

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Duncan and others v. Köster, from the High Court of Admiralty (ship "Teutonia"); delivered 21st February, 1872.*

Present :

SIR JAMES W. COLVILLE.

LORD JUSTICE MELLISH.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

THIS is an appeal in a cause instituted under the 6th Section of the "Admiralty Court Act, 1861," on behalf of Messrs. Duncan, Fox, and Co., the consignees of a bill of lading of the cargo laden on board the ship "Teutonia," against that ship and her freight, and against the owner of the vessel.

The "Teutonia" was a Prussian brig, subject to the laws of Prussia, and her master and crew were subjects of the King of Prussia. The bill of lading, dated the 5th April, 1870, was as follows:—"Shipped in good order and well-conditioned by Sawers, Duncan, and Co., of Valparaiso, upon the ship 'Teutonia,' whereof Köster is master for this present voyage, and now lying in the port of Pisagua and bound for Cork, Cowes, or Falmouth for orders, 2,742 bags (being nitrate of soda) to be delivered in the like good order and well-conditioned at the port of discharge, 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 nature and kind soever excepted, unto Messrs. Duncan, Fox, and Co., or assigns. Freight for the said goods to be paid as per charter-party."

And by the charter-party referred to in the bill of lading it was agreed that "after receiving

on board the said cargo, the said vessel shall proceed either to Cork, Cowes, or Falmouth at the option of the master, where he shall receive orders from charterers' agents within three days after his arrival to proceed to any one safe port in Great Britain or on the continent between Havre and Hamburg both included, and there according to bills of lading and charter-party, deliver the cargo. Freight to be paid in manner herein mentioned on a true and right delivery of the cargo in the port of discharge at and after the rate of 45s. British sterling per ton."

The vessel arrived at Falmouth on the 10th of July; and the master, whilst there, heard rumours that war was probable between France and Prussia. On the 11th of July, the master received orders from the consignees to discharge the cargo at Dunkirk; and he at once set sail for Dunkirk, and arrived at a distance of about fourteen miles off that port, at 12 o'clock at night of the 16th, which was a Saturday; and the master says that, after laying-to for about two hours, a regular pilot, in official uniform, came on board; that he asked the pilot about the war; that the pilot told him it had been declared two days ago; that he asked the pilot where he could bring-to in safety, so that he might ascertain whether war was declared or not; that the pilot offered to take him to Flushing, or the Downs, or wherever he liked. The master elected to go to the Downs; and he anchored there on Sunday morning, the 17th, at 10 o'clock. He says, that on that day he could obtain no advice or information; that on the Monday, the 18th, he was on shore at Deal, and the German Consul told him that war had broken out. He telegraphed to the owner, who was his father, and received an answer, forbidding him to go to Dunkirk; and on Tuesday, the 19th, he took the ship into Dover, as the nearest port. On the same 19th of July, the French declaration of war was delivered to the Prussian Government at Berlin, which was known the same day by telegraph in England. On the 23rd of July, an Agent of the Plaintiffs went to Dover, and required the master to proceed to Dunkirk, which he refused to do. Afterwards, on the 1st of August, the Plaintiffs required the master to deliver them the cargo at

Dover, which he refused to do, unless he was paid his freight.

Under these circumstances, the Plaintiffs allege, that the master has committed two breaches of contract or duty: first, in refusing to proceed to, and deliver the cargo at, Dunkirk; and, secondly, they complain that, when the performance of the contract became impossible, and the contract was, as they allege, dissolved by the war, the master was not justified in refusing to deliver the cargo to the Plaintiffs at Dover without payment of freight.

The first question to be considered is, whether the master was bound to have entered the port of Dunkirk on the 17th of July; and on that question the learned Judge in the Court below has found that, on the 16th of July, the "Teutonia" could not have entered the port of Dunkirk with her cargo without being exposed to the penalties of trading with the enemy of her country; but that, if this was an erroneous application of the law to the facts at that date, the circumstances justified the master in pausing and making further inquiries as to the existing relations between his own country and France, and that he did not exceed the limits of a reasonable time in making the inquiry. Their Lordships have great difficulty in agreeing with the learned Judge that the "Teutonia" could not have entered Dunkirk without being exposed to the penalties of trading with the enemy of its country on the 16th of July. There does not appear to their Lordships to be any satisfactory evidence that a state of war existed between France and Prussia prior to the 19th of July. Their Lordships do not think that either the declaration made by the French Minister to the French Chambers on the 16th of July, or the telegram sent by Count Bismarck to the Prussian Ambassador in London, in which he states that that declaration appears to be equal to a declaration of war, amounts to an actual declaration of war. And though it is true, as stated by the learned Judge, that a war may exist *de facto* without a declaration of war, yet it appears to their Lordships that this can only be effected by an actual commencement of hostilities, which, in this case, is not alleged.

It is, however, unnecessary further to consider

this part of the case, because their Lordships agree with the learned Judge that the master of the "Teutonia," when he was informed, on his arrival off Dunkirk, by the pilot, although incorrectly, that war had been actually declared two days before, was entitled to pause and to take a reasonable time to make further inquiries, and that he did not exceed the limits of a reasonable time in making inquiries.

If the master had entered Dunkirk, and it had turned out that war had been previously declared he would have entered it with notice that he was entering an enemy's port, and this would have obviously exposed his ship to condemnation and might have exposed himself to severe penalties when he returned to his own country. It seems obvious that, if a master receives credible information that, if he continues in the direct course of his voyage, his ship will be exposed to some imminent peril, as, for instance, that there are pirates in his course, or icebergs, or other dangers of navigation, he must be justified in pausing and deviating from the direct course, and taking any step which a prudent man would take for the purpose of avoiding the danger. And their Lordships agree, if authority was wanting, that the case of *Pole v. Cetcovitch*, 9 C. B. N. S., 430, is an authority in point. It was argued, however, on the part of the Appellant, that, to justify this course, both ship and cargo must be exposed to a common peril, whilst in the present case the cargo, being the property of a neutral owner, would have been in no danger from being carried into a French port, and it was argued that though a master might be justified in deviating from the direct course of the voyage for the purpose of avoiding a danger to which both ship and cargo were exposed, although it might afterwards turn out that the information upon which the master acted was incorrect, yet that if the reported danger was a danger to the ship alone, the master would commit a breach of contract by deviating from the direct course of the voyage unless the danger actually existed, and the master could allege that he was prevented by one of the perils excepted in the bill of lading from pursuing his voyage in the direct course. It appears to their Lordships, how-

ever, that there is no sound ground for this distinction; if the cargo had been a Prussian cargo it would have been exposed to the same danger as the ship from entering the port of Dunkirk, and it appears to their Lordships that when an English merchant ships goods on board a foreign ship, he cannot expect that the master will act in any respect differently towards his cargo than he would towards a cargo shipped by one of his own country, and that it cannot be contended that the master is deprived of the right of taking reasonable and prudent steps for the preservation of his ship because from the accident of the cargo not belonging to his own nation, the cargo is not exposed to the same danger as the ship. On the whole therefore, their Lordships are of opinion, on this part of the case, that the master was justified in going to the Downs for the purpose of ascertaining whether war had actually been declared; and they also entirely agree with the opinion of the learned Judge that the master was guilty of no unreasonable delay in not returning to Dunkirk before war was actually declared on the 19th of July.

The next question to be determined is, whether the owner of the ship is liable in damages because the Master did not deliver the goods to the Plaintiffs at Dover, and this depends on the further question, whether the master was bound to deliver the cargo at Dover without any payment in respect of freight. As neither party has relied on the law of Russia in his pleadings, or given any evidence respecting that law, the question must be decided according to the Law of England.

The learned Judge came to the conclusion that, although the cargo had not been carried to or delivered at the port of destination, and although, therefore, the shipowner was not entitled to the freight agreed to be paid by the bill of lading and the charter-party, nevertheless, that he was entitled to some payment of freight, either *pro ratâ itineris*, or by way of compensation for the carriage of the goods from Pisagua to Dover. It was argued, however, before us on the part of the Respondent, that, under the circumstances, the shipowner was entitled to be paid the freight which, according to the bill of lading and the charter-party, was to be paid on a delivery at Dover.

The argument for the Appellant assumes that the breaking out of the war rendered the performance of the charter-party illegal, and that, therefore, the contract between the parties was dissolved; and there can be no doubt that the breaking out of the war did render it illegal for the "Teutonia" to enter any French port, but the question is, whether, under the terms of this charter-party, the contract might not still have legally been performed by the delivery of the cargo at some of the other ports mentioned in the charter-party as ports at which the cargo might be delivered.

The substance of the contract between the parties is that the cargo may be delivered at any one of a great number of ports; that the consignee is to have the selection of the particular port, but that he is bound to select a safe port—that is, a port at which the master can deliver the cargo, and earn his freight; and the question is, whether that contract is completely performed by the naming of a port at which it turns out in the event to be impossible to deliver.

In *Ogden v. Graham* it was held by the Court of Queen's Bench that the charterer, under a charter framed like this, committed a breach of contract by naming a port which was closed by the order of the Government of the country at the time he named it; and this case is a direct authority that, if the war had broken out before the consignee gave orders for the Master to proceed to Dunkirk, the consignee would have been bound to name some other port than a French port as the port of discharge. It was, indeed, argued that, as it was known at the time when the orders were given at Falmouth, that there was great danger of war breaking out between France and Germany, Dunkirk was not even then a safe port, and that the charterer had no right to order the master to proceed there. Their Lordships, however, are not of that opinion; they think that, until the war was actually declared, the consignee was entitled to require the master to proceed to Dunkirk; and it is to be observed that the master, when he received the orders, made no objection to them, but proceeded on his voyage to Dunkirk. The question to be determined is, what is the effect of the named port becoming a closed

port by reason of war breaking out between the time when the orders are given, and the time when the ship arrives? As their Lordships have already given their opinion that the master was guilty of no improper deviation or unreasonable delay in proceeding to Dunkirk, they think the case, as to this branch of it, is exactly the same as if the war had already broken out when the vessel first arrived off Dunkirk. Now, on the one side it is contended that, when once the consignee has named a port, which is an open and proper port at the time he names it, the bill of lading and charter-party are to be read exactly as if this was the only port of discharge named in them; on the other side it is contended that, assuming the consignee committed no breach of contract in giving orders to the master at Falmouth to proceed to Dunkirk, yet, nevertheless, as in the event it turned out to be impossible for the master to deliver at Dunkirk, the consignee had not completely performed his part of the contract to name a port at which the cargo could be delivered, and that he was bound to select another port from among those named in the charter-party.

There is no authority on the proper construction of the charter-party in this respect, but their Lordships are of opinion that they ought not to hold that the contract between the parties has become impossible of performance, and is therefore to be treated as dissolved, if by any reasonable construction it can be treated as still capable in substance of being performed.

Although it is true that the Court ought not to make a contract for the parties which they have not made themselves, yet a mercantile contract, which is usually expressed shortly, and leaves much to be understood, ought to be construed fairly and liberally for the purpose of carrying out the object of the parties; and it would seem very unjust to hold, because the consignee has named a port at which, without any fault on the part of the shipowner, it is impossible for the cargo to be delivered, that therefore the consignee is entitled to the possession of the cargo at the nearest neighbouring port, which, in a charter framed like this, must necessarily be one of the ports named in the charter, without paying for the cargo any

freight whatever. The ship, without any breach of contract on the part of the shipowner, has arrived at Dover; the consignee has required the master to deliver him the cargo there, and he has not required the master to proceed to any other port except Dunkirk, where it was impossible for him to go. The charter provides what freight is to be paid if the cargo is delivered at Dover, and how it is to be paid; and therefore it appears to their Lordships that they ought to hold that the contract was not dissolved by the impossibility of delivering the cargo at Dunkirk, and that the shipowner had not lost his chartered freight, nor his lien for it, at the time when the cargo was demanded at Dover.

Their Lordships having come to the conclusion that the shipowner had still a lien for the full freight, it becomes unnecessary to consider whether, if Dunkirk had been the only port of discharge, the shipowner would have been entitled either to freight *pro rata itineris*, or to a sum by way of compensation for the carriage of the goods from Pisagua to Dover, and they wish to be understood as giving no opinion on these questions, which no doubt are questions of great difficulty and importance.

On the whole, their Lordships will recommend to Her Majesty that the Appeal should be dismissed with costs.