Sheerwood et al (*Appellants*) *v.* **The Lake Eyre et al** (*Respondents*)

Jackett P., Noël and Kerr JJ.—Ottawa, June 22, July 7, 1970.

Shipping—Damage to cargo—Cargo stowed on deck—Clause in bill of lading for stowage on deck—Oral discussions not so providing—Whether clause binding on shipper.

S, a professional photographer in Canada, delivered his personal goods in two large containers to the ship *Lake Eyre* at Toronto for shipment to Australia, where he intended to go into business. In his discussions with the ship's agents concerning the shipment *S* always insisted that the goods be stowed below deck but the ship's agents while assuring him that they would endeavour to meet his wish never actually gave him a definite commitment for below deck stowage. The bill of lading for the shipment was delivered to *S* just before he left Toronto by air for Australia and was endorsed "on deck at shipper's risk". *S* at once phoned the ship's agents and demanded that his goods be either stowed below deck or taken off the ship at Montreal, where the ship was then en route. *S* did not however surrender the bill of lading and his demand was not complied with. His goods, stowed on deck, were damaged in severe weather at sea.

Held, *S* was entitled to damages for his loss. There was no express agreement between the parties for stowage of *S*'s goods on deck. The clause in the bill of lading to that effect did not correctly state the oral agreement of the parties.

McCutcheon v. David MacBrayne Ltd [1964] 1 All E.R. 430 (H.L.); *S.S. Ardennes* (*Cargo Owners*) *v. S.S. Ardennes* (*Owners*) [1951] 1 K.B. 55; *Svenska Traktor Akt. v. Maritime Agencies* (*Southampton*) *Ltd* [1953] 2 Q.B. 295, referred to.

APPEAL from judgment of Wells, District Judge in Admiralty for the Ontario Admiralty District, dismissing an action for $60,000 damages sustained by goods shipped on defendant ship.

J. J. Mahoney, Q.C., for appellants.

A. S. Hyndman, Q.C., for respondents.

JACKETT, P.—This is an action for damages sustained by goods belonging to one or other of the appellants that were shipped on the respondent vessel from Toronto to the port of Sydney in Australia.

It is common ground that the damage complained of was sustained as a result of the goods being carried "on deck" and that, if, by the contract under which the goods were carried, the carrier was entitled to carry the goods on deck, the action must fail, and if, by the contract, the carrier was bound to carry the goods below deck, the action must succeed.

The statement of claim alleges that the appellant Sheerwood entered into a contract with the owners of the respondent ship for the carriage of the goods in question from Toronto to Sydney and that it was a term of the contract that the goods were "to be carried below deck" of the respondent ship. The statement of defence denies this and says that such allegations are contrary to the express terms and provisions of a freight engagement contract (dated May 18, 1962) and a bill of lading "both of which documents were issued with respect to plaintiffs' cargo and accepted by them".

The uncontested facts are that the appellant Sheerwood was the major shareholder in the appellant company, which company carried on a photographing business in Canada, that he decided to move the business assets and his personal property to Australia in a home-made container 36 feet long, 8 feet wide, and 8 feet high, that he made certain arrangements by a series of telephone calls with March Shipping Agency, Limited[1] in Toronto as a result of which he received certain documents from that company, divided his container into two containers 18 feet long, took them to Toronto and delivered them to the respondent ship; that he then went to the March Shipping office where certain conversations took place, that he then, pursuant to an arrangement made in that office, met an agent of the firm at the Toronto Airport shortly before he left Canada by air, paid the freight on the shipment to that agent and received from him a document purporting to be a bill of lading for the shipment, and that he protested vigorously, when he received that bill of lading, against the terms endorsed thereon that read "On Deck at Shipper's Risk".

The documents received by Sheerwood from March Shipping Agency, Limited before he delivered his containers to the respondent ship in Toronto are each on a printed form of that firm, addressed to the corporate appellant, by which March Shipping confirms an "engagement" in respect of an intended shipment to Sydney. Each form contains a clause reading, in part:

> The Steamship Company's regular bill of lading shall be issued for the shipment and shippers are understood to have acquainted themselves therewith.

Three of such documents were issued to the appellant corporation:

> (*a*) On April 26, 1962, engagement was confirmed "Intended for Vessel *Baltic Sea*" with "acceptance dates for cargo at Port of Load-

[1] The appeal was argued on the basis that March Shipping Agency, Limited acted throughout as agent for the respondents.

ing" being "Toronto May 7/11" from Toronto to Sydney for "1 Container" of "Various Merch." weighing "30,000#" and measuring "1960 CFT" at an ocean rate "To be assessed when commodities in container are made known to us" and with the words "on deck stowage" appearing in a line for "Remarks";

(*b*) On May 18, 1962, engagement was confirmed "Intended for Vessel *Lake Eyre*" with "Acceptance Dates for Cargo at Port of Loading" being "Toronto, May 27/31" from Toronto to Sydney for "1 Container" of "Merchandise" weighing "25,000#" and measuring "2000 CFT" at "Ocean Rate" "as per tariff (on or under deck, ship's option) Plus Seaway Tolls";

(*c*) On May 24, 1962 (by a document that purports to amend the May 18 document to "Change . . . loading Port" and bears the same "S.S. Contract No.") engagement was confirmed "Intended for Vessel *Lake Eyre*" with "Acceptance Dates for Cargo at Port of Loading" being "Montreal May 29/June 3" from Montreal to Sydney for 1 Container weighing "25,000#" and measuring "2,500 CFT" at Ocean Rate "As per Tariff" with the words "Rate to be assessed when contents of container are made known" and no reference to "on deck" stowage.

None of these arrangements were carried out, but they show that the question of "on deck stowage" was one of the matters discussed by the parties during the period before the containers were taken to Toronto.

From the learned trial judge's findings of facts and from a review of the evidence, it seems clear that whenever the question of "on deck" stowage came up in the conversations between Sheerwood and the employees of March Shipping, those employees promised to do what they could to see that the containers would be placed below deck, and led Sheerwood to think that they would probably be put below deck, while Sheerwood, on such occasions, allowed himself to be fobbed off without getting a commitment that his goods would be put below deck even though he knew that his containers were not weatherproof and even though he had not obtained insurance that would protect him against the risk arising from being carried on deck.

In my view it is clear, from the learned trial judge's findings and the evidence, that there was no actual agreement between the appellants and March Shipping before the containers were delivered to the ship and the freight was paid either that the goods would be carried below deck or that they could be carried "on deck". I quite agree with the learned trial judge that Sheerwood was "the author of his own misfortune" when he tendered to the respondent ship two containers 18 feet by 8 feet by 8 feet without either having made them weatherproof and insuring them for an "on deck" voyage, or having a clear cut agreement that the containers would be carried below

deck. In my view, also, the conduct of March Shipping Agency, Limited in dealing with a shipper such as Sheerwood was not beyond reproach. Promising him, as the learned trial judge finds that it did, "to do their best to ship all the goods under deck" was calculated to lull him into a false sense of security. Having regard to their position in relation to an isolated member of the public with a major shipment to make, I am of opinion that they ought to have warned him from the beginning that he could not count on his containers going below deck and that he should not bring them to Toronto for shipment without preparing himself to deal with the eventuality that they would have to stay on deck.

In my view, there was no agreement in writing, prior to the delivery of the goods to the ship, concerning the shipment that was finally made. If, on the other hand, the engagement note of May 24, 1962, is such an agreement, even though it does not provide for a shipment from Toronto, it is an agreement that the shipment is to be in accordance with "the Steamship Company's regular bill of lading", and this contained no term for an "on deck" shipment. Furthermore, on the learned trial judge's findings and the evidence, it is clear that, up to the time of delivery of the containers to the ship, there was no verbal agreement by the appellants that the goods could be carried "on deck". In these circumstances, in my view, when the freight was subsequently computed and paid, still without any such agreement by the appellants, there was, as of that moment, a contract for the carriage of the goods to the designated port with no terms other than those implied by law in such a contract. Compare *McCutcheon v. David MacBrayne Ltd.*[2] Handing to the shipper a bill of lading containing a special term not previously agreed upon at the time that he pays the freight for goods already accepted on board ship cannot, in my view, alter the oral contract that has already come into existence before the bill of lading was handed to the shipper. I can see no difference between the bill of lading in this case and the receipt containing notice of the carrier's posted conditions that was handed over after the contract was completed in *McCutcheon v. MacBrayne, supra,* per Lord Hodson at page 434.

In so far as concerns this type of case, the law in relation to the "bill of lading" tendered by the ship to the shipper is well put by Lord Goddard, C.J. in *S.S. Ardennes (Cargo Owners) v. S.S. Ardennes (Owners)*[3] at pages 59-60:

> It is, I think, well settled that a bill of lading is not in itself the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms: *Sewell v. Burdick, per* Lord Bramwell, (1884) 10 App. Cas. 74, 105, and *Crooks v. Allan,* 5 Q.B.D. 38. The contract has come into existence before the bill of lading is signed; the latter is signed by one party only, and handed by him to the shipper usually after the goods have been put on board. No doubt if the shipper finds that the bill contains terms with which he is not content, or does not contain some term for which he has stipulated, he

[2] [1964] 1 All E.R. 430 (H.L.)
[3] [1951] 1 K.B. 55.

> might, if there were time, demand his goods back; but he is not, in my opinion, for that reason, prevented from giving evidence that there was in fact a contract entered into before the bill of lading was signed different from that which is found in the bill of lading or containing some additional term. He is no party to the preparation of the bill of lading; nor does he sign it. It is unnecessary to cite authority further than the two cases already mentioned for the proposition that the bill of lading is not itself the contract; therefore in my opinion evidence as to the true contract is admissible.

There is no evidence upon which it can be concluded that, after Sheerwood received the bill of lading, he acquiesced in the term that provided for "on deck" stowage. Once it appears that the contract was an oral contract without an express agreement by the shipper that the goods might be carried "on deck", in my view, the matter falls to be decided by the principle stated by Pilcher, J. in *Svenska Traktor Akt. v. Maritime Agencies (Southampton) Ltd* [4] at pages 299-300:

> At common law a shipowner is only authorized to stow goods on deck in certain circumstances: the principle is set out accurately in Scrutton on Charter Parties, 15th ed., at p. 157, as follows: "The shipowner or master will only be authorized to stow goods on deck; (1) by a custom binding in the trade, or port of loading, to stow on deck goods of that class on such a voyage; or (2) by express agreement with the shipper of the particular goods so to stow them."

In this case there is, apart from the special term in the bill of lading, which, as I have already indicated, in my view never became part of the contract, no evidence of any such custom or any such express agreement. It follows that the appeal must succeed and the appellants are entitled to judgment for the damages sustained by them as a result of the respondents having delivered part of the goods in question in a damaged condition and as a result of the respondents' failure to deliver certain of such goods, together with interest thereon at the rate of 5 per cent, and are entitled, if the parties cannot agree on the amount of such damages and interest, to a reference to the Surrogate Judge or, if he is not available, to such other officer of the Court as the parties agree upon, or, if they cannot agree, as the Court may by special order nominate, to determine the amount thereof. The appellants are also entitled to the costs of the trial and of the appeal.

NOËL J.—This is an appeal from the decision of Wells J., District Judge in Admiralty for the Ontario Admiralty District, whereby the appellant's action to recover damages in the amount of $60,000 sustained when his goods were transported on the deck of respondents' vessel from the city of Toronto, Canada, to the port of Sydney, Australia, in the year 1962, was dismissed. The vessel ran into very severe weather upon leaving Brisbane, Australia, on its way to Sydney and the two cases containing appellant's goods on deck were hit by the heavy sea, shifted and their contents in part lost and in part damaged. In the month of May 1962, the appellant, who until then conducted

[4] [1953] 2 Q.B. 295.

a business known as School Photography Ltd. and operated a processing plant at Shelbourne and another in Saskatchewan, decided to emigrate to Australia and establish a similar business in that country. He purchased the framework of a vehicle described as a house trailer, 36 feet long by 8 feet wide and 8 feet high, for the purpose of packaging therein the photographic equipment and machinery from his plant as well as some personal effects including an automobile for transportation by ship to Australia. The appellant communicated with March Shipping Agency (the respondents' agents) for the purpose of shipping the container on a vessel destined for Australia and it was finally decided that appellant's cargo should be laden on board the ship *M.V. Lake Eyre* at Toronto. After the trailer had been cut in half at appellant's expense, to make two containers in order to be able to store them under deck, it turned out later that the crates were too high to go under deck and could not have been placed in the hold unless the hatch beams were cut off the hatch covers which could not be done without affecting the seaworthiness of the vessel. Three one thousand dollar bills were tendered by the appellant of which two were retained by March Shipping Agency, it being agreed that whoever would deliver the bill of lading to the appellant at the time of his departure by air for Australia the next day would also have the change necessary to accept payment of the balance outstanding of $714.12. The following day, immediately prior to his departure for Australia, the appellant was presented with a bill of lading which the latter claims did not express the contract which he understood he had entered into with the shipowner as it stated that the goods were to be carried on deck at shipper's risk, whereas he had, he says, required and understood that his goods would be carried under deck. The appellant retained the bill of lading but immediately advised the ship's agent, one Fisher, that because the bill of lading did not correspond with his understanding of the agreement, he was to either place the goods under deck or discharge the containers in Montreal, where at the time the vessel was proceeding and where it arrived on the 7th of June 1962. Fisher, the ship's agent, did not, however, comply with appellant's instructions and the goods remained on the deck of the vessel where, as already mentioned, when out of Brisbane, they were subjected to heavy seas and as a result of water washing over the deck of the vessel, the goods were in part lost and in part severely damaged.

The learned trial judge dismissed appellant's action on the basis that the appellant at all times realized the possibility of on deck shipment, made no effort to determine whether his packing cases were adequate and failed to adequately insure the goods for on deck transportation although he had been told to do so. He then concluded that there was no negligence on the part of the ship in handling the appellant's goods and that the latter had received exactly what he had contracted for. With regard to the instructions given to the ship's agent, Fisher, to either store his goods below deck or take them off

the vessel in Montreal, the learned trial judge accepted Fisher's explanation that the latter would have taken them off the vessel had the appellant " . . . handed back the bills of lading in his possession which had become negotiable documents of title to the goods and paid the extra costs involved in putting them back on land . . . ". He also accepted Fisher's version that the appellant had refused and said he had no insurance and was leaving for Australia that night. The learned trial judge stated that he was faced with the conflicting evidence of the appellant and the officers and employees of March Shipping Agency Limited and that he had formed an impression at the time he heard the evidence that the facts were more accurately stated by the shipping agency's employees. As a matter of fact, his appreciation of appellant's evidence is most critical. He indeed stated in his judgment that he had "very serious doubts about the accuracy of his evidence and to say that in his whole dealing with the matter generally he showed any common sense is to grossly exaggerate the facts. In my opinion, he was entirely the author of his own misfortune and when disaster overtook him was not above embroidering his evidence for his own advantage".

In view of the manner in which the trial judge appreciated the appellant's testimony or comportment, it indeed becomes difficult for an appellate court to consider the evidence adduced and the propriety of the findings reached on such evidence. A shipper who, upon delivering his cargo on board a vessel receives a bill of lading containing the clause "on deck at shipper's risk", which he does not protest, and then signs at the point of delivery, cannot, of course, later contest the clause and contend that he is not bound by it and had this been the case this appeal should be dismissed. This, however, does not appear to me to be the situation here. As a matter of fact, the evidence discloses that the appellant resisted from the very beginning of the discussions he had with the ship's agents that his goods should go on deck to the time of his departure by plane for Australia when he directed Fisher to either place his cargo in the hold or discharge it in Montreal, which the learned trial judge, however, rejects by admitting that the appellant had so insisted but by saying that " . . .while there was a certain lack of frankness on the part of the officials of the March Shipping Agency Limited, who should have known that it was impossible to satisfy this request once they saw the containers, they nevertheless refused to obligate themselves to ship under deck, but simply said "they would do their best to see if anything could be worked out . . . ".

With respect I do not think that the above basis is sufficient in law to determine a case such as the present one as in the carriage of goods by sea the only recognized mode of stowing is under deck except in the case of an express contract or custom and as I shall point out later there was here no express contract to stow on deck, nor was there any custom proven.

Cf. *Svenska Traktor Aktiebolaget v. Maritime Agencies (Southampton Ltd.)*[5] at pp. 299 to 300 where Pilcher J. cites *Scrutton on Charter Parties*, 15th edition, at p. 157, as follows:

> The shipowner or master will only be authorized to stow goods on deck; (1) by a custom binding in the trade, or port of loading, to stow on deck goods of that class on such a voyage; or (2) by express agreement with the shipper of the particular goods so to stow them". The effect of deck stowage not so authorized will be to set aside the exceptions of the charter or bill of lading and to render the shipowner liable under his contract of carriage for damage happening to such goods.

After reading the transcript it appears to me that the position of the appellant seems to be more consistent not only with the stand a shipper such as he was would normally insist upon taking who was charged the same price for an on deck stowage as for an under deck stowage, but even with uncontested evidence some of which was produced by the respondents' own witnesses. If such is the situation, one may be justified in differing from the trial court judge upon questions of fact and an appellate court may, under those circumstances, draw inferences which differ from those of the trial court judge. Cf. unreported Supreme Court decision in *Cominco Ltd. v. T.E. Bilton* pronounced May 4, 1970, where in a dissenting opinion Spence J. at p. 13 of his notes stated:

> I realize that in coming to this conclusion, I am differing from the trial court judge upon a question of fact. I point out that in doing so, I rely only upon undisputed evidence and that most of that evidence came from the defendant Bilton himself. It is, of course, well established that an appellate court may under those circumstances, draw inferences which differ from those of the trial court judge.

A recital of the evidence of both the appellant and a number of witnesses of the respondents will show what I mean.

Stokoe, one of the shipping agency's employees, some time before the shipment, told Sheerwood that the container was originally too big and too long to go below deck and that if cut in half he thought it would be the right size to go below deck. Sheerwood then caused the container to be cut in two in order to enable it to go below deck. A number of engagement notes were produced containing some notations of on deck or under deck stowage at ship's option and some evidence with regard to what took place some time in April was given by the respondents' employees with regard to the cargo being carried on deck, but this was at a time prior to the container being cut in two and when some consideration was being given to shipping it as one unit. This evidence, of course, is irrelevant and should not have been adduced.

There were also a number of irrelevant matters raised by the respondents during trial which should not have been and which may have, in some

[5] 2 Q.B. 295.

measure, confused the issues and reflected unnecessarily and unduly on the appellant's comportment such as the suggestion that the latter had picked up a copy of the unsigned bill of lading from a wastepaper basket in the shipping agency's office, or the fact that he had paid in thousand dollar bills and that one of the shipping agents had thought of taking down the serial numbers. I can, however, find nothing in the evidence to indicate that the appellant is not of good character and, therefore, credible, nor can I discover any attempt to embellish his narrative. He is, as one of the employees of the shipping agency stated, a "nice person" and his evidence must, I believe, be considered as would be that of an honest person, though inexperienced in dealing with the shipping of cargo on vessels.

It then appears from the evidence that the packing of the two crates was done on June 4, 1962, and they were then sent down to the wharf on June 5 for shipment on the *Lake Eyre*. It was on this day that tarpaulins were placed on the crates at the dock because it was raining and it must be stated that these tarpaulins were never agreed to by the appellant for transportation on deck, nor from the evidence does it appear that they were ever discussed or considered by him for this purpose. Exhibit No. 5, a bill of lading, dated June 4, 1962, appears to have been made up on June 5, 1962, and contained the wording "containers on or under deck ship's option". The appellant claims this bill of lading, which was unsigned, was merely given as a receipt and that he was annoyed and objected strongly to the option given the carrier of carrying it on or under deck and that Fisher had said he would definitely get this stuff below. Stokoe, at p. 92 of the transcript, admits that Sheerwood was displeased when, on this occasion, on deck stowage was mentioned. The respondents claim that this document was prepared merely to calculate the freight and that several copies of this bill of lading were made up at this time and then thrown in the wastepaper basket. It was then suggested by one of defendants' employees that Sheerwood would have picked the copy he retained from the wastepaper basket. The vessel sailed at noon on June 6, 1962, for Montreal. Prior to sailing, but on that day, however, a bill of lading, Exhibit No. 6, was made up and Stokoe, a March Shipping Agency employee, agreed to meet the appellant at the airport in the evening where he would be given the actual bill of lading so he could receive the goods at Sydney when they arrived. There is some conflict on the exact date of departure of the appellant. There is, however, no question, if one relies on the evidence, that whether the appellant left for Sydney by plane the evening of the 6th or the next, that it was the evening of the day when the bill of lading, Exhibit No. 6, was turned over to him and this, in my view, is the only important matter because, if that is so, we must take it that he had very little time, a few hours at the most, to protest and arrange for the safe custody of his cargo and not 24 hours, as suggested by counsel for the respondents. It is

also of some importance to note that this bill of lading, Exhibit No. 6, no longer contained the phrase "on or under deck at ship's option" which had been replaced by "on deck at shipper's risk". Now, although different language was used in the two bills of lading and counsel for the appellant did not, in any manner, rely on this change[6], as the appellant's position was always that he had never agreed to the contents of Exhibit No. 5, the "on or under deck stowage at carrier's option", this change appears to me to give some strength to appellant's assertion that he had not expressly agreed to on deck transportation of his cargo and that up to the time when he left the shipping office on June 5, 1962, the day he sent his crates down to the dock, they were still promising him that they would do their best to place his cargo below deck and for one unaccustomed to such transactions, as the appellant, such an undertaking appeared sufficient to convince him that this could be done. This is also consistent with the evidence of Kearney, a Vice-president in charge of March Shipping Agency Limited, who admitted quite frankly that the day prior to the day when bill of lading, Exhibit No. 6, was delivered to the appellant at the airport, when the latter left the meeting at March's office, he had reason to believe that his wishes to store under deck could be met. Kearney said at pp. 193-194 of the transcript:

Q. Now what was the nature of the discussion which you had with Mr. Sheerwood at your office?

A. Well, as I recall it, he was a little concerned about it, the storage, and we could not confirm whether it could go below deck or not and we had to establish that. And that did not happen till the next day, but at the time we told him that we would do our best to put it under deck, but we could not actually confirm it at that time.

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[6] It is however of some interest to note that there may well be some difference (which however is not relevant to the present case) between the two phrases if one refers to *Svenska Traktor Aktiebolaget v. Maritime Agencies (Southampton) Ltd.* [1953] 2 Q.B. 295 at 299:

> . . . The intention of the Act and Schedule in relation to deck cargo appears to me to be reasonably clear. At common law a shipowner is only authorized to stow goods on deck in certain circumstances . . .
>
> The policy of the *Carriage of Goods by Sea Act*, 1924, was to regulate the relationship between the shipowner and the owner of goods along well-known lines. In excluding from the definition of "goods" the carriage of which was subject to the Act, cargo carried on deck and stated to be so carried, the intention of the Act was, in my view, to leave the shipowner free to carry deck cargo on his own conditions, and unaffected by the obligations imposed on him by the Act in any case in which he would, apart from the Act, have been entitled to carry such cargo on deck, provided that the cargo in question was in fact carried on deck and that the bill of lading covering it contained on its face a statement that the particular cargo was being so carried. Such a statement on the face of the bill of lading would serve as a notification and a warning to consignees and indorsees of the bill of lading to whom the property in the goods passed under the terms of section 1 of the Bill of Lading Act, 1855, that the goods which they were to take were being shipped as deck cargo. They would thus have full knowledge of the facts when accepting the documents and would know that the carriage of the goods on deck was not subject to the Act. If, on the other hand, there was no specific agreement between the parties as to the carriage on deck, and no statement on the face of the bill of lading that goods carried on deck had in fact been so carried, the consignees or indorsees of the bill of lading would be entitled to assume that the goods were goods the carriage of which could only be performed by the shipowner subject to the obligations imposed on him by the Act. A mere general liberty to carry goods on deck is not in my view a statement in the contract of carriage that the goods are in fact being carried on deck. To hold otherwise would in my view do violence to the ordinary meaning of the words of Article I(c). I hold, accordingly, that the plaintiffs' tractors were being carried by the shipowners subject to the obligations imposed upon them by Article III, r. 2, of the Act.

Kearney indeed stated that he spoke to Captain Dragemark later that evening or next morning who told him only at that time that it had to go on deck, that it was the only place where it could be stowed because there was not sufficient room in the tween decks for the containers which were half a foot too high.

He then admitted later that Exhibit No. 5, the unsigned bill of lading, could have been used if the containers had been placed under deck, which indicates that it may well have been made for this purpose and not, as asserted, to calculate the freight but as they found out later that they could not load them under deck another bill of lading, Exhibit No. 6, was made up and the inscription changed from "on or under deck at option of carrier" to "on deck stowage at shipper's risk". The change was made according to Fisher (cf. p. 130 of the transcript) because from his viewpoint, if the first bill of lading had been used "there might be legal repercussions if something happened to the cargo" and he thought there would be no legal repercussions with the second bill of lading because, as he stated "the second one reads 'on deck at shipper's risk' and we are not liable under the marine law for that sort of thing".

It therefore appears from the above that there was, pertaining to all relevant matters, no essential conflict between the evidence of the agents of the respondents and that of the appellant.

The latter was given to understand, because of the representations made by March Shipping employees prior to the time when he caused his big container to be cut in two to the time when he caused his crates to be delivered to the vessel and, as we shall see, even later, that his crates could be shipped under deck. He then shortly before his departure by plane for Sydney was given a bill of lading which, for the first time, indicated clearly not only that his containers would be carried on deck, but that they would be so carried at his risk. One cannot conclude that this bill of lading (Exhibit No. 6) which at best is only some evidence of the contract and not the contract itself[7], contains the binding terms of the contract, when the parties were not only not *ad idem* on the deck stowage clause but where it appears also, as here, that the party who unilaterally inscribed this clause had until then agreed that all efforts would be made to place the cargo under deck and where the other party had all along been under the impression that it would be stowed under deck. It is not possible to find, under these circumstances, that there was here, as required by law, an express contract to carry on deck and that the appellant had received what he had contracted for.

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[7] (1879) 5 Q.B. 38 at 40: *Crooks & Co. and Another v. Allan and Another*

> . . . A bill of lading is not the contract, but only the evidence of the contract; and it does not follow that a person who accepts the bill of lading which the shipowner hands him, necessarily and without regard to circumstances, binds himself to abide by all its stipulations. If a shipper of goods is not aware when he ships them, or is not informed in the course of the shipment that the bill of lading which will be tendered to him will contain such a clause, he has a right to suppose that his goods are received on the usual terms, and to require a bill of lading which shall express those terms.

The only manner in which the appellant could be bound by this bill of lading would be if, in fact, after receiving it, he had accepted it and its contents and allowed his cargo to be shipped in accordance with its terms. This, of course, would have to be an express *a posteriori* acceptance of the terms of the bill of lading or conduct on his part sufficient to confirm that he had accepted to be governed by its terms. I cannot find in the evidence any acceptance by the appellant of the terms of the bill of lading nor any conduct sufficient to lead me to such a conclusion. As a matter of fact, I can find only on the part of the appellant with regard to the stowing of his cargo on deck, a consistent attitude of refusal, of opposition and protest from the beginning of the transactions to the time when he departed from this country. On the other hand, as shall appear later, the conduct of the employees of the shipping agency seem to reveal a desire to retain a customer which may have led them at times to prompting him to believe throughout the whole of this transaction that his containers would probably be carried under deck and that they would do everything possible to do so, although they must have known at one stage that because of the height of the containers, this was an impossible thing. I am content to support the conclusions I have reached on this phase of the transaction also on the evidence of the appellant as well as on that of the respondents. Sheerwood upon receiving the bill of lading (Exhibit No. 6) from Stokoe, at the airport, read it and said his reaction was one of annoyance when he saw the clause "on deck at shipper's risk". He checked in the phone book and phoned Fisher at his home. He protested very strongly because Fisher, he said, had assured him "it would be below deck". He then, at pp. 43-44, stated what Fisher told him:

A. He suggested they would be going to Montreal. They would take it and put it below deck. I said that would be fine. There was some discussion as to who is paying for that. I said that I already cut it in half to get it below deck.

Q. Did you say the shipment could be removed at Montreal or did you suggest it?
A. This was part of the conversation. I am not sure who suggested it should come off at Montreal but I believe it was on the second or third conversation I had with Mr. Fisher that night as he said he would call Captain Dragemark, I cannot remember.

Q. Did you tell him to take it off?
A. I said take it off or put it below.

Q. What did he say?
A. He said he wanted the bill of lading, Sir.

Q. I think you said he told you he would be in touch with Captain Dragemark. Do you know if he got in touch with Captain Dragemark?
A. Not as a fact, no.

Q. Did you have further conversations with him?
A. I called back in what I thought was sufficient time for him to speak to Captain Dragemark in Montreal.

Q. What did he say?
A. He said he would talk to Captain Dragemark.

And at p. 45:

Q. What was the result of the second conversation with Fisher?
A. He assured me it would go below deck or be taken off.

Q. And what did you then do?
A. Caught my flight to Australia.

Q. Did you expect, as the result of the conversation with Mr. Fisher that the goods would be on the ship, would be kept on this ship?
A. I was pretty sure they would find room for them if they wanted to.

Q. Did you have any apprehension that they might remain on deck?
A. No. I took Mr. Fisher's word. Why doubt him. I had never come in contact with him and found him to be untruthful.

Sheerwood's assertion that he told Fisher to either place his containers below deck or take them off at Montreal is confirmed by Fisher and by Captain Dragemark, two of the shipping agency's employees. Fisher at pp. 141 and 142 of the evidence gave the following answers:

Q. He gave you those definite instructions?
A. He said "I want these containers taken off at Montreal".

Q. Did he also say something about shipping by another vessel?
A. He mentioned it this way, I says, "What are you going to do with them if we take them off and you bring me the original bills of lading" and that, and what will we do with the goods in the shed? He said I will either decide to put them on another Atlanttralik vessel or a Manse vessel if they have one sooner.

Q. And I take it your reaction was you were afraid he would ship it by a vessel of a competing line?
A. This is one thing I was a little afraid of, as I have to look after my company's interest.

Q. Why were you afraid of that?
A. Let us assume he did ship them on a Manse line vessel, and he had the three original bills of lading for the Lake Eyre in his possession, he could present these bills of lading in Australia to our agent there demanding delivery of the goods, and if the goods were not on the vessel he could sue us for the value of the whole shipment.

Q. Will you tell me how he could get possession of the containers from you in order to ship them on a Manse line vessel without giving up the bills of lading?
A. If we took a chance.

Q. Did your company ever give up cargo without receiving bills of lading?
A. No sir.

Q. Therefore, you would not take such a chance, would you?
A. No sir.

Q. Therefore, Mr. Sheerwood, would not be able to do what you are now suggesting to me?

Q. Now what was your real reason for not wanting him to go by another line?
A. Well, we try to keep the cargo on our line, if possible.

Counsel for the respondents also raised the matter of the danger he said was involved in allowing the appellant to retain the bills of lading, which he said are negotiable documents and which, if transferred, could

be held by third parties who could at the point of delivery require delivery of the goods. There would, in my view, have been little to fear in the present case as the bill of lading, Exhibit No. 6, states that the delivery of the goods is to the appellant only and not to order or assigns. The Privy Council held in *Henderson v. Comptoir d'Escompte de Paris*[8] that a bill of lading which merely provided that delivery should be to named consignees was not transferable.

Finally, the position taken by Fisher was that had Sheerwood given him a letter authorizing him to take the containers off at Montreal and had he agreed to pay for the charges involved of loading and discharging, plus the heavy lift charges, he would have discharged the containers in Montreal. Respondents had, as we have seen, received from the appellant $2,714.12 which was more than enough to cover whatever charges or disbursements respondents would incur in unloading the cargo. Furthermore, according to Fisher (cf. p. 107 of the transcript) Sheerwood had told him "you may trust me for it. I am good for the money. I am going to take care of the three bills of lading". Finally, it appears to me that as the bill of lading did not contain the agreement between the parties, it could be at this stage only a receipt for the goods which the appellant would need to obtain delivery either from a warehouse in Montreal, if the goods were removed from the vessel, or at the point of delivery if stowed under deck. He was, therefore, right in refusing to release them.

The position taken by the respondents in requiring a written authorization to move the cargo from the vessel cannot either, in my view, be sustained. As the bill of lading issued was not binding, they were in no position to require, as Fisher claims he did, a written authorization to discharge the cargo from the vessel. Furthermore, by their action, they had placed the appellant in the position of having to protest the bill of lading which had been thrust upon him a few minutes prior to his departure from this country in the only manner he could in view of the limited time at his disposal by telling them to either place his cargo under deck or discharge it in Montreal. They had no right to insist upon a written authorization and should have been content with the verbal instructions issued. Through the shipping agency, their agents, they had placed themselves in the situation of a bailee who, having no right to carry appellant's cargo on deck and having received instructions to place the goods under deck or discharge them from the vessel in Montreal decided, for fear of losing a customer and a commission to send them overseas on deck in inadequate containers where, because of the heavy seas, their contents were either lost or damaged. Having done so without authorization, and thus taken upon themselves the risk of so doing, it follows that they cannot avail themselves of any limitation the *Carriage of Goods by Sea Act* could give them and should be held liable for whatever loss or damage was sustained by the appellant's goods.

For these reasons, I concur in disposing of the appeal as proposed by the President of this Court.

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[8] (1873) L.R. 5 P.C. 253.

KERR, J.—I have had the opportunity of reading the reasons for judgment of the President and of my brother Noël. They have dealt extensively with the issues, evidence and law and consequently I can be brief. On the issue in respect of stowage of the goods, "on deck" or "under deck", my conclusion is that the respondents did not have, by agreement with the shipper, custom or otherwise, any right or authorization to carry the goods on deck.

I would allow the appeal and dispose of it as proposed by the President.