CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS LIMITED (DEFENDANT). ..... APPELLANT;

AND

CANADA AND DOMINION SUGAR COMPANY LIMITED (PLAINTIFF).. RESPONDENT.

1944
*Nov. 7, 8
1945
*Feb. 6

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT

Shipping—Claim for damaged cargo—Estoppel—Cane sugar bags stored in old open wharf—In bad condition before loading—Bill of lading—Goods shipped "in apparent good order and condition"—Margin notation "Signed under guarantee to produce ship's clear receipt"—Whether shipowner prevented from proving bad conditions of goods—Proper stowage of cargo on ship—Examination on discovery—Transcription merely returned to trial court and deposited before judge—Should be disregarded before this Court.

The respondent company, by a written contract dated January 25th, 1938, purchased through brokers from B. & Co., who also acted as agents for the appellant company, 1,150 long tons of raw cane sugar, which were to be shipped to Montreal by the ship *Colborne* owned by the appellant company. The bags of cane sugar came from various plantations and were stowed in tiers on an old wooden public wharf in Georgetown, British Guiana. The wharf was built on piles and with large seams between the planks which in places were broken; the height of the wharf over the water at high tide was two to three feet at the cap of the wharf and within a few inches at the end of the foreshore; there was a corrugated iron roof, but otherwise it was an open wharf; the front end of the bags came to the edge of the roof, but were not otherwise protected. The bags had been on the wharf for from four to nine weeks when the *Colborne* proceeded to the wharf to load. The season of 1938 had been unusually wet, as a result of which and of the condition of the wharf about twenty-five per cent. of the bags were in bad condition, some being stained and some torn and re-sewn, when the loading begun on June 12th and was concluded late on the 13th or early in the morning of the 14th. The stained bags were stowed and scattered all over the four hatches. The ship was seaworthy in every respect, as the trial judge found. As the bags were loaded, a tally was kept by representatives of B. & Co., the shippers-sellers, and the results of the tally were noted on a sheet which was dated at the top June 10th and addressed to the *Colborne*. That document was endorsed, on June 13th, by the chief tally clerk: "Correct. Many bags stained, torn and re-sewn", that signature was followed by that of the chief officer of the ship and, at the very bottom, was stamped the signature of B. & Co. as agents for the appellant. A received for shipment bill of lading, dated June 13th, was issued by the appellant through its agents B. & Co., stating that the appellant had received "in apparent good order and condition "from B. & Co. for shipment 10,350 bags of cane sugar; and in

*PRESENT:—Rinfret C.J. and Kerwin, Taschereau, Kellock and Estey JJ.

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the margin appeared the stamped notation: "Signed under guarantee to produce ship's clean receipt." The *Colborne* arrived at Montreal on July 3rd, where, upon usual examination by the Deputy Port Warden and after chemical analysis, it was ascertained that the cargo was damaged and that one-third of the bags were badly stained. The respondent company then sued the appellant company for damages and based its claim on two grounds: first, that the appellant was estopped from relying upon the true facts by reason of its own statement in the bill of lading that the cargo was in apparent good order and condition when received for shipment; and, secondly, that in any event the cargo was improperly stowed in that wet bags were mixed with dry bags, which consequently damaged what otherwise would have been sound cargo. The appellant company contended that there was no unqualified statement in the bill of lading that the sugar was shipped in apparent good order and condition, upon which the respondent company could, or did, rely; and also contested the second ground of action raised by the respondent. The trial judge held that a clean bill of lading had been issued by the appellant at a time when the actual condition of the goods was known and that the appellant was estopped from setting up that the goods were not in good order and condition; he found the appellant company responsible for the damaged condition of the bags and directed a reference to determine the quantum of damages. The appellant company appealed to this Court.

Held that the shipowner, the appellant company, under the circumstances of this case, was not estopped as against the holder of the bill of lading, the respondent company, from proving that the bags were not in good condition when shipped. More specially, the effect of the stamped notation on the bill was that the bill contained a qualified statement as to the condition of the goods and the first element in estoppel was therefore lacking. But, even if the bill could be construed as containing an unqualified statement, the respondent never relied on it. *Silver* v. *Ocean Steamship Co.* ([1930] 1 K.B. 416) disc.

Held, also, that the cargo was properly stowed and that, in any event, even if the stowage was improper, the stained wet bags did not damage what otherwise would have been sound cargo.

An officer of the respondent company was examined on discovery on behalf of the appellant. A transcription of the examination was returned to the trial court and deposited on the judge's desk with other papers. The only use made of it was a reference to it by counsel for the appellant in a written argument after the closing of the evidence. Later, when settling the case for this Court, the trial judge, upon an application by the appellant, allowed the inclusion of the examination in the case.

Held that the examination on discovery should be disregarded by this Court.

Per The Chief Justice and Kerwin, Taschereau and Estey JJ.:—The mere fact of the transcription of such examination being returned to the trial court and deposited before the judge did not make it evidence. Under Rule 75 of the Rules in Admiralty, only such

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parts of an examination for discovery as are actually read at the trial become part of the record. Also, in an Admiralty case in the Exchequer Court of Canada, article 288 of the Quebec Code of Civil Procedure does not apply although the action was commenced and tried in that province.

Per Kellock J.:—The examination on discovery has not been put in at the trial; and, under the provisions of section 68 of the *Supreme Court Act*, there is nothing which authorizes a judge settling the case to include items which do not form part of the proceedings in the court below.

The appeal should be allowed and the respondent company's action dismissed.

APPEAL from the judgment of the Exchequer Court of Canada, Quebec Admiralty District, Cannon J., maintaining the respondent company's action for damages to cargo and ordering the usual reference, with the assistance of merchants, to establish the quantum of the respondent company's damages.

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

Lucien Beauregard K.C. for the appellant.

C. Russell McKenzie K.C. for the respondent.

The judgment of the Chief Justice and of Kerwin, Taschereau and Estey JJ. was delivered by

KERWIN J.:—This is an appeal by the defendant, Canadian National (West Indies) Steamships Limited, from a judgment of the District Judge in Admiralty for the Quebec Admiralty District of the Exchequer Court of Canada which declared that the respondent plaintiff, Canada and Dominion Sugar Company Limited, was entitled to damages, ordered an accounting with the assistance of merchants, and condemned the appellant to pay such damage with interests and costs. The respondent sues as the owner of a cargo of sugar and as the holder of a bill of lading issued by the appellant covering the cargo shipped on board the appellant's steamship *Colborne* at Georgetown, British Guiana, for carriage to Montreal.

By a written contract, dated January 25th, 1938, the respondent purchased through brokers from Booker Bros., McConnell & Co. Ltd., 1,150 long tons of Demerrara raw

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cane sugar to be shipped to Montreal by the SS. *Colborne*, or substitute boat, scheduled to sail on or about June 16th, 1938. Other terms requiring consideration will be referred to later. To fulfil its contract, Booker Bros., McConnell & Co. Ltd. secured bags of Demerrara raw cane sugar from various plantations. Some came by estate punts down the tidal Demerrara river, a distance of about eight miles, and others by estate sailing punts along the Atlantic coast, a distance of from twelve to one hundred and sixty miles. The bags were stowed in tiers on an old wooden public wharf in Georgetown known as Garnett's, built on piles and with large seams between the planks which in places were broken. The height of the wharf over the water at high tide was two to three feet at the cap of the wharf and within a few inches at the end of the foreshore. There was a corrugated iron roof but otherwise the wharf was an open one. The front ends of the bags came to the edge of the roof. The bags had been on the wharf for from four to nine weeks when, on the 12th June, 1938, the *Colborne* proceeded to the wharf to load.

The season of 1938 had been unusually wet in British Guiana as a result of which and of the condition of the wharf many of the bags (about twenty-five per cent. of the total, according to Leslie, the ship's mate) were in bad condition when the loading commenced. As the bags were loaded into the ship, a tally was kept by Hinckson, the Chief Tally Clerk of the shippers-sellers, and his assistants. The sellers were also the agents for the appellant. The results of the tally were noted on a sheet which is dated at the top June 10th, 1938, and addressed to SS. *Colborne:*—

Please receive on board the following packages, ex. Garnett Wharf.

Then follows the plantation marks with the number of bags from each plantation, and showing that 10,348 bags were destined for the respondent in Montreal. There were also 1,716 bags for another consignee and after the total of 12,064 appears the following:—

Correct. Many bags stained, torn and re-sewn.
J. Hinckson
Tally Clerk 13/6/38
a/c Booker Bros., McConnell & Co. Ltd.

A little further down, the mate of the ship signed as follows: "Leslie c/o".

At the very bottom of the document is stamped:—

Booker Bros., McConnell & Co. Ltd.
Agents, Canadian National Steamships.

Attention is drawn to the fact that the original of this sheet shows that it is dated the 13th of June and not the 12th, and this is confirmed by the evidence of Hinckson taken on commission. The master of the ship, referring to the ship's log or scrap log, testified at the trial that this was the last cargo loaded at Georgetown and that the ship left Garnett's Wharf at 4.26 a.m. on June 14th, 1938, to go to sea. From this I take it that the loading was continued until late on the 13th or early in the morning of the 14th of June.

A received for shipment bill of lading was issued by the appellant through its agents, Booker Bros., McConnell & Co. Ltd. The practice of shippers in Georgetown was to have received for shipment bills of lading ready to go by mail on the ship carrying the cargo, and where the ship, as in this case, sailed in the early morning hours, the mail at the post office would close about 5 p.m. on the previous day. The bill of lading in question bears date June 13th and while C. M. F. Bury, a merchants' attorney in the employ of Booker Bros., McConnell & Co. Ltd., testified in his evidence, taken on commission, that the sugar was on board before the bill of lading was issued, it appears to me, considering all the other admissible evidence in the record, that this cannot be so and that the appellant was correct in alleging in its statement of defence that the bill of lading was signed before the sugar was received on board the *Colborne*. In the view I take of the legal position of the parties, this is perhaps immaterial but I mention it because the trial judge stated that the present appellant staked its whole case on a well-recognized practice of the shipping trade in British Guiana under which a clean bill of lading is issued in order to expedite matters prior to loading of the goods and subject to the later issuance of a ship's receipt on which is noted the actual condition of the goods. The learned trial judge also states that the mate's receipt was issued and signed on the 12th of June, but, as has been shown above, the actual date was the 13th. He then finds that a clean bill of lading was issued on the 13th of

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June and after the actual conditions of the goods was known. In his factum, counsel for the appellant states that he did not, and does not, rely only on the one ground mentioned by the trial judge. As a matter of fact the factum assumes that the bill of lading was signed after the cargo had been received on board the *Colborne*. I have already indicated my reasons for considering that this did not occur but, however that may be, the appellant is entitled to succeed on other grounds.

The respondent bases its claim to succeed in its action on two grounds: (1) That the appellant was estopped to deny its own statement in the bill of lading that the cargo was in apparent good order and condition when received for shipment: (2) That the cargo was improperly stowed in that wet cargo was stowed with dry cargo, which consequently damaged what otherwise would have been sound cargo. I deal with these contentions in order.

The bill of lading states that the appellant had received in apparent good order and condition from Booker Bros., McConnell & Co. Ltd., for shipment in the steamship *Colborne,* 10,350 bags of Demerrara raw can sugar but in the margin appears the stamped notation: "Signed under guarantee to produce ship's clean receipt."

Clause 27 of the bill of lading reads as follows:—

> In cases where the clean Bills of Lading are signed, subject to Mate-receipt, the Consignee and/or Consignor to be bound by any notations and/or exceptions on such Mate's receipt, as though the notations and exceptions had been placed on the Bill of Lading itself, it being recognized that clean Bills of Lading have been surrendered before the exceptions (if any) were known, in order to facilitate the business of the shipper or other party directly interested in the goods.

The "Mate-receipt" is the same as the "ship's * * * receipt" mentioned in the marginal note.

The appellant contends that there was no unqualified statement in the bill of lading, that the sugar was shipped in apparent good order and condition, upon which the respondent could, or did, rely. The evidence of W. F. Rowell at the trial shows that when he took up the bill of lading and other documents in Montreal, on behalf of the respondent, he saw the notation stamped in the margin of the bill of lading. The effect of that notation is that there was no such statement contained in the document, and the first element in estoppel is therefore

lacking. In this aspect of the matter, clause 27 of the bill of lading may be disregarded whereas, in my view of the time at which the bill was signed, it serves to strengthen the same conclusion.

In this connection the respondent relies upon Rules 3 and 4 of Article 3 of the Rules scheduled to the Carriage of Goods by Sea Ordinance of British Guiana, which is admitted to be the same as the Canadian *Water Carriage of Goods Act, 1936,* and scheduled Rules. So far as material these read as follows:—

3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things,

* * * *

(*c*) the apparent order and condition of the goods.

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (*a*), (*b*), and (*c*).

There would appear to be no question but that the issuance of a received for shipment bill of lading complies with the Rules because by Rule 7 of Article 3, the carrier, master or agent of the carrier, shall, if the shipper so demands, issue to him a "shipped" bill of lading. If the bill of lading as actually issued did not comply with the Rules, the shipper was entitled to demand one that would. That, I think, is the only relevant effect of non-compliance with the Rules so far as a bill of lading is required to show the apparent order and condition of the goods, where the document is accepted by the shipper. I assume, without deciding, that the bill of lading in this case did not comply with the Rules in that respect. It is unnecessary to construe Rule 3 of Article 3 or to express any opinion as to the decision in *Silver* v. *Ocean Steamship Co.* (1), except that I agree that *prima facie,* Rule 4 of Article 3,

has not the effect of allowing the ship-owner to prove that goods which he has stated to be in apparent good order and condition on shipment were not really in apparent good order and condition as against people who accepted the bill of lading on the faith of the statement contained in it.

There was no statement that the goods were received in apparent good order and condition but, even if the bill of lading could be construed as containing such a statement, the respondent never relied on it. It is true that Mr.

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Rowell states he relied on it but it appears that the contract for the sale and purchase of the cargo is in a standard form generally used by the respondent, and, later in his evidence, Mr. Rowell testified that the respondent always chose to pay for cargo shipped in accordance with such a contract as sound, relying upon the policies of insurance taken out by the sellers and sent with the bill of lading and other documents. The contract here, as was usual, after providing for the price per pound, stated that it was on a basis of 96 per cent. average outturn polarization. Polarization was explained in the evidence as a test which is made in order to determine the amount of sugar present in raw sugar. The name apparently comes from the polariscope, the practical working of which is based upon the property of sucrose to rotate a ray of polarized light to the right, and the greater to the right the greater the concentration.

The agreement further provided that samples were to be drawn, at the time and place of discharge from ocean carrier, by the buyers and sellers, and that three tests were to be made of each sample, one by the sellers' chemist, one by the buyers' chemist, and one by the New York Sugar Trade Laboratory, the average of the two nearest tests to be taken as a final test. Settlement was to be made on the accepted average polarizations with an allowance of ·025c. per pound per degree above the selling basis up to 99, or ·05c. per pound per degree below the selling basis down to 94, and ·075c. per pound per degree below 94 per cent. down to 93 per cent.; fractions in proportion, but no sugar was to be delivered below 93 unless on discount terms mutually satisfactory to buyers and sellers. Polarization in excess of 99 was to be regarded as 99. Payment was to be made in Montreal in Canadian currency for 95 per cent. of provisional invoice amount on account on presentation of shipping documents in Montreal, and any balance to be paid after final settlement of weights and tests. Complete Canadian documents, in triplicate, were to accompany bills of lading. There was a marine insurance clause reading as follows:—

Marine Insurance from shore to shore, including risk of lighters at ports of loading and discharge, to be effected by Sellers on usual W.P.A. terms including Lloyd's Institute clauses, for invoice amount

plus 5 per cent.; any sum insured in excess to be for Seller's account and benefit. In the event of any low test being attributable to damage during the transit insured and directly caused by one of the perils insured against in the policy, Sellers to have full rights under the Marine Insurance policy to collect total depreciation in value for their own account, unless Buyers take such damaged sugar at full value of sound sugar. Any claim for loss in weight and/or return of premium is to be for Sellers' account.

It will be noticed that by this clause insurance was to be provided for both parties and that in the event of any low test being attributable to damage during the transit insured and directly caused by one of the perils insured against, the *sellers* were to have full rights under the policy to collect total depreciation in value for their own account *unless buyers take such damaged sugar at full value of sound sugar.* As I have already stated, the respondent, as buyer, always accepted cargoes as sound sugar. It is quite true that the bill of lading and other documents were produced before the ship arrived at Montreal and, and in accordance with the contract, 95 per cent. of the *pro forma* invoice was paid before the condition of the goods upon discharge could be known but it is perfectly clear that the respondent so acted because of its usual practice and because of its knowledge that there were always stained and wet bags in shipments of Demerrara raw cane sugar.

The trial judge made no finding as to the second claim advanced by the respondent, which is based upon Rule 2 of Article 3:—

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

In the early stages of the trial some confusion arose as to what was meant by the terms "wet", "stained", "dripping wet", but that was cleared up satisfactorily with the result that it appears that no dripping wet bags were allowed on the boat, and the ship's officers followed the usual practice in stowing wet and stained bags of cargo next to dry bags. If it were a bad practice, the mere fact that it had been long followed would not, of course, validate it but even Mr. Hayes, called in rebuttal by the respondent, admitted that there were stained bags of sugar in every cargo and that the usual practice was a

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proper one and that he did not know, in this case, the proportion of stained bags which were wet. It may be added that at the trial an attempt was made to show that the goods were damaged in transit by salt water but this attempt failed. It was shown that Demerrara raw cane sugar always contains a proportion of salt, and the preponderance of the expert evidence is that the proportions at the commencement and end of the voyage were the same. All precautions were taken and from the time the ship received the cargo, the latter was not touched by water. Mr. Jacobs, an expert called by the respondent, places the proportion of damaged sugar upon unloading at Montreal at about the same as Leslie when the bags were being put on board the ship. The proper finding is that the cargo was properly stowed and that, in any event, even if the stowage were improper, the stained wet bags did not damage what otherwise would have been sound cargo.

I desire to make it clear that I have disregarded the examination for discovery of Mr. Rowell. The mere fact that a transcription of this examination was returned to the Court and was deposited on the trial judge's desk with the other papers, did not make it evidence. Rule 75 of the General Rules and Orders Regulating the Practice and Procedure in Admiralty Cases in the Exchequer Court of Canada is as follows:—

> 75. Any party may, at the trial of an action or issue, use in evidence any part of the examination on discovery of the opposite party; but the Judge may look at the whole of the examination, and if he is of opinion that any other part is so connected with the part to be so used that the last mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence.

This means that only such parts of an examination for discovery as are actually read at the trial become part of the record. It is only then that counsel for the opposite party knows what is being offered as evidence and has an opportunity of suggesting that explanatory questions and answers be added. There is no basis for the suggestion that in an Admiralty case in the Exchequer Court of Canada, commenced and tried in Quebec, Article 288 of the Quebec Code of Civil Procedure applies so as to make an examination for discovery part of the record and evidence without any other formality.

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The appeal should be allowed and the action dismissed, with costs throughout.

KELLOCK J.:—This is an appeal by the defendant from a judgment of Cannon J., District Judge in Admiralty for the Quebec Admiralty District of the Exchequer Court of Canada, pronounced the 9th day of June, 1944 in favour of the plaintiff, in an action for damages in respect of certain sugar carried in one of the appellant's steamships from British Guiana to Montreal. The facts as found by the learned trial judge are, in part, as follows:

On the 25th of January, 1938, the respondent entered into a contract with Messrs. H. E. Hodgson and Company Limited, brokers, whereby these brokers sold to the respondent for the account of Messrs. Booker Bros., McConnell & Company Limited, of Demerara, British Guiana, eleven hundred and fifty tons of sugar to be shipped by the R.M.S. *Colborne,* propery of the defendant, for delivery in Montreal. The ship arrived at Demerara on the 11th of June, 1938, and on the following day proceeded to load the raw sugar in question from a wharf known as Garnett's wharf. Booker Bros., McConnell & Company Limited, the sellers of the sugar, were also acting as steamship's agents for R.M.S. *Colborne*. The bags of sugar cane came from various plantations; some had come by estate punts down the Demerara River; others had come by estate sailing punts along the Atlantic Coast, a distance of from 12 to 160 miles. Garnett's wharf is a wooden wharf built on piles; the wooden flooring is old, there are large seams between the planks which are broken in places. The height of the wharf over the water at high tide is perhaps from 2 to 3 feet at the cap of the wharf and within a few inches at the foreshore end. There is a corrugated iron roof, but otherwise it is an open wharf. The bags were stowed in tiers which would come to the edge of the roof. The front ends of the bags were not otherwise protected. These bags had been lying on the wharf for a period extending from four to nine weeks. All these facts were established by the witnesses who were heard upon rogatory commission. The season of 1938 had been unusually wet, and many of the bags were in bad condition when the loading began on the afternoon of June 12th and was concluded on June 13th. There were five tally clerks present at the loading, besides the ship's Officers. All these clerks and officers testified that a great number of the bags which were loaded were stained, some were torn and re-sewn. All the stained bags were stowed and scattered all over the four hatches as they came on board the ship. After the cargo was loaded, the hatch covers were put on, and three good tarpaulins were placed over the hatch covers, properly secured and made water tight. The ship was seaworthy in every respect. Before the cargo had been taken in the hold, it was examined and found dry and in good condition, and fit to receive cargo. The trip was uneventful, and good weather was enjoyed all through the voyage. The *Colborne* finally arrived in Montreal on the 3rd of July. The Deputy Port Warden made the usual examination of the hatches, noticed that there were signs of slight sweating. He found that there were stained bags throughout the stowage. Upon examination, and after chemical analysis, it was conclusively found that the cargo of sugar was damaged and one-third of the bags were badly stained.

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A document bearing date at the top June 10th, 1938 and known as a ship's receipt or mate's receipt was made out by Messrs. Booker Bros. as agents of the appellant. This document is in the form of a request directed to the ship to receive on board the sugar which is therein described, namely, 10,348 bags destined for the respondent and a number of other bags destined elsewhere. This document is endorsed

> Correct—Many bags stained, torn and re-sewn. Signed J. Hinckson 13.6.38 Tally Clerk.

Hinckson was the chief tally clerk in the employ of Booker Bros. His signature is followed by that of one Leslie, the Chief Officer of the ship. My brother Kerwin has pointed out that the printed appeal case erroneously shows "12.6.38" instead of "13.6.38". Hinckson, in his evidence, establishes that the 13th is the correct date, as an inspection of the original document itself shows. The appellant in its factum adopts this error as does the learned trial judge in his judgment.

On the 13th of June, Messrs. Booker Bros., McConnell and Company Limited issued a bill of lading, in which they acknowledged receipt for shipment of 10,350 bags of Demerara Royal Cane Sugar "in apparent good order and condition." This bill of lading they signed as agents for the appellant. The bill contains in its margin the following endorsement—"Signed under guarantee to produce ship's clean receipt". Among the printed conditions is the following:

> 27. In cases where the clean bills of lading are signed, subject to Mate-Receipt, the consignee and/or consignor to be bound by any notations and/or exceptions on such Mate-Receipt as though the notations and exceptions had been placed on the bill of lading itself, it being recognized that clean bills of lading have been surrendered before the exceptions (if any) were known, in order to facilitate the business of the shipper or other party directly interested in the goods.

The learned trial judge, on his view of the facts that the ship's receipt was dated prior to the bill of lading, held that the latter part of condition 27 rendered the condition inapplicable in the circumstances and came to the conclusion that the bill of lading was a "clean" bill, and the appellant was estopped from setting up that the goods were not in good order and condition when shipped. He accordingly held the appellant responsible for the dam-

aged character of the sugar on its arrival in Montreal. A reference was directed to determine the quantum of damage.

The respondent resists the appellant's attack upon the judgment on the grounds upon which it was decided, and also upon the further ground that, in any event, wet bags were stowed with dry bags by reason of which the latter were damaged.

I read the reasons of the learned trial judge as a finding that the damage of which the respondent complains was not due to anything which occurred during the voyage, but that it existed at the time the sugar was placed on board the ship. The question of stowage was not dealt with in the judgment below, and there is no finding as to how far, if at all, the method of loading caused further damage. In my opinion, the finding of the learned trial judge is amply supported by the evidence, which satisfies me that, insofar as the shipment of sugar had moisture in it at the time of its arrival at Montreal, that moisture had existed in the bags of sugar prior to shipment. All the evidence points to the accuracy of the evidence of Captain Murray, the Deputy Port Warden of the city of Montreal that, apart from evidence of slight sweat on the opening of the hatches, which did not "amount to any damage", no water had entered any of the holds at any time.

The respondent's contention then is that the appellant is estopped from relying upon the true facts, by reason of the statement with which the bill of lading begins, that the goods were received in apparent good order and condition. To quote from the judgment of Lord Russell of Killowen in *Nippon Menkwa Kabushiki Kaisha* v. *Dawson's Bank Limited* (1).

> Estoppel is not a cause of action. It may (if established) assist the plaintiff in enforcing a cause of action * * * by preventing a defendant from asserting the existence of some fact, the existence of which would destroy the cause of action. It is a rule of evidence which comes into operation if (*a*) a statement of the existence of a fact has been made by the defendant or an authorized agent of his to the plaintiff or someone on his behalf (*b*) with the intention that the plaintiff should act upon the faith of the statement and (*c*) the plaintiff does act upon the faith of the statement.

The bill of lading contained not only the opening words already mentioned but also condition 27 and the endorsement set out above. When the respondent inspected it at

(1) (1935) 51 LL. L.R. 147, at 150.

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Montreal before taking it up, it had no information as to whether or not the bill of lading had been issued before the ship or its agents were aware of the facts contained in the notation on the mate's receipt. I think anyone in the position of the respondent, inspecting the bill of lading without the information to which I have referred, would take from it by reason of the endorsement "Signed under guarantee to produce ship's clean receipt", that the bill of lading had been in fact issued before the ship's receipt. One of the most usual things ("notation" or "exception" in the language of the bill of lading) which one expects to find noted on a mate's receipt is the apparent condition of the goods if, in fact, anything out of the way should be noticeable in their condition. The respondent must take the whole of the bill of lading with the result that, while at the beginning it acknowledges the receipt for shipment of the sugar in apparent good order and condition, the endorsement indicates that the bill which is a "received for shipment" and not a "shipped" bill, was issued before the mate's receipt, and condition 27 makes the bill subject to whatever notations or exceptions may be upon the ship's receipt when produced. The respondent, therefore, when it inspected the bill on June 29th, was not in the position of having had made to it an unqualified statement as to the apparent order and condition of the goods.

Mr. McKenzie contended that the bill of lading in question was a "clean" bill of lading and that, therefore, the case was governed by the decision in *Silver* v. *Ocean Steamship Co. Ltd.* (1). In Scrutton, 14th ed. p. 181, the authors state with reference to the usual statement in a bill of lading, that the goods covered thereby are received in apparent good order and condition, that

> a mate's receipt or bill of lading which qualifies this admission is not a "clean receipt" or "clean bill of lading",

and they refer to *Armstrong* v. *Allan* (2) and *Restitution S.S. Co.* v. *Pirie* (3). In *Arrospe* v. *Barr* (4), the Lord President was of opinion that the words "clean bill of lading" had no settled meaning applicable to every conceivable case. He said

> it appears to me that a clean bill of lading must be construed with reference to the circumstances of each particular case. If there is a matter in dispute between parties as to the conditions on which the voyage

(1) [1930] 1 K.B. 416.
(2) (1892) 8 T.L.R. 613.
(3) (1889) 61 L.T.R. 330, at 333.
(4) (1881) 8 R. 602.

is to take place and the goods are to be carried and delivered, then a "clean" bill of lading will have reference to the subject of that dispute and the meaning of it will be that the master will not cumber his bill of lading with any allusion to it.

Lord Mure said

I am rather inclined to think, if we are forced to decide the general question, that a clean bill of lading must mean a bill in the ordinary uniform style recognized in all ports in this country, and without any special stipulations different from that ordinary style.

Lord Shand said,

if you have conditions referred to which can only be ascertained by reference to another document * * * then it appears to me that in the ordinary sense that would not be a clean bill of lading.

This is particularly applicable to the case at bar. It is quite true that condition 27 contemplates that a bill of lading endorsed as here is a "clean" bill. It is so, in the sense that it contains no express "exception". However, once the endorsement is made upon it, it does not contain any unqualified statement as to matters which may later be exceptions, and from that standpoint, the bill is not a clean bill.

In my opinion, it would not help the respondent if the fact be that the bill of lading was issued after the ship's receipt came into existence and after the apparent order and condition of the goods were known. If the respondent is to make out a case of estoppel, it must make it out on the basis of what was told to it by the bill of lading at the time it was inspected on the 29th of June, 1938 and taken up.

Mr. McKenzie further contended that the *Water Carriage of Goods Act of Canada (1936)* (which was agreed to be in terms the same as that of British Guiana) by Rule 3 (*c*) of Article III requires that the bill of lading which the carrier is thereby required to issue on demand of the shipper, shall show the apparent order and condition of the goods, and that therefore, the respondent was entitled to disregard the endorsement.

It may be noted at once that the bill of lading dealt with by rule 3 is one to be issued by the carrier on *demand* of the shipper: *Vita Food Products* v. *Unus Shipping Company* (1). The vendors of the sugar were Booker Bros., McConnell & Co. and they it was who signed the bill as

(1) (1839) 55 T.L.R. 402, at 484.

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agents of the carrier. All of this was apparent to the respondent from the contract of purchase of the sugar and the bill of lading. Booker Bros., as shippers, apparently did not see fit to demand from themselves as ship's agents the document to which as shippers they may have been entitled under the Act, i.e. one of which did show unqualifiedly the apparent order and condition of the goods. They were content with the document here in question. Ordinarily, a shipper insisting, would no doubt be entitled to obtain a bill of lading complying with the statute or be entitled to the return of his goods: *Peek* v. *Larsen* (1); *Jones* v. *Hough* (2). However that may be, I see nothing in the Act or the Rules which entitles the respondent to found a case of estoppel upon ignoring what was actually upon the face of the bill of lading when presented, even though it did not meet the statutory requirements.

Mr. McKenzie also argued that the endorsement could be ignored by the respondent as being restricted to an obligation between the shipper and the appellant merely, a breach of which would give rise to a right of action for damages as against the shipper but to no other right. I do not think that effect should be given this contention. Although the endorsement is not in the exact language of condition 27 in that the words "subject to" are not used, I think that, in the business community in which these documents are current, the endorsement would be understood as operating within the condition and I so hold.

For these reasons, I am of opinion that the respondent failed to establish the first requirement for an estoppel. The case *Silver* v. *Ocean Steamship Company Limited* (3) is quite distinguishable, as that case and other cases cited by the respondent are based upon the existence of an unqualified statement in the bill of lading.

There remains the second contention raised on behalf of the respondent, that the damage occurred during the voyage as the result of bad or faulty stowage, in respect of which the respondent alleges it is entitled to recover. The respondent relies upon the admission of the ship's master, Captain Hubley, to the effect that if wet bags were stowed next to dry bags, it was possible that these wet bags would damage the dry, and the further admission that

(1) (1871) L.R. 12 Eq. 378.
(2) (1879) L.R. 5 Ex. D. 115.
(3) [1930] 1 K.B. 416.

there were some wet bags in the cargo. Captain Hubley did not specify how many wet bags there were at the time of loading. The chief tally clerk, Hinckson, also admitted that stained bags in a wet condition would damage unstained bags, but he said that as far as he could remember, there were no bags shipped which were so wet as likely to stain other bags. It is significant that it was Hinckson who placed the notation on the mate's receipt as to the stained bags. This notation says nothing about wet bags. Leslie, the chief officer of the ship, whose duty it was to watch the loading of the cargo, said that if a wet bag were seen, it would be rejected, but there were no rejections in the case of this particular cargo. He admitted that he did not see all the bags. Captain Murray, the Deputy Port Warden, who examined the sugar on arrival, said there were bags which were badly stained, but these were not running or dripping and that their stowage with the other bags would, in his observation, not affect the dry bags, beyond sticking to the burlap of the dry bags or causing a slight stain. Henry, the third officer of the ship, testified that the condition of the bags when unloaded in Montreal was the same as when they were loaded. Evidence on behalf of the respondent was given by the witness Irons that there were wet bags on delivery, but the witness did not particularize. Jacobs, another witness for the respondent, gave evidence that he had examined certain samples of the shipment including bagging which he had received from Irons, and that the sugar was very wet and the bagging was soaking. According to him, this was due to sea water. According to the findings of fact of the learned trial judge, this, if accurate, could not have occurred during the voyage and the learned trial judge does not seem to have accepted the evidence of this witness to the full extent, as the finding of fact is that

> upon examination and after a chemical analysis, it was conclusively found that the cargo of sugar was damaged and one-third of the bags were badly *stained*.

All the witnesses, including the witness Hayes called on behalf of the respondent, agreed that in every cargo of sugar, there are stained bags and that it is the practice to stow stained bags with sound bags, as it would make the loading of vessels too costly if the stained bags had to be segregated. Hayes did not approve of the stowing of wet

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sugar with dry sugar, but he said it was a matter of degree. The preponderance of evidence establishes that the stowage was proper. Any bags there may have been, sufficiently wet to cause damage, would seem to have been so few in number as to be regarded *de minimis*.

In considering this case, I have not made use of the examination of W. R. Rowell, an officer of the respondent company, for discovery, as that examination was not put in at the trial. It appears that an application was made to the learned trial judge under section 68 of the *Supreme Court Act* and that an order was made overruling the respondent's objection, to the inclusion of this examination in the case. It is not necessary to consider the question as to whether Rule 75 of the Rules in Admiralty authorizes the use as evidence of the examination of an officer of a corporation for discovery where the corporation is a party to the proceedings, nor whether, if it does not, by reason of Rule 215, the latter portion of Rule 138 of the General Rules and Orders of the Exchequer Court of Canada becomes applicable to a proceeding in Admiralty, as the examination for discovery here in question was not put in. This fact is clearly disclosed by the record of the proceedings at the trial and counsel agree that while a transcript of the examination was physically in Court and with the papers in the possession of the registrar, no use was made of it until counsel for the appellant made reference to it in his written argument after the taking of evidence had been concluded. Under the provisions of section 68 of the *Supreme Court Act*, there is nothing which authorizes a judge settling the case to include items which do not form part of the proceedings in the court below. As the record shows that the examination was not used, I do not think there was any jurisdiction to make the order referred to and it should be disregarded. I would allow the appeal and dismiss the action with costs here and below.

Appeal allowed and action dismissed with costs.

Solicitors for the appellant: *Beauregard, Laurence & Brisset.*

Solicitors for the respondent: *Montgomery, McMichael, Common & Howard.*