

RIDDELL, J.:—The first objection on the part of the defendants is that there is no privity of contract between them and the plaintiff: and, of course, that is so, and, if this action depended upon a breach by the defendants of some contract with him, the plaintiff must fail. Under the old system of pleading in which the plaintiff must set out his claim in contract or in tort, there were many instances in which the action failed by reason of the form of pleading. . . .

[Reference to *Alton v. Midland R. W. Co.*, 19 C. B. N. S. 213; *Marshall v. York, etc., R. W. Co.*, 11 C. B. 655; *Govett v. Radnidge*, 3 East 62; *Pozzi v. Shipton*, 8 A. & E. 963.]

Under our present practice, when the battle-ground is removed from the paper, and it is the facts and not a lawyer's ideas of how the case should be reduced to writing which governs, there is no trouble as to the frame of action. Much of the learning as to torts and contracts has become obsolete.

"It is clear that a person lawfully upon railway premises may maintain an action against a railway company for injuries sustained whilst there by reason of the active negligence of the company's servants, whether he has a contract with them or not:" per A. L. Smith, L.J., in *Taylor v. Manchester, etc., R. W. Co.*, [1895] 1 Q. B. 134, at p. 140, citing *Marshall's Case*, supra; *Austin v. Great Western R. W. Co.*, L. R. 2 Q. B. 442; *Foulkes v. Metropolitan District R. W. Co.*, 5 C. P. D. 157. And *Berringer v. Great Eastern R. W. Co.*, 4 C. P. D. 163, is to the same effect. . . . [Reference also to *Meux v. Great Eastern R. W. Co.*, [1895] 2 Q. B. 387.]

Then the defendants cannot derive any assistance from such cases as *Bristol and Exeter R. W. Co. v. Collins*, 7 H. L. C. 134. . . . In *Coxen v. Great Western R. W. Co.*, 5 H. & N. 274, as in *Mytton v. Midland R. W. Co.*, 4 H. & N. 615, the frame of the action was in contract.

Failing in their contention that an action in tort does not lie against them, the defendants say that the goods in question were carried under an agreement with the express company, and that the express company had made an agreement with the plaintiff to the benefit of which they are entitled.*

* The shipping bill was as follows:—

NOT NEGOTIABLE.

Read this receipt.

Form 6, Aug., '93.

THE DOMINION EXPRESS COMPANY, LIMITED.

Received from Benjamin Allen of Toronto:

The undermentioned articles which we undertake to forward to the nearest point to destination, reached by this Company, subject expressly to the following conditions, namely: This Company is not to be held liable for