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Mr. marriott, in the case of *Bhugwanjee Dwarkadass*, argued in favour of the negative of the question, but did not produce authorities of much moment, certainly not such as to guide me; and as his application was disposed of by being granted under a rule of the Court, I cannot deem that his argument was an answer No Mr. Lang's or was complete.

From the best consideration I have been able to give to the matter, I think the Official Assignee should be instructed to proceed, so far as circumstances will admit, with the insolvency in the same manner as he would have done, had the insolvent been living. The property was by order under the 7th Section, vested in the Official Assignee in trust for the creditors, and I cannot find any authority for holding that the death of the insolvent supersedes or nullifies that order.

Had the legislature intended that the death of the insolvent should produce such a result, it would most probably have said so, as it has said in the proviso in the 7th section of the Act with regard to the dismissal of the insolvent's petition. I think that the Official Assignee may proceed as usual.

April 19.

[ORIGINAL CIVIL JURISDICTION.]

GRAHAM AND OTHERS..... ...*Plaintiffs.*

HILLE..... .....*Defendant.*

Bill of lading—Construction of Exceptions—Leakage—Breakage—Damage caused to goods by leakage from other goods.

Piece goods were carried from London to Bombay under a bill of lading, the exceptions in which protected the master from "*leakage, breakage*, rust, decay, *loss, or damage from* Machinery boilers * * * *misfeasance, error in judgment, negligence or default of* * * * * * *persons in the service of the ship** * * and the ship not being liable for any consequences of causes therein excepted however originating."

The piece goods, on their arrvial in Bombay, were found to be damaged by oil and by chafing, *i.e.*, by rubbing against other goods in the hold, but there was no evidence to show how such damage was occasioned.

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Held that the term "leakage" did not include leakage from other goods on to the piece goods, nor did "breakage" include damage caused by chafing, and that, as no negligence was proved, the master was not protected by the exception "damage from negligence.

THIS was a case stated for the opinion of the High Court, under Sec. 7 of Act XXVI. of 1864, by John O'Leary, First Judge of the Bombay Court of Small Causes. It was as follows :—

"In this case the plaintiffs sought to recover from the defendant Rs. 538 as compensation for damage done to the goods of the plaintiffs, forming portion of the cargo of the ship "St. Olaf" on a voyage from Europe to Bombay.

"The goods were what are commonly known as piece goods. The damage alleged to be caused to one bale was to the extent of Rs. 443-12, by oil having come in contact with the bale; and damage to the several other bales, to the amount of Rs. 94-8, by 'chafing,' that is, by the bales rubbing against other portions of the cargo near them.

"The defence was that the defendant was exempted from alibility as to each kind of damage by certain clauses in the bill of lading.

"No evidence was adduced by either the plaintiffs or the defendant as to the particular circumstances, under which the damage was caused, but it was not denied that the damage occurred during the course of the voyage, and the amount of damage was not disputed by the defendant.

"It was contended for the defendant that the damage caused by oil came under the exemption of 'leakage' in the bill of lading and also under the head of 'perils of the seas.'

"It was contended that the damage caused by chafing came under the head 'perils of the seas' and 'breakage.'

"A considerable amount of evidence as to the custom of the Port of Bombay was given for the plaintiffs, the result of which was that under bills of lading, similar to the pre-

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'V. I think the English law is applicable, and that the plaintiff, having served for the full month of November, is entitled to receive his wages due on the 1st December, and that as he has left the service, without leave, on the 4th December, he should receive no pay for three days of that month only."

The reference came on for disposal before Westropp, C.J., and Melvill, J., on the 1st April 1873.

PER CURIAM:—Without laying down any general rule as to the application of the English law to this case, the Court is of opinion that the servant ought to be paid his wages up to the end of November and to forfeit those for December.

April 2.

[INSOLVENCY JURISDICTION.]

In re SITÁRÁM ABBAJI.

Ex parte SUNDARDAS MULJI.

Insolvency—Death of insolvent—Vesting order, Effect on—Official Assignee—Stat. 11 & 12 *Vict.*, c. 21—*Abatement.*

The death of an insolvent before obtaining his discharge does not affect the right of the Official Assignee to deal with the property of such insolvent, nor does it cause the proceedings in such Insolvency, so far as the Official Assignee and the creditors are concerned, to abate.°

THIS was an application made on behalf of Sundardás Mulji for the opinion of the Insolvent Court on the question, whether an abatement of proceedings in Insolvency takes place upon the death of the insolvent before obtaining his final discharge.

The application was made at the request of the Official Assignee.

°*Note.*—See *In re Ramsabuck Misser* (6 Beng. L. R. 119), and *In re King* (Coryton's Indian Insolvent Act p. 18); *sed quaere* as to this last mentioned case.—ED.

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The question arose in the following manner:—The insolvent, Sitárám Abbáji, on the 19th of August 1871, entered into an agreement to sell to Sundardás Mulji a house. Sitárám Abbáji did not perform this agreement, and Sundardás Mulji sued him in the High Court for specific performance. While that suit was pending, Sitárám Abbáji, on the 14th of September 1872, filed his petition and schedule in the Insolvent Court, and, thereupon, the usual vesting order was made, vesting his property in the Official Assignee. The latter on consideration of the agreement for sale, having come to the conclusion that Sundardás Mulji was entitled, on payment of the balance of the purchase money, to a specific performance of his agreement with the insolvent, was about to execute a conveyance of the premises, the subject of the agreement, to Sundardás Mulji when before completing the conveyance and before obtaining his order of discharge, the insolvent, Sitárám Abbáji, died. The Official Assignee, thereupon, feeling doubtful as to the effect of such death upon the insolvency proceedings and as to his right under the circumstances to complete the conveyance to Sundárdás Mulji, requested him to move for the direction of the Court in the matter.

Lang, on 19th of March 1873, moved, accordingly, before Gibbs, J., sitting as Commissioner in the Insolvent Court. He contended that the vesting order had the effect of a conveyance, and that the death of the insolvent did not alter the right of the Official Assignee to deal with the property vested in him by the vesting order, in accordance with the provisions of the Insolvent Act. He referred to cases cited in Archbold on Bankruptcy p. 564 (11th edition).

Cur. adv. vult.

GIBBS, J.,—In this case, the Official Assignee applied by counsel for instructions how to proceed in the matter, the insolvent having died after the petition and schedule were filed and the vesting order was made.

The early English cases have been quoted, but they all seem to turn on the fact of statutable provision for the continuance of proceedings after the death of the bankrupt having been made as early as 1 Jac. 1.

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sent one, it is the custom for ships to be responsible for such damages, but that hitherto the amount of such damages in any one case, has been very small, and has, in no case known to the witnesses, equalled in amount that claimed in the present case.

"I was of opinion that in cases like the present, independently of any custom of the port, the ship is liable for damage like the present, unless it be provided in the bill of lading, or other contract, between the parties, that the ship shall be exempt; and I was of opinion that oil damage suffered by piece goods did not come under the head of leakage, and that there was no evidence that it was occasioned 'by 'perils of the seas' in the present case; and the bill of lading did not exempt the ship from liability.

"And I was of opinion that 'chafing' did not come within the exception as to breakge, and that there was no evidence that it was caused by 'perils of the seas,' an that the bill of lading did not exempt the ship from liability. And I found a verdict for the plaintiffs, for the amount claimed, contingent on the opinion of the High Court, as to whether the defendant was liable, or was exempt as aforesaid."

The bill of lading referred to in the case, so far as it is necessary to set it out, was as follows:—

"Shipped in good order and condition by William Graham and Company in the Steam Ship "St. Olaf," whereof is master for this present voyage Hille, lying in the Port of London and bound for Bombay (having liberty to call at any port or ports, &c.), five hundred and seventy-five packages merchandise, being marked and numbered as per margin, and to be delivered in the like good order and condition from the ship's deck (where the ship's responsibility shall cease) at the aforesaid Port of Bombay or so near thereto as she may safely get (the act of God, the Queen's enemies, pirates, robbers by land or sea, restraint of princes, rulers or people, vermin, rain, spray, insufficient packing, in accuracies, absence of marks, numbers, address or description of goods shipped, leakage, breakage, rust, decay, loss or damage from machinery, boilers, or steam however caused, or from collision, stranding, or wreck however caused, or from explosion, heat, or fire on board, in hulk or craft, or on shore however

caused, or from evaporation or smell from other goods, jettison, barratry, misfeasance, error in judgment, negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship whether in navigation of the ship or otherwise, risk of craft, or hulk, or transhipment, and all and every the dangers and accidents of the seas, land, and rivers, and of navigation of whatsoever nature or kind being excepted; and the ship not being liable for any consequences of causes herein excepted however originating, nor liable for incorrect delivery unless each package shall have been distinctly marked by the shippers before shipment with the name of the port of destination in letters not less than two inches long) unto messrs. W. and H. Graham and Company or to his or their assigns."

The case was argued, on the 19th of April 1873, before WESTROPP, C.J., and SARGENT, J.

Anstey and *Farram* for the defendant:—It is now well established law that the master of a vessel can, by special agreement, completely limit his liability in respect of damage caused to, or loss of, goods which he contracts to carry, and the Court will not go into the question of the reasonableness or the unreasonableness of the contract: *Phillips* v. *Clark* (*a*), *The Duero* (*b*), *Tanbruan* v. *Pacific Steam Navigation Company* (*c*). That being so, the only question is—are the exceptions in the bill of lading wide enough to cover the damage caused to the piece goods in the present case? (1)–There is no reason why "leakage" should be limited to loss by leakage from the goods carried. It will include, in its natural sense, damage caused to goods (*e.g.*, piece goods) by leakage from contiguous goods. The cases of *Ohrloff* v. *Briscall* (*d*), *Czech* v. *Steam Navigation Company* (*e*), show that the Courts give an extended meaning to the term "leakage."

(2) The exception "damage from negligence***however originating" also protects the master. If negligence in stowing the cargo will, under circumstances like the present, not be presumed, the injury must fall under the exception "pe-

(*a*) 2 C. B. (N. S.) 156. (*b*) L. Rep. 2 Ad. & Ec. 393.
(*c*) Aspinal. Mar. L. Ca. 336. (*d*) L. Rep. I. P. C. 231.
(*e*) L, Rep. 3, C, P. 14.

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rils of the seas," but the Court, we contend, will presume negligence. It is only on the assumption that there has been negligence that the plaintiffs can recover; but by the exception the master is protected from the consequence of negligence. [Westropp, C.J.—This is an action of contract, not of delict. It is for the defendant to show that he is within the exceptions.]

The concluding words 'however originating" extend the term "damage by negligence" and render it equivalent to the general term "damage" which protected the master in *Ohrloff* v. *Briscall*.

Breakage includes "chafing." By chafing, minute particles of the piece goods are in fact broken.

The Freedom (*f*), *Peninsular and Oriental Steam Navigation Company* v. *Shand* (*g*), and *McCawley* v. *The Furness Railway Co.* (*h*), were also cited.

Macpherson for the plaintiffs:—All the cases cited *Phillips* v. *Clark* and *The Duero*—are cases in which the leakage was of the plaintiff's own goods, and for the loss occasioned by such breakage the suits were brought. I have not been able to find a single case like the present where exemption was claimed under an exception of leakage from liability for damage done to goods by the leakage from other goods, and "*The Nepoter*" (*i*) points to an opposite conclusion to that contended for by the defendant. When the master intended to protect himself from damaage done by other goods to the goods mentioned in the bill of lading, he did so expressly—see the exception as to damage caused by "evaporation or smell from other goods." It would have been easy to insert the wood "leakage," if damage like the present was intended to be excepted. The maxim *expressio unius alterius exclusio* applies. The bill of lading will be construed most strongly against the master of the ship, as it is his document. If it is ambiguous, the

(*f*) L. Rep. 3. C. 595. (*g*) 3 Moo. P. C. [N. S.] 272,
(*h*) L. Rep. 8 Q B. 57 (*i*) L. Rep. 2 Ad. & Ec. 375.

custom of the Port will be admitted in evidence to explain it: *Leake* on Contracts pp. 110 and 111 where the cases are cited.

Then as to negligence, it is admitted that the master can contract so as to the exempt himself from liability in respect of damage caused by it, but then if he relies upon such an exception, he must prove negligence. It was not for the plaintiff to prove negligence and so put himself out of Court. The Court will not presume negligence, as the oil may have reached the bales in many ways without there having been negligence on the part of the master or crew. This is an action founded on contract; therefore, proof of the shipment of our goods in good order and of their receipt by us in bad order is sufficient to entitle us to recover, unless the master shows some defence founded on the exceptions in the bill of lading. *The Freedom* (*supra*); *The duero* (*supra*) and *Tronson* v. *Dent* (*i*).

Ansety in reply :—In *The Nepoter* the damage was held not to have occurred from leakage but from evaporation. It has not been shown that the master was aware of the alleged custom of the Port of Bombay when he signed the bill of lading. Evidence of such custom, therefore, even if it existed cannot be admitted to explain the bill of lading: *Kirchner* v. *Venus* (*k*)

WESTROPP, C.J.:—This is action upon the contract contained in a bill of lading, which states that the goods, comprised in it, were shipped in good order and condition, and were to be delivered in the like good order and condition. The goods were not so delivered, one bale of piece goods having been damaged by oil, and other bales having been injured by chafing. The goods, then, not having been delivered in accordance with tthe conditions of the biil of lading, it lay on the defendant to prove that the damage sustained by the goods came within the exceptions contained in the bill of lading or some of them.

(*j*) 8 Moo. P. C. 419.
(*k*) 12 Moo. P. C. 361.

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As to the damage by oil, it was first contended, on the part of the defendant, that the case came within the term "leakage", but we think that argument is not maintainable. The term "leakage" in the bill of lading is, in our opinion, applicable only to the goods comprised in that bill, and does not extend to damage caused to such goods by leakage from other parts of the cargo.

The defendant next contends that he is protected by the word "damage" being amongst the exception, but the term "damage" is especially restricted by the words which follow it. Those words are "from machinery, boilers, or steam however caused, or from collision, stranding, or wreck however caused, or from explosion, heat, or fire * ** however caused, or from evaporation, or smell from other goods, jettison, barratry misfeasance, error in judgment, negligence or default of pilot, masters, mariners, engineers, or other persons in the service of the ship whether in navigation of the ship or otherwise, risk of craft, or hulk, or transhipment." It is manifest that the damage in respect of which the master is protected, is damage arising from these enumerated causes and not damage generally; but then it is said that these restrictions on the kind of damage are got rid of by the last words "the ship not being liable for any consequences of causes*** however originating," but the expression used is *not* "consequences of causes however originating" but consequences of causes *herein excepted* however originating, and we think that the words 'however originating" refer only to the causes excepted in the bill of lading, that is, (when applied to damage) damage of the kind distinctly excepted in the bill of lading and (when applied to leakage) leakage of the kind excepted in the bill of lading—leakage from the goods carried under the bill of lading however that leakage may originate.

One stipulation in the bill of lading strongly supports the conclusion we have arrived at; it is that damage from evaporation or smell from other goods is expressly provided for. When the master intends to protect himself from damage caused in a particular way by other goods to the goods carried, he uses apt words to effect that purpose.

Then as to the injury caused to the piece goods by chafing, we think that that does not come within the exception "breakage." It is not stated in the case that the goods have been cut or that their continuity has been severed. What the case describes is chafing by rubbing—by the bales rubbing against other portions of the cargo near them. We have arrived at our decision on this point with some doubt, but on the whole we are of opinion that chafing of the kind described by the learned Judge of the Small Cause Court does not came within the exception. Lastly; there is no proof of negligence, and it was for the master, if he could, to prove that the case came within that exception in the bill of lading. We are, therefore, of opinion that the Judge has come to a right decision and that judgment was properly given in favour of the plaintiffs. The plaintiffs must have their costs. In deciding this case we must not be understood as basing our judgment in any degree upon what the Judge has stated with reference to the custom of the Port.

Attorneys for the plaintiffs: *Hearn, Cleveland, and Peile.*

Attorneys for the defendant: *Rimington, Hore, and Langley.*