# THE FALCON.

Case No. 4,617.

{3 Blatchf. 64;[1] 30 Hunt, Mer. Mag. 201.}

Circuit Court, S. D. New York. Oct. 6, 1853.

CARRIERS—NON-DELIVERY OF GOODS—BURDEN OF PROOF.

1. In order to charge a carrier for the non-delivery of goods, some evidence of their non-delivery must be given by the shipper or owner; but, slight evidence will be sufficient to throw upon the carrier the burden of showing the delivery.

2. Where the bill of lading of goods specified that they were to be delivered to L. or Z.: *Held,* in an action against the carrier for their non-delivery, that it was not enough for the shipper to show the non-delivery to L., but that he must also give some evidence of the non-delivery to Z.

{Appeal from the district court of the United States for the southern district of New York.}

This was a libel in rem, filed in the district court, to recover the value of a box of goods alleged to have been lost in the course of shipment from New York to Chagres, in the steamship Falcon, in April, 1849. The bill of lading, which was signed by the purser of the ship, acknowledged the receipt of the box, and engaged to convey and deliver the same at Chagres, in good order, the dangers of the seas excepted, outside of the bar, to S. Lea or Zachrisson & Nelson, or their assigns. The shippers were Livingston, Wells & Co., and the goods were destined to the house of Cooke, Baker & Co., of San Francisco. On the arrival of the ship at Chagres, the box was put on board of a boat in charge of the second mate of the ship, and sent on shore to be delivered to one Ramos, who had a place of business at Chagres, and who was the agent of the house of Zachrisson & Nelson, of Panama, on the other side of the Isthmus. The ship was anchored a little over a mile from the place of landing. Afterwards, S. Lea came on board, and called for the box. The purser, who had charge of the landing of the goods at that place, advised him that it had already been sent on shore. There was no warehouse at the place of landing, and the usual custom of the ship, in 1849, was to land goods at the store-house of Ramos, which was across the Chagres river, in the old town of Chagres. Whether the box ever reached that place, or the hands of Ramos, did not appear. There was proof that it did not reach the house of Cooke, Baker & Co., of San Francisco, the ultimate place of its destination. The district court dismissed the libel {case unreported}, and the claimants appealed to this court.

Erastus C. Benedict, for libellant.

George F. Betts, for claimants.

NELSON, Circuit Justice. The court below dismissed the libel on the ground, principally, that evidence of the non-delivery of the goods to S. Lea, was not sufficient to charge the carrier—that evidence should also have been given of the non-delivery to the

house of Zachrisson & Nelson, the other consignees. The case, as thus presented on the evidence, is undoubtedly a close one, and, if it had been before me originally, I might possibly, in weighing the evidence, have inclined to a different conclusion from that at which the court below arrived. But, as the weak point in it has not been strengthened by the additional testimony in this court, and as the libellant has, since the appeal, had an opportunity to supply the defect, it is but right, perhaps, to conclude that the inference of the court below was the proper one.

It seems to be well settled, that, in order to charge the carrier, some evidence must be given, on the part of the shipper or owner, of the non-delivery of the goods, according to the requirement of the bill of lading. Griffiths v. Lee, 1 Car. & P. 110; Gilbart v. Dale, 5 Adol. & El. 543; 2 Greenl. Ev. § 213; Ang. Carr. 470. Very slight evidence will be sufficient to throw upon the carrier the burden of showing that the goods have been delivered. But there must be some evidence by the shipper, in the first instance, of the non-delivery.

Now, the weak point of the case, on the part of the libellant, is this: According to the bill of lading, the box was to be delivered to S. Lea or to Zachrisson & Nelson, at Chagres. Lea has been examined and proves clearly that the goods were not delivered to him. But, there is a total absence of any evidence of a non-delivery to the other consignees. There is evidence that the box did not reach the house of Cooke, Baker & Co., of San Francisco, but this affords no inference, legal or logical, that it did not come to the hands of Zachrisson & Nelson, of Panama.

And, besides, the tendency of the evidence on the part of the claimants is, not that there was a delivery to Lea, but to Ramos, who was the agent of Zachrisson & Nelson, at Chagres, to forward goods to them. His place of business, and the place where the goods were landed, was on the opposite side of the river from Lea's place of business. The box had been sent there before Lea called for it on board the ship; and, if any effect is to be given to the rule of law, that the owner must give, at least, some evidence of the non-delivery, in order to charge the carrier, it seems to me, that the fair application of it, in this case, sustains the view taken by the court below. As I have already said, proving that the box did not reach Cooke, Baker & Co., of San Francisco, in no respect helps the case. It may have

been lost in the hands of Ramos, or in the transit across the Isthmus, before it reached Zachrisson & Nelson, or while in their hands at Panama.

I admit that the point on which the case turns is a nice one, and not without its difficulties, which might have been cleared up and disembarrassed by further testimony. But, I am inclined to think, that upon the strict principles of the law governing the case, the burden lay upon the libellant to furnish the evidence. He should have given some testimony legally tending to show that the goods had not been delivered to Zachrisson & Nelson, or to Ramos, their agent at Chagres. I find no such evidence in the case, and must, therefore, affirm the decree below, with costs.

[1] {Reported by Samuel Blatchford, Esq., and here reprinted by permission.}