

which was sent by another steamer of the S. S. Co. some five days later. The butter was damaged by the heat while in the lighter.

Held, affirming the judgment of the court below, that the M. D. T. Co. having made a through contract for the carriage of the goods they were liable to H. for the damage, and even under the bill of lading were not relieved from liability as the butter was never delivered to, and received by, the S. S. Co. but was in the custody of the M. D. T. Co. when the damage occurred.

1886
MERCHANTS'
DESPATCH
TRANSPORTATION Co.
v.
HATELY.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) in favor of the plaintiff.

The facts of the case as far as they affect the appeal to the Supreme Court may be stated as follows.

The plaintiff, Hateley, was an extensive shipper of butter and cheese from London, Ont. to England, and in August, 1881, he applied by telegram to the agent of the Merchants' Despatch Co. for the carriage of three hundred packages of butter to England. The following telegrams passed between Hateley and the agent:—

“TORONTO, August 22, 1881.

“TO JOHN BARR:

“Will give you car butter, London—300 packages for London—one for Bristol—one for Cardiff. Will ship Tuesday for Saturday's steamer at 63 cents. Say quick if you accept, and if you can get it through.

“W. C. HATELY.”

“August 22, 1881.

“TO W. C. HATELY:

“Sixty-four best can do—steamers 27th—if they will take it. Answer, and will wire New York to place.

“JOHN BARR.”

“August 22, 1881.

“TO JOHN BARR:

“Your list says steamers Bristol and Cardiff Saturday. Will ship butter to-morrow for them at rate you name.

“W. C. HATELY.

1886

"August 22, 1881.

MERCHANTS' "To W. C. HATELY:

DESPATCH "Ship your London butter *via* Great Western; You
TRANSPORTATION Co. can get refrigerators there. I have advised Western.

v.
HATELY.

"JOHN BARR."

The Despatch Company had traffic arrangements with the Great Western Railway Co. and the Great Western S.S. Co., and Barr was their general agent at Toronto.

The agent notified the Great Western Railway Co. of the arrangement with Hately and the butter was shipped by the Great Western on August 23. Bills of lading were signed as follows:—

"FOREIGN BILL OF LADING.


"GREAT WESTERN RAILWAY,

"Merchants' Despatch Transportation Company, and the Great Western Line of Steamships from New York. From London, Ont., to Bristol, England.

"Shipped in apparent good order, by W. C. Hately, the packages, property or articles marked, numbered, and specified as below. Contents, gauge, value, and condition of contents unknown. Weights subject to correction.

"To be delivered in like good order and condition unto order, or to his assigns, he or they paying freight, in cash, immediately on landing the goods, without any allowance of credit or discount, at the rate of gross weight delivered, with average accustomed (at \$4.80 to the pound sterling), under the following terms and conditions, viz.:— * * *

"Through rate 64c. gold per 100 lbs. Gross weight 9639 lbs.

" The property covered by this bill of lading is subject to all the conditions expressed in the customary forms of bills of lading in use by said steamships or steamship company at time of shipment.

MARKS AND NUMBERS.	MERCHANDISE.	1886 MERCHANTS' DESPATCH TRANSPOR- TATION CO. v. HATELY.
One hundred and fifty (150). P. 2 Top. P. Side. Car 2872, M. D. T.	Packages of butter. Iceing to be charged for- ward.	

"3. It is further agreed, that the said Great Western Railway, and its connections, shall not be held accountable for any damage or deficiency in packages after the same have been receipted for in good order by consignees, or their agents, at or by the next carrier beyond the point to which this bill of lading contracts. Consignees are to pay freight and charges upon the goods or merchandise in lots or parts as they may be delivered to them.

"4. It is further stipulated and agreed, that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

"6. It is further agreed, that the said Great Western Railway, and its connections, have liberty to forward the goods or property to port of destination by any other steamer or steamship company than that named herein; and this contract is executed and accomplished, and the liability of the Great Western Railway, and its connections, as common carriers thereunder, terminates on the delivery of the goods or property to the steamer or steamship company's pier at New York, when the

1886 responsibility of the steamship company commences,
 and not before."

MERCHANTS

DESPATCH

TRANSPOR-

TATION CO.

v.

HATELY.

The bills of lading were signed by "William Brown, agent severally but not jointly," and endorsed by Hately and the consignees.

The Great Western Railway Company were to forward the butter to the Suspension Bridge and the Dispatch Company thence to New York, where it was to be delivered on board a steamer of the S. S. Co., who were to carry it to England. This arrangement was carried out, but when the butter was taken from the cars at New York and placed in lighters to be put on board the steamer Dorset then in dock, a delay occurred. The lighter could not get near enough to place the butter either on the steamer or the pier at which she lay, and the stevedore in charge of the steamer caused the lighter to be towed across the river to Brooklyn, directing the lighterman to remain there until he sent a tug to bring it back. The Dorset sailed on September 3rd without the butter, and it was finally sent by the "Bristol" another steamer of the S. S. Co. on September 7th. On arrival in England the butter was found to be injured by the heat.

Hately brought an action against all three companies and on the first trial he was non-suited on the ground that the action should have been brought by the consignee who had paid him for the butter. The Divisional Court set aside the non-suit, and allowed the consignee to be joined as plaintiff in the action. That decision is reported in 2 O. R. 385. The action was tried again and Hately obtained a verdict against all the defendants. The Dispatch Company appealed from the judgment at the trial directly to the Court of Appeal, and the other defendants to the Divisional Court. The latter court sustained the verdict against the S. S. Co., who then appealed to the Court of Appeal which reversed the decision of the Divisional

Court and affirmed that of the judge at the trial, as to the Despatch Company, leaving the plaintiff with his verdict against that company. The latter company then appealed to the Supreme Court of Canada.

Robinson Q. C. and Millar for the appellants, cited the following cases:—

Collins v. Bristol and Exeter Railway Co., (1); *Wilby v. West Cornwall Ry. Co.* (2); *Strong v. Natally* (3); *Pratt v. Ry. Co.* (4); *London & North Western Ry. Co. v. Bartlett* (5); *Hutchinson on Carriers* (6).

Moss Q.C. for the respondent referred to *Muschamp v. Lancaster & Preston Junction Ry. Co.* (7); *Nashua Lock Co. v. Worcester and Nashua Railway Co.* (8); *Kent v. Midland Ry. Co.* (9); *Hyde v. Navigation Co.* (10); *Angell on Carriers* (11); *Lawson on Carriers* (12).

Sir W. J. RITCHIE C.J.—It appears to me that the only question in this case is: Was the butter delivered in good condition to the steamer or steamship company's piers at New York, as the defendants undertook to do, and if it was not was the butter damaged while in charge of the Transportation Company in accordance with the terms of the condition contained in the bill of lading? It is abundantly clear that under the bill of lading placing the butter on board the barge at New York was not a delivery to the steamship company. It seems to me that the fact of sending the goods away from the pier was a refusal to receive them and I cannot see that the transportation company, as against the plaintiff, while the goods were on board the barge had any right to leave the pier with them and remain away for so long a time as to destroy the butter. They should, in my opinion,

(1) 11 Ex. 790; 1 H. & N. 517. (7) 8 M. & W. 421.

(2) 2 H. & N. 703.

(8) 48 N. H. 339.

(3) 1 B. & P. (N. R.) 16.

(9) L. R. 10 Q. B. 1.

(4) 95 U. S. R. 43.

(10) 5 T. R. 389.

(5) 7 H. & N. 400.

(11) P. 274 ss. 287-288.

(6) ss. 240-243 p. 192.

(12) P. 345.

1887 have insisted on the acceptance of the goods at the
MERCHANTS' pier; if the steamship wrongfully neglected or refused
DESPATCH to accept the goods I cannot see that this is any
TRANSPOR- answer to the plaintiff's claim, though it may, between
TATION Co. the transportation and the steamship company, be a
v. matter for controversy. The transportation company
HATELY. assumed the responsibility of seeing that the goods
Ritchie C.J. were delivered on the pier in such manner that they
could be shipped by the first steamer, which it is quite
clear they might have been on board the "Dorset,"
which sailed on the 3rd of September. It is said that
the barge or lighter could not get to the pier; in my
opinion whether it could or not get to the pier should
have been first ascertained, and a perishable article
such as butter should not have been sent away under
such a heated atmosphere until it was ascertained that
it would reach the pier without unreasonable delay,
which was obviously not possible in this case by
reason of other lighters engaged in unloading the
"Dorset," and the lighter with the butter was sent
away because it was blocking the way showing very
clearly that the butter was sent too soon and should
not have been removed from the ice car until a proper
delivery in the terms of the bill of lading could have
been effected.

In this case I can see no reason why, if the barge
could not reach the pier, instead of sending the barge
away, as was done, the butter was not immediately
returned to the ice car from which it had been taken,
and kept there until the delivery at the pier could be
effected. If the butter was improperly moved at the
instigation of the steamship company before it could
be received at the pier that might possibly form a
very good subject for a claim by the transportation
company against the steamship company, but I entirely
fail to see how it is an answer to the unfortunate
owner of the butter who had a right to look to the

transportation company to see that his property was delivered at the pier in a position to be then and there shipped from the pier.

Therefore I think there was no delivery to the steamship company or the steamship company's pier until after the damage to the butter occurred, which took place while in the possession of the transportation company and for which they are responsible, in my opinion, to the plaintiffs.

1887

 MERCHANTS'
 DESPATCH
 TRANSPORTATION Co.
 v.
 HATELY.
 Ritchie C.J.

STRONG J.—For the reasons assigned by the Court of Appeal I am of opinion that the judgment appealed against ought to be affirmed.

FOURNIER J.—Concurred.

HENRY J.—I am of opinion that the appellant company were the original contractors to carry the butter from the place where it was delivered to them to England, and that the bill of lading only settles the liability between the different carriers. There was no privity of contract between the shipper and the steamer. The transportation company were guilty of gross negligence in taking the butter out of the ice car in the hot weather of New York and exposing it to the sun in a lighter. They should not have moved it in the heat of the sun until it was in a position to be placed on board the steamer, and when the steamer authorities declined to take immediate delivery of the butter it was the duty of the transportation company, who owned the lighters, to place it in a position where it would be preserved until it could be received by the steamer. The company were guilty of express negligence, and for these reasons I think the judgment of the Court of Appeal was right and that this appeal should be dismissed with costs.

TASCHEREAU J.—I concur in the judgment delivered by the Chief Justice, and for the reasons given

1887 by him I think this appeal should be dismissed with

MERCHANTS' COSTS.

DESPATCH

TRANSPORTATION CO.

v.

HATELY.

Gwynne J.

Gwynne J.—The Merchants' Despatch Transportation Company are, in my opinion, clearly liable for the loss of the butter in question as the parties who contracted with the plaintiff Hately to convey the butter to England, whatever may be their rights over against the Great Western Railway Company or the New York Central and Hudson River Railway Company or the Steamship Company with whom they contracted for the actual carriage of the butter. The plaintiff Hately in delivering the butter to the Great Western Railway Company at London, was acting merely in pursuance of the instructions given to him by the Despatch Transportation Company and for the purpose of enabling that company to fulfil their contract with him, and they cannot now be heard to claim exemption from liability under their contract by appealing to the bill of lading which, in pursuance of the arrangements existing between the Despatch Company and the railway companies through whom the former company carry on their business, the Great Western Railway Company issued to Hately. The difficulty which this case presented in the courts below appears to have arisen wholly from the mode in which the Merchants' Despatch Transportation Company transact their business—a mode designed apparently for the purpose of mystifying the persons with whom they enter into contracts and of throwing difficulties in the way of their recovering compensation for undoubted injuries, by attempts to shift their own responsibility to some or one of the carriers with whom, to enable them to carry on their business as a Despatch Transportation Company, they find it to be their interest to enter into special arrangements. There is no such difficulty in the case before us as the Despatch Transportation Company are the only defendants who are par-

ties to this appeal, and as to their liability there can, I think, be no doubt.

Appeal dismissed with costs.

Solicitors for appellants: *Morphy & Millar.*

Solicitors for respondents: *Fitch & Brewster.*

1887
MERCHANTS'
DESPATCH
TRANSPOR-
TATION CO.
v.
HATELY.
