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*Nov. 19, 20.
*Dec. 10.

THE NORTHERN GRAIN COMPANY }
(PLAINTIFF)

APPELLANT;

AND

THE GODERICH ELEVATOR AND }
TRANSIT CO. (DEFENDANT).....

RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Contract—Sale of goods—Bailement—Warehouseman—Storage of grain shipped to warehouse by lake vessel—Instructions from shippers to ship grain by rail to purchasers—Delivery to one purchaser without production of lake bills of lading—Failure of purchaser to pay for grain—Action against warehouseman to recover damage for loss.

The appellant, a grain merchant in Manitoba, shipped by a lake vessel 70,000 bushels of grain to the respondent, an elevator company in Ontario, for storage, and advised the respondent that the grain would be shipped out by rail from the elevator to various purchasers from the appellant. According to the documents produced in the case, it was agreed for the protection of all parties that the rail shipping bills were to be held as against the lake shipping bills and delivered to the purchaser only on delivery of or endorsement upon the lake bills and payment of the drafts attached. By letter of the 29th of May, 1923, the respondent company advised the appellant company that some 40,000 bushels of seed oats had been unloaded by the ss. *Martian* on the 24th and asked for advise as to where the rail bills were to be sent "for endorsement from the lake documents." The respondent company received no reply other than a letter of June 1 appraising it that the appellant company had carefully noted its request. In the meantime, on the day before May 31, the appellant company wrote to the respondent confirming "wire instructions * * * to accept orders from the P. Co., covering 10,000 feeds ex ss. *Martian* * * *," adding: "We are forwarding to them (The P. Co.) the lake shipping bills covering this quantity and trust that our instructions will be found entirely in order with you." Another lot of 10,000 bushels were sold in a similar way. These 20,000 bushels were shipped to the order of the P. Co., the railway shipping bills being forwarded by the respondent company to the local freight agent of the C.N.R. at Woodstock. The appellant company had forwarded the lake bills, with drafts attached, to its bank at Woodstock with instructions to hand over the bills on payment of the drafts, according to the usual course of business. The P. Co. obtained delivery of the 20,000 bushels without the production of the lake bills, but took up only one of the drafts, leaving the drafts for the residue of the two shipments, 15,000 bushels, unpaid. The appellant company, on learning the facts, immediately advised the respondent company that it would be held responsible. The P. Co. having become insolvent, this action was brought by the appellant company to recover from the respondent company the value of the grain. The appellant company contends that it was the owner of this grain, which the respondent company

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

held as its bailee and which, without authority from it, had been delivered to a person who had no title to receive it. The respondent company's defence is that the letter of May 31 was in effect a direction to ship to the P. Co. direct and to deliver the rail bills to the latter regardless of payment or of the whereabouts of the lake bills.

Held, that the respondent company was liable. The statement contained in the letter of 31st May that the appellant company was forwarding the shipping bill to its customer, should only be read as meaning that it was forwarding them in the ordinary course, through its bank or other agent, with the drafts for the price of the grain attached, and there is nothing in the letter justifying a departure from the understanding expressed in the respondent company's letter to the effect that the rail bills were to be held against the delivery or the endorsement of the lake bills.

Judgment of the Appellate Division (57 Ont. L.R. 1) reversed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment of the trial judge and dismissing the appellant's action.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

Pitblado K.C. and *Glyn Osler K.C.* for the appellant.

H. J. Scott K.C. for the respondent.

The judgment of the court was delivered by

DUFF J.—The appellant company, which carries on business as a grain dealer with its principal place of business at Winnipeg, in the spring of 1923 had a considerable quantity of grain in elevators at Port Arthur and Fort William.

In May of that year, arrangements were made with the respondent company, which had an elevator at Goderich, for the storing of this grain by them when arriving by vessel from the head of the lakes and for shipment of it from time to time to the appellant company's customers, in fulfilment of contracts already made or to be made. Among other contracts, the appellant had an arrangement with the Peerless Cereal Mills Limited, of Woodstock, for the sale to that concern of 60,000 bushels; and in May and June shipments were made from time to time, pursuant to this contract, which were duly paid for on delivery. On the 20th and 23rd of June, the appellant company gave authority to the respondent company to accept two several

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orders from the Peerless Company of 10,000 bushels each. These lots were shipped to the order of the Peerless Company, the railway shipping bills being forwarded by the respondent company to the local freight agent of the Canadian National Railways at Woodstock. The appellant company had forwarded the lake bills, with drafts attached (10 bills, representing 2,000 bushels each) to their bank at Woodstock, with instructions to hand over the bills on payment of the drafts, according to the usual course of business. The Peerless Company obtained delivery of both lots of grain, 20,000 bushels in all, without the production of the lake bills, but took up only one of the drafts, leaving the drafts for the residue of the two shipments, 15,000 bushels, unpaid. The appellant company, on learning the facts, immediately advised the respondent company that they would be held responsible. The Peerless Company having become insolvent, the action out of which this appeal arises was brought by the appellant company to recover from the respondent company the value of the grain.

The appellant company's case, in a word, is that they were the owners of this grain, which the respondent company held as their bailee and which without authority from them they delivered to a person who had no title to receive it. The respondent company's answer is, in effect, although the legal contention was advanced in a slightly different form, that they had the authority of the appellant company for making delivery to the Peerless Company.

The issue is an issue of fact, depending, however, upon documents supplemented by uncontradicted oral evidence.

The arrangements between the appellant company and the respondent company were all made by correspondence, and the letters outlining the procedure to be followed in shipping the grain from the Goderich elevator to the appellant company's customers are these:—

Winnipeg, Manitoba, May 4, 1923.

Goderich Elevator & Transit Company,
 Goderich, Ont.

Gentlemen,—We are pleased to advise you that some time during this month, probably the latter half, we will have shipped in your care 70,000 bushels no. 2 feed oats which will be for domestic distribution. We will be wanting to order this loaded out on track from time to time as our orders call for and will appreciate hearing from you just what the procedure is in this connection, so that we can handle ourselves satisfactorily with you and to give you the least trouble in the matter.

The above is our first shipment in your care, and when we get ourselves in line with what has to be done to facilitate the handling at your end, we will be guided accordingly and enabled to expedite the movement through your hands.

Appreciating your early advices and favours, we are,

Yours very truly,

The Northern Grain Co., Ltd.

P.S.—We will give you advices of forwarding as soon as the same is loaded at Fort William.

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To this letter the defendant sent the following answer:

Goderich, Ont., May 7, 1923.

Northern Grain Co.,
 Winnipeg.

Dear Sirs,—We have your favour of the 4th and note that you contemplate shipping some no. 2 feed oats in our care this month, for domestic distribution.

This will have our extreme care on arrival and in storing and shipping.

The usual method is to write or wire in your orders with complete information, backed up by shipping bills in triplicate over the road in which shipment is desired. The lake bills may be held by your bank or any eastern shipper to whom the rail bills can be sent for endorsement from, and attachment to draft on the purchaser. The usual method, however, is for us to send these rail bills to the nearest Division Freight Agent of the railway, in your territory; but we may say it is immaterial whether they go to the bank or the D.F.A. so long as all concerned are adequately protected. When the bills have been completed by shipment of the aggregate amount covered thereby, they are sent in (sic) to us for filing.

Insurance on grain stored is taken care of by the shipper and also the cancellations as shipments are made.

We are enclosing herewith one of our tariffs, which will give handling, storage and insurance rate, with general conditions covering the operation of our plant. We also enclose a mileage tariff which will prove convenient for your billing.

We shall be glad to serve you at any time, and we quite believe that a test shipment will serve to show you that we have exceptional facilities for handling domestic shipments via the Canadian National or Canadian Pacific Railways.

Yours faithfully,

Goderich Elevator & Transit Co., Ltd.

With this letter was sent a document professing to give the rules and regulations governing the Goderich Company's elevators. *Inter alia*, it contains the following rules:

9. Upon payment of all freight charges being made and in exchange for lake bills of lading properly endorsed, the company will issue warehouse receipts for grain received and weighed in to the company's elevators. No transfer of such receipts will be recognized by the company, nor will the grain so designated be delivered until the original warehouse receipt has been duly endorsed by the owners of the grain and surrendered to the company or its authorized agent.

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10. Elevation, storage, or other handling charges accruing to the company must be paid before securing delivery of the grain to the consignee.

* * * *

12. Owners or their agents when sending instructions for shipment of grain from the elevators must state name of vessel, with date of lake bill of lading, from which shipment is desired.

To these should be added a letter of the 11th of May, in these terms:

The Northern Grain Company, Ltd.,
 Winnipeg, Man., May 11, 1923.

Goderich Elevator and Transit Co.,
 Goderich, Ont.

Gentlemen,—We beg to acknowledge receipt of your favour of the 7th and appreciate the information you have so carefully conveyed to us in the same. This we have made careful note of and will govern ourselves accordingly.

We wish to thank you for the tariffs enclosed. The same will be made good use of by us.

As soon as our loadings go forward which we expect will be sometime the latter half of this month, we will give you additional advices.

Yours very truly,

The Northern Grain Co., Ltd.,

Per (Sgd.) J. N. Sternberg.

JNS:W

Comment upon these documents is, perhaps, superfluous. They manifest in the clearest way the intention that whichever of the two alternative methods of procedure described in the respondent company's letter was to be pursued, the essential thing for the protection of all parties was that the rail shipping bills (in other words, the grain itself) were to be held as against the lake shipping bills, and delivered to the purchaser only on delivery of or endorsement upon the lake bills and payment of the drafts attached. In part, no doubt, the procedure is framed with a view to the protection of the warehouseman by affording formal evidence of delivery by him to the order of the holder of the lake bills, the owner of the grain, but also for the protection of the holder of the lake bills, who is to receive payment before the rail bills become available for the purchaser.

As already mentioned, the respondent company justifies delivery to the Peerless Company by alleging that this delivery was made pursuant to the express authority of the appellant company. The contention is based upon these facts: By letter of the 29th of May, the respondent company advised the appellant company that some 40,000 bushels of no. 2 seed oats had been unloaded by the *Martian* on the 24th, and concluded with this request:

If, perchance, you are making our shipments to individual purchases, you will please advise to whose order you wish the grain shipped, naming the party to advise, and advising where we shall send rail bills for endorsement from the lake documents.

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On the 1st of June, the appellant company wrote in reply a letter which contains this observation:

We note your additional advices in connection with the procedure to facilitate the loading and shipping ex the elevator, and this we will keep in front of us for our further guidance and attention.

In the meantime, on the day before, May 31, the appellant company had sent this letter to the respondent company:

The Northern Grain Company, Ltd.
 Winnipeg, Man., May 31, 1923.

Goderich Elevator and Transit Co.,
 Goderich, Ont.

Gentlemen,—We are pleased to confirm our wire instructions to you this morning to accept orders from the Peerless Cereal Mills of Woodstock, Ont., covering 10,000 no. 2 Feeds ex ss. *Martian*, unloaded into store for our account May 24. We are forwarding to them the lake shipping bills covering this quantity and trust that our instructions will be found entirely in order with you.

Please note that on ss. *Martian*, ex Fort William May 28, in care of your good selves at Goderich, contained in Hold no. 3, shipment for our account of 24, 427.12 of no. 2 feed oats had gone forward. These oats also are intended for domestic consumption and you will receive loading out instructions by wire in due course of time.

Thanking you for your careful and prompt attention to this shipment, we are,

Yours very truly,
 The Northern Grain Co., Ltd.,
 Per (Sgd.) J. N. Sternberg.

JNS:W

By the respondent company it is now said that this letter of May 31 was in effect a direction to ship to the Peerless Company direct, and to deliver the rail bills to them, regardless of payment or of the whereabouts of the lake bills. This authority, it is now stated, was acted upon, and the same course followed in relation to subsequent shipments, without objection, until the present dispute arose. It is undeniable that the letter of May 31 seems carelessly framed, and it is quite capable in itself of an interpretation involving the suggestion at least that the shipping bills will be in the hands of the Peerless Company as the appellant company's agents, an interpretation which may receive some additional support from the consideration that the letter of May 29, asking for advice as to where the rail bills were to be sent for endorsement on the lake docu-

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ments, received no reply other than the letter of June 1, apprising the respondent company that the appellant company had carefully noted its request.

There is, however, some danger of misinterpreting commercial correspondence of this kind when a lawyer's critical apparatus is applied to it. In order to understand such letters, it is essential that one should put oneself in the position of the parties, and it is at least very difficult to suppose—one is tempted to say it is incredible—that any person experienced in commerce could have conceived the idea, in the absence of something much more explicit than anything in this letter, especially in view of the earlier letters, that the appellant company were forwarding the documents of title to their customers direct, without protecting themselves in the usual way. The statement that the appellant company were forwarding the shipping bills to their customers would only be read as meaning that they were forwarding them in the ordinary course, through their bank or other agent, with the drafts for the price of the grain attached. In any case there is nothing in the letter, on the most critical analysis of it, justifying a departure from the understanding so clearly expressed in the respondent company's letter already quoted, to the effect that the rail bills were to be held against the delivery or the endorsement of the lake bills. The same observations apply to the subsequent letter of the 11th of June.

Moreover, it is undisputed that these letters were not construed by the respondent company as authorizing any delivery except upon production of the lake bills. Three communications are in evidence, written immediately upon notification to the respondent company of the default of the Peerless Co. The first is a telegram of the 14th of July, in these words:

Telegram

Rush

Woodstock, Ont., July 14, 1923.

Goderich Elevator & Transit Co.,

Goderich, Ont.

Peerless received delivery grapple prepuce with stenting cover lake shipping bills in bank here whipsaw seedsman here care J. N. Sternberg.

The Northern Grain Co., Ltd.

Translation:

Peerless received delivery 15,000 bushels no. 2 feed oats with drafts unpaid. Amount to cover lake shipping bills in bank here. We hold you responsible. Advise by wire here care J. N. Sternberg.

The other two are letters of the 18th and 20th of July respectively, and are as follows:

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Goderich Elevator & Transit Company Limited
Goderich, Ont., July 18, 1923.

Agent Grand Trunk Railway,
Woodstock, Ont.

Dear Sir,—We are advised by Mr. Sternberg, of the Northern Grain Co., Winnipeg, that notwithstanding we had billed certain shipments to Woodstock to "Order" of Peerless Cereal Co., for no. 2 feed oats ex *Martian*, and sent the rail bills to you for delivery to Peerless Cereal Co., in exchange for lake bills, or reduction therefrom, in the usual way, that you have delivered the oats to the Peerless people without cancellation of the lake documents.

Will you be good enough to advise us immediately the numbers of the cars which were delivered in this manner, obliging,

Yours faithfully,

The Goderich Elevator and Transit Co., Ltd.,
(Sgd.) G. L. Parsons, Manager.

GLP/P

Goderich Elevator & Transit Company Limited
Goderich, Ont., July 20, 1923.

Agent Canadian National Rys.,
Woodstock, Ont.

Dear Sir,—Your favour of the 19th. What we requested from you was the numbers of the cars which had been surrendered without presentation of lake documents to Peerless Cereal Mills. We understand from The Northern Grain Co. that of 20,000 bushels shipped from here, all on the same billing instructions, you took up lake bills for only 5,000 bushels, is this correct? and why did you not take up lake bills for the other 15,000 bushels?

For your information, we have been billing grain in many cases in this way for many years, and this is the first negligence reported to us. It should be known by any agent that anything billed to "Order" of anybody, requires the production of proper authority from the shipper, or his agent, before delivery is made; thus on ex-lake grain the corresponding lake bills of lading must be surrendered for cancellation, or reduction therefrom, as the quantity shipped may necessitate.

The shipper, Northern Grain Co., will insist upon payment of the goods, and we in handling the goods between vessel and cars here wish to have a proper record of the cars affected. Please inform us by return mail, obliging,

Yours faithfully,

Goderich Elevator and Transit Co., Ltd.,
G. L. Parsons, Manager.

GLP/P

In addition to these written communications, it was stated in evidence by Mr. Sternberg, who was called for the appellant company, that Mr. Parsons, the manager of the respondent company, some time later told him that the railway company were responsible; that with all the rail shipping bills, a document went forward to the rail-

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way company's agent, directing the surrender of the rail bills on exchange for lake bills or warehouse receipts. It is undeniable, in view of this evidence, that the officials of the respondent company were fully alive to their duty to retain the control of the Peerless Company's shipments until the proper lake bills had been surrendered or duly endorsed; and it seems equally undeniable that nothing in their correspondence with the appellant company led them to believe that the appellant company was relieving them from the performance of that duty.

The view taken in the Appellate Division appears to have been that the practice of requiring the production and delivery or the endorsement of the lake shipping documents in exchange for the rail bills is a practice devised solely for the protection and in the interests of the warehouseman. With great respect, that seems hardly consistent with the letter of the respondent company, in which it is clearly implied that the procedure outlined is for the protection of all parties. The appellant company was invited by the respondent company to rely upon the observance of this procedure for the protection of its own interest as well as those of the respondent company. It is indisputable that the appellant company did act upon this invitation.

The appeal should be allowed, with costs here and in the Appellate Division, and the judgment of Riddell J. restored.

Appeal allowed with costs.

Solicitors for the appellant: *Blake, Lash, Anglin & Cassels.*

Solicitors for the respondent: *Millar, Ferguson & Hunter.*
