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*Mar. 29, 30.

*June 26.

THE NORTH-WEST TRANSPORTATION COMPANY (DEFENDANTS) } APPELLANTS;

AND

F. B. McKENZIE (PLAINTIFF).... .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Correspondence—Carriage of goods—Transportation Co.—Carriage over connecting lines—Bill of lading.

Where a court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of what has passed between the parties must be taken into consideration. *Hussey* v. *Horne Payne* (4 App. Cas. 311) followed.

A shipping agent cannot bind his principal by receipt of a bill of lading after the vessel containing the goods shipped has sailed and the bill of lading so received is not a record of the terms on which the goods are shipped.

Where a shipper accepts what purports to be a bill of lading, under circumstances which would lead him to infer that it forms a record of the contract of shipment, he cannot usually, in the absence of fraud or mistake, escape from its binding operation merely upon the ground that he did not read it, but that conclusion does not follow where the document is given out of the usual course of business and seeks to vary terms of a prior mutual assent.

Taschereau J. dissented on the ground that the correspondence in the case did not contain the contract relied on and that the injury to the goods for which the action was brought took place while they were not under the control of the company.

APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment of the Divisional Court in favour of the plaintiff.

The action in this case was for damages by reason of the defendant company having allowed plaintiff's wheat, while being carried for plaintiff from Duluth,

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

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Minneapolis, to certain points in Ontario, to become mixed with other wheat of an inferior quality during the transit. The contract between the parties was made by correspondence, telegrams and letters, and after the wheat was delivered from an elevator into a steamer of the defendant company, and the steamer had sailed, a document called a bill of lading, though not signed by the master or any one for him, was handed by an agent of the company to the elevator company, who were agents of plaintiff under the contract. This bill of lading varied the original agreement for carriage by changing the rate of freight and providing that defendant company should only be liable as carriers over its own line, and for the rest of the transit should be merely forwarders of the wheat. It was afterwards sent to plaintiff who, without reading it, attached to it a draft which he had negotiated with a bank.

At the trial plaintiff obtained a verdict, which was sustained by the Divisional Court and the court of Appeal.

Osler Q.C. and *Lister* Q.C. for the appellants.

Laidlaw Q.C. and *Kappele* for the respondent.

The judgment of the majority of the court was delivered by :

KING J.—This is an action to recover damages for the non-delivery of a lot of wheat on a contract of carriage, and the principal questions raised are as to what was the contract, and whether the confusion with inferior wheat which took place was in the course of the carriage. Upon the first of these points, the question was whether there was a through contract from Duluth, in the State of Minnesota, to Montreal or points west, in the option of the shipper, or whether, as contended by the appellant, the contract was merely from Duluth

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to Sarnia. All the judges before whom the matter has come, with exception of Mr. Justice Burton, are of opinion that there was a through contract.

In October, 1891, the plaintiff, a dealer in wheat, residing at Brandon, Manitoba, was sending forward to the Ontario markets for sale a lot of wheat, and it was on its way to Duluth by the Northern Pacific Railroad. From there he proposed sending it by water to Sarnia (or Point Edward, the terminus of the Grand Trunk Railway there) for orders, and began a correspondence with defendants, a Canadian company, with head office at Sarnia, owning a line of freighting steamers running between Duluth and other grain ports on the west shore of Lake Superior, and Sarnia or Point Edward. The parties had had no previous dealings. The correspondence resulted in the shipment of the grain, and the contract is to be found in this correspondence, or in certain shipping papers, or in both together.

In *Hussey* v. *Horne Payne* (1) it was held that where a court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration. Accordingly in that case, although the first two letters of a correspondence seemed to constitute a complete contract, it was adjudged that upon the whole of what had passed in letters and conversation no concluded and complete contract had been established. We are therefore to consider everything separately and together and draw a conclusion upon the whole transaction.

On 20th October plaintiff telegraphed from Brandon to the agent of the company at Sarnia:

(1) 4 App. Cas. 311.

Quote freight from eight to ten thousand bushels wheat Duluth to Point Edward for orders. Shipment inside of three weeks.

So far this was a bare inquiry for a rate.

The defendants, who had an agreement with the Grand Trunk Railway Company relating to through rates, but which, so far as appears, was not known to plaintiff, replied the same day by telegraph:

Cannot quote local rate Sarnia for orders. Rate to Guelph and points west eight cents, east of Guelph to Montreal (not export) nine cents. Reply if accepted.

This is something more than an answer to an inquiry. It is a proposal of carriage to which plaintiff's assent is sought. Freight is the price of, or remuneration for, safe carriage and delivery, and the natural meaning of defendants' proposition is a proposal of carriage from Duluth to Guelph, and points west of it, for eight cents, and to east of Guelph, as far as Montreal, for nine cents, in the option of the shipper of course.

To this plaintiff replied on the same day:

Accept your offer for freight eight to ten thousand, writing.

The letter so referred to is not in evidence, but presumably it merely confirmed the telegram as in ordinary course.

Upon the next day defendants wrote:

Re your telegram yesterday regarding a shipment of eight to ten thousand bushels from Duluth within three weeks, I note your acceptance of our rates. We could bring this lot by the SS. U. Empire in Duluth about the 29th or 30th. We would prefer the amount to be ten thousand bushels. Please let us know if you would have it ready so that we can arrange definitely by that steamer * * *

On the 23rd they telegraphed:

Empire thirtieth might not have room your ten thousand wheat Duluth, would take Monarch about 4th November,

i.e. would take the wheat by Monarch about date named.

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To which plaintiff telegraphed on the 26th :

Fourth will suit. (Can you take another eight thousand fifteenth) ; will make both lots ten if possible.

On same day defendants replied by telegraph :

Your telegram to-day. Will keep space for ten thousand Monarch fourth (and for ten thousand Monarch about 14th. Rates for latter nine cents, Toronto west-east to Montreal ten cents, not export.) Cannot take eight thousand lots, see letter.

The letter was as follows :

Referring to your telegram to-day relative to wheat shipments, would say that we cannot take lots of eight thousand bushels. We must load our steamers, and can only do so by having the holds full. The spaces in Monarch are 10,000, 11,000, 10,000 12,000 and 6,000 bushels * * We will therefore expect you to make the lot via Monarch about 4th, 10,000 bushels. We could take 10,000 bushels in Monarch about 14th November, at nine cents per bushel to Toronto and west, and ten cents east of Toronto to Montreal, not for export. Please say if these will be satisfactory, so that we can book them definitely.

No further correspondence took place respecting the first shipment. I draw attention to defendants' attempted variation of the terms respecting the quantity of the first shipment, merely to say that the circumstance has not been treated by either party as having any bearing upon the questions in this case. In point of fact the shipment approximated closely to ten thousand bushels, falling short of that quantity by only about three hundred bushels.

Following upon this correspondence, the wheat was shipped at Duluth on board the Monarch on the 10th November, through the Lake Superior Elevator Company, who had the storage of it, and a document called a freight contract, signed by Hurdon, the Duluth agent of defendants, was afterwards handed to the elevator company, but the precise time when this was done does not appear. It was, however, dated on the 11th November, and the master states in his evidence that the vessel sailed from Duluth on the 10th November. This docu-

ment is in the body of it referred to as a bill of lading, but it is not signed by the master, or by any one as his agent, or on his behalf.

Another paper, dated 10th November, was handed by Hurdon to the purser of the ship. This is in form a bill of lading, but differs from the freight contract and is not signed at all.

Deferring for the present a consideration of these documents, let us consider separately the effect of that which (apart from the bare receipt of the goods) was, at the time of the commencement of the voyage, the only evidence of any agreement for carriage at all.

Upon the correspondence taken by itself is it doubtful that there was a contract for carriage? Suppose that plaintiff had failed to supply cargo, or that defendants had declined to receive it, is there any doubt that an action would have lain in the one case by the defendants, and in the other by plaintiff? Then, if a contract, is it doubtful that what was contemplated was the carriage (by *some* carrier at least) to a point to be designated by the shipper, not farther east than Montreal, at a certain single rate? Such contract, as being made in this country, and to be performed upon a British vessel and on Canadian railways, is to be governed by the law of this country, under which a carrier accepting goods directed to a destination beyond its ordinary terminus assumes, in the absence of stipulation to the contrary, an obligation to transport them to the ultimate and designated destination. In point of reason, an executory contract should be interpreted in light of such principle of law. *Primâ facie* all that is to be done on the one side is the consideration for all that is to be done on the other. Here there was an agreement for a single payment of freight covering the whole transit, and no suggestion of an understanding that, as to one part of the journey, there

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was to be a contract of carriage, and as to the rest of it an agreement to forward by connecting carriers upon contracts of carriage to be entered into with them by defendants as agents for the shipper. Such an agreement is often made, but it requires apt words to raise it.

It does not follow from this that, in addition to common law and statutory limitations, such usual exceptions from liability as might amount to usage in the particular trade might not attach to the contract as an implied term, or that it would not be subject to implications arising from a course of business between the parties, if there had been such.

We are, however, now to consider as a part of the transaction the so-called freight contract, or bill of lading, given by Hurdon to the Lake Superior Elevator Co.

This expressed that the goods had been received on board to be transported by Lake to Sarnia, Ont. (dangers of navigation, fire, explosion and collision excepted) to order Imperial Bank of Canada, Point Edward for orders, and (*inter alia*) contained the following clauses:

Cancelled by new bill of lading issued for cars as per back.

Rates from Duluth to Toronto and points west nine cents. East Toronto to Montreal, 100 lbs., ten cents per bushel.

To be transported by them and forwarding lines with which they connect until the said goods have reached the point named in this bill of lading, (*i.e.*, the point east of Sarnia to which the goods might be ordered.)

* * * * * * * *

It is further stipulated and agreed that in case of any loss, detriment or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage, and that the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

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The contract is executed and accomplished, and the liability of the company, limited as a common carrier thereunder, terminates, on the arrival of the goods or property at the station or depots of delivery (and the companies will be liable as warehousemen only thereafter), and unless removed by the consignee from the station or depots of delivery within twenty-four hours of their said arrival, they may be removed and stored by the company at the owner's expense and risk.

Notice.—In accepting this bill of lading the shipper or the agent of the property carried expressly accepts and agrees to all its stipulations, exceptions and conditions.

Upon this instrument the defendants would be carriers from Duluth to Sarnia, and forwarders beyond, their obligation being to carry to Sarnia and there deliver (if directed) to the connecting carrier upon a contract to be made by them as plaintiff's agent with such connecting carrier, but involving, beyond Sarnia, no obligation as carriers.

A bill of lading is ordinarily both a receipt and a contract. In certain cases it operates only as a receipt. Such is the case where there is a charter party. A charter party is a formal instrument containing usual terms of a contract of carriage, and where it exists it is not to be supposed that there is an intention to supersede it by the bill of lading. In some cases both are to be construed together.

But, where there is only an informal contract by correspondence, the formal bill of lading, when given, would ordinarily be treated as containing the concluded contract unless an intention to the contrary appears.

And if in the case before us the bill of lading had been regular it would be difficult to resist the conclusion that, upon the whole transaction, the completed and concluded contract was to be looked for in it. But the circumstances of this case interpose a difficulty.

In *Bostwick* v. *Baltimore and Ohio Railroad Co.* (1) the plaintiff had made a verbal contract to transport cotton

(1) 45 N.Y. 712.

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by "all rail" from Cincinnati to New York, at "all rail rates." Under this agreement he delivered the cotton at the company's depot and its transportation was immediately commenced. One or two days afterwards the company's agent sent to the plaintiff a bill of lading which, by its terms, reserved to the company the right to forward in part by water. When the cotton reached Baltimore it was shipped on steamer to New York, and a portion was lost on the passage. It was held that:

After the verbal agreement had been consummated and rights had accrued under it, the mere receipt of the bill of lading, inadvertently omitting to examine its printed conditions, was not sufficient to conclude the plaintiff from showing what the actual agreement was under which the goods had been shipped.

It is contended that the Lake Superior Elevator Co., being plaintiff's agent for shipment at Duluth, he was bound by the formal contract, on the terms of which alone the defendants consented to receive the goods. And this might indeed be so if the bill of lading had been a record of such terms; but a so-called bill of lading, or other like instrument, tendered after the vessel has sailed, is not such a record, and the shipping agent's authority is limited to what is usual, and he has ordinarily no authority to bind his principal by receipt of a bill of lading after the vessel has sailed.

It is clear that if, by the tender of a bill of lading before the sailing of the vessel, it appeared that the defendant had refused to carry except upon the terms of it, the plaintiff would be put to other remedies than that resorted to in this action. But in this case there is nothing to show that defendants, prior to the sailing of the vessel, signified any refusal to receive the goods and carry them according to the terms of the prior correspondence.

Next, as to the action of the plaintiff. It is clear that he expected that a bill of lading would be given,

and we find him writing, on the 14th, that it had not been received. It did not reach him until after the vessel reached Sarnia, and he says that when received he simply attached it to a draft negotiated with a bank at Brandon, without reading it. He was not cross-examined as to this, and the fact that the mistake in the terminal points and the higher rate of freight were not noticed appears to corroborate his evidence. It is further to be borne in mind that plaintiff was not aware of the irregularity attending the giving and receiving of the document. When a party to a transaction receives a customary document under circumstances which, by the ordinary usages of business would ordinarily lead him to infer that it forms a record of the contract, he cannot very well, in ordinary circumstances, escape from its binding operation (in the absence of fraud or mistake) merely upon the ground that he did not read it.

But the like conclusion does not follow where it is sought to vary terms of a prior mutual assent by a formal document given out of the usual course of business. In such case there is wanting the presumption that usually attends transactions in ordinary course of business, and the party against whom it is set up may prove want of actual assent. The proper conclusion then, upon the whole, is that the wheat was shipped upon the terms agreed upon in the correspondence that had taken place.

This conclusion is not affected by what took place respecting the change from Point Edward to Port Huron. The defendants were to carry to Point Edward for orders, and without plaintiff's consent they could not deviate from the specified route. So far as plaintiff is affected by it it was a mere substitution of one point for orders for another, and there was in it no taking delivery by him. Then, as to the action of

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Plewes & Co. in getting fresh shipping papers from the Grand Trunk Railway Co., the goods being subject to plaintiff's orders directions for their continued transit were necessary, and upon the theory of a through contract by defendants the Grand Trunk Railway Co. were defendants' agents for completing the transportation.

The action of Plewes was as consistent with a through contract as with that contained in defendants' freight contract, for under the latter all duty of defendants would not cease with the discharge of the goods at Point Edward, or Port Huron. They would still be bound, as forwarders, to deliver to the next connecting carrier, and to make, on plaintiff's behalf, a contract of carriage with such carrier. *Moore* v. *Harris* (1).

But it is by no means clear that defendants are not liable for the mixing of the wheat even upon the contract they rely upon. The goods were to be carried to Point Edward "for orders." These words import a further duty on defendants' part after the arrival at Sarnia, *i.e.* to hold the goods a reasonable time at Point Edward for orders, and upon receiving such orders to deliver them according to the stipulations of the freight contract to the connecting carrier upon a contract of carriage on plaintiff's behalf. The course of the grain business is to discharge into elevators in such case. The mere discharge did not necessarily effect delivery. The agreement in evidence between the defendants, the Railway Company and the Elevator Company, seems to treat the latter company as agents for the defendants and the railroad in the handling and storage of wheat in course of transportation by them as connecting lines. There is also evidence that Mr. Beatty, the manager of the defendant

(1) 45 L.J.P.C. 55.

company, interfered in the delivery of this cargo of grain. Mr. Johnston, the secretary treasurer of the Elevator Company, says that he was told by Mr. Beatty that if there was a shortage in any lot of wheat the order should be filled out of like grade of wheat from any other lot. This is not denied. As warehousemen defendants would not be responsible for the safety of the wheat, but they would be liable for want of care in delivery.

Next, as to the place where the mixing took place. It is clearly proved by several witnesses that the Elevator Company, at Port Huron, treated the plaintiff's wheat and the Crowe wheat as one lot.

Johnston, the witness already referred to, says that "for some cause between the purser and my foreman, it was considered as one grade of wheat, and it was so treated," and we know that the mischief was caused by the mixing of the "no grade" and "rejected" Crowe wheat with the high grade wheat belonging to plaintiff. The attempt to trace the mixing to the delivery from the Lake Superior Elevator Co. at Duluth, while receiving colour from one of the accounts in evidence, afforded at best a very partial and inadequate explanation of the proved facts and was rightly deemed to have failed by the learned judges who have very fully and conclusively dealt with the case.

It was further argued, as affecting the amount of the damages, that the wheat was not, in point of fact, Manitoba no. 2 hard.

But, apart entirely from the evidence as to Mr. Goldie's contract for a lot of this wheat, and assuming that he might have rejected it even in its original condition as not within his contract, there is evidence that a car load that had not appreciably suffered by the admixture of the Crowe wheat was sold to the Tavistock Milling Company at the like price of $1.03 and

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was accepted by them without objection. This corroborates the testimony of the government inspector and others that upon the market it was equal to no. 2 hard by reason of the bulk of it being such, and of the quantity of no. 3 hard in it being off-set by the presence of a quantity of no. 1 hard.

The result is that the appeal should be dismissed.

TASCHEREAU J.—I dissent. I would allow this appeal upon the grounds taken by Mr. Justice Burton in the Court of Appeal. There was no through contract between these parties. A mere quotation of rates cannot constitute one, and whatever mixing of this wheat happened took place when it was not under the appellant's control.

Appeal dismissed with costs.

Solicitors for the appellants: *Lister, Cowan & Mackenzie.*

Solicitors for the respondent: *Laidlaw, Kappele & Bicknell.*