

NOVEMBER 3RD, 1902.

DIVISIONAL COURT.

ARMSTRONG v. MICHIGAN CENTRAL R. W. CO

*Railway—Carriage of Goods—Misdelivery—New Contract—Breach—
Negligence.*

Appeal by defendants from judgment of County Court of Lambton in favour of plaintiff in an action to recover damages for loss of goods shipped by plaintiff. The goods were consigned to the Canadian Bank of Commerce, and were delivered to Smith & Co. Plaintiff never asked Smith & Co. to pay for the goods, and had never been paid for them. The defendants in their defence pleaded that they had delivered the goods to the order of the Canadian Bank of Commerce, as required by the shipping receipt, and denied any liability. At the trial the shipping receipt signed by plaintiff was put in, and defendants were permitted to rely upon a clause indorsed thereon as follows: "Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than 30 days after the delivery of the property or after due time for the delivery thereof, no carrier hereunder shall be liable in any event."

I. F. Hellmuth, K.C., and E. C. Cattanach, for defendants.

A. B. Aylesworth, K.C., for plaintiff, contended that the clause quoted did not cover or apply to such a case as the present, where the original transit was at an end, and an agreement for a new one had been entered into, and where the loss had occurred by reason of the negligence of defendants.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J.) was delivered by

STREET, J.—Upon the facts in evidence plaintiff is entitled to recover. The defendants' agent at Brigiden received instructions from plaintiff to re-ship the goods from London to Campbell & Co., at Montreal, and agreed that this should be done, and so advised defendants' agent at London. After a few days' delay the shipping receipt was indorsed and delivered by the bank agent in London to defendants' agent there; the existing contract to deliver the goods to the order of the Canadian Bank of Commerce in London was then terminated, and the new contract by defendants to carry the goods to Montreal and deliver them to Campbell & Co. arose. Instead of carrying out this new contract, the defendants,