ORIGINAL CIVIL.

1883
August 25.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Latham.

JAMES SCOTT (PLAINTIFF) *v.* JAMES FINLAY AND OTHERS (DEFENDANTS).*

Shipping—Construction of bill of lading—Delivery in dock—"Landing or cranage charges"—Practice of dock to recover from consignee—Liability of ship-owner.

Certain boilers consigned to the plaintiff in Bombay were shipped at Liverpool in two steamers belonging to the same owners, under two bills of lading in these terms:—"Shipped in good order and condition, &c., to be delivered, subject to the exceptions and conditions hereinafter mentioned, in the like good order and condition from the ship's tackles (where the ship's responsibility shall cease) at the aforesaid port of Bombay, &c." One of the exceptions and conditions above referred to was as follows:—"The ship-owner shall have the option of discharging in dock, and of making delivery of the goods under the bills of lading either over the ship's side or from lighters, or a store-ship, or custom house, or warehouse, at merchant's risk." Freight was prepaid in Liverpool.

On their arrival at Bombay the two steamers went into the Prince's Dock, belonging to the Port Trust, and discharged the boilers, by means of the Port Trust cranes, on to the dock wharves. The plaintiff subsequently sent to remove the boilers, but was not allowed by the dock authorities to do so until he had paid to them various sums, amounting in the aggregate to Rs. 930, on account, as stated in the bill furnished him by the Port Trust, of "landing charges" for the said boilers. The bills also contained certain additional charges for "wharfage". These the plaintiff was ready to pay, but the "landing charges" he paid only under protest, and in order to get possession of his goods, and now sought to recover the same from the defendants, who represented the ship-owners

It was the practice of the Port Trust to recover these charges in all cases from the consignees of goods discharged in their dock, and the charge was said to be levied on all goods landed on the wharves of the dock, whether by the dock's cranes, or by the ship's own tackles. The charge was incurred the moment the goods touched the wharf. In their rates, sanctioned by Government, which by their Act the Port Trust were entitled to charge, this charge was called, not a "landing charge", but a "dock and cranage" charge. Had the plaintiff been given delivery of these goods in the stream, and afterwards himself landed them at any wharf belonging to the Port Trust in the Port of Bombay, the Port Trust would have sought to have made the same charge for allowing the goods to be landed, whether that was done by their appliances or not.

Held that the ship-owner, and not the consignee, was bound to pay these charges, they being in reality charges for work and labour done in and about the landing of the goods—an operation which, under the bills of lading, was within the duty of the ship-owner.

* Small Cause Court Suit, No. 2506 of 1883.

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Per LATHAM, J.—The ship having elected to discharge in the dock, it was her duty to land the goods on the wharf. Every charge which had to be incurred before that could be done, was a charge antecedent to delivery, and one, therefore, which must be paid by the ship-owner.

CASE stated for the opinion of the High Court, under section 69 of Act XV of 1882, by W. E. Hart, Chief Judge of the Court of Small Causes, Bombay :—

1. The plaintiff is an engineer in Bombay ; and the defendants, as the agents here for the Clan line of steamers, were the agents for the steam-ships *Clan Murray* and *Clan Graham*, belonging to that line(1).

2. The plaintiff was the holder of two bills of lading. The first, dated 30th September, 1882, was for three sixteen-ton boilers and nine smaller packages of lighter machinery per S. S. *Clan Murray ;* and the second, dated 28th October, 1882, was for three fifteen-ton boilers and thirty smaller packages of lighter machinery per S. S. *Clan Graham.*

3. These two bills of lading are both in the same form, and granted by Messrs. Cayzer, Irvine & Co., at Liverpool, on prepayment of the freight there by the shippers. The freight so paid in respect of the boilers was very greatly (in the case of those per S. S. *Clan Murray* 800 per cent., and in the case of those per S. S. *Clan Graham* 1,150 per cent.) in excess of the freight paid for ordinary cargo shipped in the same steamers.

4. The bills of lading provide that the goods therein respectively described are to be delivered "subject to the exceptions and conditions thereinafter mentioned, in the like good order and condition, from the ship's tackles (where the ship's responsibility shall cease) at the port of Bombay." The only subsequent condition material to the persent case is the eighth, namely, "The ship-owner shall have the option of discharging in dock and in making delivery of the goods under this bill of lading, either over the ship's side, or from lighters, or a store ship, or custom house, or warehouse, at merchant's risk."

5. On arriving at Bombay, the *Clan Murray* went into the Prince's Dock, which belongs to the Port Trust, and there dis-

(1) The defendants were sued, with their own consent, in the place of their principals, the owners of the steamers.

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charged at the Ibis wharf the plaintiff's three boilers, employing for that purpose the 100-ton crane belonging to the Port Trust.

6. The plaintiff presented his bill of lading of 30th September to the defendants, and they endorsed thereon an order for delivery addressed to the Port Trust. The plaintiff sent his mukadam with the bill of lading so endorsed to the Prince's Dock to obtain delivery of his goods from the Port Trust. Before the Port Trust would allow the mukadam to remove the goods, they required him to pay their bill for Rs. 580-15-6. Of this sum Rs. 480 were charged in the bill as "landing charges" in respect of the three boilers, at the rate of Rs. 10 per ton. The mukadam being new to his work, paid the bill without objection and without consulting the plaintiff, and removed the goods. The plaintiff, on subsequently discovering how much his mukadam had paid as "landing charges" on the three boilers, objected that this was an expense not rightly charged to the consignee, and directed the mukadam to apply to the defendants for a refund of the Rs. 480. This he accordingly did, but was refused by the defendants, on the ground that there was no special arrangement for the payment of this charge by the owners of the steamer.

7. In the meantime the *Clan Graham* arrived with the plaintiff's goods covered by his bill of lading of 28th October, 1882. Precisely the same course was followed in reference thereto as above described in paras. 5 and 6, except that, in paying the Port Trust bill, which amounted in this case to Rs. 517-8-0 (of which Rs. 450 were for "landing charges" in respect of the three boilers, at the same rate of Rs. 10 per ton), the plaintiff's mukadam, acting under the instructions of the plaintiff, objected to, and finally paid under protest, the Rs. 450 landing charges on the three boilers, and was told by the Port Trust officials that this sum represented "cranage". The plaintiff then demanded from the defendants a refund of the two sums of Rs. 480 and Rs. 450, on the ground that they had been paid in respect of charges which ought to be borne by the ship. The defendants refused to make any refund in the absence of special arrangements at home that the ship should bear the charges, on the ground that, according to the Bombay custom, all goods are

delivered from the quay by the Port Trust on the consignees paying cranage or other dues.

8. The plaintiff had previously paid without objection charges similar to these in nature, but far less in amount, and even in the present case he has taken no objection to the "landing charges" in respect of other goods which were included in the same bill as that containing the item of Rs. 480. I find, however, that on former occasions he paid these charges in ignorance of their true nature and without enquiry, as they were so small that it was not worth his while to raise inquiries and objections regarding them, and in the present case he objected only to the heavy charges of Rs. 480 and Rs. 450 made in respect of the boilers, not considering it worth while to contest the smaller charges made in respect of the lighter articles. There is, therefore, no inference to be drawn on this ground, to the prejudice of the plaintiff, of any admission by him that the consignee is rightly liable for the landing charges, or that the Port Trust were his agents to accept delivery from the ship and incur these charges in landing the goods.

9. The Port Trust recover all their charges in respect of goods discharged in the dock from the consignee, and not from the ship. But this is for the convenience of the Port Trust themselves, as they hold the goods, and the consignee must apply for them, whereas the ship may go away. The Port Trust, therefore, insist on their bill being paid by the consignee, and leave him to recover from the owners of the ship if any of the charges contained in the bill of the Port Trust are such as should be borne by the ship, according to the contract between the owners and the consignee.

10. The charges entered in respect of the boilers in the two bills of the Port Trust, under the head of "landing", are identical with those specified under the head of "dock and cranage" in the "Special rates for boilers, machinery, railway plant, and materials" specified at page 31 of the book of "Rates to be charged at the Prince's Dock" published by the Port Trust on the 1st April, 1882, and which were in force at the time of the delivery

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of his boilers to the plaintiff.(1) The rates specified in this book are those which were sanctioned by Government as required by section 43 of the Bombay Port Trust Act, 1879, by Government Resolution No. 122 in the Marine Department, dated 6th March, 1882.

11. The charges for "dock and cranage", described in the bills of the Port Trust as "landing", and amounting respectively to Rs. 480 and Rs. 450, were incurred by and for the convenience of the two steamers, the *Clan Murray* and the *Clan Graham*, respectively.

12. The plaintiff now seeks to recover from the defendants, as agents for and representing the said two steamers, the said two sums of Rs. 480 and Rs. 450 so paid by him as aforesaid to the Port Trust, on the ground that they were paid in respect of

(1) *Special Rates for Boilers, Machinery, Railway Plant and Materials.*

	Wharfage.			Dock and Cranage.			Total.		
	Rs.	a.	p.	Rs.	a.	p.	Rs.	a.	p.
Up to ¼ of a ton	0	8	0	1	0	0	1	8	0
Over ¼ and not exceeding 1½ tons ...	0	12	0	1	4	0	2	0	0
„ 1½ „ 5	0	12	0	1	8	0	2	4	0
„ 5 „ 8	0	12	0	2	0	0	2	12	0
„ 8 „ 100	1	8	0	10	0	0	11	8	0

Machinery in pieces will be charged by measurement or weight at option of dock officers; if by measurement, forty cubic feet will be considered a ton. Articles not landed on the wharf, but lowered into lighters, will not be charged wharfage, but only dock and cranage rates, unless the weight is kept suspended for more than quarter of an hour.

For lifting from the hold of a vessel and placing on dock half dock and cranage rates, but no wharfage fee, will be charged.

Vessels occupying the crane berth only for the purpose of using the 100-ton crane will be charged a fee of Rs. 2½ for each working hour in addition to the cranage fees.

An additional charge of Re. 1 per ton will be made when articles require to be deposited on the wharf and afterwards lifted by the crane into trucks.

Boilers lifted out of a vessel on to the wharf for repair and then lifted back again will be charged full rates for the first operation and half rates for the second.

charges properly payable, not by him, but by the said two steamers, before they could give him complete delivery under the terms of his bills of lading of his said boilers, the freight for which had been prepaid as in the third paragraph hereinbefore mentioned.

13. If delivery had been given to the plaintiff over the ship's side, and he had thereafter, with his own boats' labour and appliances, landed his boilers at any landing-place belonging to the Port Trust, the Port Trust would have sought to charge the plaintiff the full charge of Rs. 10 per ton, even though no crane belonging to the Port Trust should have been used by the plaintiff. But if delivery had been given to the plaintiff over the ship's side, he would not have landed the larger boilers in Bombay at all, but would have sent them by sea to Broach, and would thereby have avoided the payment of railway charges which he had paid for the carriage of the said boilers; and in that event he would have effected a saving of Rs. 200 on each boiler so sent by sea.

14. At the trial the defendants abandoned the contention, set up by their correspondence, as to the custom of the port of Bombay; and the only ground of defence taken was that there had been a complete delivery to the plaintiff under the terms of the bills of lading.

15. The whole question between the parties, therefore, resolves itself into one of construction of the eighth condition in the bills of lading, set forth in the fourth paragraph above, I was of opinion, that the whole contract was distinctly enunciated in the bills of lading, and no additional terms could be imported into it. By the bills of lading the defendants, representing the ship, were bound, in consideration of the freight they had received, to carry to Bombay, and there deliver, his goods to the plaintiff, by which I understand, putting the goods into the possession of the plaintiff with complete dominion and control over them. They had, no doubt, the right of exercising, without consulting the plaintiff, an option with which he could in no way interfere, as to the place of delivery. They might either deliver to him in the stream over the ship's side, or they might go into dock and deliver to him at a wharf. But in either case, as I read the contract, the delivery

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must be complete and free. It was possible that, if the defendants had chosen to adopt the first course, the plaintiff might have been put to some expense if he had landed his goods in Bombay. But they did not so choose; and I was of opinion that it was idle to speculate on what might have been the result of an hypothetical case involving a second hypothesis, neither of which actually occurred. The defendants chose to adopt the second course for their own convenience, and are unable to point out any term in their contract with the plaintiff which provides that the expense they incur by so doing shall be borne by the plaintiff, in addition to the very heavy freight which he has paid to the defendants to carry and deliver his boilers to him. I accordingly pass a verdict for the plaintiff for Rs. 930 and costs.

16. At the request of the defendants' attorney, my judgment was passed subject to the opinion of the High Court on the following question:—Whether, on a true construction of the terms of the bills of lading held by the plaintiff, the delivery, under the circumstances hereinbefore set forth, was a complete delivery to the plaintiff, in accordance with the terms of the bills of lading? If the answer to this question is in the affirmative, my judgment will be reversed, and a verdict will be entered for the defendants, with costs. If the answer be in the negative, the present verdict will stand.

Farran for the defendants.—It lies on the plaintiff to prove his right to recover these charges from the ship. These charges, the case finds, have always been recovered by the Port Trust from the consignees of goods. There is no evidence of a single instance in which such charges have ever been subsequently recovered back from the ship-owner. The ship had, by the rules of this dock, her own charges to pay; she pays so much a day while in the dock, and so much more an hour if at a particular wharf. But by the practice of this dock the landing charges are paid by the consignee. The ship has, by her bill of lading, the right to go into the dock where that practice is observed; and the consignee, therefore, must pay these charges. Moreover, it is no hardship on the consignee, for had the ship discharged in the stream, and he had then himself landed the goods at any quay in the port, he would have had to pay the same charge, whether

the Port Trust's cranes had been used or not. The case, I admit, does not find this fact very distinctly, but the defendant's evidence on the point was uncontradicted. The question really, therefore, is, is the consignee exempted from the payment of this charge by the ship's election to discharge in dock? These charges are "landing charges". They become due at the moment that the goods touch the wharf. Nothing is due till then, and then all is due, irrespective of the mode in which the goods are landed, whether by the ship's own tackles, or by the Port Trust's cranes.

[BAYLEY, A. C. J.—As a matter of fact the 100-ton crane and its appliances were used in this case; whose 'tackles' were those? The ship's responsibility is to cease only with delivery from the "ship's tackles". Supposing damage to be caused by the failure of the Port Trust's appliances, on whom would the loss have fallen?]

That question affords no test in this case, for the charge here would equally have been made had the ship used her own tackles. I admit the case has not very distinctly found that as a fact, but that is the proper inference from paragraph 13 of the case. Delivery in a dock is always governed by the practice of the dock. See *Petrococchino* v. *Bott*(1). There the practice as to payment of similar charges was the other way, but the principle is the same in either case. See also *Gatliffe* v. *Bourne*(2), *Gaudet* v. *Brown*(3), *Manzetti* v. *Smith*(4).

[LATHAM, J.—Those cases show that usage may control the manner, time or place of delivery; the question of what payment is to be made before delivery seems to stand on a different footing.]

In all cases parties are supposed to contract with reference to the practice obtaining at the port of delivery.

Jardine (*Anderson* with him) for the plaintiff.—The question whether or not a similar charge would not have had to be paid by the consignee at any quay in the port at which he might

(1) L. R. 9 C. P. 355.
(2) 4 Bing. N. C., 314.
(3) L. R., 5 P. C. at p. 160.
(4) W. N. of June 19, 1883.

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have landed these goods, had he been given delivery in the stream, is quite irrelevant. As a matter of fact, in this case that mode of delivery, as the case finds, would have been particularly favourable to us. Equally irrelevant is the question whether or not the Port Trust would have charged this sum all the same had their cranes not been used. We question their authority to make such a rule as that, but if they had authority, it matters not. Practically, by a rule of that sort, they make the use of their cranes compulsory. If the ship does not like such a rule she can keep out of the dock. She has the option, for her own convenience; all the consignee cares for is that he shall have what he has bargained for, *viz.*, delivery of his goods for a stated sum of money. If a ship goes to a dock or wharf where charges are made before goods can be delivered, the ship must pay these—*Bishop* v. *Ware*(1). The sole question, therefore, is, is the placing the goods on the dock wharf, with a stop on them in the Port Trust's hands for a sum incurred at the moment they touch the wharf, sdelivery to the consignee within the meaning of the bills of lading? It is clear it is not. "There can be no complete delivery of goods," says Willes, J., in *Meyerstein* v. *Barber*(2), "until they are placed under the dominion and control of the person who is to receive them." In this case the ship elected to give delivery on the wharf, but, when the goods touched the wharf, were they in the dominion and control of the plaintiff? He could not remove them till a lien on them in the hands of the Port Trust had been discharged; a lien for a charge—whatever you call it—which had accrued due at the moment the goods touched the wharf, and, therefore, before delivery was physically possible. That was no delivery to the consignee; it gave him no dominion and control over the goods; it was a delivery to the Port Trust. That is sufficient to decide the case. But if it is considered what this charge was, it is abundantly clear it was a charge for cranage, for the operation of lifting and landing the goods. That is quite clear from a perusal of the book of rates referred to in the case(3). The crane was used, and if that was not the charge for it, there was no charge for it, which is absurd. By going into dock, and

(1) 3 Camp., 360. (2) L. R., 2 C. P. at p. 50.
(3) See foot-note, *ante*, p. 390.

using the Port Trust cranes, the ship saved herself the stevedore's charges, which she must have incurred had she discharged in the stream. What the stevedore would have done in the stream the Port Trust did in the dock. This charge was for work and labour therefore. It was none the less so if it be a fact that, by their rules, the Port Trust practically make the employment of their cranes compulsory. The Port Trust became the agents of the ship-owners to land these goods, and did land them. Had the Port Trust tackles broken before they were landed, the loss would have been on the ship-owners—Angel on Carriers, § 282. The landing was a part of the work which the ship-owner had contracted to do for the freight, and for the freight only, and no usage—even if one were proved, which it was not—could override the definite and express contract appearing on the bill of lading. The cases cited on the other side are not in point. They show that usage may affect the place, manner, or time of delivery, but not the sum expressly agreed on between the parties as the remuneration for safely carrying and delivering.

Farran in reply.—I admit that the ship's responsibility would not cease till the goods were deposited on the wharf. But that was done, and the ship-owners made no additional charge. The dock authorities made a charge for allowing the goods to be landed. Had the ship landed the goods with her own tackles, these charges would equally have had to be paid. Could the ship-owners in that case have been asked to pay those charges?

BAYLEY, A. C. J.—The question referred to us for our opinion by the Chief Judge of the Small Cause Court is "whether, on a true construction of the terms of the bills of lading held by the plaintiff, the delivery, under the circumstances set forth in the case, was a complete delivery to the plaintiff in accordance with the terms of the bills of lading." The bills of lading were two, but are identical in form. The goods "shipped in good order and condition are to be delivered, subject to the exceptions and conditions herein provided, in like good order and condition from the ship's tackles (where the ship's responsibility shall cease)." Then follow the exceptions and conditions referred to, only one of which is material to the present question, and that

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runs as follows :—" The ship-owner shall have the option of discharging in dock, and of making delivery of the goods under the bill of lading, either over the ship's side, are from lighters, or a store-ship, or custom house, or warehouse, at merchant's risk." The answer to the question referred to us depends on whether certain charges, called " landing charges ", or " cranage charges", which the consignee was required by the Port Trust to pay before he could remove his goods, are charges which, as between the consignee and the ship-owner, the ship-owner, and not the consignee, was bound to pay. I am of opinion that, under the provisions of these bills of lading, and under the circumstances found by the case, those charges were charges which the ship-owner, and not the consignee, was bound to pay, and that, therefore, the judgment of the Small Cause Court was right. The ship-owner has it in his own power, under these bills of lading, to discharge in the dock, or in the stream, as he thinks fit. Consulting his own convenience he goes into the dock, and employs the dock's cranes to land the goods. This was work which the ship-owner was bound by the bill of lading himself to perform ; for his responsibility did not cease till the goods were delivered from the ship's tackles. These boilers were heavy goods, but on that very account the freight charged was exceptionally high. They are landed by the only crane in the dock capable of landing them. This was done solely at the request of the ship-owners, and for their convenience ; where is there any evidence of any agreement, express or implied, on the part of the consignee, to pay the charges so incurred ? In my opinion, they were charges incurred at the request and expense of the ship-owners. One test is, on whom —on the consignee or on the ship-owner—would the loss have fallen had the goods been damaged while in the process of being lifted out of the ship to be deposited on the wharf? The American case—*De Mott* v. *Laraway* (1)—cited by Mr. Angel in his work on Carriers, § 282, is exactly in point, and shows that the loss in that case would have fallen on the ship-owner. That indicates that the Port Trust were the agents of the ship-owners to do what the ship-owners were bound to do by the bill of lading, namely, deliver the goods. It is true the practice in

(1) 14 Wend., 225.

this dock has been for the Port Trust to obtain payment of these charges, as well as other charges for wharfage, &c., from the consignees; but that is a rule made solely for their own convenience, as the case finds—the goods always being there while the ship may go away—and cannot affect the question of the ultimate responsibility for the charge, as between the ship-owner and the consignee. The consignee pays it, in the first place, in order to get the goods; but if the charge is one, as in my opinion it is in this case, which, under the bill of lading, rightly falls on the ship-owner, the consignee is entitled to recover back from the ship-owner whatever has been so paid to the Port Trust. Freight in this case was paid in advance; but suppose it had been the ordinary case of freight payable on delivery, where payment and delivery are concurrent acts, could the ship-owner have claimed that he had earned the freight by such a delivery as this, not to the consignee, but to the Port Trust? Or could he have claimed to have retained a lien on the goods, not only for the freight agreed on, but for the "landing charges" as well? It is clear, I think, that he could not. The answer, therefore, which I return to the question referred to us by the learned Judge of the Small Cause Court is, that, on a true construction of the terms of the bills of lading, the delivery, under the circumstances set forth in the case, was not a complete delivery to the plaintiff, in accordance with the terms of the bills of lading. The present judgment will therefore stand.

LATHAM, J.—I agree with the Chief Justice. Mr. Farran's argument is really based upon the existence of a usage, or custom, in this dock, with reference to which the parties must be supposed to have contracted. But this argument is not open to him on the case, as stated by the learned Judge of the Small Cause Court. Moreover, if it were, I am by no means prepared to admit that such a custom—a custom affecting the question of the amount to be paid for delivery—even if proved, could affect the contract between the parties as contained in the bills of lading. Such a custom would be of a very different nature to those proved in the cases cited by Mr. Farran.

The question in this case is, after all, a simple one. The ship having elected to discharge in the dock, it was her duty to land

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the goods on the wharf. It seems to me that the ship-owner must pay every charge which has to be incurred before this is done. That was the principle of the decision in *Bishop* v. *Ware*(1). These charges, whatever they were and whether they could have been avoided or not, were charges incurred at the moment that the goods touched the wharf; they were, necessarily, therefore, charges incurred antecedently to delivery to the consignee. I think that consideration is sufficient to show that the liability for these charges must fall upon the ship-owner. But, in truth, the charges would seem to have been charges in respect of work and labour done in and about the lifting and landing of these boilers. I think that appears clearly enough from the book of rates which the Port Trust issue to the public for their information and guidance(2). This charge is there called a "dock and cranage" charge. Half this "dock and cranage" charge, and no 'wharfage', is charged for "lifting from the hold of a vessel and placing on the dock." "Boliers lifted out of a vessel on to the wharf for repair, and then lifted back again, will be charged full rates *for the first operation* and half rates for the second." From these passages alone it is clear, I think, that it is the work done by the dock cranes and appliances that is the subject of this charge. If that is the real character of these "landing" or "dock and cranage" charges then it cannot be contested but that they are charges which must be defrayed by the ship. The judgment of the learned Judge of the Small Cause Court was, therefore, in my opinion, right, and the verdict for the plaintiff must stand. Defendants to pay the plaintiff their costs of this reference.

Attorneys for the plaintiff.—Messrs. *Craigie, Lynch and Owen.*

Attorneys for the defendants.—Messrs. *Prescot and Winter.*

(1) 3 Camp., 360.

(2) See foot-note, *ante*, p. 390.