

The goods claimed for were delivered to men employed on a steamer of which defendant was chief steward.

J. J. Ritchie, K.C., and R. H. Murray, in support of appeal.

W. E. Thompson, contra.

TOWNSHEND, C.J.:—It was chiefly contended by counsel for plaintiffs on this appeal that there had been a sale of the goods to defendant. The learned Judge has decided otherwise and I think rightly.

Taking the evidence of plaintiff and his witnesses only in my opinion, no case has been established. The sale was clearly to the firemen and at the most all that the defendant undertook to do was to pay the amount for them if they remained on the vessel after she left St. John or to return the goods. The plaintiff, in his evidence, after giving the details of the sale to the men says:—

“Then the chief steward, Sebastian, called me back and said: ‘If you are willing to leave the goods with me I will send the money from St. John if they go from St. John. If they don’t go I will send you the goods.’ He meant if they still stayed on the ship he would send the money to me; if they didn’t work on the ship he would send the goods. Then I left the goods with him.”

In cross-examination he says:—

“They picked out the goods themselves. . . . I made out the account. They signed their own names as being satisfied with the goods. I gave the accounts to the chief steward.”

It thus appears from his own testimony that the sale was to the men and not to the defendant, and the most that can be said for plaintiff is that the defendant undertook to return the goods if he did not send the money. Assuming then this to be the agreement; the defendant could only be liable in damages for breach of his contract as bailee of the goods. But, as pointed out by the learned County Court Judge if that was the arrangement it would be impossible to recover in the present action which is for goods sold and delivered and not for damages, and no amendment was asked for.

The defendant and his witnesses, however, deny that he made any such agreement. On the contrary, he says: “I told Levine that if he liked to leave the things on board he