EPHRAIM ERB *et al*.....APPELLANTS; 1881

AND *March 3. *June 10.

THE GREAT WESTERN RAILWAY COMPANY OF CANADA... .....} RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Shipping note—Fraudulent receipt of agent—Liability of company.

C., freight agent of respondents at *Chatham*, and a partner in the firm of *B. & Co.*, caused printed receipts or shipping notes in the form commonly used by the railway company to be signed by his name as the company's agent, in favor of *B. & Co.*, for flour which had never in fact been delivered to the railway company. The receipts acknowledged that the company had received from *B. & Co.* the flour addressed to the appellants, and were attached to drafts drawn by *B. & Co.*, and accepted by appellants. *C.* received the proceeds of the drafts and absconded. In an action to recover the amount of the drafts:

Held (*Fournier* and *Henry*, J.J., dissenting), that the act of *C.* in issuing a false and fraudulent receipt for goods never delivered to the company, was not an act done within the scope of his authority as the company's agent, and the latter were therefore not liable.

APPEAL from a judgment of the Court of Appeal for *Ontario*, affirming a judgment of the Court of Queen's Bench, setting aside a verdict obtained by the plaintiffs and ordering a non-suit or verdict to be entered for the defendants.

This was an action brought by the appellants (plaintiffs), commission merchants at *St. John*, *N. B.*, against the respondents to recover the value of certain drafts made by *T. Brown & Co.*, dealers in flour at *Chatham*, *Ontario*, which were accepted by them and

*PRESENT:—Sir W. J. Ritchie, C. J., and Strong, Fournier, Henry, Taschereau and Gwynne, J. J.

banks, and advances made upon the faith that the goods referred to therein have been actually shipped. The respondents set up that the goods were never received by them, and therefore that they are not liable, and rely upon the authority of the case of *Grant* v. *Norway* (1), but it is submitted that that case is not parallel with this. It did not appear there, as it does here, that it was known to the owner of the vessel, as it must be taken to have been known to the respondents, that advances were usually made upon the faith of the bills of lading. It turned upon general usage known to all persons dealing with masters of vessels. The point in question in *Grant* v. *Norway* does not seem to have been considered in *England* since the date of that judgment in connection with the signing of a bill of lading by a station agent.

The most apposite case I can find is that of *Swire* v. *Francis* (2), decided since the judgment of the Court of Queen's Bench. The only difference is that the defendants were a firm instead of a corporation, and it would appear that every element which is here was in the case of *Swire*. That it is a corporation in this case makes no difference. The tendency of the modern decisions is to increase the liability of corporations in just such matters as these. *Cooley* on Torts (3).

The general rule of law now acted upon in almost all cases is that where one of two innocent persons must bear a loss, that one of them who could, by care, have avoided the loss, should bear it, and it is submitted that the company could, by a system of checking, have guarded against this representation having been made; or could have taken security against the fraudulent deeds of their agent.

In the State of *New York* the Court of Appeal of that

(1) 10 C. B. 665.
(2) 3 App. Cases 106.
(3) P. 120-122.

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State has refused to follow the judgment in *Grant* v. *Norway*, because it was felt that the meaning was not the same as applied to bills of lading signed by the agents of railway companies. See *Armour* v. *Michigan Central Ry. Co.* (1).

Then again the same point has been up in *Merchants' Bank* v. *State Bank* (2), where all cases are reviewed.

This must be treated as a case of apparent authority. See *Evans* on Principal and Agent (3).

The respondents contend that the appellants had no right to rely upon the representation of the receipt of the goods, and that they ought to have inquired whether the goods had actually been received. The appellants submit that having regard to the fact that *Carruthers* was the chief agent of the defendants at *Chatham* station, at which place enquiry would have to be made, such enquiry would have been useless, and that in any event the appellants, who carried on their business at *St. John, N. B.*, could not be expected to make any enquiry as to the shipment. The railway companies in fact do their most profitable business in this way, and no one will suggest that the directors are ignorant of the use made of the bills of lading signed by their agents. A corporate body may bind themselves without the solemnity of a seal, that is the universal way in which bills are authenticated, and such documents must be held as binding as if they had affixed to them the corporate seal.

We complain that the respondents have armed their agent with the power to practice this fraud on us, and therefore they are responsible.

The appellants also submit that the respondents are estopped by the statute of the Legislature of *Ontario*, 33 *Vic.*, ch. 19, from disputing the receipt of the goods.

(1) 22 American Rep. 603. (2) 10 Wall. 604.

Mr. *Robinson*, Q. C., for Respondents :

No doubt where a person has put another in such a position as to allow him to commit a fraud he should suffer. But to make a railway company liable under such circumstances as these would be to throw upon them a liability which would be ruinous, and certainly was never contemplated. Now, the cases show that an agent must be doing something within the scope of his authority and within the class of business he is authorized to transact. The class of business Mr. *Carruthers* was authorized to transact was to receive goods for transport, and to give bills of lading for such goods, and his authority did not extend to giving false and fraudulent receipts as for goods received, when, in fact, none have been received. See *Tobin* v. *The Queen* (1).

Then, it is said that this bill of lading, signed by a clerk of *Carruthers* as agent, is the same as if it had been a document under seal. If it was it would be the act of the company, but it is not. Then the whole matter is reduced to this, is the act of *Carruthers* the act of the company? I refer to *Brice* on *ultra vires* (2) to show that the powers of an agent are not even so wide as those of the corporation; in other words, an agent is not an *alter ego* of the corporation, and that for the simple reason that some things can be done but by the corporation. Then, it has been contended that the statute assists the appellants. The statute only professes to deal with documents signed by the company. If the company did not sign, then there is an end of it.

Then, as to the right to recover under the peculiar circumstances of the case. When the bills of lading were signed, no harm had been done. Then, when was the overt act of fraud committed? As the Chief Justice puts it :

(1) 6 C. B. N. S. 310, 349. (2) Ed. 1880, p. 322,

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"It is not a little curious to notice precisely what *Carruthers* did in this matter, and to endeavor to fix the point at which his wrong doing commenced. In procuring *Neville* to sign the bills of lading or receipts, he was not actually doing more than wasting so many of the company's forms. It is true that he was then starting the train of circumstances which was to end in the plaintiffs being defrauded. But if he had repented before acting, or if the bank had declined to cash his drafts no mischief would have been done. The first overt act of fraud was the use of receipts to obtain money from the bank. Now, the manager knew perfectly well that *Carruthers* was to all intents *T. Brown & Co.* Therefore, when he accepted these receipts he knew that they represented nothing more than that *Carruthers*, the miller, had delivered to *Carruthers*, the railway agent, a certain quantity of flour. In what capacity was *Carruthers* acting when he first committed the direct fraud, which led to the plaintiffs' injury? Certainly as *T. Brown & Co.* and not as the defendants' agent. I have grave doubts whether the bank could possibly in this state of facts, and apart from any other objection, have fastened any responsibility upon the defendants, and if they simply passed on the representation to the plaintiffs it may be that they occupy no better position."

Respondents are not estopped from stating the true facts, and saying that when *Carruthers*, not as their agent, but in fraud of them and for his own benefit, signed or procured to be signed certain fictitious receipts, he was not acting as their agent but for himself and for his own benefit and entirely outside of the scope of any employment which had been entrusted to him. He himself drew for his own use the money raised on the bills or drafts, and no benefit directly or indirectly accrued to the defendants, nor was anything

done by them to adopt or sanction what he had done.

It may be said that *Carruthers* knew that the receipt he was signing would be used in the bank and money advanced upon it. But the fraudulent intention of *Carruthers*, to make that dishonest use of the receipt, cannot be called the act or knowledge of the defendants, nor can it be called a misrepresentation by the defendants.

The defendants submit that the documents issued by them as bills of lading or shipping receipts are not intended by them to have the two-fold character assigned to them by Mr. Justice *Patterson*, in his judgment. They are intended to be a receipt to the shipper. They are not intended by them to be used as a representation to the consignees or the banker. *Grant* v. *Norway* (1), *Coleman* v. *Riches* (2) and *Hubbersty* v. *Ward* (3) ought to decide this case. The defendants referred also to *Baltimore and Ohio Ry. Co.* v. *Wickens* (4); *Schooner Freeman* v. *Buckingham* (5).

Sir W. J. RITCHIE, C. J.:—

The plaintiffs on the argument did not rely on the first six counts of the declaration which were based on contract, but relied on the other counts, which were on several bills of lading, and were substantially the same.

The seventh count sets out that plaintiffs were commission merchants doing business at *St. John*, *N. B.*, and were in course of their business accustomed to make advances upon consignments of flour consigned to them upon production to them of bills of lading or shipping receipts of defendants for such flour, such advances to be made by plaintiffs accepting bills of exchange drawn upon them on account of the price of

(1) 10 C. B. 665.
(2) 16 C. B. 104.
(3) 8 Exch. 330.
(4) 22 American Rep. 26.
(5) 18 Howard 132.

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such flour with such bills of lading or shipping receipts attached thereto. The declaration then avers that the plaintiffs contracted with certain persons carrying on business under the name of *T. Brown & Co.*, that if the said *T. Brown & Co.* would procure from defendants a bill of lading or shipping receipt of the defendants for two hundred barrels of flour marked "Creek Mills," the plaintiffs would, upon production to them of such bill of lading or shipping receipt of the defendants, accept a bill of exchange for $800 to be drawn upon them by the said *T. Brown & Co.*, on account of the price of such flour, and the defendants falsely and fraudulently by their bill of lading or shipping receipt represented that they had shipped on their railway at *Chatham* 200 barrels of flour marked "*Creek* Mills," in apparent good order, consigned to plaintiffs at *St. John*, and defendants, at the time they so made said false and fraudulent representations, well knew that the same were untrue, and that the same would be relied upon by the plaintiffs in their dealing with the said *T. Brown & Co.* The declaration then avers that plaintiffs, relying on the representations on said bill of lading, and believing the same to be true, and believing that the flour had been shipped on defendant's railway, plaintiffs accepted a certain bill of exchange drawn upon them on account of the price thereof by *T. Brown & Co.*, payable to the order of *T. Brown & Co.* for $825, which plaintiffs would not otherwise have done. It then alleges that at the time the defendants made the representations they had not received the flour from *T. Brown & Co.*, that bills before due were endorsed by *T. Brown & Co.* for valuable consideration to the *Merchants Bank of Canada*, who became holders for value without notice of such false and fraudulent representations, and by reason whereof and of such false, &c., plaintiffs became liable to pay the amount to the said bank, and they

lost certain commissions which they would have made if representations had been true.

The contract set out in the declaration as the foundation of the claim now put forward is, that plaintiffs contracted with *T. Brown & Co.*, that if *T. Brown & Co.* would procure from defendants a bill of lading, &c., the plaintiffs would, on production to them of such bill of lading, accept a bill of exchange for $825 to be drawn upon them by *T. Brown & Co.*, on account of the price of such flour. This contract with *T. Brown & Co.*, obviously was that *T. Brown & Co.* should actually ship the flour, and, on obtaining a bill of lading or shipping receipt, and drawing for the price of the flour so shipped, plaintiffs, on production of such bill of lading or receipt, would accept the bill so drawn. The action against the defendants is, however, immediately based on fraud, viz.: That plaintiffs having such a contract, defendants made false and fraudulent representations, knowing that the same were untrue; that is to say, that defendants falsely and fraudulently, by their bill of lading, represented that they had shipped on their railway certain flour consigned to plaintiffs at *St. John, N.B.*, and at the time they so made said false and fraudulent representations they well knew the same were untrue, and that the same would be relied on in their dealings with *T. Brown & Co.*; and that so relying and believing the same to be true, and that the flour had been so shipped by *T. Brown & Co.*, they accepted the bill drawn by *T. Brown & Co.*, which they would not otherwise have done; that defendants, at the time they made the representations, had not received the flour from *T. Brown & Co.*, and that *T. Brown & Co.*, before the bill became due endorsed the same to the *Merchants' Bank of Canada*, who became holders for value without notice of defendant's false and fraudulent representations, whereby plaintiffs became liable to pay and

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did pay the said bill to said bank, and so lost the amount thereof and certain commissions, &c.

The sole evidence on which the plaintiffs rely to establish against the defendants this fraudulent conduct, is that *Carruthers*, a partner of the firm of *T. Brown & Co.*, and also defendants' freight agent at *Chatham*, issued, without the acquiescence or knowledge of the defendants, the bill of lading or receipt in question, and made the said bill of lading without the said goods being shipped on the defendants' railway, or received by defendants or their officers or agents for shipment, claiming that the act of *Carruthers* was the act of the company, and the knowledge of *Carruthers* of the false and fraudulent character of the receipt and bill of lading was the knowledge of the defendants, and so the representations contained in the bill of lading were the representations of the defendants made with a knowledge of their false and fraudulent character.

The contract as thus set out between *T. Brown & Co.* and plaintiffs, it is clear *T. Brown & Co.* never fulfilled; they never did ship the flour for the price of which the bill was accepted, and *T. Brown & Co.* never did procure from defendants a bill of lading or shipping receipt, but on the contrary; in fact *T. Brown & Co.* by *Carruthers*, one of their partners, falsely and fraudulently drew a bill for the price of flour never shipped by them, and falsely and fraudulently made and transmitted simulated bills of lading or receipts, and on the strength of which plaintiffs accepted the bill so fraudulently drawn on them.

We must then consider whether the defendants are to be bound by the acts of *Carruthers* as the agent, and are to be held responsible in like manner as if they, with knowledge that the goods had not been received or shipped, had issued or directly authorized the issuing of this receipt or bill of lading, or after its issue had

acquiesced in the act and derived benefit and advantage therefrom.

The mere giving a receipt for goods and issuing a bill of lading without any goods having been received was clearly not within the usual scope of the employment of a freight agent, such as *Carruthers* is shewn to have been; it was only when he had actually received goods to be shipped that the giving a receipt and bill of lading for such goods was within the usual scope of his employment. It was never within the scope of his employment that he should create, for his own illicit gain, as instruments of fraud, "false pretences of contracts having the semblance of bills of lading." Such bills of lading as he issued did not grow out of any transaction between *T. Brown & Co.* and defendants, or between the plaintiffs and the defendants, or out of the use of the railway as a means of transportation by either *T. Brown & Co.* or the plaintiffs; they were simulated bills of lading, the result of the direct fraud and forgery or deceit of *T. Brown & Co.*, by their leading partner *Carruthers*, and if plaintiffs accepted and paid bills on the faith of such documents, their doing so was induced by the act of *T. Brown & Co.*, and not by any act of the defendants either directly or by *Carruthers*, as their agent, while acting within the scope of the authority conferred upon him by the defendants. I fail to see how such a wilful fraud committed by *T. Brown & Co.*, through their partner *Carruthers* on plaintiffs, with whom they were dealing, can be considered an act within *Carruther's* agency. The authority of *Carruthers* was a limited authority; his power and authority to sign a bill of lading depended on the actual receipt and shipping of the goods. If the fact on which the power depended did not exist, the authority could not exist.

The cases of *Grant* v. *Norway* (1), *Hubbersly* v. *Ward*

(1) 10 C. B. 665.

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(1) and *Coleman* v. *Riches* (2) appear to me in principle directly in point.

In *Grant* v. *Norway* (3), the marginal note is as follows:

> The master of a ship signing a bill of lading for goods which have never been shipped, is not to be considered as the agent of the owner in that behalf, so as to make the latter responsible to one who has made advances upon the faith of bills of lading so signed.

During the argument, *Jervis*, C. J., says:

> If the master's authority is to sign bills of lading only upon receiving the goods on board, the owner does not hold him out as his agent until he receives the goods.

After pointing out the very large authority of a master of a ship and adopting from *Smith's Mercantile Law* (4) that "the master is a *general agent* to perform all things relating to the usual employment of his ship; and the authority of such an agent to perform all things *usual in the line of business in which he is employed* cannot be limited by any private order or direction not known to the party dealing with him" asks, is it then usual, in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board? For, all parties concerned have a right, he says, to assume that an agent has authority to do all that is usual.

He then points out that, "the very nature of a bill of lading shows that it ought not to be signed until the goods are on board," for it begins by describing them as shipped. He says:

> It is not contended that the captain had any real authority to sign bills of lading, unless the goods had been shipped; nor can we discover any ground upon which a party taking a bill of lading by indorsement would be justified in assuming that he had authority to sign such bills, whether the goods were on board or not.

He then adds:

(1) 8 Exch. 330.
(2) 16 C. B. 104.
(3) 10 C. B. 665.
(4) P. 59.

If, then, from the usage of trade, and the general practice of shipmasters, it is generally known that the master derives no such authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority; and, in that case, undoubtedly, could not claim to bind the owner by a bill of lading signed, when the goods therein mentioned were never shipped.

This case was followed by *Hubbersty* v. *Ward* (1):

The master of a vessel has no power to charge his owner by signing bills of lading for a greater quantity of goods than those on board.

The authority of *Grant* v. *Norway* was conceded, but it was attempted to distinguish this case from *Grant* v. *Norway*, but *Pollock*, C. B., delivering judgment of the Court, says:

We think that when a captain has signed bills of lading for a cargo that is actually on board his vessel, his power is exhausted; he has no right or power, by signing other bills of lading for goods that are not on board, to charge his owner.

This case was followed by *Coleman* v. *Riches* (2), where the same principle was applied to the agent of a wharfinger who signed a receipt in the usual form for the delivering of corn at defendants' wharf. In the course of the argument *Jervis*, C. J., says:

The authority of this man was of a limited character. He was only authorized to give receipts when the wheat was actually delivered.

In delivering judgment:

This, however, is simply the case of a wharfinger's receipt note, and, that being so, the case is disposed of. *Board*, the defendants' agent, had only authority to give receipts for goods which had in fact been delivered at the wharf. And again, when *Board* gave a receipt for wheat which had never been delivered at the wharf, he was not acting within the scope of his authority; he was not acting for his master, but contrary to his duty and against his master's interest.

With how much more force does this reasoning and the conclusions arrived at in these cases apply to the

(1) 8 Exch. 330. (2) 16 C. B. 104.

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present case? The authority of the freight agent cannot, in my opinion, be compared in extent with the general authority of a master of a ship who is entrusted with the whole control and management of the property, and that for the most part in the absence of the owner, and when the vessel is out of his reach. Here the authority of the agent was necessarily of a most limited character; he was to receive and ship and give receipts and bills of lading for goods actually received and shipped; outside of this he does not appear to have possessed any authority whatever, nor was any other or greater authority necessary to enable him to manage and conduct that part of the business of defendants railway confided to him. He certainly was not authorized to grant receipts for goods unless the goods were actually received, nor was he empowered to contract for the company that goods should be sent by the company, when no goods were ever received by the company to be sent, and consequently never could be sent. Nor, in like manner, had he any authority to sign a bill of lading declaring the property was shipped in apparent good order, when it never was shipped, and declaring the property was to be delivered in like good order, when there was no property in the possession of the company or of their agent to be delivered.

It may be even questioned whether the general manager of this railway could legally issue or authorize to be issued bills of lading for goods never received and never shipped, such an act being wholly inconsistent with the object of a railway company, which is incorporated to transport goods delivered to them for transportation, not to issue feigned and fraudulent receipts and bills of lading for goods never received to be forwarded.

Be this as it may, it cannot be doubted that every person in business who deals with a railway company knows

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that, in the ordinary and usual course of business, no such receipts and bills of lading are ever given or issued unless the goods have been actually received to be shipped, and nobody so dealing but must know that if a freight agent, discharging the ordinary duties of a freight agent, did give or issue such receipts and bills of lading without the goods having been delivered, he would be acting in direct opposition to his duty and in fraud of his principals, and no one would knowingly act on a bill of lading so issued, when goods had never been delivered or actually shipped, unless indeed it could be shewn that some specific authority had been given to the agent outside of the ordinary course of business, authorizing the signing of such documents without delivery of the articles.

I cannot conceive it possible, in the usual course of business, that any business firm would accept drafts on their mere production, with bills of lading attached, without any notice or advice, or without anything indicating the nature of the transaction. It is very different from the buying or negotiating a bill of exchange, and the position of a holder for value of a bill of exchange purchased on the market is very different from that of a person accepting a bill of exchange drawn on him. No one, I take it, in the usual and ordinary course of business, draws on another in whose hands he has no funds, but on the strength of funds to be supplied, without advising that the funds against which he draws will be forthcoming; and, therefore, in a case like the present, where the plaintiffs allege that the transaction originated on a contract with the drawers, that on certain conditions they would accept, that is on goods consigned they would advance by accepting drafts, can it be supposed that those who were to draw drew without advising the shipping of the goods and the drawing against them through the bank for their

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value? Can it be doubted that the acceptance of the bills so drawn was on the strength of such advice rather than on that of the bill of lading. Bills of lading attached are generally more for the security of the drawer than the drawee—it is that the goods shall not be delivered over till the bills are accepted; in other words, that the consignees shall not receive the goods till they have secured the payment by accepting the bills drawn for their price. In this case the transaction in connection with the bills, with which the railway had nothing to do, was an illusion and a fraud; the consideration on which the bills were drawn, and the consideration on which the plaintiffs accepted the bills never existed, the bills were drawn against flour to be shipped and for the price of the flour, on the sale of which the plaintiffs were to make a commission; the flour never was shipped, there never was any property on the sale of which the plaintiffs could make a commission, and the reason was that the parties with whom the plaintiffs dealt deceived them, and have endeavored to cover their deceit by transmitting to their dupes feigned documents as purporting to have been legitimately issued by defendants' authority.

I can only look on this as a case of fraud pure and simple. *Carruthers*, in signing these receipts and bills, was not acting within the scope of his authority or in the course of his employment, or for his employers' benefit, and the company never adopted *Carruther's* act or profited by his fraud. *Carruthers* had no authority to make statements or representations. He was employed to receive goods, and on receipt to give acknowledgments therefor, and to ship the goods so received, and on such shipment to give bills of lading; in other words, sign a contract for their transportation and delivery. As said by *Cresswell*,

J., in *Coleman* v. *Riches* (1): "he was not employed to represent that to be true which he knew to be false."

His position was, as described by *Crowder*, J., in the same case that "of a servant whose only duty was to give a receipt when the goods had been delivered."

The case we are dealing with is, in my opinion, much stronger against plaintiffs than those I have referred to, because it is quite impossible in this transaction to separate plaintiffs from *T. Brown & Co.*, and equally impossible to separate *T. Brown & Co.* from *Carruthers*, who unquestionably was the leading partner, in fact substantially the firm of *T. Brown & Co.*, and therefore, so far as the defendants are concerned, plaintiffs must be looked upon as, if not identical with *Carruthers*, as immediately connected with him, and cannot fix on the defendants a liability growing out of a breach of *T. Brown & Co.'s* contract with them as set out in the declaration, and out of the fraudulent conduct of *T. Brown & Co.* in drawing against goods they never shipped, and fraudulently transmitting bills of lading of their own fraudulent concoction. No doubt *T. Brown & Co.*, were, by reason of the employment of their leading member, enabled the more easily to perpetrate and carry out successfully this fraud; still I think this fraud of *T. Brown & Co.* in their dealing with plaintiffs, cannot be attributed to the company. The defendants had no knowledge of the transaction between *T. Brown & Co.* and plaintiffs. The falsehood, fraud and knowledge, was on the part of *T. Brown & Co.*, with whom plaintiffs contracted, and who, instead of shipping the flour to plaintiffs, on the security of which the advances were to be made, and procuring *bonâ fide* bills of lading or shipping receipts therefor from defendants, in fulfilment of their contract with plaintiffs, falsely and fraudulently, by their senior and

(1) 16 C. B. 104.

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principal partner, made out a false and fraudulent bill of lading or shipping receipt purporting to be the bill of lading or the receipt of the defendants, and thereby falsely and fraudulently represented to plaintiffs that they had fulfilled their contract and had shipped and consigned to them the flour in question, and had procured from defendants a bill of lading and shipping receipt therefor, when in truth and in fact the flour never had been consigned and shipped to plaintiffs, nor delivered to be shipped, and defendants never had given any bill of lading or shipping receipt therefor. This was a roguish transaction on the part of *T. Brown & Co.* through their senior and principal partner, whereby they sought and obtained advances from the bank, not on the strength of flour consigned by them to plaintiffs, but on the strength of a false bill of lading concocted by themselves, handed to the bank with a draft on plaintiffs, which the bank, in ignorance of the fraud, transmitted to the plaintiffs as genuine documents, representing a real transaction, namely an actual shipment by *T. Brown & Co.*, of 200 barrels of flour to plaintiffs, when, in fact, they never had shipped a barrel, and, upon being so transmitted, the plaintiffs, in like ignorance of the fraud and believing such documents represented to be a *bonâ fide* transaction, accepted and paid the bill.

By what process of reasoning can this be said to be a transaction of defendants, or with which defendants are in any way connected in the due course of business?

I think, therefore, that *Carruthers* was in this transaction between plaintiffs and *T. Brown & Co.*, and to which defendants were no party, acting as and for the firm of *T. Brown & Co.*, to enable that firm to raise money by false and fraudulent means and pretences in their dealings with plaintiffs, and that defendants are in no

way responsible for a transaction of such a character concocted for the benefit of *T. Brown & Co.*, and carried out by *Carruthers* wholly outside of and apart from and contrary to his authority and duty as freight agent of defendants.

STRONG, J.:—

Concurred in the judgment of the majority of the Court of Common Pleas in *Oliver* v. *Great Western Railway Co.* (1).

FOURNIER, J.:—

I am in favor of allowing this appeal, for the reasons given in the judgments of Mr. Justice *Patterson* and ex-Vice Chancellor *Blake* (2).

HENRY, J.:—

This is an action brought by the appellants, who reside at *St. John, N.B.*, upon six bills of lading or freight bills dated at *Chatham*, in the Province of *Ontario*, in August, 1876. The declaration contains twelve counts six of which are based on the contract contained in the freight bills to deliver the goods to the appellants at *St. John, N.B.*, and the other six are founded on the alleged fraudulent representations of the respondents, of having received the goods, when, in fact, they had not so received them.

The respondent pleaded seven pleas.

To the first six counts: 1st. That they did not promise as alleged. 2nd. Denies the delivery to them of the goods for the purpose and on the terms alleged. 3rd. That the bills of lading were not for a valuable consideration delivered to the appellants, and that the plaintiffs were not the *bonâ fide* holders of the same for valuable consideration, as alleged, nor entitled to the property in and possession of the goods.

(1) 28 U. C. C P. 143. (2) See 3 Ont. Ap. R. 448.

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4th. Alleges the delivery of goods to the appellants at *St. John, N.B.*, according to the alleged contracts. 5th. Denies delivery of the goods to the respondents, and alleges that the appellants had actual notice when they received the bills of lading that the goods had not in fact been delivered to the respondents. 6th. Denies the delivery of goods to the respondents by *T. Brown & Co.*, and alleges that the bills of lading were, without any default on the part of the respondents, obtained from them wholly by the fraud and collusion of *T. Brown & Co.*, and of the appellants and of others through whom the appellants claim. To six remaining counts "not guilty."

The six bills of lading or freight bills were put in evidence. Each embodies a receipt of the goods and an undertaking to deliver them to the appellants at *St. John, N. B.* All are signed by *W. Carruthers*, the acknowledged shipping agent of the respondents at *Chatham*, and are filled up on the printed forms of the respondent's company.

The goods in fact were never delivered to the company, or to any of its agents or servants, and, as between the alleged shippers and the respondents, there would be no liability on the latter. It would appear that the agent, *Carruthers*, was a partner or had some interest in the firm of *T. Brown & Co.*, or partially managed it. The evidence is anything but conclusive on that point; but that would not, in my view of the matter, make any great difference. It would not affect the rights of the parties in this suit whether *Carruthers* really was a partner. If it were a question between the shipper and the respondents it would be important and essentially different. It is clear the appellants thought *bonâ fide* they were dealing with a responsible firm. They had previous consignments from them all in order, and they had also

received consignments when the business was done under the name of *A. D. Bogart & Co.* before the firm of *T. Brown & Co* was formed. In the usual order of business, the way bills were given for the goods in question as had been done previously, and signed and executed as the preceding ones. For the later shipments the respondents would have been accountable if the goods had been delivered, and were not delivered through the negligence or default of the respondents or their agents or servants. But for the non-delivery, in this case, of the goods, there should be, in my opinion, no question of the liability of the respondents. Under the statutes passed for the purpose of enabling parties to obtain advances on goods about to be moved from one part of the country to another, such receipts, when executed by the proper officer of the railway company, are made evidence of transfer of ownership, and a lien is created in favor of any party making advances on the security of such bills of lading (see 31 *Vic.*, c. 11, sec. 7, *D.*). That section provides that any carrier may give a bill of lading or freight receipt in his capacity as such carrier even for his own goods, and makes the transfer of it for advances as effectual as if the goods belonged to another. Such receipts are then, by the statute, made evidence of title as between the parties. The bills of lading in this case made the appellants the consignees, and the property in any goods forwarded under them would pass to them subject to the shippers' right of stoppage *in transitu*. In consequence, then, of the acknowledgment of the receipt of the several shipments of the goods in question by the respondents, through their long accredited agent, the bank and the appellants were induced to do what they otherwise would not have done. The bank discounted the bills drawn by *T. Brown & Co.*, as they had often done before, and the appellants accepted and paid them. The bills of lading were signed for the

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respondents by their duly authorized agent for that purpose, which makes it their act. They were bound to know the consequences of giving powers to their agent, and to remember, when appointing or continuing one, that his receipts in their name for property to be moved from one part of the country to another, were made evidence of the property in the goods upon which banks and others would, from time to time, be induced to advance immense sums of money. There was, then, thrown upon railway companies and other carriers, the duty and responsibility of having faithful and honest agents, and, independent altogether of the common law obligations of principals to answer for the fraud of their agents, I am of the opinion that their obligation under the terms, provisions, purview and spirit of the statute I have quoted, includes that of making good to the appellants the loss they have sustained. The law which, in my opinion, should govern our decision in this case, is clearly and properly expressed by *Story* in his work on Agency (sec. 127), where he says:—

> The maxim of natural justice here applies with its full force, that he who, without intentional fraud, has enabled any person to do an act which must be injurious to himself or to another innocent party, shall himself suffer the injury rather than the innocent party who has placed confidence in him. The maxim is founded on the soundest ethics and is enforced to a large extent by Courts of Equity.

In a note to the section just mentioned, he says:—

> The principle which pervades all cases of agency, whether it be a general or special agency, is this: The principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess. * * * *
> And this is founded on the doctrine that where one of the two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence and having authority in the matter shall be bound by it.

This is the admitted doctrine in all courts in *England*, and the law in *France* holds the principal liable for the

fraud of his agent in cases similar to this. See 20 *Laurent*, p. 609, where he approves this doctrine as held by *Pothier*. I might also cite in confirmation of it from the Roman law.

I have fully considered, as alleged to be applicable to this case, the law as between the endorser of a bill of lading for value signed by the master of a ship and the ship owner, which holds the latter not responsible for goods not shipped on board, but I think a different principle is involved in respect to bills of lading signed by a general receiving agent of a railway company. In *Grant* v. *Norway* (1), Chief Justice *Jervis*, in giving the judgment, gives reasons why a ship owner should not in such a case be held responsible, and says :—

> The very nature of a bill of lading shows that it ought not to be signed until goods are on board ; for it begins by describing them as *shipped*.

And adds :—

> Nor can we discover any ground upon which a party taking a bill of lading by indorsement would be justified in assuming that he (the captain) had authority to sign such bills whether the goods were on board or not.

He then shows that from the usage of trade and the general practice of shipmasters it is generally known that the master has no authority to sign bills of lading, except for goods on board. It is, however, only by mercantile law and the usage of trade that bills of lading become negotiable by assignment or indorsement, and although as binding as if regulated by statute the ruling in such cases should not necessarily determine the rights of parties under the statutory provisions referred to. The case of traffic by railways from its nature and peculiarities may be essentially different from that by means of a ship.

The legislature has provided as a means of enabling the trade of the country to be effectively carried on, that those who advance means for that purpose shall

(1) 10 C. B. 665.

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be secured in the way provided by the acts referred to. The statute before referred to created new responsibilities and liabilities, without which it would be ineffectual for the intended objects. Having expressly given to the delivery receipts of railway companies and others an importance and value which they would not otherwise possess, it necessarily enjoined the obligation for faithfulness regarding them, and called upon those who issued them, either by themselves or their agents, to exercise the necessary caution, so that the public relying upon them would be justified in advancing funds on their security. If, therefore, railway and other companies and proprietors are not to be held answerable for the acts of their duly authorized agents or servants there would be really no security in such cases, and railway and other forwarding companies or associations might retain the services of irresponsible and unreliable agents and servants, the certain results of which would be to render such receipts as those in this case comparatively worthless and require every person, before advancing or paying on the strength of them, to verify the truth of them, which, in a great many cases, would be impracticable and a drag upon the operations they were intended to promote. When we are bound to know that large advances are, and were intended to be, made on the faith of them, even by parties at great distances from the point were they are issued, we are, I think, equally bound to conclude that the legislature intended to enjoin and require that those who issued them should *bonâ fide* do so. It will not be questioned that if the delivery receipts in question in this suit had been issued directly by the respondents they would be answerable for the misrepresentations complained of. I think the obvious intention of the legislature was to make them equally answerable for the agent they employed to perform faithfully on their part the duty imposed by the

act upon them. If they are not so responsible the object of the legislation must be to a great extent frustrated, and its benefits relatively curtailed and diminished. It is our duty in construing an act to give the fullest effect to its manifest objects and intentions, and we cannot do so if we do not hold the principals answerable for the fraud or negligence of their agents or servants, through whose misrepresentations losses are occasioned to persons induced by the legislature to place confidence in them. I am of the opinion, that by a contrary decision we would lessen, if not wholly destroy, the security the legislature intended to give to outside parties when making advances on the security of such delivery receipts, and thereby to a great extent frustrate the object the legislature had in view to foster when passing the act in question. I think myself bound by motives of public policy to adopt this view, and, for the reasons I have given, I think the appeal should be allowed and that our judgment should be for the appellants with costs.

TASCHEREAU, J.:—

In this case, I am of opinion to dismiss this appeal with costs.

GWYNNE, J.:—

I desire to add nothing to what was said by me in *Oliver* v. *G. W. Ry. Co.* (1), with which case the present is identical, and between which and the cases upon the authority of which the judgment of the majority of the court in that case was rested I am unable to perceive any distinction.

Appeal dismissed with costs.

Solicitors for appellants : *Bethune, Moss, Falconbridge & Hoyles.*

Solicitors for respondents : *McMichael & Hoskin.*

(1) 28 U. C. C. P. 143.