

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Messina v. Petrococchino, from Malta ; delivered 21st February, 1872.

Present :

SIR JAMES W. COLVILE.
SIR ROBERT PHILLIMORE.
SIR JOSEPH NAPIER.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THIS is an appeal from the Court of Appeal at Malta, in the matter of a bottomry or hypothecation bond.

In October 1866, Negroponte, a merchant at Taganrog, shipped, at Berdianski, a cargo of wheat belonging to a Greek owner, on board a Greek ship, the "Evangelistria," and consigned it to Messina (the Appellant), to be delivered to his order at Malta, or at such ports as the consignee should there order. The captain, Frutta, had letters of recommendation to Cossudi, the agent at Constantinople for Negroponte.

Negroponte and the Appellant are jointly interested in the shipment.

The charter-party was sent by Negroponte through Cossudi to Messina, the Appellant. The "Evangelistria" sailed, she encountered bad weather, and was obliged to jettison a part of her cargo. She put back to Sebastopol; she sailed again, and again encountered bad weather, which necessitated further jettison, and arrived in a damaged condition at Constantinople on the 27th of December.

Upon the 30th of December the captain went before the Greek Consular Tribunal (or the Greek Royal Commercial Chancery, as it is called) at Pera, made a protest, and applied for the survey of the ship and cargo; the Court appointed Surveyors,

who drew up "a sentence and average settlement." In their first Report the Surveyors, after stating various reasons, said:—

"Whereas, for the above reasons, the cargo of the "Evangelistria" must be transhipped on another vessel, to be chartered under double condition, to serve as store, or to send, in case of need, the cargo to its destination:

"Whereas, there being in this town no legitimate representative of the owner of the cargo, a curator to the same must be named by the competent authority:

"Moved by these reasons, we have unanimously agreed that the Royal Greek Commercial Chancery should appoint a curator to the cargo, who, with the knowledge of the representative of the underwriters, will charter a vessel of the same burden of the "Evangelistria," with the double condition to serve as store, or, if necessary, for carrying the cargo to its destination, and to commence without loss of time the transhipment of the cargo in question."

A Greek merchant, by name Dimitriacopulo, was appointed curator by the Court: his agent is Petrococchino, the Respondent.

In their second and last Report the Surveyors recommended that the cargo should be transhipped on board a vessel called the "Otto Sorelle;" the captain further petitioned for the appointment of "Average or Judicial Staters;" they were appointed by the Court, and decided, among other things, as follows:—

"1. That the expenses of transhipment made by the curator to the cargo, his commission, the interest of the bottomry bond, and the remaining freight to be paid to send the cargo to its destination, must be classified in particular average to be suffered by the cargo alone.

"2. That in the general average must be put the damages of the vessel, fixed by the surveyors at 44,558 piastres, the expenses of survey and towing, &c., incurred by the captain, the fees of Chancery, the fees of the legal adviser and compiler of several acts, the fees of the judicial staters, of the representative of the underwriters, and the compiler of the present decision and average settlement, for which expenses the cargo

will contribute with its value, freight deducted, and the vessel with half its value and half its freight, as it is to be seen by the settlement prospectus which is to form an integral part of the present sentence.

"3. That the freight of the vessel "Evangelistria" is fixed to two-thirds of the freight agreed on in the charter-party, to two-thirds of primage, and the gratuity entire free of contribution.

"4. That power should be given to the curator of the cargo to contract a bottomry bond for the sum necessary to pay the freight of the 'Evangelistria,' average expenses, &c., under hypothecation of the wheat cargo, sent to its destination by the vessel 'Otto Sorelle.'"

This decision was confirmed by the Greek Consul-General, who declared it to have the force of a thing adjudicated: a bottomry bond was also ordered and was given to a Mr. Facher as a security for 35,760 fr. 52 c. The bill of lading, the average statement, and the bottomry bond were sent by the curator to Petrococchino, at Malta.

The "Otto Sorelle" arrived with her cargo at Malta on the 26th of February, 1867. Petrococchino refused to deliver the cargo without payment of the bottomry bond. Messina, the Appellant, refused to pay, and at last paid under protest, and litigation ensued.

A suit was instituted by the Appellant against Petrococchino in the Court of Commerce. The Appellant called upon him to show cause why in the first place the pretended "Average Acts" made at Constantinople should not be declared irregular, null, and of no validity on account of inherent faults, for want of authority and jurisdiction, and for the errors they contained, and for other reasons to be orally alleged, and why as a consequence the said pretended bottomry bond should not be declared null and void, and if necessary, annulled without prejudice to the right of the parties or whomsoever else it might concern, including the said Captain Giovanni Frutta, to proceed to a regular average statement in the place where the voyage of the "Evangelistria" ought to have terminated,

and claimed damages against Dimitriacopulo (without prejudice to an action against him for fraud) with costs against the Respondent.

The Court of Commerce decided against the Appellant on the ground that it had no jurisdiction in the matter of the average, but in his favour as to the bottomry bond, declaring it void. Both parties appealed to the Appellate Court at Malta, which decided that the inferior Court had jurisdiction as to the average, but gave no judgment as to the bottomry, and remitted the case.

The Court of Commerce, on the 26th of May, 1868, gave judgment that the said suit, so far as it related to the demand for the nullity of the said average acts, had been "illegally observed," by reason of the Appellant not having summoned all the parties concerned in the said average acts, and especially Captain Frutta, of the brig "Evangelistria," and that nothing was proved sufficient to make Dimitriacopulo liable in damages, and decided for the discharge of the Respondent *nomine* (that is, in the character in which he was sued) *ab observantia Judicii*, with costs; the effect of which judgment was equivalent to a nonsuit.

Both parties again appealed; and on the 20th of July, 1868, the Appellate Court decided that the "Captain of the 'Evangelistria,' having taken the legal course in going before the Consular Tribunal at Constantinople, and that Court having, on the report of experts of the necessity for unloading and transshipping the cargo in order to repair the ship, appointed Dimitriacopulo Curator of the cargo, and declared the voyage of the 'Evangelistria' ended at Constantinople, and authorized Dimitriacopulo to give a bottomry bond, he must be considered by a third party as the Attorney for the owners of the goods, and had authority to hypothecate them. That where the formalities of a Consular authority and verbal process justifying the expenses necessitating the loan are observed, the lender on bottomry is exonerated from seeing the necessity of the loan proved. That in the present case the sentence of the Court supplied the Consular authority, and the expenses having been incurred under the control of the Consul, and sanctioned by the sentence, the production of verbal process was not important, and that

substantially the formalities were to be taken as complied with, and that the lender was not bound to make inquiry as to the facts causing the necessity of the loan. That there was no proof of any fraudulent collusion between Facher, the lender of the money, and Dimitriacopulo, or that Dimitriacopulo simulated expenses, or committed any irregular or deceitful acts to the damage of the cargo, or even if he had himself acquired an interest in the bond, would that have affected its validity, and that any omissions on his part, even if they resulted in damage and gave a cause of action, would not nullify the bond, and that it was not necessary to summon Captain Frutta, the master of the 'Evangelistria.'"

From this decision the Appeal has been prosecuted to this Tribunal.

It has been strongly urged upon their Lordships that all the proceedings in the Greek Consular Court, which were in substance uphelden by the Court of Appeal in Malta, were invalid; and principally upon the following grounds: that, with regard to the bottomry bond, no adequate necessity is shown for having recourse to it, and also that it is bad because not preceded by any communication or attempt at communication with the owner of the cargo; and, with regard to the general average, that the proper place for the adjustment of it was Malta, the port of destination, and not Constantinople.

Their Lordships are called upon now to pronounce a judgment in favour of these propositions, sitting as an appellate tribunal from the Court of Malta; in other words to give that judgment which it is alleged that the Court appealed from ought to have delivered. Their Lordships are not sitting as an appellate tribunal from the Greek Consular Court at Constantinople. It is necessary to make this statement *in limine*, however obvious it may appear, for the following reason. If the Greek Consular Tribunal was a competent Court, having jurisdiction over the ship and cargo, then the sentence of that Court was not open to examination by the Court at Malta, but would be properly enforced by it, or, to borrow the clear language of Lord Ellenborough in *Power v. Whitmore*, "By the comity which is paid by us to the judgment of

other Courts abroad of competent jurisdiction we give a full and binding effect to such judgments, as far as they profess to bind the persons and property immediately before them in judgment, and to which their adjudications properly relate."

—4 Man and Sel., 150 (1815.)

And it is to be observed that, though the earlier cases exhibit some fluctuation and variety with respect to the application of this doctrine, it has become firmly established by a series of later cases as an unquestionable maxim of our jurisprudence. The strongest and the last case is that of *Castrique v. Imrie* decided by the House of Lords in 1870.—

4 L. R. H. L. 414.

The foreign judgment of a competent Court may indeed be impeached, if it carries on the face of it a manifest error; if it is shown to have been obtained by fraud, or to be wanting in the conditions of natural justice; and it cannot be applied to persons other than those who were parties to the litigation decided by it, except in cases where the judgment is *in rem*.

No such infirmities can in this case be predicated of the decree and orders of the Greek Court, and therefore the consideration as to the competency of that Court alone remains to be considered.

It has been much pressed upon us that there is no evidence of such competence, and that the acknowledged rules of the general maritime law applicable to bottomry bonds on cargo have been violated by the proceedings of the court.

Now this was the sentence of a Greek Consular Court sitting at Constantinople upon a Greek ship, and a cargo owned by Greek subjects.

The holder of the bottomry bond was a stranger who, acting *bonâ fide*, advanced his money on the bond.

That the Ottoman Porte has given to the Christian Powers of Europe authority to administer justice to their own subjects according to their own laws within its dominions is a fact *publici juris*, which their Lordships are not now called upon for the first time to take cognizance of, and which they fully recognized in the case of the "*Laconia*."—2 Moo. P. C., N. S., p. 185 (1863). It would be strange indeed, if it had been otherwise,

inasmuch as Her Majesty has established a Supreme Consular Court at Constantinople and Provincial courts, with rules for the exercise of civil and criminal jurisdiction. This kind of jurisdiction exercised by the Consuls of Christian States in Mahometan countries is to be carefully distinguished from the ordinary powers exercised by Foreign Consuls in Christian States.

Judicial cognizance being therefore taken by their Lordships of the fact that a Greek tribunal, capable of exercising jurisdiction in this case, existed at Constantinople, it is the duty of their Lordships to apply to such a tribunal the ordinary principles which regulate the reception of the judgment of a foreign tribunal by other Courts.

During the course of the argument our attention was properly drawn to the case of *Dent v. Smith*, in which the competence of the Russian Consular Court at Constantinople was placed upon this footing by the Court of Queen's Bench. In that case, the particulars of which it is not necessary to mention, Lord Chief Justice Cockburn said:—

“The facts lie in a very narrow compass. The ship, having become a Russian ship, is wrecked in Turkish waters; the gold, the subject matter of this insurance, is saved by being immediately sent on shore, the captain taking advantage of having to send his boat, and thinking it best to save this portion of the cargo, which, of course, was by far the most valuable part, and, from its small bulk, the part most easily saved. He deposits it, or causes it to be placed in the hands of the Russian Consul. It is unnecessary to follow these proceedings in any detail through their course; but afterwards a claim is made in respect of the expenses which were incurred in endeavours to save the ship, and the rest of the cargo on the gold in the Consul's hands; and in the end, the matter having been investigated by persons appointed by the Russian Consul, judgment is given as to the amount which shall be contributed by the owners of the gold to satisfy the claim for contribution in respect of the expenses. That judgment is ratified, as it is necessary it should be, by the Russian Minister at Constantinople, and being so ratified, and not being appealed against within a certain time, the judgment became a binding

judgment upon the parties concerned. That being so, the owners of the gold being shown to have no alternative in order to get the gold, but to submit to the payment of this per-centage, and in the meanwhile they, or some one, having given security, in the end they were obliged to pay the money themselves.

“ Now, it has been contended, on the part of the Defendants, that the proceedings of the Tribunal by which this judgment was given were wrongful in many respects. In the first place, that, having to apply the Russian Commercial Code, they applied the French. I think there is quite a sufficient answer to that. It appears that, in matters relating to maritime law in which the jurisdiction of the Russian Consulate has to be exercised, they have not at Constantinople the presence and assistance of Russian advocates to explain the law, whereas there are French advocates resident there, and the laws of the two countries being with reference to these matters almost the same, they had recourse to the French law, and applied it in this instance. Whether that is strictly right or wrong, I do not take upon myself to pronounce, for I think it is a matter with which we have nothing to do; but if in this case they applied the French law as a substitute for the Russian, I think we must take it that they did it with proper authority.

“ Then, it is said, that they applied the law erroneously. Again, I think we have not to deal with that. We are not to sit here as a Court of Appeal against any judgment pronounced by a Court, which must be taken to be one of competent jurisdiction in the administration of Russian law, and whatever was substituted became for the time Russian law in respect of matters of maritime law. The proper Tribunal to appeal to, if there was any ground of appeal, was to the Court of St. Petersburg.”—*Dent v. Smith*, 4 Law Rep., Q.B., pp. 445-6 (1869).

With the principles of this Judgment their Lordships are disposed entirely to agree. They think it must be presumed that the Greek Court rightly interpreted and applied the Greek law; that by that law they had the power, and duly exercised it, of deciding that, in the circumstances, Constantinople should be considered as the place of the

ship's destination, and the average adjusted according to the Greek law in force at that place; and that the bottomry bond was necessary and valid, though entered into without citing M. Cossudi, the agent of the owners of the cargo, who was, however, their Lordships must remark, aware, as is proved by his letter, of the arrival of the ship in a disabled state at Constantinople, and, it must be presumed, of the proceedings in the Greek Court, though he did not appear and take any part in them.

It must also be presumed that the Court had power to appoint the average or judicial staters, and that their decision gave authority to the curator of the cargo to contract the bottomry bond in question with Facher, and to tranship the cargo on board the "Otto Sorelle;" and that this decision was rightly confirmed by the Greek Consul-General. Their Lordships do not feel themselves at liberty to enter into the discussion into which they were invited by Counsel for the Appellants, or into the question whether the Greek law be or be not at variance with the general maritime law upon these points. They would be properly raised on an appeal to the Greek Appellate Court, whether sitting at Athens or elsewhere; and could not properly be discussed either before the Court at Malta or before this Tribunal.

Their Lordships must, therefore, humbly advise Her Majesty that the Judgment appealed from be affirmed, and the Appeal dismissed with costs against the Appellant.

