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IN THE GOODS OF WENNE.

it may be, must be intended to be a signature by name, mark or description. I am of opinion that the *khidmatgar* did not write the Persian words "this is Mr. Wynne's signature" with the intention at the time that those words, or any of them, should be considered as his signature or mark. There are numerous English cases which show that those words would not be considered a sufficient subscription under the English Act. The last of such cases—*In the Goods of Maddock* (1)—is a very la te decision by Sir James Hannen.

Application refused.

Attorneys for the petitioner : Messrs. *Berners & Co.*

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

MADHUB CHUNDER DEY *v.* LAW.

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March 11 & 12.

Bill of Lading—Construction—Liability of Master—Negligence—Burden of Proof—Estoppel.

The defendant, master of the steamer *Scindia*, signed a bill of lading by which he agreed with C. & Co. of London to deliver at Calcutta to them or their order four casks of brass wire which were shipped on board the *Scindia*. The casks were described in the bill of lading as bearing a certain mark beneath which was the word "Calcutta," as being the port of destinction, and they were stated as being carried subject to the following exceptions :—"The ship is ot liable for obliteration or absence of marks, numbers, address or descrption of goods shipped ; and expenses and losses by detention of ship or cargo, caused by incorrect marking, or by incomplete or incorrect description of contents, shall be borne by the owners of the goods. In case any part of the within goods cannot be found during the ship's stay at the port of destination, they are, when found, to be sent back by first steamer at the ship's risk and expense, and subject to any proved claim for loss of market. The ship shall not be liable for incorrect delivery, unless each package shall have been distinctly marked by the shippers before shipment with the port of destination." The bill of lading was endorsed by C. & Co. to the plaintiff, a trader in Calcutta, who, on the arrival of the *Scindia* at that port, applied for delivery of the four casks ; and it then appeared that they had been landed at Colombo. In a suit to recover the price of the goods, *Held*,

(1). L. R., 3 P. & M., 169.

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the defendant was estopped from alleging that the casks were not marked as stated in the bill of lading. It was open however to the defendant to prove that the casks did not on their arrival at Colombo bear the word "Calcutta," and thus to bring himself within the clause in the bill of lading, exempting the ship from liability for obliteration or absence of marks; but on proof of this in order to disentitle the plaintiff to succeed, the defendant must show that the absence or obliteration caused the landing at Colombo. It was found on the evidence that he had failed to do this, and a decree was given for the plaintiff.

THE plaintiff, who was a dealer in hardware in Burra Bazar, brought this suit, as endorsee of a bill of lading, against the master of the steam-ship *Scindia* to recover the sum of Rs. 1,425, the value of four casks of brass wire which the defendant failed to deliver to the plaintiff in accordance with the terms of the bill of lading.

The casks in question had been shipped in London on board the *Scindia* on 10th April 1873, the defendant agreeing, by the bill of lading, to deliver them in Calcutta to Messrs. Coulthard & Co., of London, or their order. The bill of lading was endorsed by Messrs. Coulthard & Co. to the plaintiff.

It was stated in the bill of lading that the goods were "marked and numbered as per margin," and the mark in the margin was C within a triangle, and the letters M and D on either side, with the word "Calcutta" below. The following amongst other "conditions and exceptions" were contained in the bill of lading:—

"The ship is not liable * * * for inaccuracies, obliteration or absence of marks, numbers, address or description of goods shipped. * * * and expenses and losses by detention of ship or cargo, caused by incorrect marking; * * * shall be borne by the owners of the goods."

"In case any part of the within goods cannot be found during the ship's stay at the port of destination, they are, when found, to be sent back by first steamer at the ship's risk and expense, and subject to any proved claim for loss of market."

"The ship shall not be liable for incorrect delivery, unless each package shall have been distinctly marked by the shippers before shipment with the name of the port of destination."

The *Scindia* arrived at Calcutta in June 1873, but the defendant failed to deliver the goods to the plaintiff, and on

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enquiry it appeared that they had been landed at Colombo. The plaintiff, therefore, instituted this suit to recover the value of the goods. After the institution of the suit, the goods arrived by another steamer, though not by the first after the *Scindia*, and the defendant, thereupon, offered to deliver them to the plaintiff upon his paying the forwarding charges and the costs incurred by the defendant in this suit, which offer the plaintiff declined.

The defence was that the casks were not before shipment marked with the name of the port of destination, and that the defendant, therefore, was protected by the exceptions and conditions in the bill of lading.

From the evidence given on behalf of the defendant, it appeared that, when the goods arrived at Colombo, they did not bear the word "Calcutta," and that the head of one of the casks had been knocked out.

The plaintiff produced the manifest filed in the Custom House in Calcutta by the defendant wherein the defendant had entered the casks as goods to be delivered in Calcutta.

Mr. *Evans* and Mr. *Macrae* for the plaintiff.

Mr. *Lowe* and Mr. *E. Allen* for the defendant.

Mr. *Macrae*.—The defendant having signed the bill of lading, by which he acknowledged the receipt of these casks bearing the mark "Calcutta," is now estopped from proving that, as a matter of fact, they did not bear that mark. The exceptions in the bill of lading will not protect the defendant, a shipmaster, from the consequences of his own negligence. It lies on the defendant to show he has not been guilty of negligence. Even if the burden of proof lies on the plaintiff in the first instance, slight evidence of negligence will be sufficient to shift it on the defendant—*Czech* v. *General Steam Navigation* (1).

Mr. *Lowe* for the defendant.—The exceptions in the bill of lading protect the defendant in case of obliteration or absence of marks, and it lies on the plaintiff to show that the casks were so marked that the marks could not be obliterated. A bill of

(1) L. R., 3 C. P., 15.

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lading like the present almost frees the ship from all liability—*The Duero* (1). In that case Sir Robert Phillimore expressed a doubt as to whether a ship-owner is a common carrier. It is for the plaintiff to show that the detention of the casks was not caused by the way in which they were marked—*Peninsular and Oriental Company* v. *Shand* (2). The shipper can insure himself against the risk of loss by the master's negligence, but the ship-owner cannot do so, and the tendency of recent decisions is to shift this liability upon the shipper, who has his remedy against the under-writer.—*Phillips* v. *Clark* (3) and *Wilton* v. *The Atlantic Royal Mail Steam Navigation* Co. (4): Again, the defendant is further protected by the bill of lading, as these goods were forwarded from Colombo and are now in Calcutta.

Mr. *Macrae* in reply.—The condition in the bill of lading that the ship was not liable for inaccuracies of marks does not mean that she was not liable for non-delivery caused by inaccuracies. The goods were not forwarded by the first steamer, and therefore the defendant cannot claim the protection of the bill of lading on this point. Again, the defendant relied on the exception which provided that all goods must be distinctly marked before shipment; but the only evidence before the Court on this point is the bill of lading, from which it appears that the goods were so marked. The cases cited on the other side refer to ship-owners and shippers, but it is quite a different matter where the defendant is a shipmaster, who is bound to look after the goods, Angel on Carriers, 4th ed., p. 209; Abbott on Shipping, 11th ed, 281. Even assuming the master was protected by the bill of lading, still his negligence would prevent his availing himself of that protection; see *Czech* v. *General Steam Navigation* (5) *per* Bovile, C. J., citing *Peninsular and Oriental Company* v. *Shand* (2), and *per* Willes, J.; see also his note referring to the Civil Code of New York.

(1) L. R., 2 A. & E., 393.
(2) 3 *Moore's* P. C., N. S., 272.
(3) 26 L. J., C. P., 168; S. C., 2 C. B., N. S., 156.
(4) 10 C. B., N. S., 453
(5) L. R., 3 C. P., 17.

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In the present case the plaintiff has given ample proof of negligence.

MACPHERSON, J.—In this case there is no doubt that these four casks were shipped in London to be delivered in Calcutta, and that, as a matter of fact, they were not delivered in Calcutta, on the arrival of the *Scindia*, as they ought to have been. They were, by mistake, landed at Colombo, and did not eventually arrive here till about the 21st of July,—more than a month after the *Scindia* had discharged her cargo.

The defendant says that there was no negligence on the part of the ship; and he relies upon two of the "conditions and exceptions" which form part of the bill of lading which he signed. One of these is as follows:—"The ship shall not be liable for incorrect delivery, unless each package shall have been distinctly marked by the shippers before shipment with the name of the port of destination." The bill of lading states that these four casks were shipped "being marked and numbered as per margin." The mark in the margin is C within a triangle, and the letters M and D on either side, with the word "Calcutta" below. The defendant alleges that these casks did not bear the mark "Calcutta," as stated in the bill of lading, and that therefore, as they did not bear the name of the port of destination, the ship is not liable. For the plaintiff it is contended that, as the bill of lading states that these goods did bear the mark "Calcutta," the defendant cannot as against the plaintiff, an endorsee for value, now say that they did not bear that mark. On the authority of the case of *Howard* v. *Tucker* (1), I think that the defendant is estopped from now saying that the casks were not marked in the manner stated in the bill of lading, and that, consequently, this "exception is no protection to him.

But the defendant also relies on another of the "conditions and exceptions" in the bill of lading, *viz.*,—"the ship it not liable for * * * inaccuracies, obliteration or absence of marks, numbers, address or description of goods shipped." It is said, and truly, that even if the defendant is not entitled to say that the goods were not properly marked when shipped, he may prove, if he

(1) 1 B. & Ad., 721.

can, that when they got to Colombo they did not bear the word "Calcutta," and that the word was "absent" or "obliterated," within the meaning of this exception. No doubt the defendant may prove that fact; and I think that he has proved it. Whatever the condition of the casks may have been when they were shipped, when they reached Colombo no one of them was marked "Calcutta." They all reached Colombo in good order, except one, the head of which had been knocked out. The defendant has proved that the three uninjured casks did not bear the word "Calcutta," and that the end which was knocked out of the injured casks was the end corresponding with the end which was marked in each of the other three. Although, however, when the ship reached Colombo, there was an absence or obliteration of the word "Calcutta," it does not necessarily follow that the defendant is thereby relieved from responsibility.

The words of the "exception" are peculiar, and somewhat defective, if intended to meet such cases as this. For whereas it is stated in the bill of lading that the ship is not liable for incorrect delivery if the name of the port of destination is not distinctly painted on the goods before shipment, the language in the "exception" as to obliteration or absence of marks is quite different, it being merely said that "the ship is not liable for inaccuracies, obliteration," &c. But supposing that this condition can be read as meaning that the ship was not to be liable for non-delivery caused by inaccuracies, obliteration, &c., it would not relieve the defendant in this case from responsibility, because there is no evidence that the absence or obliteration of the word "Calcutta" caused the landing at Colombo. On the contrary, there is very good evidence that the casks were landed there simply by negligence, because it has been proved quite clearly that the marks given in the bill of lading (excepting the word "Calcutta") remained at all times quite distinct and legible on the casks, save in the case of the one which was injured. There might possibly have been some excuse for putting the injured cask ashore if it had become unrecognizable while on board (of which I may remark that there is no evidence), but there was no possible excuse as regards the other three, the marks on which were perfectly distinct. The captain undertook, by the bill of

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lading, to deliver them in Calcutta, and himself entered them in the ship's manifest (which he filed in the Custom House here) as goods to be delivered in Calcutta. And the treatment of the four casks shows that the defendant was well aware that the injured cask formed one of those covered by this bill of lading, and ought to go with the three that were uninjured and marked; therefore, there is no pretence for saying that the want of any mark on the injured cask (even if the ship was not responsible for the injury which caused the obliteration or absence of marks on this cask) led in any degree to their being put ashore at Colombo. If there were anything to show that the absence of the word "Calcutta" caused the mistake, the defendant might possibly have been discharged from liability, but there is no evidence of the sort.

The casks are still lying in Calcutta in the defendant's possession. On the 21st July, when they arrived by the *Java*, they were offered to the plaintiff on condition of his paying the forwarding charges, and the defendant's costs incurred in this action which had then already been begun. The plaintiff very naturally declined this offer; but he expressed his readiness to receive the goods, and to withdraw the suit if the defendant would pay the costs which he had incurred up to that date. It seems to me that the plaintiff's offer was a fair and reasonable one. The defendant very foolishly did not accept it. The plaintiff is therefore entitled now to recover damages. The defendant has put forward another of the "conditions and exceptions" in the bill of lading, which, to some extent, applies to a case such as this. It is:—"In case any part of the within goods cannot be found during the ship's stay at the port of destination, they are, when found, to be sent back by first steamer at the ship's risk and expense, and subject to any proved claim for loss of market." But under the circumstances which have occurred, that clause does not affect this suit. For there is no evidence that the goods were sent by the first steamer; and so far from being sent at the ship's expense, delivery was refused except on the terms of the plaintiff paying the costs of forwading them. It is a mere question of market-value. The actual costs of the goods was Rs. 935, which is certainly much

lower than the market-rate at that time. The plaintiff claims at the rate of twelve annas per pound. I think ten annas per pound was about the rate of the day; and there will be a decree for damages at that rate.

There will be a decree for Rs. 1,187 8; and the plaintiff is to give up to the defendant the shipping and Custom House documents for the goods on being paid the amount of the decree, including costs on scale No. 2.

Judgment for the plaintiff.

Attorney for the plaintiff: Mr. *Dignam.*

Attorneys for the defendant: Messrs. *Berners, Sanderson,* and *Upton.*

FULL BENCH.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice L. S. Jackson, Mr. Justice Phear, Mr. Justice Ainslie, and Mr. Justice Morris.

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BEHARI LAL MULLICK (DEFENDANT) *v.* INDRAMANI CHOWDHRAIN (PLAINTIFF).*

Hindu Law—Sudra Adoption.

Among Sudras in Bengal, no ceremonies, in addition to the giving and taking of the child, are necessary to constitute a valid adoptino.

THE plaintiff, a Hindu widow, sued as heiress of her deceased husband to recover certain property to which she alleged he became entitled upon the death of his brother, Gobind Lal Mullick without other legal heirs. It was amongst other things set up in defence that Brajasundari, the widow of Gobind Lal's son, had duly adopted one Harankrishna, who thereupon became Gobind Lal's rightf ul heir, and that a portion of the property sued for was Brajas undari's *stridhan.* The parties wer Sudras; and the chief points in issue in the case were whether Braja-

* Regular Appeal, No. 88 of 1872, against a decree of the Officiating Judge of Zilla Moorshedabad, dated the 30th December 1871, and an order made on application for review, dated the 1st February 1872.