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said properties, or any and what portion thereof, in favor of the defendant, and, if so, whether the same was valid in law?

The costs of this appeal on both sides will be taxed here, and the respective amounts will be costs in the cause, and abide the event of the final decision of the lower Court.

Case remanded.

Agents for the appellant: Messrs. *Watkins* and *Lattey*.

Agent for the respondent: Mr. *T. L. Wilson*.

APPELLATE CIVIL.

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

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CHIN HONG & CO. (PLAINTIFFS) *v.* SENG MOH & CO. (DEFENDANTS).*

Bill-of-Lading, Exception in—Loss by Fire.

Under the terms of a bill-of-lading, "goods were to be delivered from the ship's tackle as fast as the steamer could discharge, failing which the agents were to be at liberty to land the goods at their godowns;" the bill-of-lading further, amongst other exceptions, "provided that the ship-owners should not be liable for loss by fire."

The steamer, on arriving at the port of discharge, came alongside the wharf, and commenced unloading at the Custom-house godowns without giving the consignees the option of landing the goods from the ship's tackle. The consignees, however, did not object to the goods being landed at the godowns, and they paid, also without objection, a sum for the wharfage of a part of the goods in the godowns.

Held, that the ship-owners, if the goods when placed in the godowns were in their possession as carriers, were protected under the clause of the bill-of-lading providing against fire, as much as if the fire had occurred on board-ship; and on the other hand, if the goods were in the possession of the ship-owners as wharfingers, they were not liable for the loss, inasmuch as the goods were destroyed by fire without any default on their part.

THIS was a suit brought to recover the sum of Rs. 8,612, the value of certain betelnuts and tobacco shipped by the plaintiffs from Calcutta to Rangoon.

* Regular Appeal, No. 240 of 1877, from a decree of C. J. Wilkinson, Esq., Recorder of Rangoon, dated the 25th June 1877.

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It appeared from the pleadings and evidence that the plaintiffs shipped a cargo of betelnuts and tobacco in a steam-ship belonging to the defendants to their agents in Rangoon; the ship arrived at Rangoon on the 11th December, and instead of discharging her cargo, as she usually did, into boats as she lay in the stream, came alongside a wharf and began to unload, no notice having been given to the plaintiffs as to when they would commence to unload, the goods when unloaded being carried to the godowns attached to the wharf, for the use of which godowns the defendants paid a monthly rent. The plaintiffs, on the 11th December, applied for delivery of their goods, and received from the defendants the bill-of-lading endorsed with the words "freight and wharfage paid," although in point of fact no money passed for wharfage dues, the amount being debited to the plaintiffs' account by the defendants. On the 12th December the plaintiffs took delivery of their goods, and continued to do so until the 16th. On the evening of that day the key of the godown as usual was handed over to the Custom-house authorities, after which a fire broke out and destroyed all the goods in the godowns; the plaintiffs thereupon claimed payment from the defendants for the value of the goods belonging to them so destroyed.

The defendants contended that they were exempt from liability under the following exceptions in the bill-of-lading:—"that they should not be liable for loss from the acts of God, "the Queen's enemies, restraint of princes, etc., pirates, rob-"bers by sea or land, accident, loss, and damage from vermin, "barratry, jetison, collison, fire, machinery, etc.; that the goods "were to be taken from the steamer's tackle by the consignees "as fast as the steamer could discharge, failing which the "steamer's agents were to be at liberty to land them at their "godowns, the cost of lighterage, godown rent, &c., to be borne "by the consignees;" that even supposing they were not covered by these exceptions, they were not liable for the destruction of the goods by fire, because at that time they held the goods as warehousemen, and not as common carriers; they further stated that although a delivery order was given to the plaintiffs on the 11th December, they neglected to appear and claim any of the

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cargo "from the ship's tackle" until the 12th December, when the goods were already placed in the godowns at their (the plaintiffs') risk and expense; and that the fire was not caused by any negligence on their part.

Upon these contentions the following issues were raised before the Recorder of Rangoon:—

1*st.*—Were the plaintiffs ready and willing to take delivery of the goods from the steamer's tackle?

2*nd.*—Were the defendants ready and willing to give the plaintiffs delivery from the ship's tackle?

3*rd.*—Were the said goods in the possession of the defendants at the time they were destroyed by fire; and if so, were they in such possession as common carriers or as warehousemen?

4*th.*—Are the defendants exonerated from liability under the terms of the bill-of-lading from any loss occasioned by the fire?

5*th.*—Was notice given by the defendants to the plaintiffs of the arrival of the steamer and of her being ready to discharge the cargo, and was such notice necessary to enable the plaintiffs to take delivery from the steamer's tackle?

6*th.*—What were the number and value of the goods destroyed by fire?

7*th.*—What amount of damages, if any, are the plaintiffs entitled to recover?

In support of these issues the following cases were cited by the plaintiffs: *Oakeley* v. *Portsmouth and Ryde United Steam Packet Co.* (1), *Morewood* v. *Polloh* (2), and *Bourne* v. *Gatliff* (3). The defendants, on the other hand, cited the *Hong Kong and Shanghai Bank* v. *Baker* (4), and *Solomon* v. *The British India Steam Navigation Co.* (5), decided by the Recorder of Rangoon.

On the first issue, the Recorder found in favor of the plaintiffs. On the second issue he found that the plaintiffs had no opportunity of taking the goods from the ship's tackle, inasmuch as the steamer had come alongside the wharf and immediately commenced to discharge them into the godowns, but found that

(1) 25 L. J., Exch., 99.
(2) 1 Ell. and Bl., 743.
(3) 11 Cl. and F., 45.
(4) 7 Bom., O. C., 186.
(5) Unreported.

the plaintiffs had impliedly waived their right to such delivery, and consented to take delivery from the godowns by paying wharfage and godown charges. On the third and fourth issues, he found that the goods were in the possession of the defendants at the time they were destroyed by fire, and that the defendants were in possession as common carriers and not as warehousemen; but he further held that the defendants were exonerated from liability under the exemption of fire contained in the bill-of-lading, and therefore dismissed the plaintiffs' suit with costs.

The plaintiffs appealed to the High Court.

The *Standing Counsel* (Mr. *J. D. Bell*) for the appellants.—The questions which arise are: (i)—Were the goods in the possession of the defendants at the time they were destroyed by fire, and if so, were they in such possession as common carriers? (ii)—Are the defendants exonerated from liability under the bill-of-lading, the fire having taken place in a place other than in the ship? It has been found in our favor that we were ready and willing to take delivery after the landing, but the goods were placed by the defendants in the Custom-house godowns, the key of which godowns was kept by the Custom-house officers, and could not be used by us after 6 P. M. [GARTH, C. J.—Before the goods were put in the godowns by the defendants, had the plaintiffs an opportunity of taking the goods themselves? Then comes the question, had they any right to put the goods in a godown at all?] [PONTIFEX, J.—There was a similar case to this lately heard before Mr. Justice Wilson; there no notice was given of the ship's arrival, and, it arriving at night, the goods were put into godowns.] [Mr. *Evans*.—The plaintiffs in the present case paid wharfage and godown charges before the fire took place,—*i. e.*, no actual money passed, but we gave them a delivery order, a document on which was endorsed 'wharfage paid.'] The delivery in this case was in day time. The bill-of-lading stipulates that the goods should be delivered from the ship's tackle. [GARTH, C. J.—If there was a stipulation to that effect, ought not the ship-owners have given a chance of so taking delivery? You seem to have acquiesced, however, in their giving you delivery

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elsewhere, by paying them wharfage for the goods placed by them in the godowns?] We say their duty as carriers had not ceased, and if we can show that they were wrong-doers in putting our goods in the godowns against our will, they would be liable; as to our acquiescing by paying wharfage, we were obliged to agree to what they had done; the ship having got alongside the godowns, we could do nothing; and supposing there had been consent, it went no further than this:—"For your convenience you may land the goods, but you must take the risk,"—see *Bourne v. Gatliff* (1). The master is bound to give notice before he lands the goods; and he cannot divest himself of his liability as a common carrier by immediately on arrival landing the goods on a wharf. We also say that the exception in the bill-of-lading covers no more than a fire on the ship. [PONTIFEX, J.—I cannot see why the exception does not apply to a fire on land as well as to a fire on the ship, as there is a provision for land carriage directly afterwards. The word "accident" in another proviso, is against you. If fire only applied to a fire on board-ship, then the word "accident" would cover a fire whilst the goods were on shore.] The case of *Morewood v. Pollok* (2) shows that "fire" would have required to be specially mentioned had it not been for the Act, and therefore would not be included as "accident," and that case decides that a fire elsewhere than on the ship, is not covered by the bill-of-lading.

Mr. *Evans*, for the respondents, was not called on.

The judgment of the High Court was delivered by

GARTH, C. J. (PONTIFEX, J., concurring).—We think there is no ground for this appeal. In order to make the defendants liable for the loss of the goods in question, it should have been shown that the defendants had no right to land them upon the godowns.

Perhaps Mr. Bell may be justified in saying that, by the terms of the bill-of-lading the defendants were bound to

(1) 11 Cl. & F., 45. (2) Ell. and Bl., 743.

give the plaintiffs the option of landing the goods "from the ship's tackle," and that they had no right to land them at the godowns without giving the plaintiffs that option.

But then we think it clear from the evidence that the plaintiffs consented to the goods being landed at the godowns.

It appears that when once the ship had been placed alongside the wharf, the goods could not have been landed from the "ship's tackle," according to the proper meaning of that expression, and that the only way to land them then was at the godowns; and the plaintiffs evidently consented to this course, because they paid without objection a sum for wharfage, &c., which we cannot doubt was a charge made by the defendants for the use of the godowns.

The plaintiffs are, therefore, placed in this position. Either the placing these goods in the godowns was a part of the defendants' duty under the contract of carriage, in which case we think they would be protected under the clause in the bill-of-lading, providing against loss by fire, as much as if the fire had occurred on board-ship; or when the goods were placed in the godowns with the consent of the plaintiffs, the defendants had the charge of them as wharfingers, which is the view which we are disposed to take of their true position; and in this case, it being conceded that the goods were destroyed by fire without any fault on the part of the defendants, the latter are not responsible.

We think, therefore, that the appeal should be dismissed with costs.

Appeal dismissed.