Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Cleary v. *Mac Andrew & Co.* (*the Cargo ex "Galam"*), *from the High Court of Admiralty of England; delivered 9th December*, 1863.

Present:

LORD KINGSDOWN.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.

THE circumstances of this case are singular; and though some of the questions of law which have been raised in it are sufficiently clear, others of much general importance seem to be involved in some doubt.

In the year 1860 Mr. White, a merchant in London, shipped in Hayti on board of a French ship called the "Galam," of which Jean Felix Neau was master, a cargo of Campeachy wood, to be brought to Europe.

In November 1860 the "Galam" became, as it is alleged, unseaworthy, and put into the port of Angra, in the Island of Terceira, where she was condemned, and her cargo discharged and stored in the Custom-house there.

The captain of the "Galam" took up a large sum of money, amounting to about 1,000*l.* English money, on the security of the cargo, and granted a respondentia bond for the amount, payable, with interest at 30 per cent., on the arrival of the cargo at her first port of destination in Europe, which was declared to be Falmouth; and this bond was afterwards transferred to the Respondents, the present holders.

Captain Neau having raised this money, does not

appear to have done anything for the purpose of forwarding the cargo to its destination.

Information of the accident, however, was given to Mr. White, the owner, who chartered a ship called the "Mary Jane," then lying at Bristol, of which Philip Cleary, the Appellant, was master and owner, to proceed in ballast to Angra, and fetch home the cargo.

By the charter-party, which was dated the 31st December, 1860, it was agreed that the ship having taken on board the cargo, should call at Queenstown, Scilly, or Falmouth, for orders, and should carry on and deliver the cargo at any port fixed by the orders, within certain limits specified in the charter-party. The port of London, for some reason which does not appear, was expressly excepted from the ports of discharge; the freight was to be 450*l.* if the cargo were delivered at a port of the United Kingdom, and 475*l.* if discharged at Hamburgh, which was within the prescribed limits.

The "Mary Jane" set out on her voyage accordingly, took on board the timber, and on her return voyage called at Scilly for orders; but on arriving there she was, by violence of weather, driven ashore, and it became necessary to unship and store the cargo, which was done in the yard of Messrs. Banfield and Co., of Scilly, who state that they received it on behalf of Captain Cleary, and subject to his claims upon it by way of lien. Considerable expenses are alleged to have been incurred in saving the ship and cargo, in respect of which Captain Cleary makes a claim on the cargo for general average. Messrs. Banfield and Co. immediately informed White by letter of what had happened, and at the same time advised him that it was expected that the ship would be got off the shore.

On the 25th February, 1861, White, in answer to this communication, sent the following letter to Banfield and Co.:—

"Dear Sirs,

"I received this morning your favour of the 22nd instant, announcing the arrival at your port of the 'Mary Jane,' from Terceira, and that she slipped her cables in a hurricane, and ran on to the shore at Tresco to save ship and cargo, and that you were making efforts to get her off, and hoped to succeed.

"Unless you should receive contrary orders from me by telegraph or by letter before she proceeds to sea, please to order the Captain to proceed to Hamburgh for the discharge of his cargo.

"There is a bottomry bond on the cargo for more than its value, therefore he must not deliver said cargo until his freight is paid, and of course any expenses incurred on your part or elsewhere, for repairing, will have to be raised by a bond which will take precedence of the one from Terceira, and there will be ample to cover this latter and freight, leaving something to account against the former one.

"I remain, &c.

"ARTHUR B. WHITE.

"Inclosed a letter for Captain Cleary,
which please deliver to him."

It appears by this letter that White at this time was apprised of the Respondent's bond which had been granted at Angra, and that he determined to adopt a course which was calculated to defeat it by diverting the cargo from Falmouth, on arrival at which place only the bond was made payable.

At what time White first became acquainted with the fact of the bond having been given, does not appear; but there is nothing to show that before this letter was received, Cleary had ever heard of or had any reason to suspect the existence of such bond.

The Respondents having discovered the directions given by White as to the destination of the cargo, immediately instituted a suit in the Admiralty Court on the Respondentia bond, and gave White notice of the proceedings, and on the 4th March, 1861, they procured the cargo to be arrested in Scilly by a warrant out of the Court of Admiralty.

White refused to appear to the action, the charges upon the cargo being, as it seems from his letter, beyond its value. Cleary of course could not be required or expected to give bail; and, on the other hand, till the order of the Admiralty was removed, the cargo could not be carried on to its destination, whatever that destination might be.

The rule of law is very clear, and was not disputed at the Bar—that the master of a vessel is entitled to recover his freight if he has either carried his cargo to its destination, or has been prevented from so carrying it by the act or default of the owner; and if by the occurrence of an accident on the voyage delay be occasioned, the master may claim a reasonable time to carry on the cargo either in the same ship when repaired or by transhipping it to another vessel.

It is said, however, in this case that the master

had abandoned the cargo to its fate, and was not prevented by the proceedings in the Admiralty Court from carrying it on; that he never intended to do so if no such proceedings had been taken, and that therefore he is not entitled to any freight.

With a view to this question it becomes material to examine with some minuteness what actually took place. Cleary had insured both the ship and the freight with the same underwriters. On the 25th March, 1861, his agents came to a settlement with them for the loss both on the ship and cargo. The terms as to the ship were that he should receive 75 per cent. on the value, and take the ship for his own account. He obtained a settlement with the underwriters at the same time on the freight as for a total loss, but the terms on which this settlement was made entitled the underwriters to stand in the place of Cleary.

They are thus stated in the letter of Mackay and Dick, the agents of the insurers, dated at Glasgow, March 25, 1861, addressed to the agents of Cleary at Greenock :—

"The freight to be treated as a total loss. The underwriters on this footing getting the charter-party, and liberty to send on the cargo, and to collect amount of same as per charter-party; Captain McCleary to give his assistance in having the cargo sent forward.

"It is also understood that you are entitled to the proportion of general average and charges applicable to freight and cargo."

Shortly afterwards White, in answer to some communication from Banfield and Co., wrote them the following letter :—

"London, April 2, 1861.

"Dear Sirs,

"I have before me your valued favours of 15th ultimo and 1st instant, and have not to alter the orders already given for the 'Mary Jane' to deliver her cargo at Hamburgh; the captain taking care to secure his freight and general average with you, and for shipping the cargo at Angra before parting with the cargo.

"I thank you for informing me that Messrs. Mackay and Dick, 1, Royal Bank Buildings, Glasgow, are now the representatives of the 'Mary Jane,' and are making arrangements for the reshipment of said cargo; but I shall wait to hear from them before addressing them, as I have fulfilled my part of the business by having given the orders, unless some suitable proposition is made to me to induce the discharge in a port of Great Britain.

"I shall feel obliged by your informing me when the 'Mary Jane' is likely to be ready to reship the cargo, and any other information that you believe may be of interest to me.

"It appears to me that the expenses for shipping the cargo at Angra, according to the document sent you, could be included in your statement of general average; it being certainly that matter, and I have paid same.

"Claiming your excuses for giving you so much trouble,

"I remain, &c.

(Signed) "ARTHUR B. WHITE."

This letter shows that White refused to order the cargo to be taken to London, and insisted on its being carried to Hamburgh, and Cleary, who was bound by his charter-party to carry it to Hamburgh, and not to carry it to London, had no right to disobey the orders of his charterer.

It must be observed that at this time the reshipment of the cargo on board the "Mary Jane" was contemplated, and that the "Mary Jane" was still in Scilly, and, as it should seem, under charge of the underwriters.

On the 13th April, 1861, the agents of the underwriters wrote a letter of that date to Cleary, urging him to insist, on their behalf, on his right to carry the cargo to Hamburgh, in terms of the charter-party, and to do all things necessary for the recovery of the freight, and authorizing him to appear on their behalf in this suit.

Cleary after this seems to have given himself no further trouble about the matter. He sold the "Mary Jane," which left Scilly about the 1st of May, and having received the full amount of her freight, or nearly so, he took himself off to Newfoundland early in May 1861.

Before he went, however, he executed a power of attorney, authorizing Messrs. Banfield and Co. to take the necessary steps for carrying on the cargo to Hamburgh should it be released from arrest, as also for the purpose of protecting his rights in respect of freight and general average; and an appearance in this suit seems to have been entered for the Appellant under this authority.

We do not find that any step was taken by any of the parties till the latter end of May. On the 25th May an application was made to the Admiralty Courts to have the cargo in question removed to London for sale, inasmuch as there were no markets for it in Scilly. An order was made for this purpose

by the Court, and in obedience to such Order the cargo was brought to London in the month of June 1861, where it was afterwards sold, and realized, after payment of the expenses incurred by the Marshal, 808*l.* 8*s.* 10*d.*, which sum was paid into Court, subject to the claims of all parties.

On the occasion of this application for the removal of the cargo to London, and on the 27th May, 1861, notice was given by the proctors for the Appellant, to the proctors for the Respondent, that the Appellant was prepared to carry on the cargo of log-wood lately landed from his vessel the "Mary Jane," warehoused at Scilly, upon its being released from the arrest of the High Court of Admiralty.

Some correspondence took place which it is not material to notice. It is said that at this time the "Mary Jane" had been sold, and there was no vessel in Scilly which could have been employed in carrying on the cargo to Hamburgh; but however that may be, the underwriters had been prevented from carrying on the cargo to Hamburgh when they had the means of doing so, and the orders of the Court of Admiralty still prevented them from completing the contract by transhipping the cargo to another vessel. Can it be said, then, that there is any evidence to show that the intention to carry on the cargo had at any time been abandoned by those whose right it was to receive the freight?

The case is in some degree prejudiced by the claims being made in the name of Cleary, who, as far at least as regards the freight, has long since been satisfied every claim which he can have in respect to it.

The rules of the Admiralty Court make it necessary that in all suits of this description, the party appearing should be the master, though his claims may have been satisfied by the underwriters, and they are the only parties really interested. He is considered in the Admiralty Court as suing as Agent and Trustee for them, and the same rule seems to prevail at common law according to the doctrine laid down in Robertson *v.* Hamilton (14 East, 522).

If we look, then, at this claim as the claim of the underwriters, it seems very improbable that they should intend to abandon their right to earn this freight. By far the greater part of the voyage for which the "Mary Jane" had been hired—out and

home—had already been performed; it remained only to carry the cargo from Scilly to Hamburgh, in order to earn the whole amount of 475*l.* Nor can we say that their conduct amounted to an abandonment of their right to do this. The orders of the Court of Admiralty, occasioned by the default of White, made it impossible to carry the cargo anywhere but to London, and there they were not bound and were not at liberty to carry it. We think, therefore, that they stand in the situation of parties who, having been prevented by the default of the owner of the cargo from completing the voyage, are entitled to claim their freight.

There being then a lien for freight, the next question is whether such lien is preferable to, or to be postponed to the claims under the Respondentia bond.

It is sworn, and there seems no reason to doubt, that Cleary knew nothing of the Respondentia bond when he took on board the cargo.

The Respondentia bond seems open to great suspicion, though it has not suited the interests of any of the parties in the suit to dispute it. The money raised by it or any part of it seems not to have been applied to forwarding the cargo, and as far as appears in this case, the Captain, Neau, had entirely abandoned the cargo, and it was carried on not by him or by his procurement, but by the act and at the expense of the owner of the cargo.

The subsequent carrying on of the cargo was essential to making it available either for the holder of the Respondentia bond, or for anybody else. It was in the nature of salvage service, and in a competition of liens the ship-owner who has rendered a service of this description is entitled to priority over the holder of a Respondentia bond who has done nothing, and whose money has contributed nothing towards forwarding the cargo to its destination.

It is upon this sound principle of justice and common sense that, by the regular practice of the Admiralty Court, a prior bottomry bond is postponed to a subsequent one, and both to claims for salvage afterwards arising, and that wages are also entitled to preference. These demands are all for services rendered to the owner of the bottomry bond, as well as to other persons interested in the ship and cargo.

We think, therefore, that the claim for freight is entitled to priority over the Respondentia bond.

There remains the question of the claim for general average. On principle this seems to stand on the same reason as freight. It is a loss incurred for the general benefit of the ship and cargo, to which those who have received the benefit are by law liable to contribute rateably. And for this claim the master who has incurred the expenses has a lien on the goods. It is a possessory lien at common law, by virtue of which he is entitled to hold the goods till his lien be satisfied. If no Respondentia bond was in question, there can be no doubt that White could not take the goods out of the hands of Cleary without paying, not only freight, but what is due for general average.

But it is said that the Court of Admiralty will take no notice of a claim for general average; and the learned Judge in this case observes, "that over and over again, from the earliest time he entered this Court, the Judges of the Court have refused to entertain this question;" and again, "I must adhere to the practice of not deciding upon questions of average."

But unfortunately the Judgment does decide the question, and determines that the Court of Admiralty may take a cargo out of the possession of a master who has, by common law, a possessory lien upon it, without satisfying such a lien.

If such be the settled law of the Admiralty Court it must prevail, however contrary to principles usually acknowledged in the administration of justice. But it requires very clear authority to support it, and, upon examination, their Lordships have not found any.

To enforce and give effect to a lien at the instance of a party seeking to establish it, is quite a different thing from setting it aside and annulling it when it arises in the Court incidentally in the progress of a cause over which the Court has properly jurisdiction. The Captain here does not say, I have by the maritime law a lien which the Court of Admiralty will enforce as it does in cases of bottomry and other cases not depending upon possession; but he says, I am in possession of this cargo, and have a lien upon it, and by the law of England no man has a right to take it out of my possession till that lien is satisfied. If

he be right in law, as it appears that he is, how can the Court of Admiralty do that which no other Court in the kingdom could do—destroy a right which exists by law ?

The case would be quite different if the Captain, having parted with the cargo, had sought to enforce a lien in the Court of Admiralty. The lien would be gone (unless there were some special contract) with the loss of possession, and the Court of Admiralty would properly say, We have no jurisdiction in this matter; we have no means of enforcing contracts or compelling contributions; we decline to interfere.

On examination of the cases referred to at the Bar, this appears to be all that they have decided—not that when a possessory right of lien arises incidentally before the Court of Admiralty, such right will be treated as a nullity; but that when the Court is called upon to enforce such a lien not depending upon possession, or to adjust the rights which grow out of it, the Court will refuse to interfere.

Two cases were strongly relied upon by the Counsel for the Respondents, the "Constancia" (2 Wm. Rob. 487), and the "North Star" (1 Lush. 45.)

Neither of these cases sustains the principle now contended for.

In the first case, the "Constancia" sailed from Lima, having for her cargo amongst other things a quantity of silver. Having suffered damage on her voyage it became necessary to raise money for repairs. A portion of the silver was sold by the master to raise the necessary funds, and other moneys required were raised by a bottomry bond on the ship. Two further bonds were granted by the captain for necessary expenses, one on the cargo, and another on the ship.

The ship arrived in this country, and was sold in the Admiralty Court, the amount of freight was brought into Court, and also a portion of the value of the cargo equal to the amount of the bottomry bond.

In these circumstances the owners of the silver made a claim upon the proceeds in Court for a contribution on a general average to the loss which they had suffered by the sale of their silver.

The learned Judge rejected the claim on the ground that it was a mere personal right to be enforced at law; that there was no lien on the ship or cargo for such demand; that the Court of Admiralty, therefore, could not entertain it, and did not possess the means of doing justice amongst the different parties interested if it did interfere.

The grounds of the Judgment are explained most clearly at page 490:—

"If this be so, and if upon the authority of my Lord Stowell, thus confirmed by my Lord Tenterden, I am to consider this claim as a subject of general average, two considerations immediately suggest themselves: first, whether I have any jurisdiction at all over questions of general average? and, secondly, whether I could satisfactorily exercise such a jurisdiction under the circumstances of the case? The absence of any precedent where the Court has exercised the jurisdiction is of itself a strong *primâ facie* proof that I have no authority to entertain the question at all, and I am the more strongly inclined to this opinion by the further consideration that in all cases of average it is essential that the Tribunal which is to adjust it should have the power to compel all parties interested to come in and pay their quota. I possess no such power; and if I could not bring all parties interested before the Court, I could not adjust a general average, which is a proportionate contribution by all."

It is obvious that this case has no bearing upon the present; there was in that case no possession by the owner of the silver of any part of the cargo from which contribution was sought, and of course there could be no possessory lien. There was an attempt to enforce a supposed maritime law which the Court thought did not exist, and to require the Court to exercise a personal jurisdiction which the learned Judge thought it did not possess, and could not usefully assume.

The case of the "North Star" was substantially to the same effect.

The question there was as to the validity of a bottomry bond on a ship. The owners of a cargo who had paid expenses in respect of which they were entitled to a general average contribution from the ship, had taken a bottomry bond on the ship from the master.

It was argued that such right to contribution formed no lien on the ship; that the owner of the cargo had no possession of the ship, and therefore could have no possessory right of her, though the master of the ship had possession of the cargo, and

had, therefore, a lien for general contribution which, however, he lost if the cargo passed out of his possession.

Dr. Lushington disallowed the claim, and made these observations :—

"The next step is to consider these claims in respect of general average, how far they affect the ship and homeward freight. Assuming the claims to be well founded in fact, in what legal category ought they to be placed? Are they liens upon the ship in any legal sense of the term, or are they simply debts—the consignees creditors, the owners debtors? Liens in the common law sense of the term these claims certainly are not. Are they to be considered as maritime liens of the same nature as salvage or damage, to be enforced against the corpus of the ship? I find no authority for such a position. They are demands for which an action might lie, but which the Court of Admiralty has never taken cognizance of. I think these claims are to be considered as conferring rights of personal action only."

Neither in these cases nor in any other can we find any decision or dictum that when a clear legal right of lien is proved in the Court of Admiralty to exist, that Court can dispose of the property without regarding it, and thus in effect decide against it.

It was said, however, tha the respondentia bond-holder was entitled to preference, because the holder of such security is not liable to contribute to general average. That is so as between the owner of the cargo and the holder of the bond, but not as between the holder of the bond and those whose lien arises in respect of services by which the cargo itself has been made available.

Upon the whole, their Lordships are of opinion that the claim for freight and general average is the first demand upon the funds in Court. The Respondents, however, must be at liberty to have the claim for general average strictly investigated. Though their Lordships feel themselves compelled, upon principles of law, to advise Her Majesty to reverse the present Judgment, and to give to the Appellant his freight and what may be found due to him for general average, and his costs of the suit, out of the fund in Court, they think that both his conduct and that of White are open to so much observation, and the facts of the case afford such ground for doubt as to the proper inferences to be drawn from them, that they will not give any costs of the Appeal.