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ASANA MARIKAR v. LIVERA.

D. C., Colombo, 13,923.

Shipping and landing agent—Contract with steamer agents to bring cargo ashore and deliver into Government warehouse under control of Collector of Customs—Loss of package after delivery into Government warehouse—Action by owner of package against landing agent for value of package—Responsibility of bailee—Ordinance No. 17 of 1869, s. 83.

Where A imported a package of goods by a steamship, the owners of which had entered into a general contract with B that he should receive all its cargo into his boats and bring them ashore and deliver them into the Government warehouse provided by Ordinance No. 17 of 1869—

Held, that A could not maintain an action against B for the value of his package found missing in the Government warehouse, as he was not bailee of it after it had been warehoused there; and the mere fact of his having received payment of the landing charges of the defendant did not imply a contract that he was to do anything more than land and warehouse the package with the Customs authorities.

THE plaintiff in this case imported a package of umbrellas by the steamship *Clan Chisholm*, and the defendant, who was carrying on business as a shipping and landing agent under the style of the *Cargo Boat Despatch Company*, landed that package into one of the Government warehouses on the 5th April, 1900. When the plaintiff went to the Customs to pay the dues and clear the package, he found it missing. The plaintiff instituted the present action to recover from the defendant Rs. 550 as the value of the package of umbrellas, alleging that the defendant cleared the said package from the steamship, and in consideration therefor received from the plaintiff certain charges, but failed and neglected to deliver the said package to the plaintiff, and thereby the same was wholly lost to the plaintiff.

The defendant denied his liability on the ground that he did not contract with the plaintiff to clear goods for him, and that by virtue of an agreement with the agents in Colombo for the *Clan Line of Steamers* it was his duty to receive all their cargo into his boats and bring them ashore and deliver them into the Government warehouse assigned to those ships by the Collector of Customs; that, among the goods so cleared and delivered was a case of umbrellas, in respect of which the plaintiff paid to him certain charges, and that if the plaintiff was the consignee of the said case it was his duty to clear it from the *Queen's Warehouse*; and that after the defendant's delivery of it into that warehouse his liability ceased under the provisions of section 83 of the Ordinance No. 17 of 1869.

The issues framed were as follows: (1) Was there any contract between the plaintiff and defendant, either express or implied, by which the defendant was bound to land the case in question and deliver it to the plaintiff? (2) If there was, did the defendant in breach of such contract fail to deliver the case to the plaintiff? (3) If so, what damage has plaintiff sustained?

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The Additional District Judge, Mr. Felix Dias, found that though the Crown was the owner of the warehouses in the Customs and the Collector kept their keys when they were locked at night, and a Customs officer was posted at each warehouse to see that no goods left the premises without payment of the Government dues, yet neither the Collector nor any of his officers assumed any responsibility for the custody of the goods unless the owner of the goods proved, under section 83 of the Ordinance No. 17 of 1869, the loss to have been due to the wilful misconduct of a Customs officer. If the defendant was a mere carrier between ship and shore, one would naturally expect him not to have meddled with goods after he had put them in the warehouse and got his boat-note initialled or signed by the proper authority, but his duties went very much further according to his evidence. He had his own storekeepers and watchers within the warehouse and in charge of the heap of goods landed by him until they were all delivered to consignees.

The Court therefore held that the defendant was the custodian of the goods he landed, and that the plaintiff as consignee was entitled to demand delivery from him upon an implied promise to so deliver on payment of his landing charges. The Court entered judgment for plaintiff for Rs. 550.

The defendant appealed.

Dornhorst, K.C. (with him *H. J. C. Pereira*), for appellant.—Defendant had no contract with the plaintiff. Section 83 of the Customs Ordinance protects the Crown from liability for loss of goods from the warehouse except under certain circumstances. That provision implies that the Crown was liable before the passing of that Ordinance. The Government, therefore, must be looked upon as the true bailee, though protected by law; therefore the defendant cannot be treated as the bailee. [*Layard, C.J.*—Much would depend upon the bill of lading.] The bill of lading is not produced. How can a mere landing agent be held liable for a loss which did not occur while the package was in his custody? Defendant could not deliver the package he took from the ship's side to the plaintiff. He was bound to place it in the Government warehouse. Having delivered it there, his whole duty was

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fulfilled, and he is not liable to the plaintiff. [Layard, C.J., to the respondent's Counsel—Was the defendant agent for the plaintiff or agent for the steamer?]

F. M. de Saram for plaintiff, respondent.—Agent for both. But as defendant looks to the plaintiff for payment he must deliver the goods to the plaintiff. [Layard, C.J.—If defendant looks to you for payment, do you mean he has a lien on the goods until payment? If so, he can sue you in the event of your not taking up the goods.] That aspect of the case does not concern me. [Layard, C.J.—It does. If there is a contract between him and you, he could sue you.] Assuming there was no contract, still he must deliver the goods to me because he took charge of the goods from the ship's side as a common carrier. [Layard, C.J.—There is no evidence that he is a common carrier. If a common carrier carries my goods without my consent, does a contract arise?] Yes. It is not sufficient for him to deliver my goods into the Customs; he must deliver them to me. He is liable for the loss; his watchers are in the warehouse. Unless he is liable, he would not incur the trouble and expense of watching. [Layard, C.J.—But his watchers cannot watch there by night. The Collector of Customs closes the warehouse at the end of the day, and the defendant has no opportunity of watching. A rogue with a false key opens the warehouse at night and removes the goods. Who is responsible for the loss? You pay the defendant for landing, but not for watching.] If he puts my goods into a warehouse where a theft may take place, he is responsible. [Layard, C.J.—But the law compels the defendant to carry the goods into the Government warehouse. His liability to obey the law is greater than his liability to deliver the goods to you. He is certainly responsible for loss between the ship and the shore.] Somebody is responsible to me for loss in the warehouse. [Layard, C.J.—Yes; the Government is, but the law protects it.] Defendant did not deliver the goods to me, but to some one else, and that is no answer to me. [Layard, C.J.—You mean he wrongfully took your goods. Then there was no implied contract such as you rely upon.] *D. C., Colombo, 68,826*, reported in *Rīmanāthan, 1877, p. 56*, seems to be a case in point. [Layard, C.J.—I do not think the case applies.]

Cur. adv. vult.

16th March, 1903. LAYARD, C.J.—

The defendant carries on the business of landing and shipping cargoes. He has obtained from Messrs. Finlay, Muir & Co. the exclusive privilege of landing goods for the Clan Line of Steamers,

for which they are agents, except, he says, in a few cases where the consignees, with the express sanction of the ships' agents, receive the goods on board themselves. In February, 1900, a package of umbrellas arrived at Colombo by one of the Clan Line of Steamers consigned to the plaintiff. The defendant landed all the goods which arrived from this port by that steamer, including the package of umbrellas, the plaintiff's property, and warehoused them at a warehouse indicated by the Collector of Customs. When the plaintiff went to obtain delivery at the Customs he could not find the package of umbrellas. He now seeks to recover from the defendant the value of the missing package of umbrellas.

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There is nothing to show in the evidence that there was any express contract between the plaintiff and defendant. There appears to have been an express agreement with the owners of the Clan Line of Steamers that the defendant should land all goods arriving in their ships and should deliver them at the Customs premises. The defendant is not a warehouseman. All goods landed by him appear from the evidence to be warehoused by the Customs authorities, who receive them into their warehouse and there detain them until the Government dues are paid. That the Customs authorities (*i.e.*, the Crown) are the real warehousemen is evidenced by the fact that they make a charge for warehousing if the goods are not removed in three days.

It is argued for respondent in this case that, though there is no express contract upon which the defendant could be sued by the plaintiff, there is an implied contract to land, warehouse, and deliver to the plaintiff. It seems to me doubtful whether any such contract can be implied at all in this particular case. The defendant was acting under an express contract with the ship-owners, the Clan Line. It is suggested that, because he paid the defendant the landing charges, an implied contract arises not only to land the goods and deliver them to the Customs authorities, but subsequently to deliver them from the Customs warehouse to the plaintiff. Is such the case? Say the plaintiff had demanded his goods from the defendant, merely tendering him the amount due for landing, could he have compelled the defendant to deliver to him the goods? Certainly not. There might be freight due on the goods, and until such freight was paid the goods would be under lien to the shipowner, and the plaintiff could not demand delivery of his goods by merely paying the defendant's charges for landing. Assuming there was an implied contract of some kind between plaintiff and defendant, what was it? According to defendant's evidence, when he undertakes to clear and deliver goods to consignees he enters into a special agreement with them. In those

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cases he pays all the harbour dues, duty, &c., and sends the goods on to the consignees. He acts then as agent of the consignees, and takes upon himself the duty of clearing the goods at the Customs and of delivering the goods to the consignees. Did the defendant undertake the duty of warehouseman until plaintiff came to take delivery? The evidence shows that the practice is that, on a consignee taking delivery at the Customs, one of the defendant's servants fills up a cart note and signs it, and this is countersigned by the Government landing waiter if he is satisfied that all Government dues have been paid, but the landing waiter deposes that a cart note alone signed by him would be sufficient authority to pass out goods, whereas one signed by defendant's servant alone would not. The Custom House authorities could not make a charge for warehousing if they are not the actual warehousemen. The presence of watchers of the defendant as well as his store-keeper in each warehouse where he landed goods, it is argued, shows that he is the real warehouseman. This is explained by the defendant to be done for the purpose of recovering the landing charges and also for securing the safe custody of those goods which he had expressly contracted to deliver. His watchers were only there by day; at night he had no means of controlling or safeguarding the goods of which, it is said, he was bailee. The contention that goods could not be stolen at night except by the Collector of Customs, in which case the Crown would be responsible, depends upon a mere assumption. Why should not the place be broken into? Moreover, if the defendant and not the Crown were the bailee, the defendant would be liable no less if the goods were stolen by a servant of the Crown, *e.g.*, the Collector of Customs, who, it is admitted, had sole control at night.

It is further significant that the plaintiff on missing the package does not apply to the defendant, but searches the Customs warehouse himself, employing for the purpose a Custom House cooly who worked for him, and also that the agents of the shipowners, Messrs. Finlay, Muir & Co., paid the Customs duty leviable on the missing package, apparently recognizing that the goods were imported (*i.e.*, landed) on their account.

I am not satisfied that after the 5th April, 1900, when the package passed the tallyman at the jetty and was warehoused in the Government warehouse, the defendant was bailee at all of that package. There is nothing to show that payment by the plaintiff of the landing charges supported a contract by defendant to do anything more than to land the goods and warehouse them with the Customs authorities.

Accordingly, I think this appeal must be allowed and the consideration should not weigh in such cases that, if the defendant is not liable, the plaintiff has no remedy by reason of the statutory protection of the Crown under section 88 of the Customs Ordinance. That is not a circumstance which can affect the question of the defendant's liability.

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MONCREIFF, J.—

I am of the same opinion. The principal question was, what was the defendant's relation to the plaintiff's goods after they were landed and warehoused? The evidence leaves no room for doubt. When the goods were warehoused the defendant, who acted as a mere landing agent, had no further responsibility in connection with them. True, he maintains a staff at the warehouse and busies himself with the goods when they are delivered. But it is clear that he is there only by the permission of the Collector of Customs, partly that he may have a chance of getting payment of his landing charges and partly for reasons which have nothing to do with this case. The goods were warehoused by the Custom House authorities, whose liability is carefully defined by Ordinance.
