

*Original Suit No. 169 of 1869.*1869
August 7.

The Hongkong and Shanghai Banking Corporation.	Plaintiffs.
T. Barker.	Defendant.

Carrier by sea—Delivery of goods carried—Landing goods on Bunder—Custom of Port of Bombay—Bill of Lading—Protection afforded by clause exempting from loss by fire—Customs Act (VI. of 1863), Sects. 51, 52, 53, and 54.

A carrier by sea is obliged to make an actual delivery of goods carried by him to the consignee; but such *prima facie* obligation may be affected by the custom of the port where the goods are to be delivered.

Neither by the custom of the Port of Bombay, nor by the provisions of the Custom's Act, is the Master of a ship bound to wait 15 days before commencing to land his cargo, but within a reasonable time after the arrival of his ship—48 hours in the case of a sailing vessel, and somewhat less in case of a steamer—he is at liberty to land goods if the consignee has not then sent boats for them; and such landing is not unlawful, or a breach of contract as carrier, on the part of the master.

The landing of goods under the above circumstances, and setting them apart for the consignee, do not constitute a delivery of them to the consignee; but such goods, after being so landed, continue in the possession of the master as carrier.

The defendant received goods on board his steamer under a bill of lading which exempted him from liability for loss occasioned by the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatsoever nature or kind, and lawfully landed them on the Custom House Bunder at Bombay, where they were accidentally burned before they were delivered to the consignee.

Held, that he was protected by the above exception in the bill of lading.

This suit was brought to recover Rs. 40,000 as damages for the non-delivery by the defendant of certain goods that had been shipped in China on board the steam-ship *American* of which the defendant was Master.

Somjibhai Vishram, towards the end of the month of January 1869, shipped on the steamer *American*, which was then loading was a general ship at Hongkong, and bound for Bombay, a large quantity of goods consisting of 1,507 tubs or sugar-candy, 53 chests of Punjum silk, 223 bags of sugar, and 25 cases of cassia. When the goods were received on board the Master, T. Baker, signed five bills of lading, and

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delivered them to Somjibhai Vishram. The bills of lading were in the usual form :

“Shipped in good order and well-conditioned by Somjibhai Vishram in and upon the good steam-ship or vessel called the *American*, whereof T. Baker is Master for his present voyage, and now riding at anchor in Hongkong, and bound for Bombay, 510 tubs sugar-candy, weighed, &c., and are to be delivered in the like good order and well-conditioned at the aforesaid port of Bombay. The Act of God, the Queen’s enemies, fire, and all the every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever excepted unto order or its assigns. Freight for the said goods payable here in Hongkong as per margin, with primage and average accustomed. In witness whereof, &c.

“ (Signed) T. Baker. ”

These five bills of lading Somjibhai Vishram endorsed in blank, and delivered to the plaintiffs, the Hongkong and Shanghai Banking Corporation, a Joint Stock Banking Company carrying on business in China and Bombay, to secure advances made by them upon the goods.

The *American* sailed from Hongkong, and arrived in Bombay Harbour on the 17th of February. She was consigned by the charterers, Messrs. Jardine, Mathieson and Co., to their agents, Messrs. Remington and Co., of Bombay. On the 18th of February Messrs. Remington and Co. caused a notice of the arrival of the *American*, and a request to consignees of cargo to take delivery, to be inserted in the newspapers of that day.

They also, on the evening of the 17th February applied to the Custom House authorities for permission to land the cargo at once. Permission was then granted at once to land those goods, for the immediate landing of which provision was made in the bills of lading. About three-fourths of the bills of lading contained a clause authorising the immediate landing of the goods comprised in them. Subsequently, on the production of a memorandum, purporting to be signed by the

Mukadams of the respective consignees, a general permission to land the cargo was given on the 20th of February. Nothing, however, turned upon these permissions.

The *American* commenced to put her cargo into boats and land the same on the 18th or 19th; and the goods comprised in the five bills of lading, the subject of the present suit, were landed between the 20th and 23rd of February.

The defendant endeavoured, but failed, to prove that he had obtained permission from the plaintiffs or their agents to land the goods at once.

When landed, the goods were placed upon the Custom House Bunder, where they remained under the care, and in the possession of Messrs. Remington and Co., until the 1st of March, when the greater portion of them was burned in a fire, which accidentally broke out in the Post Office, a building adjoining the Custom House, and which fire extended to part of the Custom House premises,

The question therefore arose upon whom the loss was to fall.

The Customs Act VI. of 1863, Sec. 51, enacts as follows:—
 “A period of fifteen working days after the entry of a vessel not exceeding 600 tons, or such other period as the officer in charge of the Custom House shall direct, shall be allowed (without charge for the officer of customs) for the landing of import cargo from such vessel. One additional day shall in like manner be allowed for every fifty tons in excess of six hundred. If the period occupied in the landing of import cargo be in excess of that so allowed, the vessel shall be charged with the expense of the officer of customs at a rate not exceeding five rupees per diem (Sundays and holidays excepted) for such excess period.”

Sec. 52.—“If the importer, owner, or consignee of any goods (except such as shall have been declared by the Master or Commander as not to be landed), or the agent of such importer, agent, or consignee shall not land such goods within fifteen working days after the entry of the vessel importing the same, or within such further period as the bill of lading

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of such vessel shall specify, the Master or Commander of the vessel, or the officers of customs, on the application of such Master or Commander, may then carry such goods to the Custom House; and the officer in charge of the Custom House shall thereupon be bound to take charge of and to grant receipts for such goods; and if notice in writing shall have been given that the goods are to remain subject to a lien for freight, primage, general average, or other charges of a stated amount, such officer shall be bound to hold such goods until the freight, primage, duties, and other charges to which such goods are liable shall be paid."

Sec. 54.—"If any earlier period than fifteen working days after the entry of any vessel is specified in the bill of lading of such vessel for the discharge of her cargo, or any part thereof, and if the importer, owner, or consignee of such cargo, or the agent of such importer, owner, or consignee shall not land the same within such specified period, the Master or Commander of such vessel, or the officer of customs on the application of such Master or Commander, may then carry such goods to the Custom House; and the officer in charge of the Custom House shall thereupon be bound to take charge of and to grant receipts for such goods; and if notice in writing shall have been given that the goods are to remain subject to a lien for freight, primage, general average, or other charges of a stated amount, such officer shall be bound to hold such goods until the freight, primage, duties, and other charges to which such goods are liable shall be paid."

The issues settled were—

I Whether the defendant delivered the goods according to the bill of lading.

II. Whether the goods were lawfully landed by the defendant, and remained to the Custom House at the risk of the plaintiff.

III. Whether the plaintiffs were bound before the fire to take delivery of the goods.

IV. Whether the defendant was liable for the loss occasioned by the fire.

The suit was heard by Couch, C.J., on the 24th July and subsequent days.

Pigot and Scoble for the plaintiffs contended: I.—That by the custom of Bombay, as well as by the provisions of the Customs' Act the defendant was bound to wait 15 days before landing the goods. II.—That having landed them before the expiration of 15 days, the defendant was a wrong-doer, and liable for any loss that thereby resulted to the goods. III.—That the defendant was in possession of the goods on the bunder as a common carrier, and was not protected by the clause in the bill of lading exempting him from loss caused by fire, as such exemption was limited to loss by fire at sea. They cited *Gatiffe v. Bourne (a)*.

The Hon. J. S. *White* (Advocate General), *Green*, and *Latham* for the defendant contended; I.—That the custom of Bombay authorised the landing of the goods before the expiration of 15 days. II.—That by the custom of Bombay the landing of goods upon the Custom House Bunder was equivalent to a delivery of them to the consignee. III.—That the defendant landed the goods with the consent of the Mukadam of the consignee, and that such consent was sufficient, though the plaintiffs were holders of the bill of lading. IV.—That having landed the goods, the defendant held them as a warehouse-keeper, and in such capacity was not liable for their accidental destruction. V.—That defendant landed the goods as carrier, and was protected by the clause relating to fire in the bill of lading.

Cur. adv. vult.

7th August—Couch, C. J.:—This suit was brought by the plaintiffs, as the indorsees of five bills of lading signed by the defendant as the master of the steam-ship *American*, of certain goods shipped on board the *American* at Hongkong by Somjibhai Vishram, to be delivered at the port of Bombay "unto order or to its assigns," for the non-delivery of a portion of the goods which were destroyed by the fire that broke out in the Post Office on the 1st of March last.

(a) 4 Bing N. C. 34.

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The first issue raised is, whether the defendant delivered the goods according to the bill of lading, it is the duty of the master to deliver to the persons mentioned in the bill of lading of their assigns; and where the goods are deliverable to the shipper's order, as was the case in these bills of lading, and the bills of lading is endorsed in blank, and delivered as a security for advances, the delivery must be made to the holder of bill of lading: Abbott on Shipping, 10th Ed., p. 247. The argument of the Advocate General, who appeared for the defendant, that a delivery to the Mukadam of Somji Vashram, who did not and could not produce the bills of lading, can not be supported. It is quite opposed to the nature of the contract in the bill of lading and the established rules of law relating to it. Nor is it necessary, as was also argued by the Advocate General, that the defendant should have dealt with the goods in such a manner as to amount to a wrongful conversion; for by Sec. 1 of Act IX. of 1856 the plaintiffs, as the indorsees of the bills of lading, have vested in them all rights of suit, as if the contracts in the bills of lading had been made with themselves. The present suit is for a breach of the contract.

But the *Prima facie* obligation of a carrier to make an actual delivery to the consignee personally may be affected by a well-established and generally well-known custom and usage. And in the case of carriers by water Lord Tenterden says: "The manners of delivering the goods, and consequently the period at which the responsibility of the master and owners will cease, depend upon the custom of particular places and the usage of particular trades." In the Judgment of the Court in *Gatliffe v. Bourne (a)*, delivered by Chief Justice Tindal, it is said: "But we know of no general rule of law which governs the delivery of goods under a bill of lading, where such delivery is not expressly in accordance with the terms of the bill of lading, except that it must be a delivery according to the practice and custom usually observed in the port or place of delivery. An issue raised upon an allegation

(a) 4 Bing. N. C. 329.

of such a mode of delivery would accommodate itself to the facts of each particular case; and would let in every species of excuse from the strict and literal compliance with the precise terms of the bill of lading, which must necessarily be allowed to prevail with reference to the means and accommodation for lading goods at different places, the time of the arrival and departure of the vessel, the state of the tide and wind, interruptions from accidental causes, and all the other circumstances which belong to each particular port or place of delivery."

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The first question then which the Court has to determine is whether the lading of the goods at the Custom House Bunder, and setting them apart (assuming that the evidence shows this to have been done), were, according to the custom of the port of Bombay, a delivery to the plaintiff. It will be convenient to state the evidence of the witnesses on both sides as to the custom. Mr. Brice said: "As far as my knowledge goes, the practice is that ship's captains cannot land goods within 15 days of the ship's arrival, except with the concurrence of the consignee, or under condition in the bill of lading. It is the practice for all steamers to land their goods immediately; they provide for power to do so." Mr. Parker said: "The custom of the port in the case of goods arriving by steamer from China is to allow the consignees 15 days to take delivery." Mr. Macaulay: "Where there is no provision in the bill of lading the custom in Bombay is not to discharge till 15 days after arrival; it applies to both ships and steamers." Mr. Macintosh: "The custom is that after 15 days, if the consignee does not send boats along side, the captain can land them at the consignee's risk and expense. If the consignees do not send for the goods during the 15 days, they must remain on board;" and he made no distinction between sailing vessels and steamers. Mr. Forman said: "Before 1863 the custom was to allow the consignees of cargo a reasonable time to take delivery from the vessel, steamers as well as sailing vessels. If it was important to get the ship away quickly, the owner or agents used to discharge the cargo on their responsibility in the case of

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both steamers and sailing vessels. Since 1863 they have had to wait 15 days, or land on their own responsibility. I have had more experience in sailing vessels than steamers; but my statement applies to both, unless there is a clause in the bill of lading." Chabildas Lallubhai, the partner of Mr. Macintosh, in examination in chief said he agreed with Mr. Macintosh; and on cross-examination, "I agree with Mr. Forman as to the custom since 1863." Mr. Paterson said: "The custom in the case of steamers from Europe is that 15 days are supposed to elapse before the cargo is discharged at the risk of the consignee. I am not aware of any difference in the custom between steamers and sailing vessels." Mr. De Quadros: "If the goods are landed before 15 days are out, we (Ritchie, Steuart, and Co.) retain them in charge of our Mukadam at the Custom House. The practice of other houses is the same as ours. There is no difference between a steamer and a sailing vessel. We have often landed goods before the 15 days are out." Mehervanji Mancharji, assistant of Ewart, Latham and Co., said: "15 days are allowed in the case of every ship of 600 tons. I don't know of any difference between steamers and sailing vessels. Goods were landed by us from the *Star of India* within 15 days. We landed on our responsibility. She was a sailing vessel. I have heard of other instances besides the *Star of India* where the landing has been within the 15 days." The foregoing were witnesses called by the plaintiffs. The following were called by the defendant:—Mr. Fogo said: "Our practice has been to land cargoes from vessels if the parties did not send for the goods within a reasonable time after her arrival. There has been no certainty in our practice as to the time allowed. It would not be a reasonable custom for a steamer to wait 15 days, because the expenses of a steamer are greater than those of a sailing vessel. The Mukadam has charge over the goods only so far as seeing to their due delivery to the parties interested. *He lands them as our servant, and holds them till he gets authority from us to deliver them.*" Mr. Kettridge: "Goods are discharged from ships and steamers as they come to hand, after due notice by advertisement, or special notice to

the consignees of the arrival of the ship, and her being ready to discharge. If the captain came to goods for which the consignees had not sent, he would discharge them at once, provided there was not other cargo which he could discharge, and for which boats were waiting. I know of steamers discharging immediately on their arrival, without any clause in the bill of lading enabling them to do so. I am not acquainted with any custom to wait 15 days for the consignees to land. The custom authorizes the master, after reasonable notice to the consignees of goods, to discharge the same as the goods come to hand in the boats hired by the captain in case the consignees' boats are not ready. I should say the custom is to allow 48 hours from the entry of the ship at the Custom House—that is for a ship; not more than 24 hours in the case of a steamer. I think this custom is acted upon in the port of Bombay.” Mr. Wilson, the manager of the firm of Rennie, Scovell and Co., said; “The custom in Bombay where the ship has a general cargo is to advertise her arrival in the papers, to wait for boats from consignees (my practice has been to wait a day after the ship was ready to discharge), and when the consignee's boats don't come alongside, to send our own boats, and take the cargo to the Custom House Bunder. I speak of sailing ships. I never had any steamers consigned to me. In steamers the custom is to allow less time. I never knew of a ship waiting 15 days before discharging cargo. I have known frequent instances of ships landing cargo on the Custom House Bunder before the 15 days had expired, without the consent of the consignees being obtained. I know of no instances showing at whose risk the goods were. If the goods are landed before the 15 days, the Custom House will not hold them for freight. We have landed at the Custom House Bunder without anything but the boat note.” Mr. Owen said: “As soon as the ship arrives, we advertise in the papers requesting consignees to send boats alongside, and if they don't do so, we shall discharge the goods on their account. We send a circular round to consignees to the same effect. We then tell our Mukadam to send boats alongside, and discharge any goods for which no boats have come from the

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consignees. We generally commence discharging 48 hours from the ship's entry at the Custom House, and land the goods at the Custom House Bunder. We commence as soon as we can, but we generally allow 48 hours. I have known no instance of a ship waiting 15 days. If the goods are landed before the 15 days, I cannot say at whose risk they are according to the custom of Bombay." Mr. Henry Maxwell said: "My experience is, that 48 hours after the arrival of the ship, if consignees of cargo whose cargo was preventing the discharge of the ship did not come forward to take delivery, that cargo would be landed either by the captain or by the agents of the ship at the Custom House Bunder. At the present moment I cannot recall instances of goods being landed before the expiration of 15 days from the arrival of the ship. I know of no instance of a sailing ship waiting 15 days before discharging. I can say nothing about steamers: I have had no experience." Mr. Moore, of the firm of Campbell, Mitchell and Co., said: "The custom in Bombay is to advertise the arrival of a ship, and send round a circular to all the offices, European and Native, in Bombay, and then to land the cargo as boats come for it. The custom is not to wait more than a day or two for the consignees to send off boats. As a general rule the cargoes are landed at the Custom House Bunder. I can't say that I remember any instance of a ship waiting 15 days for the consignees to come and take the cargo before proceeding to discharge. I have known cases where goods have been landed by the master or agents before the ship has been in the harbour 15 days. I have never known any dispute, except as to the payment of the landing charges. The consignee comes and takes the goods from the Custom House Bunder."

I cannot upon this evidence think that the custom of Bombay obliges the master to keep goods on board for 15 days after the ship's arrival for the consignee to send for them. But few of the witnesses speak to such being the custom, and the balance of the evidence is against it. And seeing how much injury it might cause to the ship-owner, and how little benefit it would confer on the consignee

stronger evidence than there is in this case would be necessary to satisfy me that such a custom had been so uniformly acted upon that it must be considered to be part of the contract. On the other hand, the evidence does not, in my opinion, show that the landing at the Custom House Bunder is, by the custom, a delivery to the consignee. Indeed, some of it is directly opposed to this it being said that the goods are landed at the risk of the master or ship-owner, and that they remain in the custody of the Mukadam of the ship's agents until an order is given for their delivery to the consignee. If the landing on the Custom House Bunder is a delivery to the consignee, the possession of the goods would be parted with, for the master cannot both deliver the goods and keep possession of them. And if he once voluntarily parts with the possession out of his own or his agent's hands, he loses his lien upon the goods, and is not authorized by law to reclaim them: Abbott on Shipping, 10th Ed., p. 282. This is to my mind a cogent reason for considering that the landing is not by the custom a delivery under the bill of lading. The custom appears to me to be that, at the expiration of a reasonable time after the arrival of the ship, which in the case of sailing vessels seems to be considered to be 48 hours, and in the case of steamers somewhat less, the master is at liberty to land goods if the consignee has not sent boats for them; that the landing is lawful, and not a breach of duty or of the contract, and the consignee is bound to take delivery from the Custom House Bunder instead of the ship, and to pay the proper charges for landing; but that the goods remain in the possession of the master by his agents, and are not delivered under the bill of lading. And the master continues liable as a carrier upon the bill of lading; for, as is said by Buller, J. in *Hyde v. The Trent and Mersey Navigation Company* (a), he received the goods in the capacity of a carrier, and as the engagement was to carry and deliver them, the goods remain in his custody as a carrier the whole time. And in *Gatliffe v. Bourne* (b) the Court say they think the ship-owner is

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(a) 5 Term Rep. 398. (b) 4 Bing. N.C. 331.

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acting during the whole of the time whilst the goods are in his possession under the obligation of a common carrier. The provisions of Act VI. of 1863 are not inconsistent with this being the custom. They only (Secs. 52, 54) provide that in certain cases the officer in charge of the Custom House shall be bound to take charge of, and to grant receipts for, the goods, and if notice in writing is given, shall be bound to hold them until the freight and other charges are paid. The Custom House authorities were not bound to take charge of these goods, and they do not appear to have done so. The defendant in his written statement (para. 4) says that Hari Bhanji, the Makadam of Messrs. Remington and Co., "was in charge of the cargo so landed from the said ship for the purpose of preserving their tea thereon."

For the above reasons I am of opinion that the defendant did not deliver the goods according to the bill of lading; and that he is liable for the loss occasioned by the fire unless it comes within the exception. If the goods had been exposed to the risk of fire by any disregard by the defendant of his duty or of the contract, I think he would have been liable, notwithstanding the exception. This has been held in America: Angell on Carriers, Sec. 227; but I am not aware of any English decision upon the point. But here, according to the custom, there was no disregard of duty or of the contract; the landing was authorized and lawful, and the goods were not put in an improper place. I do not think that the meaning of "fire" in the exception is to be controlled by the words which follow it, and limited to a fire on board the ship. The fair construction of the bill of lading appears to me to be that the exception is co-extensive with the liability; that it applies as long as the goods remain in the defendant's possession as a carrier under the bill of lading. It is true, as Mr. Scoble argued, that, when landed, the goods are not protected by any insurance that may have been effected upon them for the voyage; but neither would they be if the consignee had himself landed them, or if, instead of being landed in accordance with the custom of the

port, it had been done under a clause in the bill of lading. The consignee must be taken to know the custom of the port; and if he fails to send for his goods within the prescribed time, he must abide by the consequences as regards the insurance. I am of opinion that the finding on the 4th issue should be for the defendant, and there must be judgment for the defendant with costs.

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Judgment for defendant with costs.

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

Attorneys for the defendant—*Keir, Prescott, and Winter.*

Original Suit No. 274 of 1869.

August 20

Balvantrav Bhaskar. Plaintiff.

Bayabai, Widow, and Chintaman Maddan. Defendants.

Hindu law—Adoption—Orphan.

According to the Hindu law prevailing in Western India, an orphan cannot be adopted.

The plaintiff in this case stated that one Maddan Jagannath, a Hindu Brahman, on the 4th of January 1864, executed his last will; the material portions of which were as follow:—“The three persons, namely, my wife, Laksh-mibai, Bayabai, widow, the daughter of my deceased elder brother, and my nephew, Balvantrav Bhaskar, are the owners of whatever moveable and immoveable property, ornaments, &c., belonging to me that may remain after me. These three persons are only to use the above-mentioned immoveable and moveable property: they are not to sell it; and after the death of the above-mentioned two females, my nephew, Balvantrav Bhaskar, is the owner in every respect***. Perchance, should he have no issue, and should Chiranjiva Jagannath Janardhan, the son of his elder brother, behave well, then Balvantrav Bhaskar may give the property to him after due consideration; otherwise, he is to spend the same for religious and charitable purposes. And whatever may have to be done by the above-mentioned three owners shall be done