Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Liverpool, Brazil, and River Plate Steam Navigation Company v. *Benham and others, ship "Halley," from the High Court of Admiralty of England; delivered 2nd July,* 1868.

Present:

SIR WILLIAM ERLE.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.
LORD JUSTICE WOOD.
LORD JUSTICE SELWYN.

THIS is an Appeal from an Order by the Judge of the High Court of Admiralty, dated the 26th November, 1867, and admitting the 3rd Article of the Reply filed by the Plaintiffs in the Court below, who are the present Respondents.

The cause is a cause of damage promoted by the Respondents as owners of a Norwegian barque called the "Napoleon" against a British steam-ship called the "Halley," and her owners, for the recovery of damages occasioned to the Respondents by reason of a collision which took place on the 8th January, 1867, in Flushing Roads, between the "Napoleon" and the "Halley."

In their Petition, the Respondents state that the collision was caused by the negligent and improper navigation of the "Halley."

The Appellants in their answer to that Petition state that the "Halley" is a steam-ship belonging to the port of Liverpool, and that "By the Belgian or Dutch laws which prevail in and over the River Scheldt, and to which the said river is subject,

from the place where the said river pilot came on board the "Halley," and thence up to and beyond the place of the aforesaid collision, it was compulsory on the said steamer to take on board and be navigated under the direction and in charge of a pilot duly appointed or licensed according to the said laws, and it was by virtue of such laws that the 'Halley' was compelled to take on board and to be given in charge, and until the time of the said collision, as aforesaid, to remain in charge of, and did take on board, and was given in charge, and up to the time of the said collision, remained in charge of the said river pilot, who was duly appointed or licensed according to the said laws, and whom the Defendants, or their agents, did not select and had no power of selecting;" and that the collision was not caused by the negligence, default, want of skill, or improper conduct of any person on board the "Halley," except the said river pilot.

In reply to this answer, the Respondents pleaded the following, being the 3rd Article in their reply:—

"By the Belgian or Dutch laws in force at the time and place of the said collision, the owners of a ship which has done damage to another ship by collision, are liable to pay and make good to the owners of such lastly-mentioned ship all losses occasioned to them by reason of such collision, notwithstanding that the ship which has done such damage was, at the time of the doing thereof, being navigated under the direction and in charge of a pilot duly appointed or licensed according to the said laws, and notwithstanding that such damage was solely occasioned by the negligence, default, or want of skill of such pilot, without any contributory negligence on the part of the master or crew of such lastly-mentioned ship, and notwithstanding that it was at the time and place of the collision, by the said laws, compulsory on such lastly-mentioned ship to be navigated under the direction and in charge of such pilot; and the Defendants, the owners of the "Halley," are by virtue of the said laws, liable to pay and make good to the Plaintiffs all losses occasioned to them by the said collision, even if the statements contained in the 11th Article of the said answer be true."

The Appellants having moved the Court below to

reject the 3rd Article of the Reply, on the ground that, even if the said 3rd Article were true, the Appellants would not be liable in the Court of Admiralty in England, the learned Judge of that Court has made the Order now under Appeal, by which he has refused the motion of the Appellants, and has sustained the 3rd Article of the Reply.

The claim of the Respondents is stated by the learned Judge to be founded upon a tort committed by the Defendants in the territory of a foreign State, and we are not called upon to pronounce any opinion as to the rights which the Respondents might have obtained, either against the Appellants as the owners of the "Halley," or as against that ship, if the Respondents had instituted proceedings, and obtained a judgment in the foreign Court. For this cause is a cause for damage instituted by Petition in the High Court of Admiralty in England; and it is admitted by the Counsel for the Respondents, that the question before us must be decided upon the same principles as would be applicable to an action for damages for the collision in question, if commenced in the Court of Queen's Bench, or Common Pleas. But it is contended on their part, and has been held by the learned Judge in the Court below, that the Respondents are entitled to plead that the law of Belgium, within whose territorial jurisdiction the collision took place, renders the owners of the "Halley," although compelled to take a pilot on board, liable to make reparation for the injury which she has done.

Their Lordships agree with the learned Judge in his statement of the common law of England with respect to the liability of the owner of a vessel for injuries occasioned by the unskilful navigation of his vessel while under the control of a pilot whom the owner was compelled to take on board, and in whose selection he had no voice; and that this law holds that the responsibility of the owner for the acts of his servant is founded upon the presumption that the owner chooses his servant and gives him orders which he is bound to obey, and that the acts of the servant, so far as the interests of third persons are concerned, must always be considered as the acts of the owner.

This exemption of the owner from liability when the ship is under the control of what has been

termed a compulsory pilot has also been declared by express statutory enactments.*

In cases like the present, when damages are claimed for tortious collisions, a chattel, such as a ship or carriage may be, and frequently is, figuratively spoken of as the wrong doer, but it is obvious that although redress may sometimes be obtained by means of the seizure and sale of the ship or carriage, the chattel itself is only the instrument by the improper use of which the injury is inflicted by the real wrong doer.

Assuming, as for the purposes of this Appeal, their Lordships are bound to assume, the truth of the facts stated in the pleadings, and applying the principles of the common law and statute law of England to those facts, it appears that the tort for which damages are sought to be recovered in this cause was a tort occasioned solely by the negligence or unskilfulness of a person who was in no sense the servant of the Appellants, a person whom they were compelled to receive on board their ship, in whose selection they had no voice, whom they had no power to remove or displace, and who so far from being bound to receive or obey their orders was entitled to supersede, and had in fact, at the time of the collision, superseded the authority of the master appointed by them; and their Lordships think that the maxim *qui facit per alium, facit per se,* cannot by the law of England be applied, as against the Appellants, to an injury occasioned under such circumstances; and that the tort upon which this cause is founded, is one which would not be recognized by the law of England as creating any liability in, or cause of action against, the Appellants.

It follows, therefore, that the liability of the Appellants, and the right of the Respondents to recover damages from them, as the owners of the "Halley," if such liability or right exists in the present case, must be the creatures of the Belgian law; and the question is whether an English Court of Justice is bound to apply and enforce that law in a case, when, according to its own principles, no wrong has been committed by the Defendants, and no right of action against them exists.

* *Vide* "Merchant Shipping Act, 1854," 17 and 18 Vict., c. 104, s. 388.

The Counsel for the Respondents, when challenged to produce any instance in which such a course had been taken by any English Court of Justice, admitted his inability to do so, and the absence of any such precedent, is the more important, since the right of all persons, whether British subjects, or aliens, to sue in the English Courts, for damages in respect of torts committed in foreign countries, has long since been established; and, as is observed in the note to "Mostyn *v.* Fabrigas" in Smith's Leading Cases, vol. i, p. 656, there seems to be no reason why aliens should not sue in England for personal injuries, done to them by other aliens abroad, when such injuries are actionable *both by the law of England and also by that of the country* where they are committed, and the impression which had prevailed to the contrary, seems to be erroneous.

In the case of the "Amalia" (1 Moore N. S., p. 484), Lord Chelmsford, in delivering the opinion of the Judicial Committee said: "Suppose the foreigner, instead of proceeding *in rem* against the vessel, chooses to bring an action for damages in a Court of Law, against the owners of the vessel occasioning the injury, the argument arising out of the acquired lien would be at once swept away, and the rights and liabilities of the parties be determined by the law which the Court would be bound to administer."

As Mr. Justice Story has observed in his "Conflict of Laws," p. 32, "it is difficult to conceive upon what ground a claim can be rested to give to any municipal laws an extra territorial effect, when those laws are prejudicial to the rights of other nations or to those of their subjects." And even in the case of a foreign judgment, which is usually conclusive *inter partes*, it is observed in the same work at s. 618A, that the Courts of England may disregard such judgment *inter partes* if it appears on the record to be manifestly contrary to public justice, or to be based on domestic legislation not recognized in England or other foreign countries, or is founded upon a misapprehension of what is the law of England (see Simpson *v.* Fogo, 1 Hemming and Miller, 195).

It is true that in many cases the Courts of England inquire into and act upon the law of foreign countries, as in the case of a contract entered

into in a foreign country, where, by express reference, or by necessary implication, the foreign law is incorporated with the contract, and proof and consideration of the foreign law therefore become necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases, the English Court admits the proof of the foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is, in their Lordships opinion, alike contrary to principle and to authority to hold that an English Court of Justice will enforce a foreign municipal law, and will give a remedy in the shape of damages, in respect of anact which, according to its own principles, imposes no liability on the person from whom the damages are claimed.

The case of "Smith *v.* Condry," in the Supreme Court of the United States (1 Howard's Reports, p. 28), appears at first sight to have an important bearing upon this case; but, upon an investigation of the Report, it does not appear that any question as to a conflict between the English law and the American law was discussed in that case, or that the precise point now under consideration was noticed in the Judgment, nor is it specifically mentioned in any of the three exceptions which were taken to the decision of the inferior Court, and there is no report of the arguments.

Their Lordships think, therefore, that that case cannot be treated as an authority sufficient to support the contention of the Respondents; and, on the whole, they think it their duty humbly to advise Her Majesty to allow this Appeal, and to order that the third article of the Plaintiff's reply be rejected, and that there should be no costs of this Appeal.