

Prima facie, it appears that plaintiffs were fully insured against the loss that has happened, and it is difficult to see, upon the evidence which has been adduced, how the insurers were relieved by them from liability; or, if so, that such release would relieve them from the whole effect of condition 13, if they are bound by it. And little, if anything, could be said against the fairness of a conclusion that plaintiffs' action failed by reason of this condition, that is, assuming the insurance to have been validly effected and either to be still subsisting or to have been released by plaintiffs. . . .

But the case must be dealt with according to law, not according to any one's notions of fairness; and the first question is, what was the contract for the carriage of the goods? That is a question of fact, and, upon the whole evidence, I find that the whole contract is contained in the bill of lading, that the terms and conditions of the shipping bill do not form part of it. . . .

Condition viii. of the bill of lading has not been complied with by plaintiffs. Is it binding upon them, and, if so, does its breach relieve defendants from liability, or give them a right of action against plaintiffs? . . . Does it apply to a case of loss through negligence attributable to defendants, and, if so, is it made of no effect by sec. 246 of the Railway Act?

The cases have gone to an extraordinary length in excluding from a condition limiting liability loss occasioned by negligence of defendants or their servants.

[Reference to *Mitchell v. London, etc., R. W. Co.*, L. R. 10 Q. B. 256; *Puce v. Union, etc., Co.*, 19 Times L. R. 378; *Harrison v. Anchor Line*, [1891] 1 Q. B. 619; *Sutton v. Cicors*, 15 App. Cas. 144; *Phillips v. Clark*, 2 C. B. N. S. 156; *Fitzgerald v. Grand Trunk R. W. Co.*, 4 A. R. 601.]

The cases constrain me to hold that condition viii. applies to defendants' liability as insurers, and not their liability for any negligence attributable to them. Otherwise, I would have considered that "any loss" for which defendants were liable included a loss caused by negligence attributable to them: see *Dixon v. Richelieu Navigation Co.*, 15 A. R. 647, 18 S. C. R. 704; *Robertson v. Grand Trunk R. W. Co.*, 24 S. C. R. 611, 615.

But, assuming that the condition covers loss through negligence, does the Railway Act preclude defendants from taking advantage of it?

Section 146 is clumsily framed and worded, but, upon all hands, it seems to be now considered that (so far as the question here involved goes) it precludes defendants from