

CANADA / JUDGMENT

Wilson v. Canadian Development Co.

(1903) 33 SCR 432

COURT

Supreme Court of Canada

DECIDED

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Wilson v. Canadian Development Co. Collection Supreme Court Judgments Date 1903-05-18
Report

(1903) 33 SCR 432 Judges Taschereau, Henri-Elzéar; Sedgewick, Robert; Girouard, Désiré; Davies, Louis Henry; Armour, John Douglas On appeal from British Columbia Subjects Contract Decision Content Supreme Court of Canada Wilson v. Canadian Development Co., (1903) 33 S.C.R. 432 Date: 1903-05-18 T. G. Wilson (Plaintiff) Appellant; and The Canadian Development Company (Defendants) Respondents. 1903: March 19, 20, 23; 1903: May 18. Present: Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Armour JJ. ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA, SITTING IN APPEAL FROM THE TERRITORIAL COURT OF YUKON TERRITORY. Contract—Shipping receipt—Carriers—Limitation of liability—Negligence—Connecting lines—Wrongful conversion—Sale of goods for non—payment of freight—Principal and agent—Varying terms of contract. Conditions in a shipping receipt relieving the carrier from liability for loss or damage arising out of "the safe keeping and carriage of the goods" even though caused by the negligence, carelessness or want of skill of the carrier's officers, servants or workmen, without the actual fault or privity of the carriers, and restricting claims to the cash value of the goods at the port of shipment, do not apply to cases where the goods have been wrongfully sold or converted by the carrier. A shipping receipt with terms as above was for carriage by the defendants' line and other connecting lines of transportation and made the freight payable on delivery of the goods at the point of destination. The defendants had previously made a special contract with plaintiff but delivered the receipt to his agent at the point of the shipment with a variation of the special terms made with him in respect to all shipments to him as consignee during the shipping season of 1899, the variation being shown by a clause stamped across the receipt of which the plaintiff had no knowledge. One of the shipments was sold at an intermediate point on the line of transportation on account of non-payment of freight by one of the companies in control of a connecting line to which the goods had been delivered by the defendants. Held, that the plaintiff's agent at the shipping point had no authority, as such, to consent to a variation of the special contract, nor could the carrier do so by inserting the clause in the receipt without the concurrence of the plaintiff; that the sale, so made at the intermediate point, amounted to

a wrongful conversion of the goods by the defendants and that they were not exempted by the terms of the shipping receipt from liability for their full value. As the evidence shewed definitely what damages had been sustained, and there being no good reason for remitting the case back for a new trial, the Supreme Court of Canada, in reversing the judgment appealed from (9 B. C. Rep. 82), ordered that the damages should be reduced to those proved in respect of the goods sold and converted. Armour J., however, was of opinion that the judgment of Craig J. at the trial, including damages for the loss on other goods, should be restored. APPEAL from the judgment of the Supreme Court of British Columbia [1] reversing the judgment of the Territorial Court of Yukon Territory with costs and ordering a new trial between the parties upon amended pleadings. The action was to recover damages for loss of and damage to goods which the defendants undertook to carry from Victoria, B.C. to Dawson City, under the contract for carriage set out in the judgment now reported, and either wholly failed to carry or only carried after great delay, and also a certain sum for agreed rebate on freight. The case was tried in the Territorial Court, Yukon Territory, before Mr. Justice Craig who gave judgment for the plaintiff for \$28,855.85 for damages and costs. The defendants appealed to the Supreme Court of British Columbia, which by the judgment now appealed from [2] reversed the judgment of the Territorial Court, and ordered the pleadings to be amended and a new trial had between the parties. The material facts of the case are stated by His Lordship Mr. Justice Davies who delivered the judgment of the court. Sir Charles Hibbert Tupper K.C. and Davis K.C. for the appellant. The plaintiff's representative at the port of shipment had no authority to vary the special agreement nor could the company do so by inserting the stamped clause without the knowledge or consent of the plaintiff. But, even if the stamped clause is binding, it does not exempt from liability under the facts of this case, the loss of some shipments and the delay and consequent damage to others being caused by the defendants' own wilful act. The contract of 19th June, in connection with the negotiations at and before its execution, bound the defendants to carry all shipments by plaintiff during the season of 1899, and guarantee their delivery in that season and to pay all charges in order to carry them through, freight being C. O. D. at Dawson. They also were bound to pay the plaintiff a rebate of 7 1/2 p.c. on the total freight. The defendants undertook to carry more than they could handle, created a blockade at Bennett and White Horse, and thus by their own wilful act, prevented the performance of their contract. The most notable example was with regard to a shipment of potatoes and onions which arrived at Bennett on 21st Sep. by the White Pass Railway. The defendants' agent knew they were there, took no steps to pay back—freight nor to ship them on. Although he could have done so immediately, he did nothing. He might have notified the plaintiff by wire, but he did not, and on 28th Sept. the railway company, (who were the defendants' agents) under some imaginary right (see *Atlantic Mutual Insurance Co'y v. Huth* [3], sold the shipment to a man who forthwith shipped them to Dawson on a scow, towed by the defendants' boat as far as White Horse, and thence down to Dawson without a tow, and arrived there in good order on 22nd October. He realized \$9,000 for this shipment immediately on arrival. If defendants had taken these goods on the 21st and put them on a steamer which was

running every day from Bennett or on a scow to be towed, they would have got down. The only claim that the railway company could have had was for their freight charges; had these been paid the goods would not have been sold. Pitts was not our agent and notice to him was not notice to us. The bill of lading is not the contract under which these goods were shipped. It is nothing more than a receipt or document to show title. The contract was made long before the bills of lading were given on 19th June. We may be bound by ordinary terms as to carriage in the bill of lading; but we deny that a clause in it can effect an alteration of our rights under the original contract, See *Rodoconachi v. Milburn Bros.* [4], at page 319; *Gledstanes v. Allen*, [5], and *Wagstaff v. Anderson*, [6], per Bramwell L.J., at page 177, and in *Sewell v. Burdick*, [7], at page 105; *Leduc v. Ward*, [8] per Esher, M.R.; *Abbott on shipping*, (13 ed.) pp. 345, 350 where the whole matter is discussed. Even if the stamped clause applies, it does not exempt from liability against the negligence and the wilful wrong of the defendants. See remarks of Bramwell L.J., in *Lewis v. Great Western Ry. Co.* [9], "owner's risk means at the risk of the owner minus the liability of the carrier for the misconduct of himself or servants." See also *Robinson v. Great Western Ry. Co.* [10]; *D'Arc v. London & North Western Ry. Co.* [11]; *McCawley v. Furness Ry. Co.* [12]; *Grand Trunk Ry. Co. v. Fitzgerald* [13], at page 214; *Leake on Contracts*, 604. The liability for negligence remains unless clearly contracted out of: *The Xantho* [14] at pp. 510, 512; *Hamilton Fraser & Co. v. Pandorf & Co.* [15]. *The North West Transportation Co. v. Mackenzie* [16], has no application, as in this case, there was no refusal to take the goods; the goods were taken as the Judge has found under the terms of the contract. The only question is whether the terms of the contract have or have not been varied by the bill of lading. The principle is laid down by King J. in that case, at page 45, and the clause relied on by Mr. Justice Martin was obiter. The learned Judges erred in finding that the stamped clause applied and, even if right upon that finding they are wrong in the conclusion as to its effect. *Brit. & S. A. SS. Co. v. Anglo-Argentine L. S. & P. Agency* [17] shows that the bill of lading merely fixes whether the goods are taken by weight or measurement. We rely upon the judgment of Mr. Justice Craig, and his findings of fact which are fully justified by evidence and conclusive of the case, and also that the plaintiff was entitled to a rebate of 71/2 per cent upon the whole amount of freight from Victoria to Dawson and not only upon such part only as was applicable to carriage by defendants' boats. There are no means of finding out how much freight was applicable to any portion of the voyage, therefore, the contract must be construed as meaning a rebate on the whole through freight. Duff K.C. for the respondents. The shipments were made by Pitts at Victoria, B.C. and consigned by him to the order of Bank of Commerce at Dawson City, not to appellant, and the bills of lading were forwarded to that bank with drafts attached for collection. When in addition to the natural difficulties of the route and the trouble created by the sudden falling of the river, there was an unexpected rush of business for Dawson in 1899, and in August a blockade of freight occurred both at Skagway and White Horse, the congestion was so great that it became plain that difficulty would be experienced in delivering freight already shipped without reference to future business likely to be transported over the same route. In consequence the respondents and other companies

issued a notice to shippers that, on and after August 20th, shipments for Dawson City and Yukon points could only be accepted subject to the conditions: 1. That the carriers did not guarantee delivery before the close of navigation, and were released by the shippers and consignees from all claims in respect of non-delivery; 2. That freight charges to Bennett, B.C., be prepaid. And, with notice of these conditions, Pitts continued to ship goods after the 20th August, the bill of lading containing the condition stamped upon its face :—"This shipment is made and accepted at owner's risk of delivery during 1899, and the carriers are released by all parties in interest from all claims and liability arising out of or occasioned by non—delivery during 1899." The trial judge finds as a fact that Pitts took each bill of lading with distinct notice of this condition. This condition is sufficient to exonerate the carrier from all liability in the circumstances disclosed by the evidence in this case. *Peninsular & Oriental S. N. Co. v. Shand*, [18]; *Carr v. Lancashire & Yorkshire Ry. Co.* [19]; *Crawford v. Browne*, [20]; *Dickson v. Great Northern Ry. Co.* [21]; *Beal on Bailments*, page 411, et seq; *Peek v. North Staffordshire Ry. Co.* [22]; *Manchester, Sheffield & Lincolnshire Ry. Co. v. Brown* [23]. The only matter, therefore, open for litigation is whether or not the company are liable for breach of contract for refusing to receive the goods except on a condition exempting them from liability for failure to deliver during 1899. This issue, however, has not been tried. The court of the first instance proceeded throughout on a misconception, and if the appellant has any remedy he must resort to some other form of action than the one which he has adopted. The trial judge found that respondents were guilty of actual negligence. If he is right in holding that the contract of 19th June governs and that the guarantee was a part of it, then the question of negligence becomes immaterial. As a matter of fact, however, the finding of negligence proceeds upon the misconception of the duty of the respondents and a misunderstanding of the circumstances surrounding the shipment. In the first place, the blockade occurred before the freight reached respondents, and arose from causes which they could not control. The trial judge finds negligence because the appellant's goods were not forwarded in preference to those of other shippers. There was no contract requiring this and no such duty was imposed upon respondents. All goods were forwarded as rapidly as possible in the order of arrival at Skagway. By reason of the sudden falling of the river, all the larger vessels were compelled to carry much less than their usual tonnage; moreover, the season closed so rapidly that they were not able to make as many trips as it was reasonable to suppose they could accomplish. It is perfectly clear that Wilson's goods were not intentionally delayed. Then, the appellant was not the legal owner nor consignee of the goods and had therefore no right of action. *Leggatt on Bills of Lading*, pages 635, 636, 637; *Cahn v. Pockett's B. C. S. P. Co.* [24] at page 65; *Shepherd v. Harrison* [25]; *Kent v. Worthing Local Board* [26] We also refer to *Abbott on Shipping* (13 ed.) pp. 590-593; *Moes v. Leith, etc., Co.* [27]; *Robertson v. The Grand Trunk Railway Co.* [28]; *Norman v. Binnington* [29]. The judgment of the court was delivered by: DAVIES J.—We are all of opinion that this appeal must be allowed, and a majority of the court are of the opinion that the damages assessed and allowed by the trial judge should be reduced. The learned judges of the Supreme Court of British Columbia, in reversing the judgment of the trial judge and

ordering a new trial, did so upon the ground that after the contract of June, 1899, a new contract was entered into between the parties for the carriage of the plaintiff's goods, and that the terms of this new contract were to be found in the several bills of lading signed at the time the goods were shipped, and which terms controlled and governed the responsibility of the defendants for the carriage of the goods. As, however, we are of the opinion that the trial judge was right in holding that the goods were carried under the contract of carriage made between the parties in June and that the terms of this contract could not be varied without the concurrence of the plaintiff who was one of the parties to it, we are not called upon to express any opinion as to the meaning and effect of the stamped clause placed upon the several bills of lading after the 22nd August, 1899, and purporting to limit the carrier's liability. The plaintiff had no notice of this material change in the terms of his contract, and Mr. Pitts, who shipped the goods to him from Victoria, was not his agent to accept or agree to any such change, nor in fact did he pretend to do so. The Supreme Court of British Columbia were of the opinion that the plaintiff's action, if any, was one simply for a refusal of the defendants to carry the goods under their June contract with the plaintiff. We do not, however, agree with this view, but concur with the trial judge that their action was not a refusal to carry the goods under their contract, but an attempt made by them to vary its terms by the addition of a clause further limiting their contractual liability. The June contract was in the following terms: CANADIAN DEVELOPMENT COMPANY, LTD. FREIGHT CONTRACT entered into 19th June, 1899, between T. G. Wilson, of Dawson City, shipper, and Canadian Development Company, Limited, No. 32 Fort Street, Victoria, B.C., carriers; whereby it is agreed that the goods of class and quantity herein mentioned shall be shipped and carried between the points at the rate and on the terms herein set forth, viz : From Puget Sound and British Columbia ports to Dawson City. Date of Shipment.—Throughout season of 1899. Class of Goods.—General merchandise. Quantity.—Exclusive contract for season of 1899. Rates as fixed by joint tariff and classification of commodities hereunto annexed, subject to payment of extra packers' charges over White Pass and Yukon route on shipments made prior to July 10, 1899. Shipper to have a rebate at end of season equal to seven and one-half per cent (7 1/2%) on the amount of business routed over our steamers. Terms of Payment—C. O. D., Dawson City. Consignees—T. G. Wilson, Dawson City. Shipper to be protected in event of rate war. A shipping receipt in ordinary form in use by the company to be given for the goods at the time of shipment, to be carried under and pursuant to the terms of the shipping receipt. T. G. WILSON, Shipper, Canadian Development Co., Limited. Per R. T. ELLIOTT. The joint tariff referred to in this contract was one entered into between a number of transportation companies fixing the rates of through freight to Dawson City from British Columbia and Puget Sound ports. The only one of its terms or stipulations which was made applicable to the contract in question in this suit was that fixing the rates. Its other terms or stipulations applied simply as between the companies which were parties to it. The last clause in the contract of June between the parties hereto provides that a shipping receipt in the ordinary form in use by the company was to be given for the goods at the time of shipment, and that they were to be carried under and pursuant to the

stipulations of that receipt. The terms of that shipping receipt, so far as they are material in determining the liability of the defendant company, are as follows: It is agreed that in settlement of any claim for loss of or damage to any of the within mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment. In consideration of the goods being carried by the company at a reduced rate, it is expressly agreed and declared that the shipper waives and abandons any right accorded, by statute or otherwise, to hold the company responsible in any manner for the keeping or safe or prompt carriage of the goods, and waives and abandons all advantage and benefit accorded by the statute, 37 Vict. c. (blurred), to the shipper, and himself accepts all responsibility for the safe-keeping and carriage of the goods, and agrees to hold the company absolved and discharged from delays, damages or losses, from whatever cause arising, including delays, loss or damage arising through negligence or carelessness or want of skill of the company's officers, servants or workmen, but which shall have occurred without the actual fault or privity of the company. The terms of this agreement are undoubtedly very wide and relieve the company from liability for losses or damages arising out of their contract for "the safe keeping and carriage of the goods" even when caused by the negligence or carelessness or want of skill of the company's officers, servants or workmen. But it was clearly not intended to relieve them of all responsibility because their liability for damages caused "by the actual fault or privity of the company" is expressly reserved and we are of opinion that, with respect to such of the plaintiff's goods as were actually converted and sold by the defendant company or their agents, while being carried by them to Dawson, the cause does not exempt them from liability. Nor do we think the clause restricting claims for loss of or damage to the goods to their cash value at the port of shipment covers or was intended to cover cases where the goods were wrongfully sold or converted to their own use by the carrier. It is impossible to conceive that such a clause should be so construed as to enable the carrier wantonly to destroy the goods while being carried by him to their destination, and possibly at a time and place when their value had become enormously enhanced, and then say to the owner: "True it is, I have without justification destroyed your goods, but I am only liable to pay you their value at the place of shipment." We do not construe this clause limiting the amount of the claim which the owner of the goods can make for loss or damage to his property as extending to cases of either wanton or unjustifiable destruction or conversion of the goods. In the late case of *Price v. The Union Lighterage Company*[30] Walton J. reviewed the cases upon the construction to be given to these contracts of carriage and his remarks and conclusions are instructive. Now with respect to the shipment of potatoes and onions sent forward on the 5th September, the evidence is that these goods were sold by one of the companies or parties to whom the defendants had given them because of the non-payment of the freight. The purchaser at this wrongful sale himself took the goods forward to Dawson and realised a very handsome profit. We are all of the opinion that for this wrongful conversion or destruction of the plaintiff's goods for the carriage of which to Dawson the defendants had contracted, they have not exempted themselves from liability. By the express terms of the contract the freight was not payable by the plaintiff till his

goods were delivered to him in Dawson. The non-payment of the freight which was made an excuse for the sale of the goods, was, as between the parties to this suit, due entirely to the actual fault of the defendants. The evidence as to the actual loss sustained by the plaintiff in consequence of this wrongful conversion of his goods was not contradicted, nor was it seriously contended that, if liable at all, the amount claimed as damages for the goods sold was excessive. As the evidence shows definitely the damages sustained by the plaintiff by reason of the wrongful destruction of this shipment, as distinct from the damages claimed on the other shipments from which the defendants have by contract exempted themselves from liability, we see no good reason for remitting the cause back for further evidence. The damages must be reduced to those proved with respect to the goods sold and converted while on their way to Dawson, viz.: \$13,904.71. The appeal will be allowed with costs in all the courts, and the damages reduced to the amount above specified. ARMOUR J.—I agree with the findings of fact and the conclusions of law of the learned trial judge, and am of opinion that the appeal should be allowed with costs and the judgment of the trial judge restored. Appeal allowed with costs. Solicitors for the appellant: Smith & Macrae. Solicitors for the respondents: Clarke, Wilson & Stacpoole.

[1] 9 B. C. Rep. 82.

[2] 9 B. C. Rep. 82.

[3] 16 Ch. D. 474.

[4] 17 Q. B. D. 316.

[5] 12 C. B. 202.

[6] 5 C. P. D. 171.

[7] 10 App. Cas. 74.

[8] 20 Q. B. D. 475.

[9] 3 Q. B. D. 195.

[10] 35 L. J. C. P. 123.

[11] L. R. 9 C. P. 325.

[12] L. R. 9 C. B. 57.

[13] 5 Can. S. C. R. 204.

[14] 12 App. Cas. 503.

[15] 12 App. Cas. 518.

[16] 25 Can. S. C. R. 38.

[17] 18 Times L. R. 382.

- [18] 3 Moo. P. C. (N.S.) 272.
- [19] 7 Ex. 707.
- [20] 11 U. C. Q. B. 96.
- [21] 18 Q. B. D. 176.
- [22] 10. H. L. Cas. 473.
- [23] 8 App. Cas. 703 at p. 708.
- [24] [1898] 2 Q. B. 61.
- [25] L. R. 5 H. L. 116.
- [26] 10 Q.B.D. 118.
- [27] 5 Ct. of Sese. Cas. (2 ser.) 988.
- [28] 24 Can. S. C. R. 611.
- [29] 25 Q. B. D. 475.
- [30] [1903] 1 K. B. 750.
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