Burger v Central South African Railways
1903 TS 571

Supreme Court of the Transvaal

1903. June 9 and September 7, 14.

INNES, C.J., and SOLOMON and WESSELS, J.J.

Flynote

Carrier's liability. --- Special contract. --- Railway.

Headnote

B, through his duly authorised agent, delivered a box of books to the respondents at Johannesburg for carriage by rail to Grahamstown, The agent signed a consignment note, which was also signed by an official of the department, which stated on the face of it that it was issued subject to the goods traffic regulations in force on the railway. Under sec. 14 of these regulations the liability of the department was very materially limited in the case of loss or damage to goods entrusted to it, unless the value had been declared and the goods had been specially insured by the consignor. B read the note before the goods left Johannesburg, but did not make himself acquainted with the regulations. The goods were lost *in transitu*. *Held,* that though the facts proved established a strong *prima facie* case of negligence, and therefore of liability against the respondents, and though the regulations alluded to in the consignment note had not been annexed to it or printed upon it, yet the signatory was bound by the terms of the document he signed; that the special written contract signed by both parties limited the liability of the respondents to a certain definite amount, which they had duly tendered; and that they were therefore not liable to make good the full value of the articles lost.

Case Information

This was an appeal from the First Civil Magistrate of Johannesburg. The appellant sued the respondents in the lower Court for £46, 4s. 6d., being the value of a box of law books delivered by him to the respondents at Johannesburg for carriage by rail to Grahamstown. The summons alleged that the box in question had been lost by the respondents *in transitu*. The respondents admitted this, and tendered the sum of £1, 19s., as being the full amount to which they were liable, such amount being calculated at the rate of 1s. for every pound on which freight had been paid. They pleaded that as the appellant had

through his duly authorised agent, one Meyer, before entrusting the box to them, signed a consignment note which stated on the face of it that the appellant would be bound by the goods traffic regulations of the railway as though they were fully stated thereon, they were freed from their common law liability as carriers. Sec. 147 of the railway regulations reads as follows: ---

"The railway in case of loss or damage to goods . . . refunds against receipt to the claimant payment for the damage really suffered, with a maximum of 1s. per lb. for which freight has been paid. If claimants wish to be entitled to a greater indemnification, the value must be declared, and the goods insured at the railway at a premium as under."

The parties at the trial agreed not to call evidence, but to take the facts as stated in the summons. The magistrate on these facts found that the tender of £1, 19s. was sufficient, and gave judgment for that amount. The appellant (plaintiff) thereupon appealed. When the matter came before the Supreme Court in the first instance the Court wished for fuller information as to the facts. Availing themselves of the powers conferred by sec. 26 of the Magistrate's Court Proclamation, they remitted the case to the magistrate for him to take evidence on the following three heads: –

(1) The circumstances under which the consignment note was signed by the appellant's agent, and his knowledge or ignorance of the regulations.

(2) The facilities which he had of making himself acquainted with these regulations at the time of so signing.

(3) What became of the box of books, and what inquiries were made with a view to finding it.

The material facts in the evidence thus taken appear fully from the judgment.
Gregorowski, for the appellant: The respondents are entitled to contract themselves out of their common law liability as common carriers, but the terms of that contract must be very clearly stated,

and must be brought to the notice of the consignor. It is not enough for them (the respondents) to prove that they issued a notice to the public that they had guarded

themselves against their common law liability as carriers, without proof that the appellant was aware of that notice; see *Naylor v Munnik* (3 Searle, 183). The incorporation of the regulations in the ticket or consignment note was not sufficient notice. A bailee for hire cannot contract himself out of his common law liabilities by means of conditions which are unjust and unreasonable; see *Dickson v Great Northern Ry. Co*. (56 L.J., Q.B. 111); *Cutler v North London Ry. Co*. (56 L.J., Q.B. 648); *Richardson, Spence & Co. and the Lord Gough Shipping Co. v Rowntree* (63 L.J., Q.B. 283). The conditions are not binding unless read by the customer.

[INNES, C.J.: Is not the onus on you to show that you did not know the regulations?]

The onus is on the respondents to show that there was no wilful misconduct on their part. It is incumbent on them to show how the box was lost; see *Herman v Z.A.S.M* (1889-1890 (4) OR 327); *Meltzer v Z.A.S.M*. (1889-1890 (4) OR 489); *Cape Government Rys. v Green & Co*. (O.R. 1, Webber's Translation, 320); *Ashen v London, Brighton, and South Coast Ry. Co.* (42 LTR 586). The appellant naturally assumed that the liability of the railway was the ordinary common law liability of an insurer.

Matthews, for the respondents: The railway is not liable for the value of the books. The consignment note signed by the appellant was a special contract under which the respondents limited their liability. It incorporated by reference thereto the whole of the Imperial military railway regulations. There is nothing to show that the respondents did not exercise reasonable care. The last two cases cited support this contention, for in neither of those cases was there a special contract; see Story on *Bailmnents* (8th ed., p. 510, sec. 549); *Harris v Great Western Ry. Co.* (L.R. 1 QBD 515); *Parker v South Eastern Ry. Co.* (L.R. 2 CP 416); *Henderson v Stevenson* (L.R. 2, Scotch and Irish Appeal Cases, 470); *Streatham v Union S.S. Co*. (1 EDC 315); *Zeederberg v Franck* (O.R. 1, Webber's Translation, 118); *Cape Government Rys. v Green & Co.* (O.R. 1, Webber's Translation, 320); *Lampart v Union-Castle S.S. Co., Ltd*. (11 CTR 472); *Acton v Castle Mail Packets Co.* (73 L.T., N.S. 158).

Gregorowski, in reply: Whereas the English railway companies

have a higher and a lower rate, according as to whether the carriage is at the company's or the owner's risk, here the railway regulations quote only one tariff, and that at the owner's risk. There must be clear knowledge of the conditions, and clear proof of such knowledge; see Shirley's *Leading Cases*, note to *Peek v North Staffordshire Ry. Co*. The liability of common carriers is part of the *jus publicum* (Voet, 4, 9, 2); see *Tregidga & Co. v Sivewright, N.O*. (7 CTR 72; 14 SC 76); *Commercial Union Assurance Co. v Geo. Heys & Co*. (1889-1890 (4) OR 563).

Postea (September 14): –

Judgment

INNES, C.J.: This matter comes before the Court on appeal from a decision of the First Civil Magistrate of Johannesburg. The appellant Burger sued for the sum of £46, 4s. 6d., being the value of a case of books delivered to, and accepted by, the Central South African Railways at Johannesburg, to be duly forwarded from there to Grahamstown in the Cape Colony. The facts would appear to be these: The appellant sent a clerk named Meyer with the books to the Johannesburg station. The clerk filled in and signed a consignment note in duplicate, to the terms of which it will be necessary hereafter to refer. He did not read the note, nor was his attention drawn to the words printed upon it. The railway official with whom he was dealing desired to know the value of the books for the purpose of filling up the bill of export. Meyer went away to obtain from Burger the particulars required, leaving the books and the duplicate consignment note at the station. Having ascertained the value, he returned and informed the official, and then he formally placed the books in charge of the railway department. He brought away from the station one signed copy of the note, which he handed to Burger; the other copy was retained at the station. This happened during the course of the morning; the goods were thereafter trucked, but could not have left Johannesburg before six o'clock that evening.

Burger states that he read the consignment note handed to him by Meyer, and it will be convenient here to state what that note contained. It purported to be addressed to the "Imperial Military Railway Department," and it embodied a request that

the department would receive and forward to Grahamstown the package (of which full particulars were given) "in accordance with the Goods Traffic Regulations in force on the Imperial Military Railways, . . . which regulations I hereby agree to be applicable to this consignment, as though they were fully stated thereon." The space filled by Meyer's signature was indicated by the words, "signature of sender or person duly authorised to sign the contract," and the note was also signed at the foot of it by a railway official on behalf of the department. Such was the document which Meyer, as Burger's duly authorised agent, signed, and which the appellant received and read before his books had actually left Johannesburg. According to his evidence, he noticed when he received the note that his books had been consigned to be carried subject to the regulations, but he did not know what those regulations were; he had no idea that any of them limited the liability of the department, and it never occurred to him to stop the books even had it been possible to do so. He retained his copy of the consignment note, and the package went forward. It has been wholly lost, and all efforts to trace it have been unsuccessful. So far as can be gathered from the evidence, the truck by which it is supposed to have left Johannesburg reached Springfontein station (which is on the system of the Central South African Railways) without it, and the box of books has never been heard of since. When Burger claimed its value he was met by a tender of £1, 19s., based upon the terms of sec. 147 of the railway regulations, which reads as follows: "The railway in case of loss or damage to goods . . . refunds against receipt to the claimant payment for the damage really suffered, with a maximum of 1s. per lb. for which freight has been paid. If claimants wish to be entitled to a greater indemnification, the value must be declared, and the goods insured at the railway at a premium as under." Then follows a scale of payment, in regard to which it is only necessary to say that for a premium of 5s., the books in question could have been insured at their full value. The case went to trial; the magistrate upheld the tender as being sufficient, and gave judgment for £1, 19s., and no more; and against that decision the present appeal is brought.

It will be observed that the consignment note in question is upon an old form, addressed to the Imperial Military Railways, and referring to the regulations of those railways. The present railway administration, however, is the successor of the Imperial Military Railways, and employs and uses the regulations originally framed by the Netherlands South African Railway Company, and thereafter adopted by the Imperial Military Railways. In so doing it acts under the provisions of Ordinance No. 25 of 1902. It is clear that the form of consignment note employed in this case was received from the defendant administration, and was, after signature, handed by the consignor's agent to an official of that administration, to be acted upon by him in his capacity as such. And it must for the purposes of this case be read as if it had been in terms, as it certainly was in intention, addressed to the Central South African Railways.

A number of English cases were referred to during the argument, which really have no bearing upon the point before the Court, Some of them, and of these *Dickson v Great Northern Railway Co*. (56 L.J., Q.B. 111) may be taken as an example, were decisions under sec. 7 of the Railway and Canal Traffic Act, 1854. In terms of that section a railway company, though liable for the loss of goods caused by its neglect or default, may make by special contract, assented to and signed by the consignor, any conditions adjudged by a court to be just and reasonable. Acting under the powers conferred by that section, English courts have repeatedly set aside special contracts limiting the liability of railway companies, on the ground that they were unjust and unreasonable, though they had been entered into deliberately with full knowledge of their purport. But the very special provisions of that section have no operation in this country, and our law does not recognise the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable. Nor is it necessary in the present case to discuss the question whether, and to what extent, a common carrier may by special contract protect himself against the consequences of his own negligence, however gross; because the regulation in dispute has no such scope. It recognises the full liability of the railway

in cases where the higher tariff is paid; but in regard to the lower rate, it imposes upon the department a very small, though appreciable, responsibility.

A number of other English decisions quoted were cases in which the carrier attempted to establish a restricted liability by setting up a contract alleged to have been entered into on the basis of a condition or notice put forward or delivered by the carrier to the employer, and tacitly assented to by the latter. Under what circumstances such a contract should be regarded as established is a

question of great interest and considerable difficulty. And the reports abound with cases in which the consequences of the acceptance by a passenger or consignor of a ticket, having printed upon it a notice limiting the liability of the carrier, have formed the subject of much learned investigation (*Parker v South Eastern Ry.*, 36 LT 540; *Acton v Castle Mail Packets Co*., 73 L.T., N.S. 158, &c.). But these decisions can have no application to the matter now before the Court. They are all concerned with the mode of proving the contracts to which they refer, and with the question of what circumstances will justify an inference that a consignor has agreed to stipulations with which he has had the opportunity of making himself acquainted. In the present instance the railway department does not need to depend upon the tacit acquiescence of the consignor in conditions notified to him. It relies upon a special contract expressly entered into, and it proves that contract by producing a communication addressed to itself, and admittedly signed on behalf of the consignor. This fact differentiates the present case not only from the English authorities quoted at the Bar, but also from the decisions of the High Court, to which reference was made during the argument. None of those decisions dealt with the effect of a special written contract signed by the consignor and limiting the liability of the carrier. In *Herman's* case, indeed, it would seem that a note embodying such a contract had been signed; but through some mistake it was not put in at the trial, and it was therefore disregarded by the Court in giving judgment.

But the point must now be decided, and it lies in a very small compass. Can a man who has signed a document in the

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form of the one now before the Court claim that he is not bound by it, simply because he did not read what he signed, and did not know what the document referred to? Had the regulations alluded to in the consignment note been annexed to it or printed upon it, there could surely have been no doubt as to the signatory being bound. And the fact that though referred to in the contract, they were not actually printed as part of it, cannot alter the legal position of the consignor. The appellant could easily have acquainted himself with the regulations; a copy was kept at the inquiry office, and it was the special duty of one of the clerks to give information to consignors and others with regard to them. Had Meyer read what he signed and asked for information, or had Burger after he perused the consignment note gone to the office and made inquiries, the additional charge of 5s. could have been paid before the package left, and full liability would have attached to the railway.

"It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. There are, of course, grounds upon which he may repudiate a document to which he has put his hand. But no such grounds have been shown to exist in the present case. Consider the circumstances under which this note was signed. Neither fraud nor misrepresentation have been alleged; nothing was said by any railway official which misled the signatory; the language of the document was one which the consignor understood: no pressure of any kind was exercised. All that can be said is that the consignor did not choose to read what he was signing, and after he signed did not know the particulars of the regulations by which he had agreed to abide. For the Court to hold upon these facts that the appellant is legally justified in repudiating his signature would be a decision involving far-reaching consequences, and it would be a decision unsupported by any principle of our law. The mistake or error of the signatory in the present case was not such justus error as would entitle him to claim a *restitutio in integrum*, or as could be successfully pleaded as a defence to an action founded upon the written contract, and therefore it cannot be used for the purpose of attacking that contract when

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the railway seeks to rely upon it. Nor does the law of England in this respect differ from our own." In an ordinary case of a written agreement," said MELLISH, L.J., in *Parker v South Eastern Railways*, "it is wholly immaterial that the signatory has not read the agreement, and does not know its contents." And the rule is thus stated by Anson (*Law of Contracts*, pt. 2, ch. 4, sec. 1): "Apart from fraud," he says, "the Courts would not permit one who had entered into a contract to avoid its option on the ground that he did not attend to the terms which were used by himself or the other party, or that he did not read the document containing the contract, or was misinformed as to its contents, or that he supposed it to be a mere form."

The position then is this: The contract relied upon by the railway has been proved by a written document admittedly signed by the authorised agent of the appellant; no grounds have been shown by the evidence which would entitle him to repudiate his contract. And though the facts establish a strong *prima facie* case of negligence, and therefore of liability against the railway, the effect of the contract is to restrict that liability to the amount tendered. The finding of the magistrate

was therefore right. The Court would have been glad to assist the appellant had it been possible to do so; but the law is against him, and the appeal must be dismissed, with costs.

SOLOMON and WESSELS, J.J., concurred.

Appellant's Attorneys: *Rooth & Wessels*; Respondents' Attorneys: *Lennon & Nixon*.