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any member, or members of a family, might separate from the rest at their option: a mere declaration by one member *that he was separate* from the others would seem to be sufficient to effect the separation. But *partition* of the property is a different thing, because, in order to effect a just partition, it is necessary of course to ascertain the share to which each and every member of the family is entitled, and we have not been able to find any case in the books, in which either a suit has been brought for a *partial partition*, or a partial partition has been *adversely decreed*. (His Lordship then proceeded to consider the evidence, and dismissed the appeal.)

Appeal dismissed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

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Aug. 13.

COSSIM HOSSEIN SOORTU AND OTHERS (DEFENDANTS) *v.* LEE PHEE CHUAN (PLAINTIFF).

Construction of Document—Bill-of-Lading—Shipowner's Liability—Consignee.

A bill-of-lading, given by the defendants to the plaintiff for certain goods, contained a stipulation, that the goods were to be taken from the steamer's tackles by the consignees as fast as the steamer could discharge, failing which, the steamer's agents were to be at liberty to land the same into godowns, the cost of lighterage, godown rents, &c., thereby incurred to be borne by the respective consignees.

Held, that under this bill-of-lading the shipowners were entitled to charge for landing and wharfage, only in default of the consignees failing to take the goods from the steamer's tackles within reasonable time.

Held (*per* PONTIFEX, J.), that for the speedy discharge of their vessel the shipowners were entitled to land and wharf the goods, though not to charge for landing and wharfage, unless the plaintiff had had an opportunity of landing the goods himself.

THIS was a suit for damages, for the loss of 430 bundles of tobacco, part of a consignment of 434 bundles, which had been delivered by the plaintiff to the defendants at Calcutta, for the

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purpose of being carried by them to Rangoon, and delivered to the plaintiff's agent there. The bill-of-lading, which excepted losses by fire, contained a stipulation, that the goods should be taken from the steamer's tackles by the consignees, as fast as the steamer could discharge, failing which the steamer's agents were at liberty to land the same into godowns, the cost of lighterage, godown rent, &c., thereby incurred to be borne by the respective consignees. It was also provided, that the bill-of-lading was to be presented, and delivered up cancelled, before delivery of the goods could be granted.

The plaint stated, that the ship arrived in Rangoon on the 11th of December 1876. The bill-of-lading, which arrived with the ship, was received late the same afternoon by the plaintiff's agent, who, early next morning obtained a custom-house pass for the goods (which he could not have got the evening before, and without which the goods could not be landed), and went to the office of the defendants, where he demanded a delivery order. But he was told that it could not be ascertained whether his goods had been landed, and he was directed to come again: this was denied by the defendants, who alleged, that the plaintiff did not apply in time to have his goods from the ship; that they were, therefore, landed by the defendants, and stored in a godown; that when the plaintiff's agent came for the delivery order, on the 12th of December, he was not prepared to pay the freight; and that the goods were lost on the night of the 12th of December by a fire, which destroyed the godown in which they were stored.

The defendants contended that whether the goods were in their hands as carriers, or bailees, the plaintiff could not recover, as in the former case they were covered by the bill-of-lading, and in the latter, no negligence could be shown.

On the hearing of the case the following judgment was delivered by

WILSON, J.—In this case, the suit is brought for the value of goods shipped to Rangoon, and short delivered. The goods were shipped in Calcutta, and arrived in Rangoon on the 11th December between three and four o'clock. On the 12th December the plaintiff applied for the goods, and did not get

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them. There is a conflict of testimony as to what took place, but I am satisfied that the plaintiff applied for his goods, and tendered the freight for them, but was refused, on the ground that the defendants had a right to detain the goods in respect of a further claim for landing and other charges. On the following night the goods were destroyed by fire. I think, *primâ facie* the defendants are liable for the loss of the goods. They were *primâ facie* wrong-doers, because they detained the plaintiff's goods after demand, and were liable for the consequences, unless they can show lawful ground for the detention. Now the defence is this.—There is a clause in the bill-of-lading to this effect:—"The goods to be taken from the steamer's tackles by the consignees as fast as the steamer can discharge, failing which the steamer's agents are at liberty to land the same into godowns, the costs of lighterage, godown rent, &c., thereby incurred to be borne by the respective consignees."

Two constructions have been put on the clause. The defendants say, it entitles the shipowner, without notice, to land the goods as fast as he can, after arrival, by delivering to the consignees, if there; by landing in the godowns if the consignees are not there. The plaintiff says, this clause does not affect the time at which the unloading can commence, does not override the ordinary liability of the shipowner to give notice in a reasonable time to the consignees, but has to do only with the rate of unloading, when once properly commenced.

As to this, I think the defendants' contention seems to me right.

Then, the ship arrived on the 11th. The unloading began on the same day. The defendants say, the plaintiff's goods were unloaded before the plaintiff came for them on the 12th. And the defendants go on to say that, that being so, they had a lien for charges thereby incurred, and were entitled to retain the goods till satisfied, and therefore that their refusal to deliver was right. There again, I think the defendants' contention is right in law. I think, if the goods were duly landed, the defendants would have a lien for reasonable charges. If it were not so, the 178th section of the Contract Act would, I think, give such a lien.

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It is then further contended that the goods being rightfully in the possession of the defendants, they either held them as carriers under the bill-of-lading, and were protected against liability from fire by the clause in the bill-of-lading itself; or they held them as warehousemen, and as such were not responsible for fire arising by no default of theirs. Here again the defendants are right in point of law.

But I think the defence fails in an essential point of fact. The whole defence rests on the allegation that the goods, when demanded on the 12th, had been landed, and that therefore a lien for the charges had then attached. The burden of proof of this lies on the defendants. On the part of the defendants there is no evidence of that at all. (His Lordship then discussed the evidence on this point, and found that the plaintiff was entitled to recover damages at the rate of Rs. 60 per 355lbs. upon the quantities not delivered.)

From this decision the defendants appealed.

Mr. *Phillips* and Mr. *Trevelyan* for the appellants.

Mr. *Trevelyan*.—The plaintiff was absolutely bound by his contract to take delivery as fast as the ship could unload—*Straker* v. *Kidd* (1), *Leer* v. *Yates* (2), *Rogers* v. *Hunter* (3). Not having done so, we were clearly entitled to land the goods, and though the goods were burned while on shore, we were protected by the clause against fire in the bill of lading—*Honghong and Shanghai Banking Corporation* v. *Baker* (4). We are sued for conversion, but we never converted the goods, because we never refused delivery; we only made excuses for non-delivery, and they would not amount to conversion—*Severin* v. *Keppel* (5), *Addison* v. *Round* (6), *Bullock* v. *Toay Aung* (7). There is evidence to show the tobacco was landed when the plaintiff came to demand it, and that disposes of the case, as we were entitled to wharfage. The case set up

(1) 3 Q. B. D., 223.
(2) 3 Taun., 387.
(3) 1 M. and M., 63.
(4) 7 Bom. H. C. R. (O. J.), 186.
(5) 4 Esp., 156.
(6) 7 C. and P., 285.
(7) 24 W. R., 74.

in the plaint is different from that made out at the hearing. The learned Judge in the Court below should not have allowed the questions of wharfage and tender to be gone into, as those questions were not raised in the pleadings.

Mr. *Branson* and Mr. *Hill* for the respondents.—There is no doubt of the conversion. As soon as we possibly could get a pass for the goods, we offered the freight, but they refused to give the delivery order unless we agreed to pay wharfage. Now, they were not entitled to claim wharfage dues, because they were wrong in landing the goods without giving us reasonable notice—*Bourne* v. *Gatliffe* (1), *Alexiadi* v. *Robinson* (2). The excuse for not giving us the goods,—namely, that it was impossible to get to them,—is no justification, as they were bound to have a wharf large enough for the traffic—Kay on Shipping, Vol. I, p. 337. Besides, that statement was inadmissible in evidence—*Stapylton* v. *Clough* (3), *The Sussex Peerage* case (4), *Patteshall* v. *Turford* (5), *Edie* v. *Kingsford* (6). It is a clear case of conversion. They also referred to *DeBussche* v. *Alt* (7).

Mr. *Trevelyan* in reply.—There is no conversion in this case—*Heald* v. *Carey* (8). It is too late for the respondent to set up a new case now.

The following judgments were delivered by

PONTIFEX, J.—The learned Judge in the Court below has held, upon the bill-of-lading in this case, that the shipowners had the right to land the goods, and charge for landing and wharfing; but he has given a decree to the plaintiff on the ground that there was no proof that the goods had been landed at the time when landing and wharfage charges were claimed.

It appears to me that there is no question in this case that the goods were landed and wharfed by the shipowners, and burnt.

(1) 11 Cl. and Fin., 45.
(2) 2 F. and F., 679.
(3) 2 E. & B., 933.
(4) 11 Cl. and Fin., 85.
(5) 3 B. & Ad., 890, 897.
(6) 14 C. B., 759.
(7) L. R., 8. Ch. D. 312, 313.
(8) 11 C. B., 977.

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I am unable to go as far as the learned Judge appears to have gone, and to hold that the shipowners were entitled to claim landing and wharfage charges, whether an opportunity had, or had not, been given to the plaintiff to land the goods himself. But I am of opinion that, for the speedy discharge of their vessel, the shipowners were entitled to land and wharf the goods, though not to charge for landing and wharfing, unless the plaintiff had had an opportunity for landing the goods himself.

Under the words of the bill-of-lading, I think the shipowners were entitled to charge for landing and wharfing, only in default of the plaintiff failing to do so within a reasonable time; and I do not think the plaintiffs had been allowed a reasonable time for landing the goods himself, if they were in fact landed before 12 o'clock on the day after the ship's arrival.

In the late case of *Wright* v. *New Zealand Shipping Company* (1), where it was necessary to define what was a reasonable time under ordinary circumstances for unloading, Lord Justice Cotton stated, that the question as to what might be a reasonable time, depended on the facts of each case; but, speaking chiefly with reference to the case before him, said, that the charterer should be ready to unload, either when the ship arrives, or within a short time, such as a day or a couple of days after her arrival. In that case the shipper chartered the entire vessel, which was a sailing ship. In the present case, the ship was a general ship, and a steam ship; and the words of the bill-of-lading import, I think, more urgency, and at least authorize the shipowners to land, without charging for it, and to place the goods in a godown.

In *Alexiadi* v. *Robinson* (2) it was held, that the consignee was entitled to time to receive the necessary documents, and make the necessary entries at the custom-house.

It appears to me, that our decision in this case ought to rest on the simple question—Were the goods lost to the plaintiff by reason of an improper refusal by the defendants to give a delivery order? If yes, then the plaintiff would be entitled to recover. If no, then he had no cause of action.

(1) L. R., 4 Exch. Div., 165. (2) 2 F. and F., 679.

With respect to the evidence, I am unable to arrive at the conclusion that the plaintiff made a definite tender of the freight, which was refused.

As I read the evidence, I take it that what happened was as follows:—

The plaintiff, taking with him a person, who, if satisfied with its quality, proposed to purchase his tobacco, went to the defendants' office with the freight-money. But having been previously told at the wharf, by a servant of the defendants', whom the plaintiff's witness, Sooleyman Ahmadjee, describes as "the godown-keeper, a Chinaman," that his goods had been landed during the night, and were so covered by other goods, that they could not immediately be got at, he repeated this statement to the agent of the defendants' at his office. Thereupon a loose conversation ensued, and the agent said, that if the goods had been landed, landing and wharfage charges would have to be paid. Indeed, at this time, as there was no certainty how many, if any, packages had been actually landed, it must have been impossible for the defendants to have asked for a definite sum for landing, and I should have thought, that the natural place and time for demanding payment of these charges would have been the time of delivery at the godown. But, however this may be, the plaintiff made objection, but does not seem to have absolutely refused to pay the charges; nor did he insist upon a delivery order being given to him on payment of freight alone; nor in his plaint does he make any such case. If the plaintiff's objection had been admitted, and consented to, could the plaintiff have obtained his goods before the fire? I think the evidence goes to show, that he could not, as they were covered by other goods in the godown. And beyond that, if the defendants were entitled for the speedy discharge of their ship to land the goods—as in my opinion they were entitled—the goods continued in their possession as carriers, in a place sanctioned by the bill-of-lading, and it seems to me that the defendants, as carriers, were entitled to a reasonable time for giving delivery, in the same way precisely as the plaintiff was entitled to a reasonable time for taking delivery, and I think that such reasonable time had not expired when the fire

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happened, and therefore that the accident was covered by the exception in the bill-of-lading.

In the case of *Alexiadi* v. *Robinson* (1) the facts were, that before the goods were actually landed, the consignee, having his craft alongside, applied for the goods and tendered the freight; but the master refused to receive the freight without the order of the ship's agents, who had no representative on board; and the landing of the goods commenced and proceeded against the expressed wish to the contrary of the consignee.

The question, as put to the jury by Cockburn, C. J., was, in fact, whether the shipowner took the course he was entitled to take under the circumstances, in having the goods landed when the consignee was ready to receive them. And in that case, even after having been landed, the goods were actually at hand, but upon demand, delivery was refused, because payment of wharfage charges was objected to by the consignee.

In the present case, the evidence seems to me to show that the goods were never at hand, in the sense that the plaintiff actually applied for them and could have received them, but for the objection to pay landing and wharfage charges.

Upon the whole, therefore, I am unable to agree with the conclusion of the Court below; and I think the plaintiff's suit should have been dismissed; but, under the circumstances, the goods having been landed for the defendants' convenience, without costs. I think, however, that the plaintiff should pay the costs of this appeal. The plaintiff may possibly be entitled to receive from the defendants some portion of the money realized by the sale of the damaged goods after the fire; but we cannot deal with that matter in this suit.

GARTH, C. J.—This suit is brought by the plaintiff to recover damages for the non-delivery of certain goods, which were shipped from Calcutta to Rangoon, by the steamer *Fitzpatrick*, in December 1876.

The defence is, that the goods were landed in due course, and placed in a godown at Rangoon, and were there burnt by an accidental fire.

(1) 2 F. and F., 679.

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The *Fitzpatrick* was a general ship, and the bill-of-lading under which the goods were shipped contains a clause protecting the defendants against any loss by fire; and it also contains another clause, which is important for our present purpose, to the effect, that "the goods were to be landed from the steamer's tackles at Rangoon by the consignees, as fast as the steamer could discharge, failing which, the steamer's agents were to be at liberty to land them into godowns, the cost of lighterage, godown's rent, &c., thereby incurred to be borne by the respective consignees."

The ship arrived at Rangoon on the 11th of December 1876, and was taken at once alongside the wharf. On the same evening, she began to unload the goods of the several consignees into a godown upon the wharf, and continued to do so during the whole of that night and the following day, the 12th. The fire occurred at 7 o'clock on the evening of the 12th, and I think it sufficiently appears that the goods in question were burnt.

The plaintiff's agent, Esoop Ismail, who was the consignee of the goods in question, received his bill-of-lading soon after the arrival of the ship on the 11th. He did not take any steps to obtain the goods on that day; and it seems doubtful whether he could have obtained his pass from the custom-house if he had applied for it. At any rate, he did not obtain it until the following morning (the 12th), and he then went to the wharf and asked the clerk who had charge of the godown, whether his goods had been landed. The answer was that they had been landed during the night, but that he could not have delivery of them till the next day, as other people's goods had been placed on the top of them. Esoop Ismail then went to the office of the defendants' agent, a Chinaman, named Sing Moh, and asked for a delivery order. The evidence is conflicting as to what passed on this occasion, but I believe Esoop Ismail's story to the effect, that Sing Moh claimed wharfage dues, and Esoop Ismail refused to pay them. In the afternoon of the same day, Esoop Ismail went again to look for his goods at the wharf, but could not find them.

Eventually, after the fire, he paid freight for the whole of

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the goods, and obtained a small portion of them. But on that occasion no wharfage was demanded or paid. As the goods were not forthcoming, of course no wharfage could have been payable; and therefore, the fact of no wharfage having been claimed after fire, is no argument in favor of the plaintiff.

In this state of facts, the learned Judge in the Court below decided in favor of the plaintiff. He held, that, under the terms of the bill-of-lading, the defendants had a right to commence unloading the ship immediately on its arrival, and if the plaintiff's agent was not there to receive the goods, they had a right to place them in the godowns at once, and charge wharfage, rent, &c. But then the learned Judge considered, that there was no sufficient evidence that at the time when the plaintiff's agent was required to pay wharfage dues, and refused to pay them, the goods had been in fact landed in the godown, and, consequently, he decided that the charge for wharfage was improperly made, and that, as the refusal to pay it was the reason why the defendants' agent would not give the delivery order, the defendants must be held liable for the loss of the goods.

Now, the difficulty, which the learned Judge's view of the case presents to my mind, is this. If the goods were in the godown at the time when the wharfage dues were claimed, the plaintiff's agent might, no doubt, have obtained delivery of them; but in that case, the defendants' agent was justified in claiming wharfage, and Esoop Ismail was wrong in refusing to pay it. If, on the other hand, the goods were not in the godown at the time when wharfage dues were claimed, then the plaintiff's agent could not then have obtained them, even if he had received his delivery order, and I am by no means satisfied, that in that case the plaintiff's agent could or would, at any subsequent time, have obtained delivery of them, before the fire occurred.

The construction which I put upon the bill-of-lading is somewhat different from that which has been put upon it by the Court below.

I consider that it was not intended to relieve the defendants from their ordinary obligation as carriers to give the consignees

a reasonable time to come and receive the goods from the ship, before they placed them in the godowns; see *Bourne* v. *Gatliffe* (1). On the contrary, the clause appears to me expressly worded so as to secure to the consignees the option of landing the goods, if they pleased, from the ship's tackles, and it was only in default of their being ready to receive them from the ship's tackles, that the defendants had any right to place them in the godown, and charge the consignees wharfage dues.

Moreover, the consignees were entitled, in my opinion, to a reasonable time to land the goods, if they so pleased, from the ship, and if I were satisfied that Esoop Ismail was ready and willing to have landed the goods at the ship's tackles, if he had been allowed a reasonable time for that purpose, and that the defendants would not permit him to do so, I should certainly have acceded to the argument that has been pressed upon us by the plaintiff's counsel, that the defendants had no right to place the goods in the godown at all, and must be answerable for the consequences of having done so.

But it seems to me, that from first to last this was not in the plaintiff's case, or the plaintiff's complaint. He never testified in any way, as far as I can see, his wish or readiness to land the goods from the ship's side. Esoop Ismail never applied to the defendants' agent, or to the ship's officers, to be allowed to land the goods in that way. He asked for the goods on the morning of the 12th, not from the ship, but from the clerk who had the charge of the godowns; and when he was told by him that the goods were in the godown, he never complained either to the clerk or to the ship's agent that he had not had the opportunity given him of landing the goods from the ship.

Nor, again, when he wrote for compensation before bringing this suit, nor when the plaintiff stated his grievances in detail in his plaint, nor even in the conduct of the case in the Court below, do I find that any complaint was made, or evidence offered, that Esoop Ismail wished or attempted to land the goods from the ship and was not allowed to do so. If he had put his complaint in this form, the defendants might have been

(1) 3 Man. and Gr., 643.

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prepared to prove more conclusively than they have done, that the plaintiff and the other consignees consented to the goods being unloaded into the godown. As it is, it seems to me that the facts all tend to show the plaintiff's acquiescence in the course that was taken.

None of the consignees, so far as I can see, either received, or asked to receive, their goods from the ship's side. No questions upon this point were put to any of the witnesses on either side. The consignees generally appear to have acted upon the assumption that the course which was taken by the ship was the right one; and though Esoop Ismail objected to pay the wharfage, he never complained that the defendants had no right to land the goods into the godown, or stated any other reason for his objections. It seems to me, therefore, that it is a great deal too late now for the plaintiff to attempt to say, that he never had an opportunity given him of landing his goods from the ship, and that the course taken by the defendants, was improper.

That being my view of the case, the plaintiff's cause of complaint appears to me to resolve itself into the one point upon which the judgment in the Court below proceeded, namely, that although the defendants were justified in placing the goods in the godown, they had no right to charge wharfage for them, at any rate till the goods were actually there.

But, according to the construction which I put upon the bill-of-lading, if the defendants were at liberty to discharge the goods into the godown, they were also entitled to charge wharfage dues.

If it were necessary to decide the point, I do not think that the statement of the godown clerk (even assuming it to be evidence at all, which I much doubt), would justify us in finding as a fact that the goods were in the godown, and covered up by other goods at the time when Esoop Ismail, the agent, applied for them.

But whether they were then in the godown or not, if the plaintiff's agent consented, as I think he did, to the goods being landed in that way, then I consider that the defendants' agent was justified, before he allowed him to have the delivery order,

in asking him to pay the wharfage dues. I am not satisfied, as I have already stated, that if the plaintiff had obtained the delivery order when he applied for it, he would have been able to get his goods from the godown before the fire occurred; but as he did not pay the wharfage dues, and consequently did not obtain the delivery order, I think that if the fault was anywhere, it was with himself.

In my opinion, therefore, the judgment of the Court below should be reversed, and the plaintiff's suit dismissed. I should have been disposed to have given the defendants their costs in both Courts: but in deference to the view of my learned colleague, I agree that they shall have their costs in this Court only, and not in the Court below.

If the defendants have paid the costs in the lower Court, those costs must be refunded by the plaintiff.

Appeal allowed.

Attorneys for the appellants: Messrs. *Orr* and *Harriss.*

Attorneys for the respondents: Messrs. *Pittar* and *Wheeler.*

APPELLATE CIVIL.

Before Mr. Justice Morris and Mr. Justice Prinsep.

AUKHIL CHUNDER SEN ROY (PLAINTIFF) *v.* MOHINY MOHUN DASS AND OTHERS (DEFENDANTS).*

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Valuation of Suit—Stamp-duty—Valuation of Subject-matter for purpose of determining Jurisdiction—Jurisdiction—Consent to Appeal.

The valuation of a suit for the purposes of stamp-duty, and the valuation of the subject-matter of the suit for the purpose of determining the jurisdiction of the Court in appeal, are two different things. The value of the suit for the purposes of stamp-duty is fixed by certain rules which determine an artificial value for those purposes. The value of the subject-matter of a suit on

* Appeal from Appellate Decree, No. 325 of 1878, against the decree of the Judge of Tippera, dated the 18th December 1877, modifying the decree of the First Subordinate Judge of that District, dated the 26th June 1876.