Coram:
KOTZÉ, C.J.
AMES-HOFF, J.
ESSER, J.

COMMERCIAL UNION ASSURANCE CO.

v.

GEO. HEYS & CO.

1897

9 *November.*
10 ,,
17 *December.*

CARRIERS—PUBLIC AND PRIVATE—NEGLIGENCE—SPECIAL CONTRACT—RISK OF CONSIGNOR.

Persons who carry on business as carriers for hire are liable for negligence in the carriage of goods entrusted to them. A stipulation on a way-bill that the goods are conveyed at the risk of the owner or consignor does not relieve the carrier from his responsibility for negligence.

Quœre, *whether a special contract relieving the carrier from all possible responsibility is binding on the consignor by our law.* (*See* obiter dictum *of Esser, J.*)

Where goods are carried by more than one carrier, and, owing to negligence, are not delivered in good order, the first carrier, who received the goods in good order and condition, must show that he handed over the goods to the second carrier in like good order and condition, and that, consequently, there was no negligence on his part. If he fail in this he will be held liable for the loss or damage.

Cf. The Colonial Government Railways *v.* Green & Co., 1 *Off. Rep.*, *p.* 320.

A. delivered a box of gold to the coach proprietor, H., to be conveyed from Pretoria to Bulawayo. On arrival at Bulawayo the box contained nothing but sand. It appeared that the drivers and conductors of the coach were not informed that the box contained gold, and, consequently, constant supervision was not exercised in regard to the box. From Pietersburg to Bulawayo the box was conveyed by Z., another carrier. It was assumed that the gold was conveyed at the risk of the consignor, and that A. knew that from Pietersburg the conveyance was taken over by Z. Held, *that as H. had failed to prove that the box with gold was handed over to Z. in good order and condition, and it did not appear on which section of the coach line, and where, the negligence occurred, H. was liable to A. for the loss of the gold.*

THIS was an action instituted by the Commercial Union Assurance Co., Ltd., of London, England, against George Jesse Heys and Edmund Francis Bourke, coach proprietors, carrying on business under the style of George Heys & Co., for the recovery of the sum of 12,000*l.* The summons set forth that on the 22nd October, 1895, one, G. E. Meadway, manager of the African Banking Corporation, at Pretoria, delivered to the defendants a box containing 12,000*l.* in specie, to be conveyed to Bulawayo, in Matabeleland; that the defendants accepted the said box for conveyance, and the said banking corporation had paid the defendants

at a higher rate than ordinarily, viz., the sum of 90*l.*, as remuneration for such conveyance, according to the receipt annexed; that the condition in this receipt, "The contractors do not in any way hold themselves responsible for the safe delivery of the said parcel, which parcel shall be conveyed entirely at the risk of the sender," was not brought to the notice of the African Banking Corporation, and was not assented to by the said Meadway, and formed no part of the contract between the African Banking Corporation and the defendants, as the banking corporation was ignorant of such condition when the said box was delivered and the carriage paid; that through the negligence of the defendants, and while the said box was under their control, it was broken open and the 12,000*l.* in specie were stolen or lost, and when the box reached Bulawayo it was found to contain nothing but sand; that the plaintiff company had insured the said box with specie for 12,000*l.*, and in terms of its policy of assurance had paid out to the African Banking Corporation the sum of 12,000*l.*, as and for the loss sustained by the said corporation, and had obtained from it a written cession of action, and that, consequently, by virtue of the said contract of indemnity, as well as of the cession, the plaintiff is entitled to claim from the defendants, on account of their negligence, the sum of 12,000*l.*, with interest, *a tempore moræ*.

The receipt was in the following terms.—

"Government Mail Service.

"Kimberley—Barberton Coaches, *viâ* Witwatersrand and Pretoria.

"George Heys & Company, contractors.

"Parcel.

"Date, 22 October, 1895.

"From Pretoria to Bulawayo.

"Pretoria, 22 October, 1895.

"Received of the African Banking Corporation, one box addressed to the African Banking Corporation, Bulawayo, and said to contain twelve thousand pounds gold coin (£12,000), likewise the sum of ninety pounds sterling (£90 for carriage of the same.

"The contractors do not hold themselves in any way responsible for the safe delivery of the above-named parcel, which said parcel will be carried entirely at the risk of the sender.

"pp. Geo. Heys & Co., Agent,

"(Signed) W. Keith."

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The defendants pleaded, as a preliminary plea, that they only carried on the business of coach proprietors between Pretoria and Pietersburg, and only conveyed passengers and parcels between these places; that a certain firm of Zeederberg & Co. conveyed passengers and parcels from Pietersburg to Bulawayo; that the defendants, when they accepted parcels for conveyance to Bulawayo, only did so for themselves as far as Pietersburg, and that in regard to the conveyance of parcels from Pietersburg to Bulawayo they only acted as the agents of Zeederberg & Co.; that when the said Meadway, on 22nd October, 1895, delivered the said box to the defendants for conveyance to Bulawayo, he was well aware of the above facts, and knew that the defendants had only undertaken to carry the box as far as Pietersburg, where it would be handed over to Zeederberg & Co.; that the defendants had properly carried the box to Pietersburg, and had there handed it over to Zeederberg & Co. in the same condition in which they had originally received it; that if the box was not delivered at Bulawayo in the same condition this was due to Zeederberg & Co., and not to the defendants, and that if the plaintiff company had any action, it had such against Zeederberg & Co., and not against the defendants.

The defendants then pleaded generally and specially that in the year 1892 the defendants, together with Gibson Brothers, had conveyed gold and other specie for the African Banking Corporation between Johannesburg and the then terminus of the Bloemfontein-Johannesburg line of railway, and under an agreement, a copy of which was annexed; that in July, 1895, when Meadway first delivered gold to the defendants for conveyance from Pretoria to the north, the defendants, through their representative, William Keith, at Pretoria, laid the said agreement before Meadway, and that it was then verbally agreed that any gold or other specie which may be received by the defendants from the African Banking Corporation for conveyance to the north, would be so received and conveyed by the defendants, entirely upon the conditions and stipulations relating to their responsibility as expressed in the said agreement; that on the occasion in question, in July, 1895, the said Keith, on behalf of the defendants, gave a receipt similar to that annexed to the summons, and drew the attention of the said Meadway to the conditions in the said receipt, who acquiesced therein that the gold or specie

should be conveyed on those terms, and that it was then specially agreed between Meadway and Keith that until a written contract should be drawn up between the parties regulating the conveyance of gold to the north, the defendants would only receive and convey gold, &c., without any responsibility for loss, and that a receipt, as above mentioned, should be sufficient evidence thereof; that the box alleged to contain 12,000*l.* was received and conveyed by the defendants upon the above terms and conditions, and if the alleged specie is lost this was not due to any negligence on the part of the defendants, and that, consequently, the plaintiff company has no right of action against the defendants.

The agreement referred to was as follows:—

> "Memorandum of Agreement made and entered into between George Heys & Co., acting for themselves and for Messrs. Gibson Bros. and the African Banking Corporation.
>
> "It is clearly understood and agreed to, that all gold, native or otherwise, and all specie that the said bank may export from or import into the Transvaal shall, except where otherwise specially instructed by their clients, be carried by the former until the Bloemfontein extension railway is completed to and opens in Johannesburg for traffic, and that the rate to be charged for carriage of such gold, specie, &c., will be ¾ per cent. (*3s. 9d* per £100 value) between Kroonstad and Johannesburg, or any lesser portion of that route . . . .
>
> "And it is clearly understood and agreed that any specie, native gold, &c., shall be carried entirely at the risk of the said bank, during its transit to or from any point, on any route whatsoever by any of the coaches of the above firms, who will not be held liable, under any circumstances, for any loss or any damage to such gold, &c., arising from the negligence of Geo. Heys & Co. or Messrs. Gibson Bros., or from the negligence or felonious acts of their servants, or from any cause whatsoever.
>
> "Johannesburg, 6 March, 1892."

In the replication the plaintiff denied the above facts set out in the plea, and alleged that, even if these facts were true, they afforded no answer to the claim, for the contract was made with the defendants and not with Zeederberg & Co., and that these facts were never brought to the knowledge of the said G. E. Meadway by the defendants at the time of the contract, and that he

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never had any inspection of the agreement between the defendants and Zeederberg & Co. The replication to the special plea likewise traversed the facts therein, and alleged that, even if the facts were true, they afforded no answer to the claim, for the bare knowledge by Meadway of the alleged condition was not binding on the plaintiff or on the African Banking Corporation, and that the defendants did not set up a contract between the African Banking Corporation and the defendants, whereby it was agreed between the parties that the defendants would not be liable for loss occasioned through the negligence of their servants, and that without a definitely concluded contract on the subject the plaintiffs were not bound.

The plaintiff company further replied (if the Court should hold that such a contract did exist) that it was not bound by such a contract, inasmuch as the defendants were common carriers, and that a contract, whereby the defendants stipulated that they should not be liable for the negligence of their servants, was contrary to the public interests and the law, and was therefore void and of no effect.

The plaintiff company led evidence in regard to the packing and despatch of the box from Capetown, the delivery thereof to the defendants at Pretoria, and its arrival at Bulawayo, where it was ascertained that the box contained nothing but sand. Two conductors of the coach, in which the box had been conveyed, were called to prove that they received no instructions that the box contained gold, or that special supervision was to be exercised in regard to it. Meadway denied having entered into any verbal agreement as alleged, but admitted that he had seen the condition inserted in the receipt, and had had some discussion with Keith, the agent of the defendants, in regard to the effect of this condition.

The defendants called their agent, W. Keith, who stated that a verbal agreement as alleged was come to between him and Meadway, and his evidence was to a certain extent supported by one R. Watson, who was a clerk in the same office, and had overheard a portion of the conversation.

Wessels (with him *De Wet*), for the plaintiff: It is clear that the box of gold was delivered to the defendants at Pretoria, was received by them, and a receipt given that it was in good order.

On arrival at Bulawayo, the contents of the box consisted of sand. The gold had consequently been stolen while in the control of the defendants. That *per se* is evidence of negligence. (*Voet*, 4, 9. 2; *Story on Bailment*, § 38; *Roscoe*, *Nisi Prius Evidence*, 15th ed., vol. 1, p. 575. *Simpson* v. *Nourse*, decided in this Court in 1889; S.C., Transv. Rep. (1889), p. 11.)

The clause or condition in the receipt does not exclude liability for negligence, assuming even that such a contract will be recognized in this country. The condition means no more than "at owner's risk," which has already received judicial interpretation, as appears from *Stroud's Judicial Dictionary*, *sub voce* "owner's risk."

The defendants, moreover, are liable for the whole route. We have not contracted with Zeederberg & Co. We are quite ignorant of the relation between that firm and the defendants. Heys & Co. undertook to carry the specie to Bulawayo on payment of a through rate, and to deliver it to us there. They are, therefore, liable. (*Macnamara on Carriers*, § 192; *Redfield on Carriers*, § 180, p. 145. *Colonial Government* v. *Green*, 1 Off. R., p. 320.)

The Court will not find that there was a verbal agreement above and beyond the contract which is disclosed by the receipt. Meadway has denied entering into such an agreement, and the *onus probandi* thereof is on the defendants.

Esselen (with *Curlewis*), for the defendants: The question is whether the Court will consider the special contract set up by the defendants as proved. We have clearly proved such a contract. The defendants are not "common carriers" in regard to the conveyance of gold. They are not obliged to carry gold for any member of the public. (See *Hutchinson on Carriers*, where carriers are ranked into three classes—"carriers without hire, private carriers for hire, and common carriers.") The responsibility of each of these varies. (See § 37, p. 30.) The liability here is therefore a different one, namely, that of private carriers; that is to say, they are only obliged to exercise ordinary diligence. The probability is that the defendants have acted in regard to the conveyance of the gold as on former occasions, and it is not probable that they would run the risk of the conveyance of 12,000*l.* to Bulawayo for the sum of 90*l.* It did not matter much to the bank, for the bank was insured. Keith has sworn positively that he read the agreement to Meadway, who acquiesced in it. On

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this point he is more trustworthy than Meadway, and is supported by Watson. The receipt is an old form, and only serves to prove the payment of the 90*l.* (*Simpson* v. *Donaldson*, decided in this Court on 23rd February, 1892, where there were a similar receipt and verbal special contract. After the loss of the gold further gold was received under the like receipt and without any written contract. The African Banking Corporation commenced already in 1892 to despatch specie under the same conditions.

Assuming such a contract to exist, then it will be recognized by our law. (*Story*, § 549.)

[KOTZÉ, C. J.: *Campbell on Negligence*, p. 73 *et seq.*, seems to show that there is no material difference between the English and American decisions.]

Esselen: Voet, 4, 9. 7, says the equitable actions cease beyond the ordinary business. There is no doubt that even in America, a private carrier for hire can contract himself out of his liability for negligence. But, even assuming that the verbal contract has not been proved, then there remains the receipt with the condition expressed on it. The defendants are not "common carriers," and the only liability out of which they could contract themselves, as stated in the receipt, is that of "private carriers for hire" for negligence. *Tregidga* v. *Colonial Government*, 7 Sheil, 67. Moreover the onus of showing negligence rests on the plaintiff, where the defendants are not common carriers. *Story on Bailments*, § 573; *Hutchinson on Carriers*, § 767. Finally, we are not liable for the box was safely handed over to Zeederberg & Co. Meadway was aware that their responsibility commenced at Pietersburg. *Story*, §§ 507, 538, *in notis*; *C. D. Asser*, *International Goederen-vervoer*, *pp.* 16, 17.

Wessels, in reply. The defendants cannot say that they are not common carriers, because they have a special tariff for goods. *Voet*. 4, 9. 8; *Dutch Consult*. *Vol.* 1, *Cons.* 182: *Vol.* 2, *Cons.* 203; *Schorer ad Grot*, 3, 33. 5. Theft (*furtum*) is always negligence. The weight of evidence is against the existence of a verbal contract, but even if there were such a contract, it is not binding. The earlier English decisions, like the American cases, are against it. A different doctrine was subsequently laid down in England

by a wrong decision. See *Railroad Co.* v. *Lockwood* (United States S. C. Rep. 17 Wall. 357). In *Simpson* v. *Donaldson* there was no theft. See further *Beven on Negligence* and *Smith on Negligence*, *p.* 171; *Story on Bailments*, § 549.

Cur. ad. vult.

Postea. 17th December.

KOTZÉ, C. J.: In this case I have come to a conclusion as to what the judgment of the Court should be. I propose later on to give a full written judgment, and will now only briefly state my opinion on the different points which arise in the case.

1. I am not satisfied that the special contract between Meadway and Keith, which the defendants allege to have been entered into verbally, has been proved.
2. The waybill is the contract between the plaintiff and the defendants.
3. Quite apart from the question whether the defendants are common carriers, in the sense of being insurers, they are certainly carriers for hire—persons who carry on the ordinary business of carriers for a reward. As such they are liable for negligence.
4. The mention in the waybill that the goods are carried at the risk of the consignor or owner, cannot free the defendants from the consequences of their negligence.
5. The defendants undertook to carry the box of gold from Pretoria to Bulawayo, within a different jurisdiction. It appears that the coachline from Pretoria to Bulawayo is only partly conducted and managed by the defendants, that is, as far as Pietersburg in the district of Zoutpansberg. From that point the firm of Zeederberg & Co. takes over the coach to Bulawayo.

   Negligence has been proved, for the box of gold was safely and properly sealed, delivered to Heys & Co. at Pretoria, and reached Bulawayo with the seals broken and filled with sand. As decided by this Court in *Colonial Government* v. *Green* (1 Off. Rep. p. 320), the first carrier or coach proprietor who receives the parcel in good order must show that he has handed it over to the second carrier in the like good condition. If he fails to do so, he will be held liable for any loss occasioned by negligence.

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The defendants have failed to satisfy me that they have discharged themselves from this duty, and that the box of gold was handed over to Zeederberg & Co. in good order, and this, independently of the question whether the bank, through Meadway, had notice that Heys & Co. had not the whole coach line from Pretoria to Bulawayo under their management and control. As it has not been proved at which portion of the line and where the negligence occurred, the defendants must be held liable for the loss.

6. There must, therefore, be judgment in favour of the plaintiff, whose *locus standi* is admitted, for the sum of 12,000*l.* with interest at 6 per cent. *a tempore moræ* and costs.

AMESHOFF, J., concurred.

ESSER, J.: The first question which arises is whether the defendants are common carriers or, in this instance, bailees for hire. In the latter case they are only liable for ordinary negligence. The criterion is generally taken to be whether they can refuse to accept certain goods for conveyance. It seems to me that in this instance there is no duty on the defendants to accept gold for conveyance. Consequently they are bailees for hire. *Story on Bailments*, § 496; *Story on Contracts*, § 919.

The next question is, has ordinary diligence been observed? From the evidence it appears that the drivers and conductors of the coach did not know there was gold in the coach, and consequently they did not exercise constant supervision in regard to it, and in general, not any, even the most simple, care was taken to convey the specie safely. This is, therefore, a clear case of *culpa lata*, for which also the private carrier for hire is responsible.

But a verbal contract has been relied on, by which the defendants protected themselves against all possible liability, even for the fraudulent acts of their servants. On this point, however, there exists a conflict of evidence; and if it were not for the positive denial of the witness Meadway, I would be inclined to accept the evidence of Keith and Watson, who depose to a definite transaction, while Meadway confines himself to a denial. I can, however, not discard the weight of the evidence of this witness, and consider that we have here to face a *non liquet*. As the onus

of proving this contract rests entirely on the defendants, the doubt must go against them, and it must be held that no contract was entered into between the parties. It is, therefore, unnecessary to consider whether such a contract should, under the circumstances, be considered as binding, although I may say here that, in my opinion, the American system is the safest and most reasonable, regard being had to the public intercourse.

Nor do the words of the receipt exclude this liability. Apart from the fact that this receipt, as has been proved, is made out on an old form, from which it seems to me that we cannot attach any importance to the printed words, still these words denote nothing else than "at owner's risk," which have already been interpreted not to include any wrongful acts of the carrier or his servants, including gross negligence.

In like manner the question whether the defendants are liable for the carriage along the whole route can, in the absence of evidence that they in some way or other gave notice to Meadway that they specially declined to take this responsibility upon themselves, not be answered otherwise than in the affirmative. Even if we take it, for the sake of argument, that their responsibility ceased at Pietersburg, then nevertheless the plaintiff has established a *primâ facie* case of negligence on the part of the defendants, and the duty lies thus on them to show clearly that the loss of the gold is not to be ascribed to their negligence, and that, too, they have failed to show.

It therefore appears to me that the plaintiff company has, in every respect, proved its case, and that there must be judgment in its favour, according to the summons, for 12,000*l.*, with costs.

Attorneys for the plaintiff: *Tancred* and *Lennon*.

Attorneys for the defendants: *Booth* and *Wessels*.