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Oct. 8.*Appeal Suit No. 161.*

THE HONGKONG AND SHANGHAI

BANKING CORPORATION... (*Plaintiffs*)—*Appellants*,T. BAKER ..... (*Defendant*)—*Respondent*.

*Carrier by Sea—Delivery of Goods carried—Landing Goods on Bandar—Custom of Port of Bombay—Bill of Lading—Protection afforded by clause exempting from Loss by Fire—Customs Act (VI. of 1863), Secs. 51, 52, 53, and 54.*

Neither by the custom of the port of Bombay, nor by the provisions of the Customs Act, is<sup>o</sup> the master of a ship bound to wait fifteen days before commencing to land his cargo; but within a reasonable time after the arrival of his ship—forty-eight hours in the case of a sailing vessel, and somewhat less in the case of a steamer—he is at liberty, if the consignee has not then sent boats for them, to land the goods at the Custom House Bandar or other place sanctioned by the Customs authorities; 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 on the Custom House Bandar 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.

Course of legislation with reference to the landing of goods on the Custom House Bandar reviewed.

Whether, (under the special circumstances of this case stated in the text,) the goods when so landed remained in the custody of the master in his capacity of common carrier or as a warehouseman? *quere*.

The master of a vessel who receives goods on board under a bill of lading which exempts him from liability from 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 lands the goods at the port of discharge, is, so long as the goods remain in his custody after being so landed, protected from liability from loss by fire under the above exemption in his bill of lading.

THIS was an appeal from the judgment of COUCH, C.J., delivered on the 7th of August 1869. The report of the case in the Division Court will be found in the 6th volume of the Bombay High Court Reports, O. C. J., p. 71. The facts are there, and in the judgment of the court of appeal, fully set out.

The appeal was argued before WESTROPP and SARGENT, JJ., in December 1869, when the arguments extended over five days.

*Scoble* (Acting Advocate General) and *McCulloch* for the appellants.

*Green* and *Latham* for the respondent.

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The questions raised were the same as those raised in the Division Court.

The arguments and cases cited are so fully stated in the judgment of the Court that it is unnecessary to set them out here.

*Cur. adv. vult.*

WESTROPP, C.J.:—This is an appeal, heard by Sir Charles Sargent and myself, from a decree made by our late Chief Justice, Sir Richard Couch, upon the 7th of August 1869. Somjibháí Visrá́m, who carries on business both at Hongkong and Bombay, shipped at the former place goods, consisting of sugar-candy, sugar, Panjam silk, and cassia, on board the “American,” a steamer of about 1830 tons register, for Bombay. By the bills of lading (five in number) signed by the defendant, who was master of the “American,” the goods were to be delivered at the port of Bombay, “(the act of God, the Queen’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever excepted,) unto order or its assigns,” the freight &c. being made payable in Hongkong. Eighty-eight of the bills of lading signed by the master expressly provided that he should be at liberty to land the goods immediately on arrival. Twenty-nine of the bills of lading did not contain any such proviso. The five bills of lading with which we are concerned in the present case, were amongst those twenty-nine. These five bills of lading were indorsed in blank by Somjibháí Visrá́m and delivered to the plaintiffs, who had advanced money to Somjibháí Visrá́m in Hongkong on a bill of exchange for Rupees 35,000, drawn, against the above-mentioned shipment, by him on his firm in Bombay, and payable fifteen days after sight.

The “American” arrived in the port of Bombay on the 17th of February. She was consigned by the charterers to their agents, Messrs. Remington & Co., at Bombay.

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Messrs. B. & A. Hormasji were the agents of the plaintiffs at Bombay, and received and held on their behalf the five bills of lading and bill of exchange, which latter was presented by them to, and accepted by, the firm of Somjibhai Visram at Bombay on the 15th of February 1869. It, consequently, was not due until the 5th of March. In the *Times of India* of the 18th February there appeared the following advertisement:—

“NOTICE.—Consignees of cargo per steamer ‘American,’ Baker commander, from Hongkong and Singapore, are requested to present their bills of lading at the office of the undersigned, and take delivery of their goods as landed.”

“REMINGTON & Co.,

Agents S. S. ‘American.’

“*Bombay, 17th February 1869.*”

Nasarvanji Ardesar Hormasji, one of the firm of B. & A. Hormasji (plaintiff’s agents) admits that he saw, on the day after the arrival of the “American,” the usual advertisement of it amongst the announcements of the arrival and departure of vessels, and that he immediately took delivery of some bullion consigned to him by the same vessel, but said that he did not recollect to have seen Remington & Co.’s advertisement in the *Times of India*. He took no step towards taking delivery of the goods, the subject of this suit, until between 2 and 3 P.M. on Saturday the 27th of February, when he wrote the following letter to Remington & Co:—

“*Bombay, 27th February 1869.*”

“MESSRS. REMINGTON & Co.,

Agents S. S. ‘American,’ Bombay.

DEAR SIRS,—Oblige us by stating if the following goods by above steamer are ready for delivery, or if they are landed and sent to Government Warehouse.

We remain, &c.,

p. pro. B. & A. HORMASJI,

N. A. HORMASJI.”

Then followed a statement of the goods and their marks. N. A. Hormasji has deposed that he was on the same day informed by one of his firm's *mukádam's* men that the goods bearing the marks (mentioned in the bills of lading) were lying on the Custom House wharf. He immediately wrote to Somjibháí Visráám a formal letter (not in evidence). On Monday morning (the 1st of March) N. A. Hormasji received a message from Somjibháí Visráám that he would call in the course of the day to settle the matter. He did so call, and while in conversation with N. A. Hormasji, the fire, which I shall presently mention, was reported as having then broken out, and Somjibháí Visráám (by which name I presume the witness meant to indicate Ján Muhammad Somji, the son of Somjibháí Visráám, who managed his father's business, his father being too old to conduct it himself) went to the Custom House. Remington & Co., under date the 1st of March (Monday) 1869, before the fire had occurred, replied to N. A. Hormasji's letter of the 27th of February, as follows:—

“We are in receipt of your letter dated 27th instant, and in reply thereto beg to inform you that the steamer ‘American’ completed the discharge of her cargo some days ago, and the goods have been stored in the Government warehouse.”

“The goods, in fact, were lying upon the Custom House wharf, and had not been warehoused. But I have no doubt, that Messrs. Remington and Co., when writing that letter of the 1st of March, were under the impression that the goods had been warehoused. It appears from the evidence of their clerk, Motibháí Sundarji, who usually attended to their business at the Custom House, that Mr. Baumbach, one of the assistants in their firm, directed that clerk to cause the goods, which had come in boats alongside the Custom House wharf, to be placed in the Government warehouse, and that order they must have supposed to have been obeyed.

The discharge of the cargo of the ‘American’ seems to have commenced on the 18th of February. Many of the consignees landed their own goods. The goods the subject of this

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suit, appear to have been landed by Hari Bhánji, *mukádam* of Remington & Co., between the 20th and 24th of February. Whether that landing took place with the consent of Somjibháí Visráam or not, is a point on which there is conflicting evidence. Any real difficulty which occurred about the landing is, I think, attributable to the not unusual cause of such difficulties, namely, the rivalry between the *mukádam* of the agents of the master and the *mukádams* of the respective consignees, as to which of them should have the landing of the goods and the recompense consequent on the performance of that duty, and not to any unwillingness on the part of the consignees that the landing should take place. The evidence of Mr. Forman and other gentlemen shows that cargo from China is so valuable that consignees are generally anxious to obtain delivery as soon as possible. I have come to the conclusion that the landing was made with the consent of the firm of Somjibháí Visráam. Ján Muhammad Somji, its manager, admits that Ransord Madan was their *mukádam* for business within the Fort, in which the Custom House is situated, but denies that he authorised Ransord Madan to land the goods, although admitting that he knew of the arrival of the steamer, and that he had some conversation with Ransord about the goods four or five days after the arrival of the ship. Ransord also denies that the firm of Somjibháí Visráam authorised him to consent to the landing of the goods by Hari Bhánji, and states that he (Ransord) was concerned about the landing from the "American" of the goods of one Edalji Dádábhái, and that his negotiations with Hari Bhánji were with respect to those goods only, and that he and the *mukádams* of certain other consignees signed an agreement as to the rates at which Hari Bhánji might charge for the landing. It seems to be the fact that he did act on behalf of Edalji Dádábhái, and on other occasions frequently acted as *mukádam* for other Memon and Khojá merchants, besides Somjibháí Visráam. I place but little reliance on Ransord's testimony, and on that of Ján Muhammad Somji, so far as they ignore the fact of Ransord acting on the occasion for the firm of Somjibháí Visráam. And although it is true Somjibháí Visráam had

not then the five bills of lading relating to the goods the subject of this action, and had only the bill of lading for some aniseseed consigned to him by the "American," yet his firm was so far interested in the goods mentioned in the five bills of lading as to prevent there being any *à priori* improbability in the evidence of Kávasji Edalji, *dubásh* to Remington & Co., who seems to me to be a trustworthy witness. If his evidence be true, as I think it is, Somjibháí Visrá́m did authorise Ransord to see to the landing of the goods, and Ransord sanctioned the landing of them by Hari Bhánji. Kávasji Edalji's evidence is strongly supported in several points by other witnesses called for the defendant. It appears, too, from the evidence of Nasarvá́nji Ardesar Hormasji that his firm, B. & A. Hormasji, considered that it was the business of the firm of Somjibháí Visrá́m to apply for the goods. They had not, however, supplied Somjibháí Visrá́m with the bills of lading, without which he could not have obtained delivery of the goods. It unquestionably was the duty of B. & A. Hormasji, as holders of the bills of lading, to have taken proper measures in proper time, whatsoever that may have been, to have obtained delivery of the goods. When the goods were about to be landed, Ransord and the other *mukádam*s objected, probably on the ground of expense, to their being placed in a Government warehouse, and preferred that they should be placed on the Custom House wharf, which was done, and those goods bearing Somjibháí Visrá́m's marks were separated from the rest, and placed together on the wharf. Notwithstanding what Ján Muhammad Somji and Ransord may have said to the contrary, I think it has been established that one Nansi Visrá́m was directed by Ransord to look after the goods of Somjibháí Visrá́m after they had been placed on the Custom House wharf, and that he did so; but it is also quite clear that Hari Bhánji and his men, on behalf of Remington & Co., although tolerating the presence of Nansi Visrá́m, continued in possession of the goods until the occurrence of the fire, which broke out about noon on Monday the 1st of March in the Post Office, and eventually extended to part of the Custom House, and

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destroyed or damaged the greater portion of the goods contained in the five bills of lading. For the non-delivery of that portion this action has been brought.

The five bills of lading not having been produced to Remington and Co. up to the occurrence of the fire, Hari Bhánji, as *mukádam* to Messrs. Remington and Co., would, and did, according to the usage of that firm, continue in possession of the goods. The practice of that firm as to delivery of goods was stated by Mr. Fogo, a partner in it, to be, to give to the *mukádam* authority for delivery, by indorsement of that authority upon the bills of lading. The 4th paragraph of the defendant's written statement admits that Hari Bhánji, as *mukádam* of Remington and Co., was in charge of the goods landed from the ship for the purpose of preserving their lien thereon (*i.e.*, I presume, for the landing charges), and is inconsistent with the 3rd paragraph, which alleges a previous delivery to the servants of Somjibháí Visráám.

Assuming that the landing of those goods took place with the assent of Somjibháí Visráám, it has not, however, been shown that the plaintiffs' agents, Messrs. B. and A. Hormasji, had previously given any express authority to him to land them or to assent to their being landed. N. A. Hormasji says that he spoke to Somjibháí Visráám a few days after the arrival of the vessel about taking up the bill, but did not communicate with him about the goods until after he (N. A. Hormasji) heard, on the 27th of February, that the goods had been landed at the Custom House wharf. Even if he had seen Remington and Co.'s advertisement in the *Times of India* of the 18th of February, as I am strongly inclined to believe that he did, notwithstanding his assertion that he does not recollect to have seen it, yet that advertisement contains no definite statement of the time at which the goods were to be landed. His omission to prohibit the landing of the goods, therefore, cannot be considered an acquiescence in their being landed within any given time less than that usually allowed for such purposes, whatsoever that may be.

It becomes necessary, then, to consider what, if the consignees do not come or send for the goods, would be, according to the custom of the port of Bombay, a proper time to elapse before the master should land the goods. The importance of this point does not appear to have struck the learned counsel for the defendant at the commencement of the plaintiff's case. Counsel for the defendant did, however, give notice at a sufficiently early stage of the plaintiff's case of their intention to dispute the view of the custom put forward on behalf of the plaintiffs, to prevent any surprise to their counsel from the nature of the evidence subsequently given on this subject on behalf of the defendant. The plaintiffs' counsel had full opportunity of adducing before Sir Richard Couch such evidence as they thought desirable to offer upon it, and availed themselves of that opportunity.

It has been contended for the plaintiffs that, until 15 days from the arrival of the vessel have elapsed, the master is not, according to the custom of this port, at liberty to land the goods without the permission of the consignees. In support of that view, the plaintiffs have called witnesses, amongst whom undoubtedly there are gentlemen of high respectability, incapable of saying anything which they do not completely believe; but I cannot help thinking that the idea of many of them as to the custom is borrowed from an indistinct recollection, or imperfect comprehension, of the provisions of Act VI. of 1863, and of the practice at the Custom House with reference to that Act, of which the 51st, 52nd, 53rd, 54th, and 55th sections have been much relied upon for the plaintiffs, as corroborating their allegation of the custom. That Act is not the earliest legislation on this subject. It was dealt with also by Act I. of 1838 (Secs. 44, 45) and Act I. of 1852 (Sec. 51). Of these, Act I. of 1838, Sec. 44, enacted that "when a Customs officer shall be sent on board of any vessel to superintend the delivery of cargo, twenty days, exclusive of Sundays and holidays, shall be allowed for the discharge of the import cargo of vessels not exceeding 600 tons burthen; and thirty days, exclusive of Sundays and holidays, for the dis-

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charge of the import cargo of vessels exceeding that burthen, and the said periods shall be calculated from the day when the Customs officer first went on board: and if the whole cargo be not discharged by the expiration of the above-mentioned periods, the master shall be charged with the wages of such officer, and other expenses, for any further period that such officer may be detained on board: *and if the owners, importers, or consignees do not bring their goods to land within the period above fixed, it shall be the duty of the master so to do.*" This then provides, not that the master may not land the goods within the fixed period, but that, if the owners, &c., "do not bring their goods to land within the periods above fixed, it shall be *the duty of the master so to do.*" Sec. 45 related to cases in which a Customs officer was not sent on board, and enacted that the Collector of Customs might fix a period, not less than twenty days, for the discharge of cargo, and clearance of the vessel inwards, "*and if any goods remain on board after the time so fixed, or after the time allowed in the last preceding section of this Act, the Collector may order the same to be landed and warehoused, for the security of the duties chargeable thereon, and of any freight and primage and other demands that may be due thereon, giving his receipt to the master for the same: provided always that in all cases it shall be lawful for the Collector or other officer in charge of the Custom House, with the consent of the master of the vessel, to cause any packages to be brought on shore, and to be deposited in the Government warehouses, for the security of the duties and charges thereon, although twenty days may not have expired from the entry of such vessel; and in case any goods brought to land from any vessel be not claimed, and cleared from the Custom House within three months from the date of entry of the ship in which such goods were imported, it shall be competent to the Collector to sell the same on account of the duty and other charges due thereon; and the balance remaining after deducting the said duties and charges, shall be held in deposit, and paid to the owner on application.*" This section, so far from prohibiting, clearly contemplates a landing within the

time prescribed, whether or not the owner, importer, or consignee may have consented. It also enables the master to rid himself of the custody of the goods without losing his lien for freight, &c. Act I. of 1838 was repealed by Act I. of 1852, the 51st section of which is as follows:—"Except in special cases sanctioned by the Collector of Customs, twenty days, exclusive of Sundays and holidays, shall be allowed for the discharge of the import cargo of vessels not exceeding six hundred tons' burthen, and thirty days for vessels exceeding that burthen; and the said periods shall be calculated from the date on which the vessel was admitted to entry inward; and if any goods remain on board after the periods above fixed, the Collector may order the same to be landed and warehoused, for the security of the duties chargeable thereon, and of any freight and primage and other demands that may be due thereon, giving his receipt to the master for the goods so warehoused; but the Collector or other officer in charge of the Custom House, with the consent of the master of the vessel, may cause any packages to be brought on shore, and to be deposited in the Government Warehouse, although the periods above fixed have not expired." Of this, as of the previous enactment, I may say that it certainly does not prohibit a landing by the master within the prescribed period, without the consent of the consignees, but does in fact contemplate that before the expiration of that period such a landing may take place. Act I. of 1852 has been repealed by Act VI. of 1863, the Act in force when the cause of action in this case is alleged to have arisen.

Secs. 51, 52, 53, 54, and 55 of Act VI. of 1863, I have already mentioned as having been much relied upon for the plaintiffs in support of their allegation of the custom. It cannot, however, be affirmed that any one of these sections in express terms prohibits a landing of goods within fifteen days without the consent of the consignee. But the prohibition is sought to be implied from those sections: To us, however, it seems that their objects were only these: namely, 1st, to lay down the time during which the officer of Customs, under whose especial surveillance the import cargo is placed, should remain

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on board without charge to the vessel, and the rate at which she should be charged for hire after the expiration of that time ; and 2ndly, to lay down the time, not at which the cargo might be landed without the consent of the consignee, but rather at which the master of the vessel, in the event of the consignee not of his own accord taking delivery of the goods, ought to relieve himself altogether of the custody of them, and at which also it should be compulsory upon the principal officer at the Custom House to take them into his own charge, and to hold them, "until the freight, primage, duties, and other charges to which such goods are liable, shall be paid." That object, then, was to confer a boon, and not to impose a restriction, upon the master ; to enable him to part with the goods, and yet to preserve his lien for freight &c. upon them ; and not to deprive him of any rights as to landing which he may have according to the custom of the port.

Act XVII. of 1869, which received the assent of the Governor General of India on the 11th of August 1869, *i.e.*, four days after Sir Richard Couch gave his judgment in this cause, has been mentioned by counsel for the plaintiffs in aid of their argument. But we doubt whether more can be inferred from it than that the Legislature wished to enable the local Government from time to time to fix a period within which the master of a vessel may relieve himself altogether of the custody of the goods without losing his lien for freight, &c., and the Customs officer should be compelled to take charge of them, which period should be more conformable to that within which the custom of the port authorises, or hereafter may authorise, the master to land the goods, than that fixed by Act VI. of 1863.

For the plaintiffs it has been said that the evidence of Mr. Jervis and Méhérijbhái Bápuji Vikháji, two Custom House officers, shows that the practice of the Custom House is not to permit the landing of goods within fifteen days, except on the consent of consignees, or when the bill of lading provides for a shorter time. It is, however, manifest from the note made by Mr. Jervis on the 18th of February 1869, on Remington

and Co.'s letter of the previous day, requesting permission to land the cargo of the "American" at the Custom House Bandar, and from the evidence of Mr. Fry, that there is at least one further exception, namely, when the master chooses to forego his lien for freight &c. on the goods landed.

The evidence of many other witnesses, however, shows that there really is no difficulty in landing goods at the Custom House long before fifteen days have elapsed, although the Custom House officers may not take them into their exclusive charge unless the landing has been made with the consent of consignees, or when the bill of lading provides for a shorter time than fifteen days, or the master waives all lien for freight, &c. When the landing within fifteen days takes place in any case not within these exceptions, the master, by his agents, has the custody of goods lying on the wharf, and the consignees, after paying the freight, &c., and landing charges, take delivery on the Custom House Bandar. In the present case the freight appears to have been paid in Hongkong, and the only claim against the goods would seem to have been the landing charges.

Mr. Fry, Assistant of Remington & Co., had an interview with Mr. M. B. Vikháji at the Custom House on the 18th of February 1869, and the latter, after consulting Mr. Jervis, then made a note, on behalf of the Deputy Commissioner of Customs, below that of Mr. Jervis, on Remington & Co.'s letter of the 17th of February, as follows:—"Permission granted to land the cargo, as there is provision made in the bills of lading of the vessel." Mr. Fry, Mr. Jervis, and Mr. Vikháji were apparently at first under the impression that such a provision was made in all of the bills of lading. Subsequently, a difficulty having been made in consequence of the omission in some of the bills of lading of that provision, Mr. Fry had, on the 19th or 20th of February, a second interview with Mr. Vikháji, who said that, in consequence of that omission, the permission to land the goods must be withdrawn; however, on the agreement, of which I have already spoken, being made amongst the *mukádams* of the consignees to land

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the cargo at certain rates, the Custom House officers allowed it to be done.

This also appears from the evidence of Hari Bhánji and of Mr. Williamson, a Customs officer, and is touched upon by Motibháí Sundarji.

As to the points in which Mr. Fry and Mr. Vikháji differ, I prefer the evidence of Mr. Fry. He states that goods cannot be landed within fifteen days from the entry of the vessel, unless the Custom House authorities give permission, and that he has known it to be done without the consent of the consignees. That it is a common practice, as already said, for the masters of vessels, and their agents, to land within fifteen days is manifest not only from the evidence of many witnesses for the defence, but also from that of some of the plaintiff's witnesses: for instance, Mr. De Quadros, speaking of both sailing ships and steamers, says: "If the goods are landed before fifteen days are out, we retain them in charge of our *mukádam* at the Custom House;" and again, on cross-examination, "We have often landed goods before the fifteen days are out." Mehervánji Mánikji, another of the plaintiffs' witnesses, said: "Goods were landed by us from the 'Star of India' within fifteen days. We landed on our own responsibility. She was a sailing vessel." On cross-examination he added: "I have heard of other instances, besides the 'Star of India,' where the landing has been within the fifteen days." The extent of the responsibility of which that witness spoke, shall be presently considered.

What the custom of the port of Bombay may be as to landing goods, is a question of fact. In the recent case of *Gray v. Turnbull* in the House of Lords (a), Lord Chelmsford and Lord Westbury strongly insist upon the prudence and necessity of abiding by the original decision upon a question of fact depending on evidence nearly balanced, unless it be shown irresistibly that the decision was erroneous. In *Gray v. Turnbull*, too, the evidence was upon written depositions,

(a) L. R. 2 Scotch & Div. App. 53.

and not taken, as in this cause, *vivâ voce* in the presence and hearing of the learned Judge who decided it; and no additional evidence was taken by, or offered to us. We should, therefore, in weighing the evidence, be fully satisfied that it clearly preponderated in favour of the appellants (plaintiffs) before we ventured to differ from the conclusion at which he arrived. We have perused the evidence, with the greatest care, and so far from entertaining an opinion different from that of Sir Richard Couch, as to the result of the evidence upon the custom, we completely concur in his appreciation of it. He has set forth in his judgment the most important parts of it. It is unnecessary that we should repeat them, or do more than make a few comments upon it. We were surprised to find that such a custom, as that contended for by the appellants, had been set up, namely, that in the case of steamers and sailing vessels the master must, unless it please the consignee to take an earlier delivery of the goods, keep them on board for fifteen days. Such a custom appeared to us to be quite unreasonable, and we can only account for its having been set up in consequence of misapprehension, by some members of the mercantile community, of the legislation which has taken place, and more especially of Act VI. of 1863. Had such an inconvenient custom existed, it could hardly, I think, have been heard of in the principal courts here for the first time so late as 1869, when this cause was tried. I can, I think, safely say that during my own experience, from the beginning of 1854 until the hearing of this case in last year, there has not been any such custom put forward, either in the Supreme or High Court. The circumstance that the Peninsular and Oriental Steam Navigation Company, and other owners of steamers, have introduced into their bills of lading a special clause, enabling them to land goods immediately on arrival, has been advanced as an argument for the appellants in aid of the alleged fifteen-day custom, but that clause may have been adopted *pro majori cautelâ*, to get rid of any doubt created by legislation, or in order to enable the parties adopting the clause, if desirable or necessary, to compel the Customs authorities, under the present or former Customs Acts, to take the goods completely into

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their custody, and to hold them, subject to the lien for freight, &c. Mr. Brice, one of the witnesses for the appellants, says that "it is the practice for *all* steamers to land their goods immediately—they provide for power to do so." Other witnesses show that he is mistaken in supposing that all steamers make such a special provision to land their cargoes immediately; his statement, that as a matter of fact they all do so land their cargoes, tells strongly in favour of the respondent. Mr. Parker was unable to specify any instance of a steamer waiting fifteen days before landing her cargo, and even if he had been able to specify one or more instances, those may have been cases in which it suited the purposes of the owners or charterers of the vessels not to expedite their discharge. This remark is applicable to the evidence of several witnesses, for instance, Mr. Mackintosh and Chabildás Lallubháí. Mr. Parker's idea of the custom seems to be chiefly based upon what he supposes to be the provisions of the Customs Act, and not upon any actual experience. Being an officer of the Peninsular and Oriental Company, whose bills of lading stipulate for the right of immediate delivery, he was not likely to have had actual experience as to the practice of steamers or other vessels not specially making such a proviso. Mr. Forman, one of the appellants' witnesses, admits that if masters wish to land their goods within fifteen days they do so, but, he adds, "on their responsibility," the extent of which remains to be considered. Mr. Mackintosh, who appears to think that the detention of a steam vessel in harbour is not more expensive than that of a sailing vessel, is on that point at variance with Mr. Parker, Mr. Fogo, and Mr. Kittredge. Whether we regard their opportunities of knowledge, or the substance of what they have said as to the unloading of vessels in Bombay Harbour, we think that the evidence of Mr. Kittredge, Mr. Wilson, Mr. Owen, Mr. Henry Maxwell, and Mr. Moore is of great weight, and wholly irreconcilable with the existence of any such custom as that alleged by the appellants, namely, that the masters, either of sailing vessels or steamers, are bound to keep goods on board for fifteen days, unless in the meantime taken delivery of by the holders of the bills of lading. It is not

the case even with respect to sailing vessels, and *à fortiori* not so with respect to steamers. We think that it has been satisfactorily established that, at the expiration of a reasonable time from the arrival and entry of the vessel, which in the case of sailing vessels seems to be forty-eight hours, and in that of steamers somewhat less, the master is, according to the custom of the port, at liberty to land goods at the Custom House Bandar, or other place sanctioned by the Customs officers, if the holders of the bills of lading have not sent boats for their goods; and that this landing is lawful, and not a breach of duty or of the contract. We fully concur with the learned Judge in holding that such a landing is not a delivery under the bill of lading, that the consignee is bound to take delivery from the Customs Bandar, and to pay the proper charges for landing, the goods in the meantime remaining in the possession of the master by his agents. To indorsees of bills of lading there would, generally, be no means of giving notice of arrival except by public advertisement. The master or his agents would not in most cases, have any means of knowing who they were, until they notified that they held the bills of lading. In the present case, B. and A. Hormasji knew of the ship's arrival, and that she was discharging cargo, and actually had landed bullion from her.

I shall conclude my remarks upon the custom by observing that although Messrs. B. & A. Hormasji were aware of the ship's arrival on the 17th of February, and that fifteen days had not elapsed from that time, and possibly may not have heard of the landing of the goods which have been destroyed, they, by their letter of the 27th of February, show that they thought it probable that the goods had been already landed, for they ask if the goods "are ready for delivery, or if they are landed and sent to Government Warehouse."

And further N. A. Hormasji, of that firm, says: "The man that took the letter on the 27th, afterwards went to the Bandar. I told him to go and see if the goods bearing the marks were on shore. He said he saw some goods on the wharf bearing these marks." This shows not only that B. &

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A. Hormasji were well aware of the probability that the goods would have been landed before the fifteen days were out, but also where that landing would take place, namely, at the Custom House Bandar. These facts are important in the case of a firm with such large business connected with shipping as they have been represented as enjoying.

Whether or not in this particular case, under the peculiar circumstances under which the landing took place, the master continued liable as a common carrier on his bill of lading, it is unnecessary for us to express any positive opinion. It may be that inasmuch as B. & A. Hormasji knew on the 18th of February that the vessel arrived on the previous day, and shortly after took delivery of bullion consigned to them, and, therefore, knew that she was delivering her cargo, and must also be taken to know the established custom of the port, that the master of any vessel is at liberty, within a reasonable time after the arrival and entry of the vessel at the Custom House, to land the goods if the holders of bills of lading do not send for them, the master in this case might have some ground for contending that after the goods were landed on the Custom House Bandar, though they must be considered as undelivered and to have remained in his custody, they did so not in his capacity of common carrier, but as warehouseman (*b*).

Upon that point we shall not express any opinion, because, even assuming that his liability as a common carrier continued, we concur with Sir Richard Couch in thinking that the master, having landed the goods, according to the custom of the port, within a reasonable time after the entry of the vessel, and being free from any imputation of negligence or breach of duty, is protected by the special exception of "fire" contained in the bills of lading.

It has been contended for the plaintiffs that the scope of that exception must be controlled by the word "other" preceding the words, "dangers and accidents of the seas, rivers,

(*b*) *Garside v. Trent and Mersey Navigation Co.*, 4 T. R. 581.—Angell on Carr. pl. 302—305 *et seq.*, 4th ed.

and navigation, of whatever nature or kind soever;" but we cannot accede to that argument. Fire, no doubt may occur at sea, as well as on shore, but it never has been regarded as a peril, danger, or accident of the sea within the meaning of those terms as known to mercantile usage or the law.

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In his work on "Perils of the Sea," Mr. Bailly defines them as "all losses caused by the action of wind and water acting on the property insured under extraordinary circumstances, either directly or mediately, without the intervention of other independent active external causes" (c). Sir Joseph Arnould says of "perils of the seas":—"Under these words are embraced all kinds of marine casualties, such as shipwreck, foundering, stranding, &c., and every species of damage done to the ship or goods at sea by the violent and immediate action of the winds and waves, as distinct from that included in the ordinary wear and tear of the voyage, or directly referable to the acts and negligence of the assured as its proximate and sole conclusive cause." (d) Wharton (referring to Jones on Bailments, p. 98), in defining "perils of the sea," says, "They are strictly the natural accidents peculiar to the water, but the law has extended this phrase to comprehend events not attributable to natural causes, as captures by pirates (e), and losses by collision, where no blame is attributable to either ship, or at all events to the injured ship (f). The word 'peril,' like 'periculum,' Lat., from which it is derived, is in itself ambiguous, and sometimes denotes the risk of inevitable mischance, and sometimes the danger arising from the want of due circumspection."

Kent (Vol. III., p. 301, 10th ed.) says: "Perils of the sea denote natural accidents peculiar to that element which do

(c) Page 6, ed. of 1860; and see p. 2.

(d) Vol. II. p. 817, 2nd ed.; and see pp. 826, 827, et seq., and p. 1326.

(e) 2 Arnould, 841 (2nd ed.) *Pickering v. Barklay*, Style 132; S. C. 2, Rol. Abr. 248, pl. 10; *Barton v. Wolliford*, Comberbach 56. Not so if the vessel fall into the hands of pirates by the negligence or fault of the master: Emerigon, tom. i., 532. The owners are responsible for a robbery in the Thames: *Morse v. Slue*, 1 Ventris 190.

(f) *Smith v. Scott*, 4 Taunton 126; *Buller v. Fisher*, 1 Esp. 67; Abbott on Shipping, 9th ed., p. 318, Pt. IV., ch. VI., pl. 2. See L. R. 1 C. P. 600.

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not happen by the intervention of man, nor are to be prevented by human prudence." The only exception which he admits to the definition is loss by pirates.

In *Kay v. Wheeler (g)* the bill of lading contained the usual exceptions: "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what kind and nature soever;" the goods shipped under that bill of lading were injured during the voyage by rats, although the ship-owner had taken every possible precaution to prevent it. The Court of Exchequer Chamber affirmed the judgment of the Court of Common Pleas, by which it was held that the cause of injury did not come within either the exception of perils of the sea, or any of the other exceptions. Nor is a loss caused by worms, which have destroyed a ship's bottom, a loss by perils of the sea: *Rohl v. Parr (h)*.

I have not met with any decision to the effect that a loss by lightning could be regarded as a loss by perils of the sea. It certainly, however, would be a loss by the act of God (*i*), and the carrier is by the Common Law not responsible for losses by the act of God or the Queen's enemies. But for a loss or injury by fire occasioned by other means than lightning he is at Common Law liable: *Forward v. Pittard (j)*.

The only exception formerly made in bills of lading was of perils of the sea (*k*). To this exception the Common Law, as we have seen, added the act of God and the Queen's enemies, but, fire by means other than lightning being deemed not to fall within any of these three exceptions (*l*), it was enacted by Stat. 26 Geo. 3, c. 86, s. 2, "that no owner or owners of any ship or vessel shall be subject, or liable to answer for or make good, to any one or more person or per-

(g) L. R., 2 C. P. 302, and see *Hunter v. Potts*, 4 Camp. 203.

(h) 1 Esp. 445.

(i) 3 Kent 302 (10th ed.).

(j) 1 T. R. 27; Angell on Carr., chap. VI., pl. 156, 157, *et seq.*, pp. 134—137, 4th ed.

(k) Abbott on Shipping, 9th ed., p. 316, Part IV., ch. vi., pl. 2.

(l) *Ibid.*, p. 320, Pt. IV., Ch. vi., pl. 3; 3 Kent 302, 10th ed.

sons, any loss or damage which may happen to any goods or merchandise whatsoever, which from and after the 1st of September 1786 shall be shipped, taken in or on board any such ship or vessel, by reason or means of any fire happening to or on board the said ship or vessel." In this enactment the master is not mentioned; and, therefore, Lord Tenterden says: "It may be doubtful whether his responsibility is in this case removed by the statute: but the insertion of the word *fire* in the modern bill of lading has certainly removed it" (*m*). The Merchant Shipping Act 1854, s. 503, which is as follows: "No owner of any sea-going ship, or share therein, shall be liable to make good any loss or damage that may happen without his actual fault or privity of or to any of the following things (that is to say):—(1) Of or to any goods, merchandise, or other things, whatsoever taken in or put on board any such ship, by reason of any fire happening on board such ship," &c., "to any extent whatever," is also silent as to the master, and is conversant only of fire "happening on board such ship."

Mr. McLauchlan, in his book on Shipping, has the following note at page 109 *n*:—

"Under the operative words in the 26th Geo. 3, c. 86, § 2, which were 'shipped, taken in or put on board such vessel,' it was held that goods destroyed by fire while on board a lighter not belonging to the owners of the ship, for the purpose of being conveyed from the shore to the ship, were not within the intention of the Act, and the owners were responsible for them as at Common Law: *Morewood v. Pollok*, 1 E. & B. 743 (*n*), an interpretation which appears to apply to the present Act (*o*). Of course, if the goods are not in the ship, but put out of it, on shore, and without notice to the consignees, when they are destroyed by fire, the only defence of the owners is at Common Law: *Bourne v. Gatliffe*, in error, 11 Cl. & F. 45; 7 M. & G. 850."

In *Bourne v. Gatliffe* the point here did not arise, because there was not in the bill of lading any exception of fire. Nor

(*m*) Abbott on Shipping, Part IV., ch vi., pl. 3. (*n*) S. C. 21 L. T., 86.

(*o*) Merchant Shipping Act 1854, s. 503.

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did the point arise in *Morewood v. Pollok*; the declaration there averred that the goods were to be delivered to the plaintiffs, "the dangers of the sea only excepted," which averment was not traversed by the plea, on demurrer to which that case was disposed of. The court, too, relied on the words of the statute as showing that, "to bring a case within the Act, the fire must be on board a ship which is the property of the defendants"<sup>3</sup> (p).

Mr. Latham, in his argument for the respondent, suggested that the special exception of fire was introduced into bills of lading subsequently to, and in consequence of, the decision in *Bourne v. Gatcliffe*, pronounced in the House of Lords in 1844. It is true that in the sixth edition of Beawes' *Lex Mercatoria*, published in 1813, the form of bill of lading given (Vol. I., p. 196) only excepts the dangers of the sea, and in two out of three forms of bills of lading given in Montefiore's *Commercial Precedents*, published also in 1813, pp. 111, 112, the exceptions are, "all and every the dangers and accidents of the seas and navigation, of whatever nature and kind soever;" but in the third form in the same book (p. 112) the exceptions are "the act of God, the King's enemies, *fire*, and all every other dangers and accidents of the seas, rivers, and navigation, of whatever nature, save risk of boats so far as ships are liable thereto." Mr. Scoble has also stated that in an edition of *Abbott on Shipping*, published in 1802, the exception of fire is mentioned.

The case of *De Rothschild v. The Royal Mail Steam Packet Company* (q) has been referred to as authority for the proposition that exceptions in a bill of lading should be construed strictly, but in the judgment (attributed in the *Exchequer Reports* to Parke, B., and by the *Law Journal* to Pollock, C.B.) the court lays it down that the ordinary meaning of the words used must be followed, and the circumstances under which the contract is made must be regarded; and it refused to adopt a meaning which it considered unreasonable, or unlikely to be within the intention of the parties. The

(p) Per Lord Campbell, C.J., E. & B. 748; *et vide ibid.* per Wightman, J.

(q) 7 Exch. 734 S. C. 21, L. J. Exch. 273.

same doctrine has been applied to charter-parties: *Barker v. McAndrew* (r), *Bruce v. Nicolopulo* (s), *Brough v. Whitmore* (t).

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The use of the word "other" before "dangers and accidents of the seas," &c., in the present bills of lading, cannot, we think, render "fire" a peril of the sea, or limit it to fire on board the ship. The reasonable mode of construing the contract contained in the bill of lading is to treat the exceptions as co-extensive with the liability. Were we to apply the word "other" so as to cut down the shipowner's and master's protection against fire to fire occurring on board the ship, we should be equally bound to apply it in the same manner to limit the exception of the acts of God and the Queen's enemies, so that if the goods, even though landed after the expiration of the fifteen days contended for by the appellants, were, whilst yet undelivered, to be destroyed by lightning, or by a hostile force at war with the Queen, the shipowners and master would be unprotected. This we do not think could have been the intention of the parties. It may not be inappropriate here to mention *Gage v. Tirrell* (u), an American case mentioned in *Angell on Carriers* (v), in which the court, after careful consideration, held "that a common carrier did not, by giving a bill of lading which contained only the exception of perils of the sea, thereby make a special contract to deliver subject only to this exception, but that he was excused from delivery if prevented by the act of God or the public enemy." In *Pelly v. The Royal Exchange Assurance Company* (w), loss of rigging, sails, &c. accidentally burnt on a sandbank, where such articles are generally stowed in the Canton river by the usage of the Chinese trade, was held to be a loss by fire under the common form of policy on the ship, her tackle, &c., on a voyage from London to China and back to London, because there was no fault in the master, inasmuch as he acted in the usual course (x); and the defendants, the insurers, must be taken to know the

(r) 11 Jur. N. S. 637. (s) 11 Exch. 129, S. C. 24, L. J. Exch. 321.

(t) 4 T. R. 206.

(u) 9 Allen 299.

(v) 4th ed., note (a) to pl. 294, pp. 260, 261. (w) 1 Burr. 341.

(x) *Ibid.* 348, 351.

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custom of the port, and, in taking the risk, to have contemplated that what was usual or necessary would be done.

Sir Joseph Arnould (*y*), in discussing the continuance and end of the risk under a marine policy on goods, after referring to the authorities which show that where a usage exists, by the general course of trade, to employ smaller craft such as lighters, shallops, &c., to carry the goods from the ship to the shore, the underwriters will be liable for any loss or damage which may happen to the goods in the course of being so carried from the ship to the shore, mentions a case (*Osacar v. The Louisiana Insurance Co.* (*z*), decided in the Supreme Court of the United States, in which the same principle was carried to the extent of protecting goods destined for a Mexican port (Soto la Marina) while being carried up from the river-bar to the town, partly in boats, and *partly overland on mules*, that being shown to be the general mode of conveying them to their place of destination.

There is an instance in a charterparty in *Gilkison v. Middleton* (*a*), and also in Maude and Pollock on Shipping, 229 (3rd ed.), of the very loose manner in which the word "other" is used. The exceptions are "the act of God, the Queen's enemies, fire, *strike of pitmen*, and all other damages and accidents of the seas, rivers, and navigations, of what nature and kind soever, throughout the voyage." It would be absurd to hold that a strike of pitmen on board the ship only was intended.

The language of the five bills of lading in this case leads to the conclusion that the exception of fire is co-extensive with the contract to deliver, and does not limit the protection to the time during which the goods are in the ship. The landing of the goods appears to us to have been in conformity with the custom of the port, and without default on the part of the master. For these reasons, we affirm the decree with costs.

*Decree affirmed with costs.*

Attorneys for the appellants: *Hearn, Cleveland, & Peile.*

Attorneys for the respondent: *Keir, Prescott, & Winter.*

(*y*) Vol. I., 482, *et seq.*, 2nd ed.

(*z*) 5 Martin N. S. 386; and sec 1 Phillips on Ins., 3rd ed., p. 537.

(*a*) 2 C. B., N. S., 134, 137.