Warehousemen—Warehouse Receipts—Shipment—Loss—Liability—Delivery.

Under section 3588 R.C.M. 1921, as amended by section 1 of chapter 174, laws of 1925, if delivery at terminal is demanded by holder of warehouse receipt for grain no shipping instructions are required or should be given by the holder to the warehouseman, said instructions being required only when there is a delivery of the grain at the warehouse and it is loaded by the warehouseman for the owner for shipment on his own account.

Where grain is to be delivered at terminal loss in transit is borne by the warehouseman.

Where wheat is delivered by the warehouseman to the owner at the warehouse and merely loaded by the warehouseman in cars the shipment to be made by the owner, the warehouseman is not liable for loss in transit unless the loss was due to failure to follow the shipping instructions given by the owner.

A. H. Bowman, Esq., March 31, 1929.
Commissioner of Agriculture,
Helena, Montana.

My dear Mr. Bowman:

You have requested my opinion whether A, the holder of a warehouse receipt for stored grain, can recover from B, the warehouseman, for loss of grain in transit between elevator and terminal when it was shipped under the following instructions from A to B: "You will prompt-

ly order a 60,000 pound capacity .....line car, load the wheat as quickly as possible and bill the car.....Minneapolis, Minnesota, we electing to take delivery of the grade, quality and quantity at the Minneapolis terminal."

The blank spaces above mentioned were filled in in the shipping instructions, but they are not shown in the correspondence submitted to us by your office.

Under Section 3588 R.C.M. 1921, as amended by Section 1, Chapter 174, Laws of 1925, A could demand delivery at the elevator or at terminal. If he intended by his order to exercise his option to demand delivery at terminal in Minneapolis, then it was immaterial to him how the wheat would be loaded as B was bound to deliver grain of grade, quality and quantity equal to that called for in the receipt at Minneapolis, and B being responsible for such delivery, it did not lie within the power of A to assume to direct B as to the method of loading and shipment, as the warehouseman had the right to load and ship the wheat in accordance with his own judgment as to what would be the best and surest method for him to use in order to be able to fulfill the obligation resting upon him, and the warehouseman, until the wheat arrived at terminal and possession thereof was given to the receipt holder, still held it as a warehouseman, subject to all the liabilities as such.

The order given the warehouseman states that the holder of the receipt elects to take delivery at terminal, and if that was his intention he had no right to specify the manner of loading and shipment, as that was entirely the concern of the warehouseman.

If it was the intention by the order to take delivery of the wheat at the elevator and merely to have the warehouseman load the wheat and ship it to terminal for the owner, then the shipping instructions were proper, but this does not constitute electing to take delivery at terminal. The shipping instructions are inconsistent with the idea of delivery at terminal, and the notice to take delievery at terminal is inconsistent with the idea of delivery at the elevator, so that the character of the transaction is uncertain, that is, whether the parties intended that it was to be a delivery at the elevator and loading and shipment for the owner or whether the shipment was by the warehouseman, on his own account, for the purpose of making delivery to the holder of the receipt at terminal.

If the intention was to make and accept delivery at the elevator, then the loading and shipping by the warehouseman was for the owner and delivery was complete at the elevator when the wheat was loaded and billed, and the transportation to terminal would be at the owner's risk, save and except that the warehouseman would be liable to him for any damages suffered by reason of the failure of the warehouseman to follow accurately the loading and billing instructions and for the amount of any excess freight paid, provided the holder of said warehouse receipt furnished to the warehouseman a duplicate copy of the original state weightmaster's certificate of the shipment of wheat at terminal.

Applying these rules to the question submitted by you, if the parties considered the transaction as one by which the holder of the warehouse receipt was taking delivery at terminal then the warehouseman would be liable to the holder of the receipt for whatever amount of wheat he failed to delivery at terminal and the loss in transit would be that of the warehouseman. On the other hand, if they regarded the transaction as a delivery to the holder of the warehouse receipt at the elevator and that the loading and shipping by the warehouseman was at the instance of the owner and for the purpose of enabling the owner to ship the wheat delivered to him, then the warehouseman would not be liable for any loss occurring in transit, unless it was due to a failure of the warehouseman to follow the loading and billing instructions given, or unless the warehouseman failed to originally put in the car the amount of wheat called for by the receipt surrendered.

The ambiguity surrounding the transaction was caused by the character of the order given by the warehouse receipt holder to the warehouseman, and which of the above two kinds of deliveries the transaction between A and B constituted is a question of fact which it would lie within the province of a jury to determine, and that determination would no doubt rest upon facts and circumstances which would be put in evidence to explain the ambiguity, which are not before me, and I cannot give an opinion as to which of the two kinds of transactions above mentioned it might be judicially determined the transaction between A and B constituted.

Very truly yours,
L. A. FOOT,
Attorney General.
By L. V. Ketter, First Assistant.