1914. *April* 24. MASON, J.

Carriers.— Railway.— Carriage of goods.— Liability for.— Inevitable Superior Force."—Act 13 *of* 1908, *sec.* 18 (1), (*d*).— *Civil commotion.—Riotous assembly.*

An act of destruction committed by persons riotously assembled to the number of two hundred or more, during a time of civil commotion, is an act caused by "inevitable superior force," within the meaning of sec. 18 (1) (*d*), of Act 13 of 1908.

Argument on exception to the defendant's plea.

The plaintiffs claimed damages for the loss of certain goods, their property, received by the defendant, for transport for reward, which the plaintiffs alleged the defendant had failed to deliver to them.

The defendant admitted failure to deliver the goods. The relevant portion of the plea was as follows:

Par. 5: In respect of his failure to deliver the said goods, the defendant says:

(*a*) That on or about the 5th day of July, 1913, during a time of civil commotion in the town and neighbourhood of Benoni, certain persons riotously assembled together to the number of two hundred or more, forcibly entered the defendant's goods sheds in which the goods specified were then stored, and set on fire and utterly destroyed the said goods;

(*b*) That the defendant, by his servants and by calling to his aid all available forces provided by the State for the preservation of the public peace, used all means in his power to prevent the said persons from entering the goods shed and from injuring and destroying the said goods, but was overpowered by the force and violence of the said persons;

(*c*) That the failure of the defendant to deliver the said goods and the loss and injury arising therefrom have been caused solely by the acts hereinbefore set forth and have therefore been caused by inevitable superior force within the meaning of sec. 18 (1), (*d*), of the Railways Regulation Act, 1908.

The plaintiffs, in an amended replication excepted on the ground that par. 5 of the plea disclosed no defence to the declaration.

C. F. Stallard, K.C. (with him *H. H. Morris*), for the plaintiffs, the excipients: The first use of the phrase "inevitable superior

force" occurs in the corresponding law of 1903, Ord. 60 of 1903, sec. 33 (1), (*d*); there has been no judicial interpretation thereof, and consequently it will have to be interpreted in the light of other considerations. "Inevitable" is not "irresistible," and is something quite different from "inevitable accident." It qualifies both "Superior" and "Force." The quality of "Inevitability" is to be interpreted in connection with "King's enemies," and must be of the same nature. There has been doubt, since the days of the Praetors, as to the liability of common carriers, and it has been intentionally set at rest by the limitations in sec. 18. By the common law of England the Act of God or the King's enemies, or inherent vice are the exceptions to the liability of a common carrier. The exceptions mentioned in sec. 18 have all this common quality, that they are all cases where a common carrier has no remedy over against a third person who actually causes the damage: see Clark and Lindsell, *Torts*, p. 454, where it is stated that the act of the King's enemies is an excuse, because the carrier has no remedy against the third person. "Inevitable Superior Force" therefore cannot refer to riotous or traitorous enemies, because there is a remedy over against them; it refers therefore to the act of others, who although not King's enemies, yet exercise that superior force which is beyond the control of the law of this State or the police, *e.g.*, this Act, having been enacted before Union, may have applied to the railway systems of Natal or Delagoa Bay.

[MASON, J.: But sec. 31 expressly exempts the Administration from acts done outside the borders of the Transvaal.]

Yes; but I am referring only to the acts of those railways inside the Colony. From the use of the word "other" the *ejusdem generis* rule must be applied, even though only one example is given: see *Van Wermeskerken* v. *Johannesburg Municipality* (1913, T.P.D. 540), where "dog or other animal" was held to include a "pigeon."

[MASON, J.: How about the case of allies fighting? Suppose they occupied the railway station and destroyed it?]

There is a remedy against the allies.

[MASON, J.: No. It can be said it was a necessary military operation; the supreme law of the land is that all necessary precautions should be taken, and for that purpose property may be destroyed.]

I admit that if the destruction were lawful there would be no remedy against the destroyer, *e.g.*, the destruction of diseased animals.

[MASON, J.: Or lawful destruction by the police?]

Yes; if the destruction were lawful. I cannot understand anyone with a knowledge of the English language using such a phrase as "inevitable superior force," which, taken by itself, is absolute nonsense.

J. Stratford, K.C. (with him *S. S. Taylor*), for the defendant, the respondent: "Inevitable" means unavoidable. There is no reason to depart from the ordinary meaning. The word is practically interpreted in the same sec. 18 (1), (*c*), in connection with "accident." Inevitable accident is defined in Beven, *Negligence*, (vol. 1, 115 and vol. 2, 1091) as an accident which cannot reasonably be avoided. "Inevitable superior force" therefore means some force which the State cannot reasonably avoid. Superior force is the same as *vis major*.

[MASON, J.: No. *Vis major* may include a storm.]

I am prepared to concede that "inevitable superior force" means human force.

[MASON, J.: You plead "irresistible" force; is that a good plea that the force was inevitable?]

Yes; we say the loss was caused solely by these acts.

[MASON, J.: That is a good plea that it is superior force. Is it a good plea that it is inevitable superior force?]

Yes; using it in the sense of unavoidable.

[MASON, J.: Inevitable means that you could not reasonably foresee the danger, and that you could not reasonably avoid the result.]

No, it means that though you could forsee it, you could not avoid the result.

C. F. Stallard, K.C., in reply: My learned friend's only case is that inevitable and unavoidable are interchangeable. That is false; they can be interchanged, but it is wrong to say that whenever inevitable is used it means unavoidable. Inevitable refers to a contingency which is happening; unavoidable means something which a person approaching an object cannot avoid. The superior force has to arise by something quite outside the State itself; it has to have the quality of inevitability.

MASON, J.: The question in issue is whether the plea sufficiently avers an act of "other inevitable superior force" so as to protect the Railway Administration from liability. Mr. *Stallard's* argument, as I understand it, is that all the exceptions in sec. 18 of the Railways Regulation Act of 1908 deal with cases in which there would be no remedy by a common carrier against the persons responsible for the loss of goods. The phrase which is under consideration, is, "The act of the King's enemies or other inevitable superior force," and I have to decide what the latter part of the phrase means. I think that the acts of rebels or rioters or civil commotion are of a somewhat analogous nature to acts of the King's enemies, or of enemies of the State. Using the *ejusdem generis* rule of construction, the latter part of the phrase therefore seems to me to cover civil commotion or the acts of rebels or rioters. Mr. *Stallard*, however, argues that the word "inevitable" cannot apply to internal civil commotion, because the State could always redress it, and that it applies only to acts of some external power. One of my difficulties in accepting that argument is that, so far as the acts of external persons are concerned, the Railway Administration is, generally speaking, protected from liability by sec. 31 of the Act; with reference to anything not taking place within the Province there is no liability on the part of the Administration. As to the other difficulty, I cannot see circumstances in which there is likely to be any other superior force which is not the act of the King's enemies, except perhaps in the remote case of operations of the allies of the King in his territory; that, however, seems to me a very remote case indeed.

In the phrase "inevitable accident" the word inevitable is used in the sense in which it has been judicially interpreted, namely, something which a person could not by reasonable care and foresight have avoided. The words "Inevitable superior force" seem to me *prima facie* to have the same meaning, unless it is impossible or manifestly contrary to the general intention of the section to give that meaning. I quite agree that the phrase is an unfortunate one, and wanting in exact precision of meaning but it seems to me that one can fairly apply to the word "inevitable" used in connection with force, exactly the same definition as that given by Beven, namely, force, the results of which a person could not by any reasonable care or foresight have avoided. That seems to me to cover acts of violence during the course of civil commotion which

the Railway Administration was unable by any reasonable precautions to avoid. The main argument of Mr. *Stallard*, therefore, appears to fail. If that argument were successful, the plea would afford no defence to the action. As it is, the plea is somewhat defective in not going somewhat further and alleging that the Administration could not by any reasonable care or foresight have possibly avoided the destruction of the goods by violence, because the plea amounts to very little more than a statement that the Administration took every reasonable precaution to resist the rioters in order to avoid the destruction of the goods by them, but such a defect in the plea could be easily amended. In these circumstances I have come to the conclusion that the words "inevitable superior force" cover the act of rioters, during a time of civil commotion, in forcibly entering the goods sheds and destroying the goods stored therein. The exception must therefore be overruled. Costs to be costs in the cause.

Plaintiff's Attorneys: *Kuper & Reid*; Defendant's Attorneys: *Bell & Nixon*.

[G. W.]

WHITE v. COLLINS.

1914. *April* 30; *May* 15. WARD, J.

Land.—Proclamation 8 *of* 1902, *sec.* 30.—*Promise to hold land in trust.—Absence of contract in writing.—Interdict.*

A promise by A to hold freehold property, registered in her name, in trust for B, is a contract to deliver such property to B on demand.

Such contract is not a contract of sale of fixed property in terms of sec. 30 of Proclamation 8 of 1902, and is not void therefore for want of the contract being in writing.

Where A threatened to sell such property, B was held entitled to an interdict, pending action, restraining her from doing so.

Application for an interdict restraining the respondent from alienating certain fixed property. The facts appear fully from the judgment.

H. H. Morris, for the appellant, moved in terms of the petition.