the application of section 233 of the Criminal Procedure Code: *King-Emperor* v. *San Dun*(1). Consequently, on the ground of misjoinder alone, the conviction and sentence are liable to be set aside; but we have preferred to rest our decision on the merits of the case, inasmuch as we would have felt inclined to direct a retrial if the appeal had succeeded merely on the ground of misjoinder.

The result is that this appeal is allowed and the conviction and sentence set aside. The consequential order for confiscation made under section 63 (*1*) and 64 (*1*) will necessarily stand cancelled. The fine, if paid, will be refunded, and the articles seized will be returned to the appellant.

E. H. M. *Appeal allowed.*

(1) (1906) 3 L. B. R. 52.

ORIGINAL CIVIL.

Before Chitty J.

FREEMAN

v.

P. & O. S. N. Co., Ld.*

Carriers—Conversion—Mis-delivery of goods—Notice of arrival—Delivery order—Unauthorised act—Reasonable conduct—Consignee, duty of, regarding delivery—Calcutta Port Act (Beng. IX of 1890), s. 91.

The plaintiff, Noel William Freeman, shipped goods from London to Calcutta under a bill of lading which provided that the goods were "to be delivered at the Port of Calcutta unto Mr. N. W. Freeman or his assigns," and in which the consignee's name and address were stated as "N. W. Freeman, Calcutta." The consignee took no steps regarding delivery of the goods on arrival, and the defendant company after landing the goods

* Original Civil Suit No. 280 of 1912.

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handed them over, in the usual course, to the Port Commissioners. The defendant company thereafter posted a notice of arrival addressed to "N. W. Freeman Esq., Calcutta," which was delivered by the post office to one Nigel W. Freeman. The latter through his agent gave a letter of indemnity to the defendant company, and the agent, without production of the bill of lading, obtained from the defendant company a delivery order on the Port Commissioners for the goods, and wrongfully took delivery of the same. When communicated with, Nigel W. Freeman returned most of the goods in a damaged and deteriorated condition to the plaintiff,

In a suit by the owner consignee against the shipping company for damages for misdelivery :—

Held, that the defendant company had not done an unauthorised act in issuing the notice of arrival or the delivery order, and that they had acted in a reasonable and proper manner.

Hiort v. *Bott* (1) and *The Stettin* (2) distinguished.

Heugh v. *London and North Western Ry. Co.* (3) referred to.

It is the duty of the consignee to ascertain when the goods will arrive and to be ready to take delivery.

THIS suit was brought by the plaintiff to recover a sum of Rs. 2,242 from the defendant company for the loss to him of certain articles of wearing apparel contained in a box which was entrusted to the defendant company in London to be carried to Calcutta and delivered to the plaintiff there under a bill of lading.

In January, 1911, the plaintiff, Noel William Freeman, started from London on a journey to Nagpur in the Central Provinces *viâ* America, Japan, and Calcutta. Before starting he requested his mother to send on to Calcutta two packages, on which were clearly painted in large white letters the name "Noel Freeman", containing his wearing apparel and personal effects. The plaintiff's mother shipped the packages by the defendant company's s. s. 'Namur' under a bill of lading dated 3rd February, 1911, which provided that the packages were "to be delivered at the Port of Calcutta unto Mr. N. W. Freeman or his

(1) (1874) L. R. 9 Ex. 86. (2) (1889) 14 P. D. 142.
(3) (1870) L. R. 5 Ex. 51.

assigns," and in the bill of lading the name of the consignee was stated to be "N. W. Freeman, Calcutta." The plaintiff gave no instructions and made no arrangements for taking delivery of the packages on their arrival in Calcutta. The packages arrived in Calcutta on the 10th March, 1911, while the plaintiff was still on his journey, and were, in accordance with the usual practice, landed by the defendant company and handed over to the Port Commissioners. No one having come to take delivery, the defendant company on 30th March, 1911, sent by post a notice of arrival addressed, like the bill of lading, to "N. W. Freeman, Esq., Calcutta." The notice was delivered by the post office to one Nigel W. Freeman, an employee in a paper mill at Kankinarah, who sent as his agent one W. H. Powell to take delivery of the packages. Powell produced the notice of arrival to the defendant company, and upon executing an indemnity bond was granted a delivery order, dated 18th April, 1911, by the defendant company, which he presented at the Custom House, and after paying duty, obtained possession of the two packages. On 4th April, 1911, Max Freeman, the plaintiff's brother, wrote to the defendant company in Calcutta stating that the bill of lading had been forwarded to catch the plaintiff on his journey, and requesting the defendant company to store the packages until the plaintiff communicated with them as to their disposal. To this the defendant company replied stating that they had already granted a delivery order to Powell who had applied for delivery of the packages on instructions from N. W. Freeman.

On 26th August, 1911, the plaintiff wrote to the defendant company from Alaska, where he then was, stating that he had just received the bill of lading and would probably call to take delivery of the packages

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in person very shortly. On 13th November, 1911, the plaintiff called in person at the defendant company's office in Calcutta with the bill of lading and discovered that the packages had been delivered to the other N. W. Freeman. The latter on being communicated with returned some of the contents of the packages, which he had made use of, in a damaged condition, and the plaintiff thereupon brought this suit against the defendant company for recovery of the loss and damage suffered by him.

Mr. Langford James, for the plaintiff. Delivery of the packages would not have been given by the Port Commissioners without a delivery order from the defendant company, and the latter, having issued the delivery order without production of the bill of lading, did so at their risk and must be liable for any consequential loss: *The Stettin* (1).

The fact that the defendant company took an indemnity bond before issuing the delivery order shows that they considered their liability as still existing.

The defendant company committed two unauthorised acts which resulted in loss to the plaintiff: *first*, by gratuitously and officiously sending out the notice of arrival; and, *secondly*, by issuing the delivery order without production of the bill of lading at a time when the defendant company, though not in actual possession of the packages, were exercising dominion and control over them.

The cause of action is analogous to one of conversion: *Hiort* v. *Bott* (2).

Mr. Buckland and *Mr. Camell*, for the defendant company. The defendant company are not liable in contract under the bill of lading because under s. 91 of

(1) (1889) 14 P. D. 142. (2) (1874) L. R. 9 Ex. 86.

the Calcutta Port Act (Beng. IX of 1890) their liability ceased as soon as the packages were after arrival handed over to the Port Commissioners, and the defendant company are not liable in tort for conversion as bailees, as the goods were not in their possession at the time of the mis-delivery.

There was no negligence in issuing the notice of arrival. It is the duty of the consignee to watch for the arrival of the goods and arrange for their delivery, and where he does not do so the defendant company as a matter of courtesy issue a notice, and here the notice was sent according to the name and address given in the bill of lading.

The document referred to as a delivery order was merely given for the purpose of notifying the Port Commissioners that the defendant company claimed no lien for unpaid freight or otherwise on the packages, and was not an order to deliver.

As regards the letter of indemnity, this is merely taken by the defendant company as a matter of practice and is really unnecessary. It does not amount to an admission of continuing liability. A similar letter is also taken by the Port Commissioners.

The facts of this case come within the rulings in *Heugh* v. *London and North Western Ry. Co.* (1) and *M'Kean* v. *M'Ivor* (2).

The following cases were also referred to: *Erichsen* v. *Barkworth* (3) and *Houlder* v. *The General Steam Navigation Co.* (4).

Cur. adv. vult.

CHITTY J. This is a suit brought by the plaintiff against the P. & O. S. N. Co. to recover a sum of Rs. 2,242 as damages for the loss to him of articles of wearing apparel contained in a case delivered to one

(1) (1870) L. R. 5 Ex. 51.
(2) (1870) L. R. 6 Ex. 36.
(3) (1858) 28 L. J. Ex., N. S., 95.
(4) (1862) 3 F. & F. 170.

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Nigel W. Freeman. The claim for Rs. 142 part of the above sum on account of the plaintiff's expenses between Nagpur and Calcutta and his evidence here is clearly unsustainable. The plaintiff values the entire contents of the case at Rs. 3,000, and those articles of clothing which were returned to him by Nigel W. Freeman at Rs. 900. The balance claimed is thus Rs. 2,100. The facts of the case are not in dispute. In January, 1911, the plaintiff, Noel William Freeman, who is a barrister-at-law intended to come out to Nagpur in the Central Provinces. He was then coming to India for the first time and proposed to travel by America and Japan, arriving at Calcutta from the East about the end of April. He purchased an outfit, packed and locked the box now in question, and left England in January, 1911. Before leaving he requested his mother to send on his things to Calcutta. There were two packages, the case in question containing clothes, a medicine chest, and a revolver, and a crate containing a gun and golf-sticks. The packages were sent by Mrs. Freeman by the defendant company's s.s. " Namur " under a bill of lading dated 3rd February, 1911. She signed a declaration of value in which the contents of the case were valued at £15 and of the crate at £ 7. The plaintiff had given his mother no directions on this point. The consignee in the bill of lading was N. W. Freeman, Calcutta. The plaintiff did nothing with regard to taking delivery of the cases on arrival, either by notifying the defendant company or by instructing an agent to clear the goods on his behalf. The packages arrived on 10th March, 1911, and were in the ordinary course landed by the defendant company and made over to the Port Commissioners. The responsibility of the defendant company thereby ceased under section 91 of the Calcutta Port Act, 1890. As no one appeared to take

delivery, the defendant company on 30th March, 1911, sent a notice of arrival addressed, as was the bill of lading, to "N. W. Freeman Esq., Calcutta". This was delivered by the post office to one Nigel W. Freeman, an employee in the paper mill at Kankinarah. That person requested a Mr. W. H. Powell to take delivery of the packages on his behalf. Mr. Powell accordingly attended at the defendant company's office; produced the notice of arrival; executed in the defendant company's favour an indemnity bond, and thereupon received a delivery order dated 18th April 1911. Armed with this he accompanied Miss Adelaide Freeman, a sister of Nigel W. Freeman, to the Customs House where the packages were lying, as they contained arms. The packages were opened at the Customs House, as of course Mr. Powell had not the keys, and the contents were there appraised at Rs. 491. The duty was paid by Miss Freeman or Mr. Powell and the packages were delivered to them. It is difficult to understand how these persons can have taken delivery without some enquiry, as the box bore the name "Noel Freeman" clearly painted in large white letters. It is still more difficult to understand how Nigel Freeman could have retained the goods, knowing, as he must have known, that they were not his. He did however retain them. He did more. He wore many of the clothes, and used and broke the gun.

On 4th April, 1911, Mr. Max Freeman, a brother of the plaintiff, wrote to the defendant company in Calcutta stating that the bill of lading had been sent to catch Mr. N. W. Freeman on his way to India from Japan, and asking them to store the baggage until Mr. N. W. Freeman could get the bill of lading and communicate with them as to what he wished to do. This letter must have reached the Calcutta office of the defendant company on 24th April, and was answered

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on the 25th. Mr. M. Freeman was informed that the delivery order had been granted to Mr. Powell on a letter of guarantee, as he had applied personally for delivery of the packages on instructions from Mr. N. W. Freeman.

The plaintiff had changed his intention of arriving in Calcutta in April. He turned aside in America, and went as far north as Alaska, from which country he wrote to the defendant company on 26th August, 1911, that he had just received the bill of lading and should probably claim the packages in person very shortly. As a fact he first called at the defendant company's office in person with the bill of lading on 13th November, 1911, when he found that the goods had been delivered to the other Mr. N. W. Freeman. Mr. Nigel Freeman was then addressed both by the defendant company and the plaintiff. Eventually in December, 1911, he returned to the plaintiff the gun and revolver, for which no claim is now made, and some of the articles of wearing apparel. For the non-production of the remainder he gave no satisfactory account. No criminal proceedings were instituted against him, and I am told that he has now gone to Australia. Such being the facts of the case, the sole question for my determination at present is whether the defendant company are liable to the plaintiff. The question of the extent of such liability, if any, has been allowed to stand over until the other point has been decided.

In the first place it is now conceded that no liability can attach by reason of the contract contained in the bill of lading. The contract of carriage was admittedly at an end when the packages were made over by the defendant company to the Port Commissioners. It is therefore unnecessary to consider the several provisions of the bill of lading or to determine whether, if at all, the defendant company could be

made liable under that contract, having regard to the undervalue stated in the declaration made by Mrs. Freeman, and other circumstances.

Secondly, it is conceded that the defendant company were not bailees in the ordinary sense, inasmuch as they had not possession of the goods at the time when they were delivered to Nigel Freeman.

It was contended for the plaintiff that the defendant company were liable because they had done an unauthorized act in sending out the notice of arrival of 30th March, 1911, and again in issuing the delivery order of the 18th April, 1911. The words " unauthorized act " are taken from the case of *Hiort* v. *Bott* (1) on which plaintiff's counsel strongly relied. That case appears to me to be clearly distinguishable from the present. There was no authority whatever to the defendant to make over the goods to Grimmett or any one else. He did so innocently no doubt, but having chosen Grimmett as his agent to return the goods to the plaintiff, he was held responsible for that person's misappropriation of the goods. There was in that case no contract, as there is here, between the plaintiff and the defendant. The case of *The Stettin* (2), cited by plaintiff's counsel, has not in my opinion any application in the present case. That decision turned upon the bill of lading. I am unable to hold that the act of the defendant company in sending out the notice of arrival and issuing a delivery order to a person whom they *bona fide* thought to be the person entitled to the possession of the goods, was an unauthorized act for which they can be made liable. Their duty under the bill of lading was to carry the goods to Calcutta and there deliver them to the consignee. Here the Legislature has conferred on the Port Commissioners the duty of actually delivering

(1) (1874) L. R. 9 Ex. 86. (2) (1889) 14 P.D. 141.

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goods which arrive by sea, but it is the practice of shipping companies, and certainly of the defendant company, to issue such notices of arrival. This, as the evidence shows is done out of courtesy to the consignees and not as a duty. On the contrary it is clearly the duty of the consignee to ascertain when the goods will arrive and to be ready to take delivery. As to the delivery order, the evidence shows that the bill of lading is released, or a delivery order issued on an indemnity being taken, rather to show the Port Commissioners that the shipping company have no outstanding lien for freight or other charges, than as an authority to the Port Commissioners to deliver. The only circumstance that suggests any liability on the part of the defendant company is that they consider it necessary to take an indemnity bond at all. Why they do so Mr. Arnold Jenkins was unable to explain, except by saying that it is and has long since been the invariable practice. The Port Commissioners also take such bonds, in cases too where the shipping company has taken one. Whether that course was followed here does not appear. In my opinion what the Court has to see is whether the defendant company in doing what they did acted in a reasonable and proper manner. If they did they cannot be held liable, simply because the notice got into the hands of a wrong person, who acted fraudulently in the matter. It was argued for the plaintiff, that the sending out of the notice addressed simply "N. W. Freeman, Esq., Calcutta" indicated gross negligence on the part of the defendant company. I am unable to accept this contention. That was the address given by the plaintiff himself, or on his behalf, in the bill of lading, and the defendant company had no other. It might be a perfectly sufficient address or it might not. The defendant

company cannot be held responsible for the fact that the plaintiff was not at hand to receive the notice and take delivery, while there was another person of the same name who was unscrupulous enough to do so. The case of *Heugh* v. *London and North Western Ry. Co.*, (1) is more like the present case in its facts, and the remarks in the judgments in that case are very much in point. The plaintiff is certainly entitled to sympathy for the loss of his effects, but I cannot hold that the defendant company are liable to make good that loss.

It follows that the suit must be dismissed, and except as regards the costs of the commission to England it must be dismissed with costs, including reserved costs, if any, on scale No. 2. As regards the commission, I have considered the correspondence between the parties previous to its issue. The question of authority to make the declaration was not gone into in England, and Mrs. Freeman was not in fact examined. I accordingly direct that the plaintiff and defendant company do each bear their own costs of that commission.

C. E. B. *Suit dismissed.*

Attorneys for the plaintiff: *Sanderson & Co.*

Attorneys for defendant company *Watkins & Co.*

(1) (1870) L. R. 5 Ex. 51.