1951
*May 9, 10, 11
*Oct. 12

PATERSON STEAMSHIPS LTD. (DEFENDANT) .... APPELLANT;

AND

ALUMINUM CO. OF CANADA LTD. (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Shipping—Ship time-chartered—Whether owner of ship lost at sea liable for cargo—Bill of lading—Consignee of goods—Whether lien de droit between owner of ship and owner of goods—Bills of Lading Act, R.S.C. 1927, c. 17, s. 2.

The appellant company, a ship owner and operator, granted a time charter of the SS. *Hamildoc* to Saguenay Terminals Limited. Demarara Bauxite Company Limited shipped a cargo of bauxite upon the vessel from a port in British Guiana for delivery to a port in Trinidad, for reforwarding to the plaintiff at Arvida, P.Q. The bill of lading was signed by an agent of Saguenay Terminals Ltd. at Georgetown on behalf of the master. The cargo was lost at sea, owing to the unseaworthiness of the vessel, and the holder of the bill of lading claiming as the owner and consignee of the goods sought to recover its value from the appellant. The appellant contended that it was not bound by the contract evidenced by the bill of lading and that there was no privity of contract as between the parties. The action was maintained by the Superior Court and by the Court of Appeal for Quebec.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Estey, Locke, Cartwright and Fauteux JJ.

Held, dismissing the appeal, that the charter party was not a demise of the ship and the appellant was the carrier of the goods; the respondent as the owner and consignee of the goods was entitled to sue upon the bill of lading.

Wehner v. *Dene Steam Shipping Co.* [1905] 2 K.B. 92 and Carver, 9th Edition, p. 250 referred to.

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), maintaining the action of the consignee of a cargo against the owner of a ship lost at sea.

C. R. McKenzie K.C. for the appellant.

R. C. Holden K.C. for the respondent.

The judgment of the Chief Justice and of Rand and Fauteux JJ. was delivered by

RAND J.:—This action was brought by the owner of goods against the owner of the ship *Hamildoc* for the loss of the goods through the unseaworthiness of the vessel. This ground of liability, although strongly resisted in the courts below, was abandoned before us; and the only question now in the appeal is one of parties: whether the appellant is liable directly to the respondent for the loss.

The contention that that is not so arises from the fact that the vessel was under a time charter party to the Saguenay Terminals Limited of Montreal. The charter was executed at Montreal on September 16, 1941 and by its terms the use of the vessel was to be enjoyed by the charterers for "about" six months. The special purpose in mind, although the charter was not limited to it, was to carry bauxite from South American points to Trinidad for furtherance to Canadian and United States points.

The usual provisions of such a charter were stipulated. The owner was to be paid a specified sum monthly; the captain was to prosecute the voyages with despatch: although appointed by the owner, he was to be under the orders and direction of the charterers as regards employment and agency; and the latter were to load, stow and trim the cargo at their expense under the supervision of the captain who was to sign bills of lading for cargo as presented in conformity with notes or tally clerk's receipts.

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The owner was to pay for all provisions and the wages of captain and crew; and maintain the vessel in her class and efficiency. By clause 26 nothing in the charter was to be construed as a demise of the vessel and the owner was to remain responsible for the navigation of the vessel, insurance, crew and all other matters, the same as when trading for its own account.

Under such a charter, and in the absence of an undertaking on the part of the charterer, the owner remains the carrier for the shipper, and in issuing bills of lading the captain acts as his agent. In this case, the bill of lading was signed for the captain by the agents appointed by the charterers certainly for themselves and probably for the vessel also and that fact raises the first of the only two points deserving consideration.

It is, I think, too late in the day to call in question the relation of the time charterer or his or the ship's agent towards cargo. The charterer has purchased the benefit of the carrying space of the ship; he is the only person interested in furnishing cargo; and the captain is bound to sign the bills of lading as presented, assuming them not to be in conflict with the terms of the charter party. The practical necessities involved in that situation were long ago appreciated by the courts and the authority of the charterer to sign for the captain confirmed.

For the purpose of committing cargo to carriage, the captain, the charterer and the ship's agent are all agents of the owner, acting in the name of the captain; and where the charterer has the authority, as here, to sign for the captain, that he may appoint and act by an agent would seem to me to be unquestionable. To hold him to a personal performance would, under modern conditions of traffic, be an intolerable restriction.

In *Wehner* v. *Dene* (1), the bill of lading was signed by the captain but the question was, on whose behalf, the owner's or charterer's, and Channel J. held it to be the former.

In *Kuntsford* v. *Filmanns* (2), both the Court of Appeal and the House of Lords affirmed the holding of Channel J., that under the clause obligating the captain to sign bills of

(1) [1905] 2 K.B. 92. (2) [1908] A.C. 406.

lading as presented, the charterer could sign for him as representing the owner. It was pointed out that the question of the person undertaking the carriage of the goods for the shipper was one of fact: but that in the normal practice under a time charter, that undertaking was by the captain for the owner. The same view was taken by the Court of Appeal in *Limerick* v. *Coker* (1). Here, the charterers had their own steamship line and used one of their own bill of lading forms; but they had signed them on behalf of the captain.

In *Urleston* v. *Weir* (2), the charterers had signed the bills of lading and contended that they were the parties to the contract; but the court held against them. A similar ruling was made in SS. *Iristo, Middleton* v. *Ocean Dom. S.S. Co.* (3). In *Baumwall* v. *Furness* (4), the remarks of Lord Herschell at pp. 17 and 18 are to the same effect.

Finally, in *Larrinaja* v. *The King* (5), Lord Wright, at pp. 254-5, deals with the words "employment and agency" which appear in the present charterparty, and which he treats as referring to the ship: "'Employment' means employment of the ship to carry out the purposes for which the charterers wish to use her"; "'Agency' deals with another aspect of the ship's affairs. The shipowner is entitled in the ordinary course to decide to what firm or person in each port the ship in the course of the charterparty is to be consigned as agent. The selection is here left to the charterers. This is an important matter, because of the multifarious duties and responsibilities which may fall to be discharged according to the mercantile law by the ship's agents."

That Sproston's Limited were authorized by the charterers to act as they did in signing the bills of lading is not seriously to be questioned. The argument against their authority is really that neither the owner nor the captain had anything to do with their appointment; but that contention overlooks the point that the owner has authorized the charterers to sign and that they in turn can do so by agents.

(1) (1916) 33 T.L.R. 103.
(2) (1925) 22 D.L.R. 521.
(3) [1941] A.M.C. 1744.
(4) [1893] A.C. 8.
(5) [1945] A.C. 246.

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The remaining question is whether the respondent is a consignee named in the bill of lading. That document acknowledges the shipment by Demerara Bauxite Company Ltd. on board the *Hamildoc* of the cargo "to be delivered in like order and condition at the port of Chaguaramas, Trinidad, B.W.I. or so near thereto as she may safely get, always afloat, unto For re-forwarding to Aluminum Co. of Canada, Arvida, P.Q., Canada, (or to his or their assigns) on payment of freight and charges thereon in cash without deduction, credit or discount, unless prepaid." The form used was printed and the space for the name of the consignee was filled out in typewriting. From such language I cannot see how any doubt can arise that the Aluminum Company is the named consignee. Transshipment was involved and as the ship undertook only to deliver at the first port, the necessary implication is that the acceptance and forwarding there would be made by some person with responsibility for seeing that the transit was continued to Arvida. The Aluminum Company is named as the ultimate consignee, and it is impliedly so at the intermediate port. In the absence of any contrary indication, the ultimate consignee is the consignee at every stage of the transit; each section of the carriage is directed towards furthering the goods to him; and the intermediate agencies are his, serving the same end and purpose.

The respondent is therefore the named consignee; and that title to the bauxite passed to it on the consignment is equally clear. It is mere trifling with the facts to suggest anything else. "Consigning" goods is delivering them to a carrier who accepts them as initiating his obligation to carry and deliver. The bill of lading is to evidence the terms of the undertaking and to operate as a document of title. Whether it is issued five seconds or five hours after the last pound has been stowed is immaterial; in either case it takes effect as from the moment of the commencement of the duty of the carrier as such. The title passes to the purchaser when the goods have been committed to the vessel for the journey; that is, it has passed on the "consignment" and the requirement of the Bills of Lading Act has been satisfied.

The appeal must therefore be dismissed with costs.

The judgment of Taschereau and Locke JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of King's Bench for Quebec (Appeal Side) (1), dismissing an appeal by the present appellant from a judgment delivered in the Superior Court by Salvas J., whereby the appellant was found liable to the respondent for the value of a cargo lost in the sinking of the *SS. Hamildoc* off the coast of Venezuela in January, 1943.

The respondent's claim as pleaded is that by a bill of lading dated at Georgetown, British Guiana, on December 22, 1942, the appellant acknowledged that there had been shipped in apparent good order and condition on board the *SS. Hamildoc* by Demerara Bauxite Company Limited 3,033 long tons of Demerara Bauxite for carriage to and delivery at the Port of Chaguaramas, Trinidad, for reforwarding to the plaintiff at Arvida, P.Q.: that the plaintiff was the holder of the bill of lading and at all material times the owner and consignee of the goods and that: "in breach of the contract evidenced by the said bill of lading and/or of its duty in the premises implied by law the defendant failed to carry the said goods safely to the said Port of Chaguaramas or to deliver them there in good order or at all."

By the statement of defence, among other matters to be hereinafter referred to, the appellant pleaded that the loss of the *Hamildoc* was due to perils, dangers and accidents of the sea and that the defendant was not liable under the terms of the bill of lading. By way of answer the respondent alleged that the loss arose from the fact that the ship was unseaworthy at the time the voyage was undertaken. Upon this issue the learned trial judge found that the loss of the cargo was due to the unseaworthiness of the vessel and, further, that the appellant had failed to prove that it had exercised due diligence to make her seaworthy before her last voyage, and these findings were upheld on appeal. There being concurrent findings on this question of fact the question was not argued before us.

In so far as they are relevant to the other questions to be decided upon this appeal, the facts are as follows: the appellant company is a ship owner and operator, and

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by a charterparty dated September 16, 1941, chartered the *Hamildoc* to Saguenay Terminals Limited for a term of six months, with an option to continue the charter for a further period. The instrument was a time charter and not a demise of the vessel and provided, *inter alia,* that the owners should have a lien upon all cargoes and all sub-freights for any amounts due under the charter, including general average contributions. By clause 8 it was provided:

That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the owners), shall be under the orders and directions of the charterers as regards employment and agency; and charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain, who is to sign bills of lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts.

It was further stipulated that all bills of lading should include a Both-to-Blame Collision Clause which would impose certain obligations towards the ship owner upon the owner of cargo carried, in the event of collision with another ship as the result of negligent navigation of both ships, and an Amended Jason Clause imposing liability in certain circumstances on the cargo owner to contribute with the ship owner in general average. At the time the shipment in question was made in British Guiana, the *Hamildoc* was being operated under the terms of this charter by Saguenay Terminals Limited, a subsidiary of the respondent company.

The lost shipment was part of a large quantity of bauxite purchased by the respondent company from Demerara Bauxite Company Limited, (a company organized in the Colony of British Guiana) by a contract dated May 1, 1942. By the terms of that agreement, wherein the vendor was referred to as Demerara and the purchaser Alcan, the respondent agreed to purchase its requirements of bauxite for the balance of the year 1942 on defined conditions, including the following:

Demerara shall deliver the bauxite, trimmed in ship's hold, at Mackenzie, B.G. Transportation of the herein described bauxite shall be effected by Alcan, who will however retain Saguenay Terminals Ltd. as "Forwarding Agents". All ocean freight, marine insurance, and other charges related to transportation of the bauxite after it is delivered, trimmed in ship's hold, at Mackenzie, British Guiana, shall be borne by Alcan.

The cargo in question was delivered by the Demerara Company on board the *Hamildoc* at Mackenzie. The bill of lading issued was upon a form bearing the heading "Saguenay Terminals Limited" and the name of the respondent company did not appear. It acknowledged, as alleged in the declaration, the receipt of the shipment, the place of its destination and in the blank space left for the insertion of the name of the consignee there appeared the words:

For reforwarding to Aluminum Company of Canada, Arvida, P.Q. Canada (or to his or their assigns).

As stipulated in the charterparty the bill of lading contained, *inter alia,* the Both-to-Blame Collision Clause and the Amended Jason Clause. A further term provided that:

It is hereby understood and agreed that if Saguenay Terminals Limited are not the owners of the vessel named herein, the shippers, consignees and other persons interested in the goods landed hereby will make and enforce all claims arising under this contract of purchase, whether or not based upon a breach of warranty or seaworthiness, solely against the vessel named herein and/or her owners.

In the clause reserved for the signature the following appeared:

In witness whereof, the Master, or agent on behalf of the Master of the said vessel has affirmed to 2 Bills of Lading, all of this tenor and date, one of which accomplished, the others stand void.

Sprostons Limited
Bruce Brebner,
Master, or Agents.

By its statement of defence the appellant alleged, *inter alia,* that the bill of lading "was not issued by, nor is it a contract to which the defendant is a party" (para. 5), and again:

That there is no lien de droit between the Plaintiff and Defendant and the Plaintiff is an entire stranger to any and all rights in, to and under the said time charter.

(para. 6).

It was not suggested by the respondent that it was a party to or claimed any rights under the charterparty, its claim being as shown by the complaint founded upon the contract evidenced by the bill of lading and of the "duty in the premises implied by law", which latter phrase was apparently intended as a claim in tort for injury occasioned to the respondent's goods by the carrier's negligence. While denying that there was any contract between itself and

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the cargo owners, the appellant had, in answer to the claim that the loss was occasioned by the ship being unseaworthy, pleaded that the bill of lading was to be construed in accordance with the provisions of the Carriage of Goods by Sea Act of British Guiana and that the appellant had exercised due diligence to make the ship in all respects seaworthy, and further that the loss had been occasioned by perils of the sea, an exception to the owner's liability provided by that statute. These pleas were raised in the alternative and, as has been stated, failed.

As to the liability of the appellant upon the contract evidenced by the bill of lading: the charterparty was a time charter and not a demise of the vessel and provided, *inter alia,* that the owner was to remain responsible for the navigation of the vessel as when trading for its own account. The Both-to-Blame Collision Clause, which it was stipulated should be included in any bill of lading issued, provided that:

> If the ship owner shall have exercised due diligence to make the ship seaworthy and properly manned, equipped and supplied, it is hereby agreed that in the event of the ship coming into collision with another ship as a result of the negligent navigation of both ships, the owners of the cargo carried under this bill of lading.

would indemnify the ship owner in a certain manner, recognizing, in my opinion, the obligation of the owner towards cargo owners for the seaworthiness and proper manning and equipment of the ship. The provision that this clause and the Amended Jason Clause should be included in the bills of lading shows that it was contemplated that there should be a contractual relationship established as between the ship and the cargo owners under the contracts of carriage to be issued. The terms of the charterparty, that cargoes would be taken on or discharged at any place as the charterers or their agents might direct and that the Captain should sign bills of lading for cargo as presented, make it clear that it was intended that the charterers would prepare and issue the bills of lading.

While the charterer was thus empowered to decide on the manner of the employment of the ship and to appoint agents for the ship at points of call, possession of the vessel remained in the appellant through the Captain. The

rule applicable is stated by Channell J. in *Wehner* v. *Dene Steam Shipping Company* (1), as being that in ordinary cases, where the charterparty does not amount to a demise of the ship and possession remains with the owner, the contract is made not with the charterer but with the owner. In Carver, 9th Ed. p. 250, the following passage appears:

> It would seem then that the ship owner is a party to the bill of lading contract; and, that being so, he must be entitled on his side to treat the contract of the shipper as made with himself as principal and to sue for breaches of it. This is, in fact, recognized by allowing him to make claims under the bills of lading against consignees; for example, for demurrage and for freight, even though the bills of lading refer to a charter party. In effect, then, the contract is in general with the ship owner; and the master should be regarded as having made it on his behalf and not on behalf of the charterer.

This appears to me to be an accurate statement of the law relating to a charterparty such as this.

As to the signature upon the present bill of lading, apart from any question as to whether by virtue of the terms of clause 8, Sprostons Limited as the agents designated by the respondent were not authorized to sign on behalf of the master, a practice was established that this should be done if the evidence of the witness Farrar, the Traffic Superintendent of Sprostons Limited, is to be accepted. McEwen, the manager of the appellant company, gave evidence that the *Hamildoc* was but one of sixteen ships owned by the appellant which were chartered to Saguenay Terminals Limited, for use in what was called the shuttle trade between British Guiana and Trinidad and other ports to which bauxite was consigned. The bauxite was loaded at Mackenzie and the information required for the preparation of the shipping documents was cabled from that place to Sprostons at Georgetown. According to this witness, Sprostons Limited signed the bills of lading for the masters of the ships of the appellant from the time they started carrying bauxite towards the end of 1941 until they ceased to do so at the end of 1943 or early in 1944. When a particular vessel carrying this cargo arrived at Georgetown from Mackenzie, one of the clerks from Sprostons Shipping Department would go aboard the vessel, taking with him the bill of lading theretofore prepared, and after checking this with the particulars shown on the dead weight survey and loading scale, which

(1) [1905] 2 K.B. 92 at 98.

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he would receive from the captain, he would hand the latter a copy of the bill of lading, the manifest, the dead weight survey and the ship's loading scale. This was done throughout this period without objection. According to Farrar, S. W. McElroy, a superintendent of the appellant who was in Georgetown as the representative of the appellant, was aware of this practice. McElroy, however, denied this and McEwen also said that he was unaware that the bills of lading were being signed in this manner. Both of these witnesses in fact said that the Naval Control Headquarters at Georgetown enforced secrecy in regard to shipments from that port and forbade the issue of bills of lading. The learned trial judge made no finding upon the question of credibility as betwen these witnesses but found that, under the terms of the charterparty, Sprostons Limited were lawfully fulfilling an obligation imposed upon the master in signing the bills of lading, and that the latter was binding upon the appellant and evidenced the contract of carriage between the parties. Bissonnette J. apparently considered that the evidence of Farrar had not been met by the contrary evidence tendered on behalf of the defendant, a conclusion with which I agree. Hyde J., considering that by virtue of the terms of the charterparty, Sprostons Limited as the agents appointed by the charterers were entitled to sign for the master and thus bind the appellant, did not deal with the question. While the two named officers of the appellant said that they were unaware that this was being done, this may merely indicate that they were not giving close attention to what was transpiring as the various vessels called at Georgetown over this period of years. Without any more assistance than is to be obtained from an examination of the evidence and the perusal of the reasons for judgment which have been given, I think Farrar's evidence on the point is to be accepted.

In my opinion, the appellant was the carrier of the goods under the terms of a contract evidenced by the bill of lading. The respondent was the holder of the bill of lading but, so far as appears from the evidence, that document was not endorsed to it by the shipper Demerara Bauxite Company Limited. Clearly, under the contract for the purchase of

bauxite between the Demerara Company and the respondent, title to the shipment of ore passed when delivery was made on the *Hamildoc* at Mackenzie. By reason of this fact the appellant contends that there is no right of action in the respondent in respect of these goods, in view of the decision of this Court in *The Insurance Company of North America* v. *Colonial Steamships Limited* (1). That decision involved the interpretation of section 2 of the *Bills of Lading Act*. c. 17, R.S.C. 1927, which reads as follows:

> Every consignee of goods named in the bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such consignment or endorsement shall have and be vested with all such rights of actions and be subject to all such liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

No evidence was given as to the law of British Guiana where the contract of carriage was made, so that it must be assumed that it is the same as in the Province of Quebec. The decision in the *Colonial Steamships Case* followed the decision of the House of Lords in *Sewell* v. *Burdick* (2), and in each of these cases the claims advanced were by persons claiming as endorsees of the bill of lading. It appears unnecessary to consider the other facts which differentiate these decisions from the present matter, since here the respondent does not claim as endorsee of the contract but as the consignee named in the contract and as the owner of the goods. While the language of the bill of lading is in this respect unusual, I agree with Hyde J. that it should be interpreted as naming the respondent company as the consignee of the shipment and thus entitled to sue upon the contract. In the view I take of the matter, it is unnecessary to consider the claim based upon the appellant's negligence. The learned trial judge found that, even if the bill of lading was not binding upon the appellant, the action should succeed since, in the absence of proof to the contrary, it was to be assumed that the common law of British Guiana was to the same effect as Article 1675 of the *Civil Code* which, in declaring the liability of carriers, says that they are liable:

> for the loss and damage of things entrusted to them, unless they can prove that such loss or damage was caused by a fortuitous event or irresistible force or has arisen from a defect in the thing itself.

(1) [1942] S.C.R. 357.

(2) (1884) 10 A.C. 74.

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The learned judges of the Court of Appeal did not consider it necessary to deal with this aspect of the matter.

The appeal, in my opinion, fails and should be dismissed with costs.

ESTEY J.:—The respondent, Aluminum Company of Canada Limited, brings this action as consignee under a bill of lading dated Georgetown, British Guiana, December 22, 1942, claiming damages for the loss of a cargo of bauxite shipped on the steamship *Hamildoc* which, on January 1, 1943, foundered at sea while en route to its port of discharge, Chaguaramas, Trinidad, B.W.I. The entire cargo was lost. The *Hamildoc* was loaded at Mackenzie (70 miles up the Demerara River from Georgetown, British Guiana).

The Court of King's Bench, Appeal Side (1), for the Province of Quebec affirmed the learned trial judge's finding that the loss was due to the unseaworthy condition of the *Hamildoc* when it sailed on its final voyage. It was, upon the hearing of this appeal, not contended that this concurrent finding of fact should be set aside.

The main issues in this Court concern the validity of the bill of lading, the appellant contending that it was in no way a party thereto; that Sprostons Limited, in signing the bill of lading, was not its agent and was not requested by the master of the vessel or by any other person on its behalf to do so; that never, at any time prior to these proceedings, did it have any knowledge thereof and, moreover, even if Sprostons Limited did act as agent, that the respondent, as consignee therein, cannot recover by virtue of the provisions of sec. 2 of the *Bills of Lading Act* (R.S.C. 1927, c. 17); and finally that if the bill of lading was issued it was in contravention of the prohibition issued by the Naval Control authorities.

The respondent, a producer of aluminum, entered into a contract with the Demerara Bauxite Company Ltd. (hereinafter referred to as Demerara), at Mackenzie, British Guiana, on the 8th day of June, 1942, whereby it agreed to purchase from that company all its requirements of

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bauxite for the year 1942. The bauxite was to be shipped as ordered and para. 5 of this contract reads as follows:

> Demerara shall deliver the bauxite trimmed in ship's hold, at Mackenzie, B.G. Transportation of the herein described bauxite shall be effected by Alcan, who will however retain Saguenay Terminals Ltd. as "Forwarding Agents." All ocean freight, marine insurance, and other charges related to transportation of the bauxite after it is delivered, trimmed in ship's hold, at Mackenzie, British Guiana, shall be borne by Alcan.

The word "Demerara" in the foregoing paragraph refers to the Demerara Bauxite Company Ltd. and the word "Alcan" to the respondent.

The respondent entered into a verbal contract with the Saguenay Terminals Limited to transport the bauxite from Mackenzie to Trinidad and from Trinidad to Arvida, Quebec. Saguenay Terminals Limited had vessels of their own, but chartered others, including the *Hamildoc,* from the appellant. This charterparty is dated September 16, 1941. It is a time charterparty and cl. 8 thereof reads, in part, as follows:

> 8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts . . .

Moreover, cl. 26 provided:

> 26. Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The owners to remain responsible for the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account.

Not only is the issue of bills of lading provided for as in cl. 8, but a War Risks Clause, New Jason Clause, Both-to-Blame Collision Clause, U.S.A. Clause Paramount and Canadian Clause Paramount were incorporated in the charterparty. These provided that all bills of lading shall include the Both-to-Blame Collision Clause which provided that the owners of the cargo would, in certain circumstances, indemnify the shipowner; that the New Jason Clause should also be included in all bills of lading which, in certain circumstances, provided that the shippers, consignees or owners of the cargo "shall contribute with the

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shipowner in general average." The Clause Paramount provided that the bill of lading should have effect, subject to the *Water Carriage of Goods Act 1936* (S. of C. 1936, c. 49). The War Risks Clause was with respect to non-issue of bills of lading to blockaded ports, etc., and the liberty of the ship to comply with orders given by the government of the Nation under whose flag the vessel was sailing.

It is conceded that this was a time charterparty under which the captain and his crew, as servants of the owner, remain in charge of the ship which, therefore, remains in the possession of the owner while the charterers direct the use thereof.

The foregoing cl. 8 is a well-known provision in charter-parties and the sentence "The captain (although appointed by the owners), shall be under the orders and directions of the charterers as regards employment and agency; . . ." is similar to that construed by the House of Lords in *Larrinaga Steamship Company, Limited* v. *The King* (1), where, at p. 254, Lord Wright stated:

> "Employment" means employment of the ship to carry out the purposes for which the charterers wish to use her; "agency" deals with another aspect of the conduct of the ship's affairs. The shipowner is entitled in the ordinary course to decide to what firm or person in each port the ship in the course of the charterparty is to be consigned as agent. The selection is here left to the charterers. That is an important matter because of the multifarious duties and responsibilities which may fall to be discharged according to mercantile law by the ships' agents.

Under this cl. 8 the parties provided that the captain "is to sign bills of lading for cargo as presented, in conformity with mate's or tally clerk's receipts." It is not suggested throughout the record that the parties to the charterparty ever agreed to the deletion or the variation of this provision. Moreover, apart from the charterparty, the Carriage of Goods by Sea Act of British Guiana, which is the same as *The Water Carriage of Goods Act 1936* (S. of C. 1936, c. 49), expressly contemplates the issue of bills of lading.

The bill of lading covering this particular shipment contained the aforementioned War Risks Clause, New Jason

(1) [1945] A.C. 246.

Clause, Both-to-Blame Collison Clause and U.S.A. Clause Paramount and, in part, it read as follows:

> Shipped in apparent good order and condition by Demerara Bauxite Co. Ltd. on board the Steamship *Hamildoc* whereof R. P. Legendre is Master, now lying at the Port of Georgetown B.G. . . . 3,033 long tons (more or less) Demerara bauxite . . . to be delivered . . . at the Port of Chaguaramas, Trinidad B.W.I. . . . for reforwarding to Aluminum Co. of Canada, Arvida P.Q. Canada."

and is signed:

> IN WITNESS WHEREOF, the Master, or Agent on behalf of the Master of the said vessel . . .
>
> Dated at Georgetown this 22 Dec. 1942.
>
> Sprostons Limited
> Bruce Brebner,
> Master, or Agents.

While not signed by the master or captain personally, this bill of lading does purport to be signed by appellant's agents, Sprostons Limited.

The plant and dock superintendent of Demerara deposed that as the bauxite was loaded into the *Hamildoc* it was checked "either by the captain or one of his officers" and that seven copies of a document styled a "Dead Weight Survey," showing the tonnage of the bauxite on board, were prepared and signed by himself. Two of these were retained by the company at Mackenzie "and the remaining five copies were forwarded to Sprostons Limited in Georgetown in a closed envelope in care of the captain."

The traffic superintendent of Sprostons Limited deposed that Sprostons Limited was agent for Paterson Steamships Limited and that, as agents, it signed bills of lading for the Paterson steamships engaged in the same service as the *Hamildoc,* both before and after its sailing on December 22, 1942. He pointed out that when the *Hamildoc* was loaded at Mackenzie the information necessary for the preparation of the bill of lading was radioed to Sprostons Limited; that as agents for Demerara they prepared the bill of lading and when the ship docked at Georgetown an employee went aboard with the bill of lading and received "from the captain an envelope containing copies of Dead Weight Survey and Loading Scale, which envelope had been handed to the master on his departure from Mackenzie." He checked the figures in these documents with the bill of lading as it had been prepared and when his

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work was concluded he left a copy of the bill of lading with the captain and the original and a copy were forwarded to respondent. This practice, he stated, continued in respect of the vessels of Paterson Steamships Limited until they were taken off the service in 1943.

In November, 1941, the appellant had sent a representative to Georgetown "To generally supervise and see that the money and office work was done as far as the boats were concerned." This representative was present at Georgetown when the *Hamildoc* was there in December, 1942, and deposes that he did not see any bill of lading. So far as he knew the captain did not issue a bill of lading and, in reference to their practice: "We never issued any bills of lading for our boats on that shuttle service;" that Sprostons Limited did other work such as making repairs to the ship for the appellant. Their offices were across the street and ". . . we were all the time in contact" and "We had to work very, very closely together . . ." and, while he made the disbursements to Sprostons Limited, he says he never paid an agency fee. He says that the "Naval Control" "issued instructions that I was not to document the ships, and I never had any occasion to go and ask them to change that."

The captain also deposed that he did not have or receive a bill of lading, and other captains in the service deposed to the same effect.

The foregoing evidence of the plant and dock superintendent, as well as that of the traffic superintendent, is in accord with the terms of the charterparty and with what is the general practice among shippers, carriers and consignees. A bill of lading is not only evidence of the agreement between the shipper and the carrier, but through it the goods may be transferred. That so important a document should have been discarded and no substitute provided therefor in respect of shipments extending throughout so substantial a period of time is difficult to accept. Respondent, however, submits, as its justification, the orders of the Naval Control authorities. These orders, it was suggested, were similar to the Defence of Canada Regulations, but were not proved nor was our attention directed to any provision under which judicial notice might

be taken thereof. In order to succeed upon this basis, the respondent should have proved the orders in order that their effect might have been determined.

It follows that the finding of the trial judge, affirmed as it was by the Court of King's Bench, that the bill of lading was signed by Sprostons Limited, acting on behalf of the master, is supported by the evidence and ought not to be disturbed.

The appellant further contends that the respondent, as consignee, cannot succeed under this bill of lading because it is not a party to whom the property in the goods therein mentioned passed upon or by reason of such consignment within the meaning of sec. 2 of the *Bills of Lading Act* (R.S.C. 1927, c. 17, s. 2). Sec. 2 reads as follows:

2. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such consignment or endorsement, shall have and be vested with all such rights of action and be subject to all such liabilities in respect of such goods as if the contract contained in the bill of lading has been made with himself.

This section, originally sec. 1 of the *Bills of Lading Act 1889* (S. of C. 1889, c. 30), was enacted in order that the consignee might bring an action under the bill of lading in his own name, provided, of course, he otherwise came within the terms of the section. The precise contention of the appellant is that the respondent was the owner of the bauxite before the issue of the bill of lading, by virtue of the provision in cl. 5 of the Agreement for Sale under which Demerara was required to "deliver the bauxite, trimmed in ship's hold, at Mackenzie, B.G.," a place seventy miles up the Demerara River from Georgetown, and, therefore, the property in the bauxite did not pass to it "by reason of such consignment."

This cl. 5 is part of the Agreement for Sale and cl. 4 thereof reads:

4. Alcan shall order the said bauxite by means of one or more purchase orders issued to Demerara as soon as possible, and containing instructions concerning shipments, billing, and the various necessary documents.

These clauses 4 and 5 must be read together and the entire agreement must, I think, be read and construed in relation to the usual practice of the trade. This Agree-

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ment for Sale contemplated that orders would be given by the respondent and filled by Demerara by delivering the bauxite as aforesaid and following the instructions with respect to billing. The instructions contemplated in cl. 4 were given under date of May 26, 1942, and provided that Demerara would send one original ocean bill of lading to the respondent, Montreal, Quebec, and one non-negotiable copy of the ocean bill of lading to the Saguenay Terminals Limited at Montreal. It, therefore, would appear that the parties intended that the title should pass to the bauxite when "trimmed in ship's hold" and the shipping documents prepared in accordance with the instructions given. These instructions and the practice developed thereunder were followed throughout 1942. Sprostons Limited were agents for Demerara and the latter apparently followed the practice, as already outlined, of having the bill of lading prepared by its agents at Georgetown with the full knowledge and acquiescence of all parties concerned and, under these circumstances, it cannot be said that the title to the bauxite passed to the respondent until such time as the bill of lading was executed and mailed by Demerara, or its agents, addressed to the respondent. If the point were in issue, I should be prepared to hold that when so mailed and executed the bill of lading related back to, and became effective as of the time when the loading was completed. In *Delaurier* v. *Wyllie* (1), the purchasers (Delaurier & Company) agreed to buy from Stevenson & Company coal to be shipped as follows:

> . . . delivery by steamer of 800 to 1,000 tons, ready to load and sail second fortnight in May.

Stevenson & Company chartered a ship and named itself as consignee in the bill of lading, which it endorsed to Delaurier & Company. The ship with its cargo was lost and Delaurier & Company sued the ship owners (Wyllie and Others) on the bill of lading. Lord Shand, at p. 180, stated:

> In my opinion, the contract between Messrs. Stevenson & Company of Glasgow and the pursuers (Delaurier & Company) was fully executed and completed as soon as the coals were shipped on board of the vessel and the bill of lading was transmitted by Stevenson & Company to the pursuers.

(1) (1889) 17 Ct. Sess. 167.

The case of *Delaurier* v. *Wyllie supra* dealt not only with a shipment of coal, but also with one of iron, and while the property did pass in respect to the iron, the property did not pass by virtue of the endorsement of the bill of lading. There the shippers were instructed to, and did purchase the iron as agents for the endorsees of the bill of lading. When shipped, the bill of lading covering the iron showed the agents as consignees and they endorsed the bill of lading to their principals. In these circumstances Lord Shand stated at p. 184:

> It was taken in favour of the charterers, and must be regarded even in the pursuers' hands as being merely a receipt for the goods, because the indorsation by the charterer did not operate any transfer of the goods, as in the case of a purchaser for value, the goods being at shipment the property of the pursuers.

This case is also distinguishable from *The Insurance Company of North America* v. *Colonial Steamships Limited* (1), where an endorsement of the bill of lading was made for the purpose of presenting a claim to the insurance company and it was held that a subsequent endorsement to the insurance company which acquired the goods by reason of its obligations under its policy, certificate and attached endorsement did not bring the insurance company within the language of the aforesaid sec. 2 of the *Bills of Lading Act.*

The appellant's position is not improved because the *Hamildoc* would have unloaded the cargo at Chaguaramas instead of Arvida. It is true that there is no consignee specified at Chaguaramas, but what the bill of lading further contemplates is a re-forwarding from that port to the Aluminum Company of Canada at Arvida, Quebec. The practice of the parties in this shuttle service was sufficiently well established and followed to justify the conclusion that the Aluminum Company of Canada was the consignee at both points and that the goods would be dealt with at Chaguaramas either by that company or by an agent appointed to protect its interests there.

The respondent is, in the circumstances of this case, a consignee named in the bill of lading to whom the property passed by reason of such consignment and entitled to bring

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this action within the meaning of the foregoing sec. 2 of the *Bills of Lading Act*.

The appeal is dismissed with costs.

CARTWRIGHT J.—I agree that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Montgomery, McMichael, Common, Howard, Forsyth and Ker.*

Solicitors for the respondent: *Heward, Holden, Hutchison, Cliff, McMaster, Meighen and Hebert.*