liability of a railway company as a common carrier does not extend to damage consequential on an inherent "vice" in the article carried. "If such a cause of destruction exists, and produces that result in the course of the journey, the liability of the carrier is necessarily excluded from the contract between the parties." That very learned Judge quotes with approval the statement of the law in Story on Bailments, where it is said—"Although the rule is thus laid down in general terms at the common law that the carrier is responsible for all losses not occasioned by the act of God or of the King's enemies, yet it is to be understood in all cases that the rule does not cover any losses not within the exceptions which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity or quality in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect or wrong or misconduct of the owner or shipper thereof." Story goes on, in the passage cited by Willes, J., to give as an illustration the case of "the goods not being properly put up and packed by the owner or shipper; for the carriers' implied obligations do not extend to such cases."

This principle appears to me to rule out any liability sought to be fastened on the appellants in this case arising merely out of their position as common carriers, and to leave the matter to be disposed of according to the answer given to the question—"What was the actual contract in the case?" For the reasons I have stated I am of opinion that the judgment of the Court of Appeal should be reversed and that of the Divisional Court restored.

LORD DUNEDIN—In view of the divergence of judicial opinion in the Courts below and in your Lordships' House this cannot be called a clear case. I do not recapitulate the facts.

The respondents sue the appellants for damage to goods which belonged to the respondents and were carried by the appellants. The action is based on the fact that the appellants are common carriers, and carried the goods as such. That a common carrier is an insurer of goods entrusted to him for carriage, and can only excuse himself on the ground of act of God, or of inherent vice (in which expression I include bad packing) of the goods themselves, is axiomatic. Now Lord Mansfield in *Forward* v. *Pittard* (1 Term R. 27) speaks of this obligation on the carrier's part as an obligation independent of the contract. By that I understand that it is not an adjected term to the contract as made, but is an obligation which attaches from the fact of the goods being carried by a common carrier, in favour of the owner of the goods, whoever he may be. For, indeed, in many common cases it would seem to be inaccurate to speak of a contract of carriage as being made between the carrier and the consignee. Take the ordinary case of A buying goods from B to be delivered to A, B being resident at a distance from A. It is settled that delivery to the carrier is delivery to A; but suppose that the goods are entirely disconform to contract and that A refuses to receive the goods, A could not be sued on the contract. No doubt there is in the case of A receiving the goods a resulting contract between A and the carrier, but that contract is inferred from the receipt of the goods by the carrier, and the acceptance

of the goods when carried by the consignee, and is not in the proper sense made by the person who delivers the goods. The same view that the obligation is independent of the contract is a corollary to the decisions which, in view of the provisions of the County Courts Act, settled that an action for damages at the instance of the owners of the goods against the carrier could be held as an action of tort and not of contract.

Now if these views are correct they dispose of the present case, for Hudsons did not require to have recourse to the contract, if any, between Kynochs and the London and North-Western Railway Company, but may rely on the common law duty of the railway as common carriers to carry the goods safely.

But even if these views were not correct I should still come to the same conclusion. The view of the Divisional Court is that there was a contract made by Kynochs as agents for Hudsons, that in terms of this contract made the Railway Company were not answerable for the loading, and that as the damage came from improper loading Hudsons cannot recover. Now what was the contract? Sankey, J., says that the contract was that the Railway Company should haul a loaded waggon from Birmingham to Manchester. I cannot agree with this view. It is obvious that no such contract was ever intended or authorised by Hudsons' instructions. That by itself is not conclusive, but what was the contract made, assuming that it was made by anything more than delivery of the goods themselves and acceptance thereof? It must be sought for in the consignment-note. Now the consignment-note begins with the request to the Railway Company to receive and deliver the under-mentioned goods, and then it specifies the goods—not a loaded truck, but bales of cotton identified by certain marks. It specifies the consignee, gives the weight, and states that the carriage is to be paid by the consignee. The Railway Company, by a marking on the note, acknowledge that the goods are in good condition. That document seems to be a clear instruction that the goods are handed to the Railway Company as common carriers, and that the consignee is to be debtor to the Railway Company for all expenses in connection with carriage. The corresponding invoice is entirely congruous, for the Railway Company affirm that Hudson is their debtor for the total charge for carriage of the bales of cotton. Now if by the terms of the contract the Railway Company received the goods as a common carrier, they cannot get out of their liabilities by asserting a private arrangement between themselves and the consigner of the goods, no mention of such arrangement being made to the consignee, and, on the contrary, a demand made as for all services of carriage rendered. It is the duty of a common carrier to carry the goods in a vehicle fit for the purpose of carrying the goods. The goods in question needed some sort of covering to protect them from the weather, and it was the duty of the carrier to see that they had such covering. I am therefore of opinion that the respondents here are right in suing the appellants, and that the County Court Judge and the Court of Appeal were right in giving judgment in their favour.

I would like to put another test to the opposing view. Supposing Hudsons, the goods being safely carried, had had owed to them a debt by Kynochs, could they have refused to pay the Railway Company's account in full in order to have the benefit of a set-off against Kynochs? It would seem absurd to suppose they could, and yet if the Railway Company's argument is right I see no answer to such a demand.

I ought to add another remark. Undoubtedly though a common carrier is an insurer, yet if the damage arises from inherent vice or from bad packing of the goods the common carrier is not liable. If, then, the improper sheeting could be represented as bad packing, then the Railway Company might be excused, but I think it is out of the question to so consider it. It is really a part of the vehicle, not of the goods.

Some mention was made of section 4 of the Railway and Canal Traffic Act of 1894. I do not think it has anything to do with the question, for it is obviously inapplicable. The section is dealing with the maxima that may be charged against a trader, and then in the proviso prevents the Railway Company charging a loading terminal against a trader when the trader has requested the company to do that service himself and his request has been unwarrantably refused. Here no such request was ever made by Hudsons, and the section could therefore have no application, and afforded no justification for Hudsons refusing if they had been so minded to pay the total charge.

I think these views are, in slightly other words, exactly the views of the County Court Judge and the Court of Appeal. I confess that although, as I have already said, in view of the divergence of judicial opinion the case cannot be looked on as easy, I do feel that the judgment will be in accordance with the ordinary common-sense of a commercial community. That an unfortunate consignee of goods who has made no request except for their being forwarded by the ordinary means of public transit should be driven, if his goods are damaged, to seek out some other than the carrier with whom the carrier has made a private arrangement of which the consignee knows nothing, as to the performance of part of the carrier's service, might be in accordance with law, but would never be accepted by the ordinary public as being in conformity with justice.

I think the appeal should be dismissed with costs, and I move your Lordships accordingly.

LORD ATKINSON—This case is not free from difficulty. It is at common law the duty of a common carrier, such as the appellants, who accepts goods of any particular kind to be carried by him on any particular journey to provide a vehicle or other means of carriage reasonably fit and sufficient to carry them on the contemplated journey, having regard to their nature and

the character of the transit. It is also his duty at common law to load or stow the goods properly in the vehicle provided, so that they may, having similar regard to their nature and to the risk and dangers attending the transit, be safely carried to their destination — see judgment of Lord Ellenborough in *Lyon* v. *Mells*, 5 East 428.

It is clear, I think, upon the evidence in the present case that all the parties concerned assumed that open railway trucks—that is, a truck without a roof, permanent or temporary, which would effectually keep out the rain—was not a fit or proper vehicle for the carriage of the respondents' goods from Birmingham to Manchester in the month of August 1917. If therefore the respondents or their agents authorised on that behalf had in the ordinary course of business delivered to the appellants at their sheds or stores in Birmingham the respondents' goods to be carried to Manchester and there delivered, and the appellants had accepted the goods for that purpose, it is, I think, clear that the appellants would have been responsible for the damage the goods sustained by reason of the defects in the tarpaulin or sheet with which the truck containing them was covered. It was contended, however, as I understood, that the appellants are not responsible for this damage, mainly because of the arrangements which have been made between them and Kynochs Limited, under section 4 of the schedule of maximum rates and charges of the London and North-Western Railway Company (Rates and Charges) Order Confirmation Act 1891, and further, of the character in which Kynochs Limited acted in the matter of the transmission of these goods.

This fourth section of the above-mentioned schedule provides what are the maximum charges which the company can make to a trader for maximum service terminals, which services include loading, unloading, covering, and uncovering of merchandise, and all charges for the provision by the company of machinery, plant, stores, and sheets. And it further provides that where merchandise conveyed in a separate truck is loaded or unloaded elsewhere than in a shed or building of the company, the latter may not charge a trader his service terminals for the performance by the company of any of the above-mentioned services if the trader has requested the company to allow him to perform these services for himself and the company have unreasonably refused to allow him to do so. Kynochs, who have large sidings on their own premises and carry on a very extensive trade, have availed themselves of the privilege conferred by this section. In this instance the appellants supply the trucks and sheets needed by Kynochs, but they leave to that firm the selection of a truck suitable for any particular kind of goods to be loaded therein, and also the loading and covering of the same when loaded, the appellants confining themselves to the haulage of the trucks when loaded from the premises of Kynochs to their destination. For the performance of these terminal services the company make to or secure for Kynochs payment in this way — They charge the consignee of the goods the full freight as if they themselves had performed the terminal services as well as done the haulage, granting Kynochs a rebate of 2s. 3d. per ton. I have little doubt that the latter part of this section 4 was designed and intended to apply to the goods of a trader, whether manufacturer or mere distributor, which he desired to have carried by the appellants over some part of their system. In such a case, of course, if the trader performed those terminal services so negligently that injury thereby resulted to his own goods, he could not (with the exception hereafter referred to) recover damages from the railway for the consequences of his own neglect, the company not having been themselves guilty of any negligence — *Tally* v. *Great Western Railway Company* (L.R., 6 C.P. 44); *Barbour* v. *South-Eastern Railway* (34 L.T.R. 67).

It is not very easy to determine what was the true relation in which the company stood to Kynochs in the matter of the transmission, under the aforesaid arrangement, of their own goods to their consignees. Two services were performed for the benefit of the consignees and they paid for both. The terminal services were performed by Kynochs, for which they were paid a share of the aggregate freight, 2s. 3d. per ton. The haulage was done by the Railway Company, for which they were paid the balance of that freight. Their relation *inter se* would, as regards these transactions, resemble most that of joint adventurers, or partners in this business of transmitting Kynochs' goods to their destination. If so each would be the agent of the other in performing his appropriate services, and each would be liable for the acts or defaults of the other while performing those services.

After the purchase of these cotton goods by the respondents from the Ministry of Munitions Kynochs stood to the purchasers in the relation of gratuitous bailees. They had the custody of the goods, but no right or title to or interest in them. There is no proof that the respondents had any notice or knowledge of the arrangement entered into between the company and Kynochs under section 4 of the above-mentioned schedule. Neither is there any evidence that they ever authorised Kynochs to transmit to them at Manchester the purchased goods on the terms arranged under that section; nor is there any evidence that the respondents ever authorised Kynochs to deal with the transmission of the respondents' goods as if they were their own. The respondents, no doubt, requested Kynochs to forward the goods to them to Manchester. That was all. But in the absence of all evidence to the contrary, that, I think, must be taken to mean to forward the goods, not on the terms of some secret arrangement between Kynochs and the company of which they were unaware, but according to the ordinary course of business of the Railway Company as common carriers and with all the protection that character afforded. The consignment-note

of the 21st August 1917 and the invoice of the 23rd of the same month would not be different in form or contents from what they are if they had been specially designed to evidence a contract such as, I think, it must be taken the respondents requested Kynochs to enter into on their behalf. There is no reference whatever in it to the special arrangement between Kynochs and the company or anything to indicate that the transaction was other than the ordinary transaction entered into by a consignor of goods for the consignee, the freight for all the services, terminal and other, to be paid by the consignee. That was the kind of contract Kynochs, the agents of the consignees, were, I think, authorised to make, and in my view they as between the consignees and the Railway Company did in fact make. No doubt the Railway Company arranged according to their system of business that Kynochs should perform the terminal services with regard to these goods, but that arrangement I think no more affects the contract between the Railway Company and the respondents than if the Railway Company had sub-contracted with some independent person to perform those terminal services. I think the Railway Company should be held to have contracted with the consignees to perform with due care either by their own servants or their agents all the terminal and other services necessary to carry the respondents' goods from Birmingham to Manchester with safety. They have failed to perform that contract. The terminal services were negligently performed by those with whom the company arranged to perform them, in that the goods were inadequately covered, and they are therefore in my view responsible for the damage to the goods caused by that negligence.

There is another question for consideration. Martin, B., laid down in *Hart* v. *Baxendale* (16 L.T.R. 390) that although a common carrier is an insurer it is a condition precedent to his liability that goods if liable to injury unless carefully and properly packed should be so packed. And in *Sutcliffe* v. *Great Western Railway* (1910, 1 K.B. 478), Kennedy, L.J., at p. 499, said that a common carrier may refuse to carry goods which are tendered to him for carriage without such protection as would be necessary to enable the carrier to carry them to their destination with a reasonable prospect of security during the transit. But though this be so, yet if the imperfect nature of the packing be obvious to the carrier when the goods were tendered for his acceptance, and he received them without objection notwithstanding, he will not be excused for any damage which may subsequently result from the imperfect packing—*Smart* v. *Crawley*, 2 Stark, 323; and *Richardson and Sisson* v. *North-Eastern Railway Company*, L.R., 7 C.P. 75; and judgment of Miller, J., p. 82. Again, if the defect in the packing from which damage is likely to occur is discovered on the journey, the carrier should take reasonable means to arrest the loss or deterioration therefrom—*Beck* v. *Evans*, 16 East, 244. And if the defect be discovered in time to prevent the forwarding of the goods they should not be forwarded till the defect has been remedied—*Carr* v. *London and North-Western Railway Company*, L.R., 10 C.P. 307.

I am unable to see why the principles laid down in these cases in reference to the defective packing of goods tendered to a carrier to be carried by him should not equally apply to the defective covering of goods packed in a waggon to be hauled by him. In my opinion the principles do apply, but the difficulty of applying them in the present case arises from the uncertain sense in which the word "obvious" is used. Does it mean easily seen without any careful examination or discoverable by such an examination? In my view it is clear that if the covering of the truck in question had a large rent in it (which the servants of the company could easily have seen from the ground if they looked only casually at it, then, though they did not so look and did not see the rent but sent the truck on its journey), the company would have been responsible for the injury caused by the rent. But the actual condition of things in the present case is far different from this. The County Court Judge found that the cover used was full of holes and defective, and that the damage which the respondents' goods sustained resulted from those defects. There is no finding that the servants of the company could, by examining the cover from the ground, have detected its defects. The result of the evidence is, I think, this, that the servants of the company could not without using ladders get up high enough to examine the cover when *in situ* so as to discover its defects. They did not resort to that expedient. They seem to have left it to Kynochs' men to do all that was requisite. It may have been very negligent on the part of the servants of the company not to have made a careful examination of the cover before they sent the truck upon its journey, but I do not think they can be treated as if they had before they sent it on its journey been actually in possession of the knowledge of the cover's condition which they would have acquired had they made a proper and reasonably careful examination of it. I do not think, therefore, that they can be held liable for the damage the goods sustained on the principle adopted in *Beck* v. *Evans* and *Richardson and Sisson* v. *North-Eastern Railway Company*. I therefore rest my judgment on the first-mentioned ground.

I think the appeal should be dismissed, with costs.

LORD BUCKMASTER—The respondents are the plaintiffs in an action brought to recover compensation for injury caused to their goods during carriage by imperfect protection from the accident of rain.

The goods were undoubtedly damaged in transit, and the damage was due to the imperfect condition of a tarpaulin sheet by which they were covered in the truck. These facts are not in any way in dispute. The plaintiffs' case rested on two contentions. The first that the appellants the

London and North-Western Railway Company were guilty of a breach of their duties under the contract which they made for the carriage of the goods, and, secondly, that they failed in their duty as common carriers. These arguments are not really independent, and the contract in this respect was that as common carriers they took charge of the goods.

The actual contract was made by Kynochs. The goods were on their premises when they were bought by the respondents, and at their request Kynochs entrusted them to the Railway Company for carriage. The terms of the contract are evidenced by the consignment note under which the respondents were bound to pay the freight including the charge for loading and sheeting the goods. This work was, however, performed by Kynochs under a special arrangement which they had made with the Railway Company, and it is this circumstance which gives rise to the whole difficulty in the case.

I have been greatly impressed with the argument that as the negligence alleged was a negligence in the performance of duties for which as between the Railway Company and Kynochs the latter were responsible, and that as the Railway Company's duties only began after the operation had been completed, the Railway Company could not be made liable for Kynochs' carelessness.

I cannot, however, regard this argument as conclusive. The duties of the Railway Company when they accepted the goods included the provision of all the proper and necessary means of carriage. If the damage had been caused owing to the breakdown of the truck owing to its unfitness for the journey the Railway Company would have been liable, and I see no difference between the carriage on which the goods are placed and the cover by which they are protected.

This case is not in my opinion similar to that of goods imperfectly packed. It is not part of the duties of the Railway Company to pack goods. They can refuse to carry them if the packing is obviously imperfect, or only consent to carry them at the risk of the owner. But the duty to provide proper protection against wet and proper means of carriage is part of their ordinary duty as carriers from which they cannot escape except by express contract.

The Court of Appeal appears to have taken the view that Kynochs acted as agents for the Railway Company in loading and sheeting. I am not sure that this is the true position, but there is no difference in the result. If the Railway Company had contracted with a third party to do the work performed by Kynochs it would have been impossible for them to escape liability; and the only difference in that case would have been that their responsibility would have been assumed to commence from the moment when the goods were delivered to the contractors for the purpose of being placed upon the trucks. It is not, however, to my mind the moment when their responsibility began which is the determining factor in the present dispute. It lies rather in considering what was the true measure of their obligation when they had in fact received and become responsible for the goods. They did not merely undertake the safe carriage of a loaded and sheeted truck —they undertook safe carriage of what the truck contained, and if loss arose owing to imperfection in the carriage or the cover which reasonable care could have avoided they were responsible. It is quite true that if the goods had been Kynochs' own they would in the circumstances have been unable to claim for the loss; and it is pointed out that the Railway Company could not tell that these goods differed in any way from an ordinary consignment from Kynochs' own property, but that argument means no more then this—that in special circumstances Kynochs' relation to the Railway Company would have prevented them from asserting a claim. In the present case the Company undertook to carry for and on behalf of the consignees who were responsible to them for the total freight, and in the discharge of these duties proper care was not taken to secure the goods against damage which it was the company's duty to prevent. For these reasons this appeal ought in my opinion to be dismissed.

LORD PHILLIMORE—The facts in this case are as follows:—R. Hudson & Sons, Limited, bought from the Minister of Munitions twenty-seven bales of calico goods which were then lying at the works of Kynochs Limited, near Birmingham. Hudsons carried on business at Manchester, and having been evidently put into communication with Kynochs they requested the latter to forward them to Manchester.

Kynochs have a private siding at Birmingham of very large extent, and out of a number of open trucks which were then upon the siding, and from a number of tarpaulins or sheets also there they selected a truck and a sheet, neither of them actually belonging to the appellant Railway Company but treated as if they were theirs, such things being all pooled during the war, loaded the bales on the truck, covered them with the sheet, and put the truck in position to be hauled by the Railway Company from the siding and taken by rail to Manchester, and there delivered to Hudsons. This was accordingly done, but on arrival at Manchester the goods were found to be damaged by water, and the conclusion come to by the learned County Court Judge, who tried the case in the first instance, was that the damage was due to the fact of rain coming through the sheet which was defective and had several holes in it. For this damage, amounting to a sum of £42 and some shillings, Hudsons brought suit in the County Court against the Railway Company. In that Court they recovered judgment. This was reversed by the Divisional Court and restored by the Court of Appeal and the Railway Company have now appealed to your Lordships' House.

The defective sheet having been put upon the truck by the servants of Kynochs when the Railway Company took delivery, its servants gave a receipt stating that the

goods were received in good condition. This was properly held to put the burden upon the Railway Company of showing that the damage was subsequent and was not due to the negligence of its servants while the goods were in the company's charge.

A question might arise as to whether the servants of the Railway Company ought to have discovered the defects before they proceeded to haul the truck away. And to a certain extent this case was made at the trial but on the other hand evidence was given that any examination of this kind would be commercially impracticable, and there was no finding by the County Court Judge that in this or any other respect there was direct negligence by the servants of the Railway Company.

The case therefore made against the Railway Company depends upon what may be called their constructive negligence or breach of contract through Kynochs.

Your Lordships have, I think, first to consider the contractual relations of the parties. The first contract arises out of the request by Hudsons to Kynochs to forward the goods to them. Kynochs accepted the request and thereby entered into a contract with the Railway Company. We have not the terms of the actual request or acceptance but they are not material. There is no dispute about the fact.

Kynochs then applied to the Railway Company. The document by which they applied is a consignment-note in the following terms:—"The Railway Company will please receive and deliver the under-mentioned goods at their respective destinations."

Then follows the number of the truck and the Railway Company to which it belongs; the number and the species of goods, described as twenty-seven bales of glazed calico bearing certain marks; the name and address of the consignees, Hudsons, and their address in Manchester, and under the column stating who pays carriage the word "forward."

When the Railway Company delivered to Hudsons the delivery was accompanied by an invoice making a "total to pay" of £3, 10d., and the company collected and received that amount.

The sum is a composite one made up of terminal and haulage charges, and by the Railway Companies Rates and Charges Confirmation Act—"Where merchandise conveyed in a separate truck is loaded or unloaded elsewhere than in a shed or building of the company, the company may not charge to a trader any service terminal for the performance by the company of any of the said services if the trader has requested the company to allow him to perform the service for himself, and the company have unreasonably refused to allow him to do so."

It was suggested to your Lordships that Kynochs, not being the actual owners of the bales, were not traders within the meaning of this enactment. I do not think it is necessary that the point should be decided, but it is my impression that Kynochs were traders for this purpose. However this may be, they had in fact an arrangement with the company by which they did render the service of "loading and covering the merchandise," to use the words of an earlier part of the same enactment. And the railway company making one charge to the consignee for the total service, out of it allowed or gave to Kynochs a sum or rebate of 2s. 3d. per ton. When, therefore, the company collected, it collected partly for itself and partly for Kynochs.

It is not suggested that Hudsons were aware of this arrangement. They did, however, know before they brought their suit that it was the company's case that the damage resulted through Kynochs covering the goods with an improper sheet, and that Kynochs and not the Railway Company was responsible, and they paid what was in any event due from them and paid no more because of the arrangement by which the services and the sums paid for them were divided between the Railway Company and Kynochs.

The authority which Hudsons gave to Kynochs would have authorised the latter in making a contract with the Railway Company to contract with it to take the goods from the start and to load and cover as well as carry and deliver. But we must look at the contract which they in fact made, and that as it appears to me was a contract to take the goods already loaded and covered. If this be so, there was no breach of contract, and no negligence in the performance of it on the part of the Railway Company or its servants, and your Lordships were I think all of the opinion at the conclusion of the hearing that there was no claim in contract against the Railway Company, and that the judgment of the Court of Appeal in favour of Hudsons could not be supported upon this ground, nor upon the ground of estoppel.

But in the course of the argument a suggestion was made that Hudsons as owners of the goods had a right of action which could be maintained against the Railway Company as common carriers. I agree that this is so, and further that as common carriers the Railway Company was responsible for any cause of damage not being the act of God or the King's enemies which arose during the transit.

But if the cause of damage arose before the transit, though the actual damage accrued during the transit, the law I conceive to be otherwise. If, for instance, goods are tendered to the carrier so improperly conditioned or packed that they will heat, spoil or decompose during the ordinary course of the transit and under ordinary conditions, though in fact at the moment of delivery to the carrier they were in good order, the carrier is not responsible for the physical deterioration which actually begins during the transit. This is what is called *vice propre* or proper vice. And for the same reason, if the damage accrues during the transit by reason of the goods being stowed in such a vessel that they leak or percolate or spill in the ordinary course of handling, or if the wrapping be too feeble to protect them in the ordi-

nary course of handling, or while carried in the ordinary way for such goods, the carrier is not responsible.

Decided cases have given other illustrations of this doctrine. If a horse be of such temper and disposition that it would kick and plunge and cast itself in the ordinary course of railway travelling, or if a dog be sent with a collar so loose that it can slip its head out and run upon the railway line and get killed, the carrier is not responsible.

Applying these principles to the case before us, it seems to me that when the Railway Company as carriers received these goods the cause which led to the future damage had already arisen. Nothing more was wanted than the ordinary incident of ordinary rainy weather, and for this the carrier cannot be responsible.

Upon the whole, therefore, I am of opinion that this action against the Railway Company fails, and that this appeal should be allowed.

Appeal dismissed.

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