

CAYLEY, Q.A., v. KERR.

*D. C., Colombo, 1,629.*

1878

Sept. 17.

*Shipping—Liability of master for non-delivery of goods received on board—Bill of lading unauthorized by master—Receipt of goods by chief officer as part of ship's cargo—Implied contract between master and consignee—Action by consignee—Evidence.*

The master of a ship has the whole conduct and management of the ship and everything on board in his charge and custody.

If he is not himself the owner of the ship, he has this conduct, management, and custody as agent of the owner.

The chief mate of the ship is the master's hand or servant to receive on board for him goods into his custody, but is not generally authorized to bind him by special promises.

Where, in a suit brought against the master of a ship for recovery of damages consequent upon non-delivery of goods received on board by his chief mate, it was proved that G. H. S. & Co., professing to act for the master (but without due authority), acknowledged in a bill of lading that C. A. had shipped certain goods to be delivered at the port of Colombo unto O. A., and it appeared that the chief mate of the ship had received the goods in question on behalf of the master from a Dock Company in London without instructions as to their destination, or to whom they were to be delivered in Colombo,—

*Held*, that the master was not liable to O. A. on the bill of lading, or upon the implied contract created by the chief mate's acceptance of the goods on board, in the absence of proof that the Dock Company had contracted on behalf of O. A.

THE Queen's Advocate (the Hon. Mr. Cayley), by his information, gave the Court to understand that the defendant above-named, being master of the ss. *Eldorado*, received on board in London on 28th February, 1877, an iron girder of the value of Rs. 835 belonging to the Government of Ceylon in good order and condition, and agreed to deliver it in like good order and condition (certain perils and casualties only excepted) to the Government of Ceylon or their assigns in Colombo; that the said girder was duly delivered to and received by the defendant in good order and condition, and the delivery of the same in Colombo to the Government of Ceylon or their assigns in like good order and condition was not prevented by any of the perils or casualties aforesaid; and all conditions were fulfilled, &c., to entitle the said Government of Ceylon to have the said girder delivered to them at Colombo, and yet it was not so delivered, but was wholly lost to them to the damage of Rs. 835. The plaintiff prayed for such damages.

Though no mention was made in the information of a bill of lading, the defendant in his answer denied that he "signed the

“bill of lading in the libel declared upon,” and said, by way of demurrer, that “the plaintiff cannot have and maintain this action “against him.” The defendant further said that, if the defendant and his servants were liable at all upon the bill of lading, they were liable only for the safe carriage of the said goods till they should be placed in the tackles of the vessel and delivered therefrom, and that the defendant was not responsible for the reception into the cargo boat of the goods in question, which were effected at the risk of the plaintiff, and that the loss in the libel alleged occurred after the girder left the tackles of the vessel, and that therefore the defendant was not liable. He further pleaded that under the exception in the said bill of lading contained, he was exempted from all liability in respect of loss or damage occasioned by the act of God or the perils and dangers and accidents of the sea, and that the loss of the said girder was occasioned by such perils, dangers, and accidents, and by the carelessness and negligence of the plaintiff’s servants.

After argument had on the demurrer, the defendant was allowed to amend his answer by adding a denial that he received or agreed to deliver the girder as set forth in the information, and the parties proceeded to trial.

The bill of lading acknowledged that the Crown Agents for the Colonies had shipped in good order and condition certain goods, including the girder which was the subject of dispute in the present case, &c., “to be delivered, subject to the conditions and “exceptions hereinafter mentioned, in the like good order and “condition from the ship’s tackles [where the ship’s responsibility “shall cease] at the port of Colombo ..... unto the Officer Adminis- “tering the Government of Ceylon, &c. In witness whereof the “master of the said ship has signed three bills of lading ..... “For the master, Gellatty, Hankey, Sewell & Co., *per* P. MacSewell, “Agents.”

It appeared in evidence that the defendant did not expressly authorize Gellatty, Hankey, Sewell & Co., or the ship’s agents, to bind him by their signature to a bill of lading executed in England, but that the chief officer of the *Eldorado*, whose duty it was to receive cargo on board, had received the goods in question on behalf of the master, and that the girder slipped from the sling while being hoisted over the ship’s side and fell into the cargo boat slantingly, and rolled out of it into the sea owing to a heavy swell.

The learned District Judge found that there was no evidence to connect the defendant with the bill of lading, and that there was no written document of any kind between the parties. He

held that there was an implied agreement on the part of the chief officer acting for and in behalf of the master to deliver to the plaintiff the girder actually received by him as cargo for freight, and that though the girder fell into the boat "clear of the ship's tackle," it was not such a delivery as to enable the plaintiff in the circumstances of the case to receive it, and that the loss consequent upon such impracticable delivery should be borne by the defendant, especially as there was no proof that the plaintiff's servants were either careless or negligent. He also found that the loss was not occasioned by the dangers and perils of the sea, because though there was a pretty good swell on, which caused the cargo boat into which the girder had fallen to partially capsize, yet the loss of the girder was due simply to its slipping from the slings from want of care either in securing it to the slings or in lowering it. He accordingly gave judgment for plaintiff as claimed.

On appeal by defendant, *Layard* appeared for him.

*R. H. Morgan*, for plaintiff respondent.

*Cur. adv. vult.*

17th September, 1878. PHEAR, C.J.—

This action is brought on behalf of the Crown against the defendant, Kerr, who is described in the information or libel as master of the steamship *Eldorado*.

The information states that the defendant received on board his steamer in London on the 28th February, 1877, certain goods belonging to the Government of Ceylon, to wit, an iron girder marked C  $\wedge$   $\Delta$  of the value of Rs. 835·73, in good order and condition, and did promise and agree to deliver the said iron girder in like good order and condition (certain perils and casualties only excepted) to the Government of Ceylon or their assigns in Colombo. And it goes on to complain that, although all things had happened to entitle the Government of Ceylon to have the said iron girder delivered to them at Colombo in good order and condition, yet the said iron girder was not so delivered, but was wholly lost to the Government. And the plaintiff claimed as damages Rs. 835·73.

It is not a little remarkable that this information omits to state to whom the defendant's promise, which is the ground of suit, was made. And it can hardly be assumed that the omission was accidental, because the whole gist of the matter in issue between the parties lies at this point.

1878. The answer of the defendant, as at first filed, was no answer at all. It assumed that the contract or promise relied upon by the plaintiff was contained in an unmentioned bill of lading, and then proceeded both to demur and also to deny all liability under this imaginary bill of lading.

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It is much to be deplored that such an example as this of loose and inaccurate pleading is to be found constituting the original structure of a not unimportant mercantile suit in the principal District Court of this Colony.

At the trial the answer was amended by the addition of the traverse : "The defendant denies that he received, or promised, "or agreed to deliver the goods in the libel mentioned as in the "libel alleged." And I suppose it was taken as understood that the promisee of this promise set out in the information was intended by the person who drew the information to be the plaintiff.

It is conceded on the part of the plaintiff that this promise was not put into writing, and that it was not actually *expressed* by the defendant in any other way. The case of the plaintiff is, that it is to be inferred or implied from the facts which occurred in reference to the shipment of the girder.

These facts, so far as they are material, seem to be that the defendant was master of the ss. *Eldorado* when she was in the course of being loaded in the docks of some unnamed Dock Company in London, probably in August, 1877 ; and that the girder was then and there received on board the vessel by the chief mate in the manner described by him as follows :—

It was my duty as chief mate to receive the cargo on board. In the course of my duty I received goods shipped on behalf of the Crown Agents to be cargo on the voyage in question for freight ; and among these goods I received the girder in question, acting on behalf of the master.

To the Court he said :—

It is almost invariable that the chief mates receive the cargo, acting in so doing on behalf of the masters of ships.

On cross-examination he said :—

The girder came to the ship in a lighter, and as a rule the Dock Company at London receive the greater part of the cargo and get it put on board. The Dock Company sends a clerk on board, but only to keep a tally of what the Company puts, and the chief mate receives, on board. I had no communication with the defendant in regard to the girder, nor did he ask me to take it on board. I gave a receipt to the Dock Company for the cargo they delivered to me. I am certain of this.

The master himself, when examined as a party not on oath, said :—

Before sailing I knew from the ship's owner's agents in London that there were Government goods on board shipped on behalf of the Crown

Agents, and to be delivered to the Government here. It was not till the day of the accident to the girder in question that I knew that particular article had been on board.

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This is all the evidence in the case bearing on the issue between the parties; and it is unfortunate that it should be so indefinite as it is.

When the chief mate says, "I received the girder acting on behalf of the master," adding the explanation, "it is almost invariable that chief mates receive the cargo, acting in so doing on behalf of the masters of ships," I do not understand him to mean that he had any special agency authority to bind the defendant. On the contrary, I understand him simply to convey: "I only acted in this matter for the defendant, as it is the duty of all chief mates to act for their respective masters." The master has the whole conduct and management of the ship, and everything on board is in his charge and custody. If he is not himself the sole owner of the ship, then he has this conduct, management, and custody as agent of the owner or collective owners. The chief mate is thus the master's hand or servant to receive for him goods into his custody on board the ship, but is not generally authorized to bind him by special promises. In the present case the utmost that can be gathered from the evidence is, as it seems to us, that the girder came into the custody of the defendant on board the *Eldorado*, in some docks in London, through the hands of the chief officer of the ship, to be carried probably to, and to be delivered over the ship's side to somebody at, Colombo. How its destination was originally made known does not appear; and to whom the effort to deliver at Colombo, which the mate describes was made, is not disclosed. All that can be legitimately inferred from these facts is, I think, a promise by the defendant to the person from whom the girder was in fact received on board to carry it and to deliver it, in like condition as it was received, to some consignee at Colombo. If we assume that the plaintiff was that consignee, still it seems tolerably clear that the person from whom the girder was actually received, and to whom therefore in the absence of anything expressed on the point the implied promise was primarily made, was the Dock Company, whoever this may be. Possibly, as the chief mate himself seems to have thought, the Company acted in the matter of putting the goods on board for the Crown Agents, and so third hand (so to speak) for the plaintiff in this suit. In other words, it may be the case that the Crown is entitled to claim the benefit, as principal of the implied promise, which seems from the facts to have been made by the defendant to the Dock

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**PHILAS, C.J.** Company, by showing that the Dock Company made the contract on its behalf. But nothing of the kind has been attempted. And it seems to us on the whole that the plaintiff has quite failed to prove that the defendant ever made with him, the plaintiff, the promise or contract of carriage on which the information is based.

With this view of the case, we think the decree of the District Court is wrong, and ought to be set aside, and that the plaintiff's suit ought to be dismissed.

