M. HERMAN *v.* N. S. A. RAILWAY COMPANY.

Coram: AMES-HOFF, J. MORICE, J. GREGO-ROWSKI, J.

1897

25 *June.*
16 *August.*

PUBLIC CARRIERS—FIRE—LIABILITY—SPECIAL CONTRACT—NEGLIGENCE—GENERAL REGULATION IN REGARD TO CARRIAGE OF GOODS BY RAIL—EVIDENCE—DOCUMENT—APPEAL.

In the absence of a special contract restricting their responsibility under the common law, public carriers are responsible for the carriage of goods entrusted to them, and are bound to deliver them safely unless they can show that they have not been negligent or that the goods have been lost or destroyed without any fault on their part.

Quære, *whether public carriers can protect themselves by a special contract against responsibility for negligence:* obiter dictum *of Ameshoff, J., that they can thus protect themselves.*

The general regulations for carriage of goods by rail have not the force of law, and where a defence is based on any given section of them, the railway company must show that this formed part of the contract to carry between it and the consignor.

H. delivered to the N. S. A. Railway Co. 300 *bundles of sacks to be conveyed by rail. On arrival only* 200 *were delivered, the remaining* 100 *having been burnt while in the railway trucks, the fire having in all probability been caused by a spark from the engine.* Held, *that in the absence of proof by the company that a special contract of carriage existed, or that the fire was not due to any negligence on its part, the company was liable to H. for the loss sustained.*

It is the duty of an agent in the lower Court to tender any document which he desires to put in, and if the Court refuses to admit it, he should request the Court to note on the record that the document was tendered in evidence and its admission refused. If this be neglected the document cannot be availed of on appeal.

THIS was an appeal from the judgment of the Second Special Judicial Commissioner of Johannesburg, pronounced on 27th March, 1897. The appellant (plaintiff below) had, on the 16th October, 1896, through his agent Hartley, handed over to the respondent company 300 bundles of empty coal sacks for conveyance to Brugspruit. Instead of 300 only 200 bundles of sacks were delivered to the appellant at Brugspruit, and he now sued the railway company for the delivery of the 100 bundles of sacks, or otherwise for 100*l.* as damages.

The defendant company pleaded the general issue, and specially that the plaintiff, according to the signature of his agent Hartley

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on the way-bill, had taken all risk upon himself, according to sect. 23 (b) of the General Regulations dealing with the conveyance of goods by rail (*Local Laws*, 1890-93, p. 914), and further, that the truck in which the lost goods of the plaintiff had been packed had been destroyed by fire, without any negligence on the part of the defendant, and that consequently the company was not liable according to sect. 24, sub-sect. (a), of the General Regulations.

It appeared from the record kept by the Judicial Commissioner that the attorney of the defendant company had objected to the way-bill annexed to the summons as not being a copy of the actual way-bill, but, on the attorney of the plaintiff demurring to this, he had not pressed for the production of the alleged original way-bill.

The Second Judicial Commissioner, after having heard evidence, gave the following judgment: "In this matter it has not appeared to me that the plaintiff was acquainted with the nature of sect. 23, sub-sect. (b), of the General Regulations, and as this has not been pleaded by the defendant company, we might take it that he (the plaintiff) cannot be bound by it, and ought accordingly to succeed in an action for damages; but, after careful consideration, it seems to me that sect. 24 (a) of the said Regulations must be applied. This section reads: 'The carrier is not liable (a) for loss or damage of (1) goods or things of whatever nature in consequence of fire, war, internal disturbances, storm, necessity, and in general *vis major*.' The evidence shows that the truck, in which the lost coalbags were being carried, was destroyed by fire about ten miles after the train had left the Eerste Fabrieken station. A reasonable inference might be drawn from the evidence that the defendant company had not taken proper precaution against fire, and that sparks from the engine set fire to and burnt the bags. The bags were being carried under sect. 23, sub-sect. (b), at a lower rate, in an open truck without any covering. But in cases like the present, inferences are not to be drawn. In my opinion the *onus* rests on the plaintiff to prove negligence as contemplated by sect. 24. It is possible that other circumstances may also have existed which caused the fire. The plaintiff has not satisfactorily established negligence on the part of the defendant company, and I feel myself accordingly obliged, according to law, to grant absolution, with costs."

From this judgment appeal was brought.

Curlewis, for the appellant: The General Regulations have not been approved by the Volksraad, and have not the force of law. The Judicial Commissioner found that the bags were uncovered in an open truck. That constitutes negligence.

Lohman, for the respondent: Whenever goods are carried uncovered, this is done with the consent of the consignor, and at a lower rate. In any case, according to the finding of the Judicial Commissioner, negligence was not proved. He has found that the bags were being conveyed at a lower rate under sect. 23, sub-sect. (b). In order to succeed, the plaintiff had to prove gross negligence or wilfulness on the part of the company.

Curlewis, in reply: The Judicial Commissioner found that the appellant was not acquainted with sect. 23 (b). Consequently the appellant could not have caused his goods to be carried under that section, and, even if he did do so, the company cannot contract itself out of its responsibility for negligence. It was clearly an act of negligence to convey the bags uncovered. (*Smith* v. *L. & S. W. Railway Co.*, L. R. 6 C. P. 14; *Naylor* v. *Mannik*, 3 Searle, 187; *Story on Bailments*, § 549; *Tregidga* v. *Sivewright N.O.*, 14 S. C. 76; *Voet*, 4, 9. 2.)

Lohman: By Roman-Dutch law the parties are at liberty to stipulate what they please, except against *dolus*. (*Vide Clan Line Steamers* v. *Alcock & Co.*, 6 Sheil. 130.)

Cur. ad. vult.

After a consultation of the Judges the case was, on the 6th July, 1897, referred back to the Judicial Commissioner to amend his record on the point, whether the attorney of the defendant company had requested that he might put in the original way-bill. The reply of the Judicial Commissioner to this was as follows: "I am under the impression that during the argument Attorney Van Gorkum, for the defendant company, stated that the way-bill could, if necessary, be put in by him, against which Attorney Bauman (for the plaintiff) objected at the time. Mr. Van Gorkum then let the matter drop, and did not insist upon putting in the way-bill. Judging from Mr. Van Gorkum's remarks at the time,

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it seemed to me as if he had the way-bill in his possession. Had Mr. Van Gorkum insisted upon the putting in of the document, I would either have admitted it or made a note that I had refused to admit it, according to the circumstances."

Postea. 16th August, 1897.

AMESHOFF, J.: This is an appeal against the judgment of the Second Judicial Commissioner of Johannesburg. The action in the Court below was for damages sustained in consequence of the respondent's negligence. The defence was that there was no negligence on the part of the respondent, seeing that the appellant found it convenient to despatch his goods at a cheaper rate, whereby he took the risk of damage upon himself. The alleged negligence consisted in the circumstance that a certain consignment of bale bags, while being conveyed in an open truck, was burnt through the fault of the company. The attorney for the respondent also pleaded specially that the plaintiff had admitted in the Court below that the risk of carriage was for his account according to sect. 23, sub-sect. (b) of the General Regulation dealing with the conveyance over steam tramways and railways, as appears from the signature of his agent to the way-bill dated 16th October, 1896. A difference of opinion arose among the Judges in consultation in regard to the question whether the Judicial Commissioner had refused to admit this way-bill, when it was relied on during the argument without having been put in. The case was therefore referred back to the Judicial Commissioner for his report thereon. According to his report the way-bill in question was not put in, nor was it tendered for the purpose. The case must therefore be treated as if no such way-bill existed.

If this be so, then the company is liable, for the mere fact of the payment of a lower rate is not sufficient to show an undertaking by the plaintiff in the Court below to take the risk upon himself. Had the way-bill been put in, the position would have been different, and it would have been necessary to decide the question whether a company like the railway company is entitled to contract itself out of its liability to make compensation. Notwithstanding the argument of Mr. Curlewis, it appears to me that the company does indeed possess the right to do so; but I leave the point undecided. The case must therefore be sent back to the Judicial Commissioner to decide as to the amount of damage

sustained by the plaintiff, the present appellant. The appellant is declared entitled to the costs of this appeal.

MORICE, J., concurred.

GREGOROWSKI, J.: The defendant company is sued for the delivery of 100 bundles of bags, or the payment of 100*l*. If we had to judge from the summons, we would conclude that 100*l*. represents the value of the bags; but the evidence shows the value of the bags to be 50*l*., and that the plaintiff has added 50*l*. by way of damages. The ground for the action arises from the fact that on 16th October, 1896, the plaintiff, through his agent Hartley, loaded 300 bundles of bags on the railway at Elandsfontein in order to be conveyed to Brugspruit, and that only 200 bundles were delivered, the plaintiff having thus sustained damage through the negligence and wrongful conduct of the defendant company. Against this claim the company has pleaded that the plaintiff had taken the risk of the conveyance of the bags upon himself in accordance with sect. 23 (b) of the General Regulation for the carriage of goods over railways and steam tramways (*Local Laws*, 1890—93, p. 914), and that this appears from the way-bill of 16th October, 1896, signed by the plaintiff's agent, Hartley. The plea further set forth that the lost bags were burnt without any negligence on the part of the company, and that therefore, according to sect. 24 (a) of the Regulation, it is not liable.

The evidence shows that the bags were put uncovered in the fifth or sixth truck from the engine, and that between Elandsfontein and Eerste Fabrieken stations a fire occurred in the truck containing these bags. The engine driver stated that "no sparks whatever were emitted by the engine. When I saw the fire, I tried to put it out, so far as I was able. The truck was not covered. If sparks had issued from the engine, they could have set fire to the truck—an open truck." The station master at Elands river stated: "If any sparks came from the engine they could have set fire to the bags; generally, no sparks are emitted by the engine." He also testified that when the train arrived the truck was on fire, and that it was destroyed with its contents.

The Second Judicial Commissioner at Johannesburg granted absolution from the instance on the ground that the plaintiff had not, in his opinion, satisfactorily proved negligence on the part of the company. In his written judgment he says that no proof was

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tendered that the plaintiff was aware of the nature of sect. 23 (b) of the General Regulation for the conveyance of goods over railways and steam tramways, but that he considered that sect. 24 (a) applied, and that consequently the company was not responsible for damage caused by fire, unless the plaintiff tendered sufficient proof to show that there was negligence on the part of the defendant company. In this Court, however, it was admitted by both parties that, although the General Regulation appears in the statute book, it has not the force of law, and as both parties are agreed on this point, I must take it that they are right, and I can only express my regret that the General Regulation is included in the statute book, without having first been approved by the Volksraad, for the lower Courts are misled thereby and suitors are cast in unnecessary costs. Assuming, then, that the General Regulation has not the force of law, the Special Judicial Commissioner should not have taken cognisance of it, and should have decided the case as if sect. 24 (a) had not existed.

It is quite another question whether a special contract was entered into between the plaintiff and the company. This is matter of evidence. A special contract is set up in the plea of the company, but no evidence whatever was taken on this point. A way-bill has been put in by counsel for the company in this Court, which purports to have been signed by Hartley, but *non constat* whether this is the same Hartley, the agent of plaintiff, nor whether the signature on the way-bill is genuine. According to this document the consignor would take the risk of the carriage of the goods upon himself, according to sect. 23 (b) of the General Regulation. I fail to see how a document tendered in this way can affect the case. There is nothing in the record to show that the way-bill was tendered in evidence and its admission refused, or that it was ever exhibited in the Court below. It should be distinctly understood that it is the duty of an agent in the Court below to tender any document which he wishes to put in, and if the Court refuses to admit it, he should request the Court to make a note on the record that the document was tendered in evidence and its admission refused. The case before us can, therefore, not be decided on the ground of a special contract, for no such contract has been proved, and, as I have already observed, counsel on both sides have admitted that the General Regulation has no binding effect. It is therefore unnecessary to decide whether the com-

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pany would have been responsible if the special contract under sect. 23 (b) of the General Regulation had been proved; nor will it be necessary to enter into the question how far the Special Judicial Commissioner would have been correct in his reasoning if sect. 24 (a) had the force of law.

The question in regard to the liability of the company must be decided under the common law. The responsibility of public carriers has frequently been before this Court and the other Courts of South Africa, and has recently been once more fully considered in the case of *Tregidga* v. *Sivewright N. O.* (14 S. C. 76). It is beyond all doubt that common carriers are responsible for negligence, and that the *onus* lies on them to show clearly that where goods entrusted to them are not delivered there has been no negligence on their part, and that the goods have been lost without their fault. Now in this instance it appears from the evidence that the fire which consumed the goods in all probability was caused by a spark from the engine. There is no reason to suppose that the fire originated through spontaneous combustion, and this being so, the question is whether the company is liable for the loss. The matter of damage caused by fire and by sparks has been much discussed in England and America. (*Vaughan* v. *Taff Vale Rail. Co.*, 5 H. & N. 679; and *Shirley, Lead. Ca.* 367; *Smith* v. *L. & S. W. Rail. Co.*, L. R. 6 C. P. 14; *Pollock on Torts*, 403; *Addison on Torts*, 342; *Angell on Carriers*, §§ 156—59, §§ 566 *et seq.*) Here, in the present case, the question arises *ex contractu*. What has the defendant company undertaken in law to perform? Undoubtedly to carry the plaintiff's goods safely, and to take all necessary precaution to that end. It is no excuse to say "a spark has escaped out of our engine, fallen on your goods stowed in an open truck, and they have been destroyed." The company should have taken proper preventive measures against this danger. Had the goods been carried in a covered truck they would not have been destroyed by fire.

There is no proof that the plaintiff has suffered any damage, but he is entitled to the value of the goods. The appeal must be allowed, and the judgment of the Court below altered into judgment for the plaintiff for the sum of 50*l.*, together with costs in the Court below and costs of this appeal.

Attorney for appellant: *J. H. L. Findlay.*

Attorney for respondent: *S. K. H. Lingbeek.*