1905.

DINKAR v. NARAYAN.

It has been objected before us that defendant No. 4 is not a riparian owner, and that the water is taken by him to land which cannot be described as part of the riparian tenement. If that had been made out, the objection would have been sound: *McCartney* v. *Londonderry and Lough Swilly Railway Co.* (1)

But we find no suggestion of this kind in the lower Court, nor is it objected in the grounds of appeal that the land of defendant No. 4 does not fall within the description of abutting on the stream. Therefore no effect can now be given to this contention.

We agree with the District Judge that the order passed by the Mamlatdar cannot affect defendant No. 4 in this suit.

The result is that the decree of the lower Appellate Court must be confirmed with costs.

G. B. R. *Decree confirmed.*

(1) (1904) A. C. 301.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1905.
March 7.

HAJI HASAM JANOO AND OTHERS (PLAINTIFFS) v. CHOONILAL CHOTALAL AND ANOTHER (DEFENDANTS).*

Marine Insurance—Policy of insurance—Memorandum in a policy, office of—Written conditions—Printed conditions—Particular average loss—Stranding of the ship.

The plaintiffs shipped certain goods from Cochin and Calicut for carriage to Karachi by a craft. The goods were covered by three policies of marine insurance. The three policies were in almost identical terms, with this difference that the following words which occurred in the body of the policy were printed on one of them and written on the other two: "Warranted free from the particular average unless the vessel be sunk or burnt." The memorandum at the foot, after enumerating certain articles, proceeded: "All other goods free from average under three per cent. unless general or occasioned by the ship's being stranded." And then there was added a note in Gujrati, which as translated ran: "Dhanji Madat Rahman Nakhwa Osman from the seaport town of Cochin and

* Small Cause Court Reference in Suit No. 153/5765 of 1904.

the seaport town of Calicut up to arrival at the seaport town of Karachi (insurance) on the goods to be without damage—loss on account of damage is to be borne by the owner of the goods." The craft in which the goods were was stranded and did not sink, but the goods damaged were over three per cent. The plaintiffs thereupon sued the underwriters on the three policies in respect of damage to good s:

Held, that on the true construction of the policies the defendants were not liable for the particular average loss occasioned by the ship's being stranded.

Held, also, that the office of a memorandum in a policy ordinarily is to limit, not to impose, liability, so that it would be contrary to one's expectation that it should have the operation of creating a liability where none apart from it existed.

Held, further, that even if the memorandum could be regarded as capable of imposing a liability that would not otherwise exist, still applying the doctrine of *Robertson* v. *French* (1), *Dudgeon* v. *Pembroke* (2), *Glynn* v. *Margetson and Co.* (3), *Gumm* v. *Tyrie* (4) and *Bier* v. *Chhotalal* (5), the memorandum did not create a liability which was expressly exempted, in the body of the policy, and thus was never undertaken.

THIS was a case stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV of 1882) by C. W. Chitty, Chief Judge of the Bombay Court of Small Causes. The reference was to the following effect :—

This is a suit by the plaintiffs to recover from the defendants as underwriters a sum of Rs. 1,227-13-0 on three policies of marine insurance.

The plaintiffs are merchants carrying on business in Bombay in the name of Janu Hoossein. The defendants are also merchants and underwriters carrying on business in Bombay in the name of Abhechand Panachand.

In January 1901 the plaintiffs shipped from Cochin and Calicut for carriage to Karachi by the 'Dangi' *Madad Rehman* certain goods consisting of khopra, coffee, ginger, coir, ropes, oil, etc., which were valued at Rs. 11,000.

The plaintiffs had the said goods insured by several underwriters in Bombay—under three policies, Exhibits A, B and C. The defendants signed Exhibit A for Rs. 1,500, in respect

(1) (1803) 4 East p. 135.
(2) (1877) 2 App. Cas. 284.
(3) (1893) A. C. 351.
(4) (1864) 33 L. J. Q. B. 97.
(5) (1904) 6 Bom. L. R. 948.

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of goods worth Rs. 7,000; Exhibit B for Rs. 500 in respect of goods worth Rs. 3,000; and Exhibit C for Rs. 1,000 as an extra insurance in respect of all the goods.

The three policies are in the same form, the only distinction being that the words "warranted free of particular average unless the vessel be sunk or burnt" in Exhibit B are printed, while in Exhibits A and C they appear, with a slight and immaterial difference, in writing.

The goods were duly shipped on board the *Madad Rehman*, and all went on well until the vessel arrived in Karachi harbour on Sunday, 24th February 1901. As she was entering the harbour she took the ground in the channel, about 100 yards from the wharf. She heeled over to starboard and with the rising tide became wholly or partially filled with water. As the water was coming into her the Preventive Officer went off to her with some lighters and a number of coolies and had a considerable portion of the cargo removed and taken ashore. The vessel then floated and was taken alongside the wharf.

The plaintiffs' goods were injured by sea water and it is in respect of the loss so occasioned that they now claim. Their claim as put forward in the plaint was based on the fact of the vessel having sunk, but I found, as a fact, that the vessel never sunk, but only stranded.

* * * * * *

The only other question of law in the case was whether the ship having stranded, the defendants were liable under the policies. I was of opinion that the words in the body of policy "warranted free of particular average unless the vessel be sunk or burnt" were perfectly consistent with, and might be read along with, the memorandum in italics at the foot of the policy. There was no question that the goods in this case fell into the category of "all other goods" in that memorandum. By the memorandum "all other goods" than those specified are warranted "free from average under three per cent. unless general or occasioned by the ship being stranded." In this case the vessel having stranded, I was of opinion that the defendants were liable for particular average loss, especially as the loss in this case was well over three per cent. On this point the decision of

Sir Charles Sargent in *Richard Latham* v. *Hurruckchand* (1) does not afford any assistance, as the goods in that case were "hides" and it appears to have been taken for granted that the words as to stranding did not apply to them.

It was further argued for the defendants that the Gujarati words in the margin of the policies "(Insurance to be) without damage. Loss arising from damage is to be on the head of the owner of the goods," converted the policies into "total loss" policies. I was of opinion that these words must be read with the English clauses and were subject to the exceptions as to sinking, burning or stranding. This point is covered by authority, as the same words formed the subject of the decision in *Hajee Esmail Hajee Sidick* v. *Shamji Poonjani* (2), where their Lordships held that the addition of these Gujarati words did not absolve the underwriters from liability in the case of sinking, burning or stranding.

The policies of insurance (Exhibits A, B and C) were in almost identical terms. They were in their usual form. Each of them contained a proviso: "Warranted free from the particular average unless the vessel be sunk or burnt." At the foot of the policy was a memorandum, which after enumerating the description of the goods ran: "All other goods free from average under three per cent. unless general or occasioned by the ship being stranded. Vessel and freight also warranted free from average under three per cent. A ship's provision of all kinds, free from average, unless general or occasioned by the vessel being stranded." It also contained an endorsement in Gujarati, which, when translated, ran as under: "Dhanji Madat Rahman Nakhwa Osman free from the seaport town of Cochin up to the arrival at the seaport town of Karachi (insurance) on the goods to be without damage. Loss on account of damage is to be borne by the owner of the goods."

The questions of law referred were:—

(1) Whether the plaintiff's claim is barred by limitation?

(2) Whether on the true construction of the policies the defendants are liable for particular average loss occasioned by the ship being stranded?

(1) (1878) 4 Bom. 314. (2) (1878) 2 Bom. 550.

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The reference came up for hearing before Jenkins, C. J., and Batty, J.

Branson for the plaintiffs.

Robertson for the defendants.

JENKINS, C. J.:—This reference arises out of a Small Cause Court suit against underwriters on three policies of marine insurance in respect of damage to goods. These policies are marked in the suit as Exhibits A, B and C, and I will first deal with that marked A. In the body of the policy are the words "warranted free from the particular average unless the vessel be sunk or burnt." The memorandum at the foot, after enumerating certain articles, proceeds: "All other goods free from average under three per cent. unless general or occasioned by the ship's being stranded." And then there is added a note in Gujarati, which, as translated, says: "Dhanji Madat Reman Nakhwa Osman from the seaport town of Cochin and the seaport town of Calicut up to arrival at the seaport town of Karachi (insurance) on the goods to be without damage—loss on account of damage is to be borne by the owner of the goods."

The first and last of these provisions are in writing: the memorandum is a printed form.

The craft, in which the goods were, was stranded, and did not sink, but the goods damaged were over three per cent.; so the question is whether in these circumstances any liability attaches under the policy.

The learned Chief Judge considered that the provisions in the body of the policy and in the memorandum were consistent, and held the underwriters liable.

The office of the memorandum ordinarily is to limit, not to impose, liability, so that it would be contrary to one's expectation that it should have the operation of creating a liability where none apart from it existed.

Here the object of the memorandum obviously was to limit liability, so that what we have to deal with is, not two clauses imposing liability, but a clause purporting to limit a liability which had never been created.

In this sense it may be that the case is not so much one of inconsistency as of superfluity, and it can hardly be contended

that a clause of exemption creates a liability, if it is merely superfluous.

But apart from this I cannot agree with the conclusion of the learned Chief Judge.

The memorandum, as I have said, is a printed form, and this points to a general intention that in no case should the underwriters under a policy in this form be liable in the exempted cases therein specified, unless the memorandum be struck out.

At the same time the limitation in the body of the policy is in writing, and this calls in aid the rule of construction applied in numerous cases, of which it will be sufficient to cite *Robertson* v. *French* (1); *Dudgeon* v. *Pembroke* (2); *Glynn* v. *Margetson & Co.* (3) and *Gumm* v. *Tyrie* (4) recently applied by this Court in *Bier* v. *Chhotalal* (5). Lord Herschell puts the point succinctly in *Glynn* v. *Margetson & Co.*, where he says: "It is legitimate to bear in mind that a portion of the contract is on a printed form applicable to many voyages, and is not specially agreed upon in relation to the particular voyage."

In my opinion, therefore, even if the memorandum could be regarded as capable of imposing a liability that would not otherwise exist, still applying the doctrine of these cases I hold that the memorandum in Exhibit A does not create a liability which was expressly exempted in the body of the policy, and thus was never undertaken.

It is clear that the Gujarati words impose no liability.

What I have said of Exhibit A is applicable in its entirety to Exhibit C. But in the case of Exhibit B there is the distinction that the words in the body are not written but printed; they are however printed in a much larger type than the context, and stand out prominently from the rest of the document. It has not been suggested that the liabilities under the several documents are different and I therefore come to the same conclusion in respect of Exhibit B.

Our answer to the reference, therefore, is that on the true construction of the policies the defendants are not liable for the

(1) (1803) 4 East 130 at p. 135.
(2) (1877) 2 App. Cas. 284.
(3) (1893) A. C. 351 at p. 355.
(4) (1864) 33 L. J. Q. B. 97.
(5) (1904) 6 Bom. L. R. 948.

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particular average loss occasioned by the ship being stranded. The other question referred does not in this view of the case arise.

Attorneys for the plaintiffs: *Messrs. Wadia, Ghandi & Co.*

Attorneys for the defendants: *Messrs. Little & Co.*

R. R.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Russell and Mr. Justice Aston.

1905. *March* 16.

BALARAM BUDHARAM MARVADI AND OTHERS, DECREE-HOLDERS, v. RAMKRISHNA VALAD CHILOJI, JUDGMENT-DEBTOR.*

Civil Procedure Code (Act XIV of 1882), section 396—Indian Stamp Act (II of 1899), section 2 (15)—Decree for partition—Commissioner's report—Decree in accordance—Final order—Instrument of partition—Stamp.

A decree for partition passed in accordance with a Commissioner's report under section 396 of the Civil Procedure Code (Act XIV of 1882) is a final order for effecting a partition passed by a Civil Court and must therefore be stamped as an instrument of partition under section 2 (15) of the Indian Stamp Act (II of 1899).

REFERENCE under section 60 of the Indian Stamp Act (II of 1899) by Janardan Damodar Dikshit, Subordinate Judge of Sinnar in the Nasik District.

The facts were as follows:—

The plaintiffs, Balaram Budharam Marvadi and others, sued the defendants, Ramkrishna valad Chiloji and others, to recover possession of moveable and immoveable properties mentioned in the plaint. The first Court dismissed the suit. On appeal by the plaintiffs, the First Class Subordinate Judge of Nasik with Appellate Powers held that the plaintiffs were entitled to a half share in the house and land in dispute. He, therefore, passed a decree in the following terms:—

Plaintiffs Nos. 1 and 2 (appellants) should effect division of the property in the suit, that is to say, of the house and the open land with the defendants

* Civil Reference No. 9 of 1904.