Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Giacomo Gazzolo v. *G. Kœnig and others* (*The Ida*), *from the High Court of Admiralty of England; delivered Tuesday March 23rd*, 1875.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR HENRY S. KEATING.

THIS was a suit brought by the shipper of the cargo against the shipowner to recover damages sustained by the cargo in consequence, as it was alleged, of improper stowage. The cargo consisted of some 700 tons of cotton seed loaded in bulk on board the ship Ida at Port Said in Egypt, to be delivered at Hull. The Ida left Port Said on the 7th February 1873, and arrived at Hull in May after a passage of nearly twice the usual length, in consequence of adverse winds and stormy weather. On the unloading of the cargo it was unquestionably in a very damaged condition; a great part of it had heated so much that it had become almost charred, while a comparatively small portion, some 40 or 50 tons, was found in a tolerably sound condition. The case of the Plaintiffs was, that this cargo was shipped in a dry and good condition at Port Said, and that it had become damaged through improper stowage. The case of the Defendants was, that the cargo had been shipped in a green state, and had become heated in consequence, and that the heat had been increased by the unusual length of the voyage.

The case was heard before the learned Judge of the Admiralty Court, who found generally for the Plaintiffs, directing the usual enquiry as to damages. From this judgment the Defendants have appealed. Undoubtedly, the question is one of fact, and their Lordships are always slow to reverse the judgment of the Court below upon a pure question of fact, when that Court has had the advantage, which they have not, of hearing and seeing the witnesses, unless they come to a very clear conclusion that the judgment was wrong.

It has been contended, firstly, on the part of the Appellants, that the learned Judge was wrong in holding, as he did, that the Plaintiffs had given *primâ facie* evidence that the cargo was in good condition at the time of its being shipped,—evidence calling upon the Defendants to rebut it. This was obviously a cardinal question in the cause, and this finding may be considered as, in a great degree, the foundation of the judgment. The bill of lading throws no light upon the question, the master having written across it, "Ignoro qualita è quantita," thereby preventing its constituting any admission by him of the state of the cargo, as was rightly held by the learned Judge. It appears that the cargo was shipped by a Mr. Miami and his clerk at Port Said, who acted there as the factors of the Plaintiffs, who have two houses, one in London, the other at Alexandria. Mr. Miami and his clerk are described by the captain as having superintended the lading of the cargo, and having been constantly on board the vessel, and they must, of course, have been perfectly well acquainted with the quality of the cargo. Neither Mr. Miami, nor his clerk, nor any witness from Port Said, was called by the Plaintiffs, or examined by them on interrogatories. But for the purpose of proving the condition

of the cargo they called Mr. Liddell, who is a partner in the Plaintiffs' firm, and at the time of the shipment of the cargo was residing in Alexandria, a distance of 125 miles from Port Said, and who had never seen the ship or the cargo. This gentleman, in answer to a leading question put to him by the counsel for the Plaintiffs, says that, as far as he knows, the cargo when shipped was in good condition. It appears, however, that his means of knowledge consisted simply in his having been supplied, as he says, with samples of the cargo from Port Said, which samples he does not produce, saying that they had been destroyed; but he does not show, as indeed he could not, that he had examined these samples with the bulk; nor is any person called who did examine them with the bulk; nor is any evidence whatever given that the samples which this gentleman alleges that he saw, and on which he founded his opinion, whatever it may be worth, did fairly represent the cargo which was shipped. The learned Judge seems to have been under some little misapprehension with respect to the evidence of this witness, for the learned Judge observed, "He said, in "answer to a question whether the cargo was "shipped in good condition, it was; and he "gave as his reason for it, that he knew it was "from the samples which he had seen of it at "Port Said." The learned Judge would appear to be under the impression that the witness was at Port Said for some time during the loading of the vessel. That, undoubtedly, was an erroneous impression, the witness not having been nearer, as far as we know, than Alexandria. The learned Judge held upon this that *primâ facie* evidence was given that the seed was shipped in proper condition, subject, of course, to be rebutted by the evidence of the other side.

Their Lordships have come to the conclusion that the learned Judge was wrong in holding that this was *primâ facie* evidence of the seed being shipped *in good* condition. They are of opinion that no evidence whatever was given upon this subject.

Their Lordships collect from the report of a case which has been laid before them (the Prosperino Palazzo,) that, if the learned Judge had come to the conclusion which their Lordships have, that no evidence had been given by the Plaintiffs of the condition of the cargo when shipped, he would have found for the Defendants. Their Lordships cannot, indeed, suppose that the learned Judge intended to lay down, as the marginal note to that case represents him, that there is a rule of law which requires that a Plaintiff in such a case as this must show, in the first instance, that the goods were shipped in good order and condition, or fail in his suit. Undoubtedly there is no such rule of law. But their Lordships think that in this case, considering that the Plaintiffs must have known how material it was to prove the condition of the cargo, that they abstained from calling witnesses who knew its condition and called a witness who was ignorant of it, when further it appears from evidence uncontradicted that a great number of cargoes arrived at this time in a heated and damaged condition from Port Said, and that this would seem to have been a bad season for seed, their Lordships think it not too much to say that there appears a good deal of reason to suspect that this seed was in a condition at the time of its being shipped which would account for its appearance when unloaded; and that the Plaintiffs, having failed to show its condition on loading, were bound to give very clear and cogent evidence that the damage which

it sustained was traceable to causes for which the shipowner was responsible.

The Plaintiffs have endeavoured to prove this in the following manner: They put forward a theory by their witnesses, which seems to have been adopted by the learned Judge to this effect, viz., that sand ballast was used in this vessel, which is improper, inasmuch as it is liable to get wet and to communicate wet to the cargo; that there was no sufficient dunnage between the sand and the cargo; that the sand wetted the lower portion of the cargo; that that wet spread to other portions of it, whereby the bulk became wet and heated and all the damage ensued. This appeared to be, as far as their Lordships are able to understand it, the original view of the case put forward by the Plaintiffs. It is now, indeed, suggested by their learned counsel that this may not be quite the accurate view; that it may be that the cargo did of itself heat to some extent, being somewhat damp; that the sand below may not have been completely wet, and may not have communicated its wetness to the cargo to any great extent by contact; but that, the cargo having heated, the heat of the cargo would dry up the moisture from the sand, and thereby the damage which the cargo would otherwise sustain by its heating would be increased. Their Lordships have to observe upon this, that this view would appear to open a new subject of inquiry which has not been considered by the learned Judge, namely, assuming some damage to have resulted from the defective state of the cargo when shipped, and some additional damage from the wetness of the sand, how much of the damage was due to the one cause and how much to the other. Their Lordships have no materials whatever for deciding such a question; and if there are no such materials it is entirely the fault of the

Plaintiffs inasmuch as they have given no evidence of the state of the cargo when it was shipped.

But both these hypotheses assume that the sand was more or less wet, and whether it was so or not becomes a very important question, which it is necessary to determine. It seems that at the bottom of the ship on each side of the keelson, which is in itself some 17 inches wide, a planking extends to about two feet six inches, making a kind of deck of rather more than six feet wide, and this deck is about two feet six inches from the very bottom or lowest skin of the vessel, and that under it there is what is called a water-course; that is to say, the water courses freely backwards and forwards from stem to stern under this deck. Some of the witnesses for the Defendant called this permanent dunnage; the witnesses for the Plaintiff denied that it was permanent dunnage, alleging that in order to constitute permanent dunnage it ought to have extended further towards the bilges of the vessel. It would appear that permanent dunnage is often found in steamers, but rarely, if ever, in merchant vessels, and that in English merchant vessels no approach to permanent dunnage is usually to be found. The Ida is an Italian vessel, and undoubtedly this planking of six feet and upwards is in the nature of permanent dunnage, and, as far as it goes, is an advantage. Above this planking, by the account of both sides, there was a layer of sand some 10 or 15 inches thick; above that sand there was, according to the evidence of the Plaintiffs, only one layer of matting between it and the cargo; according to the evidence of the Defendants, there was between the sand and the cargo dunnage in the shape of timber throughout the vessel, and in the middle of the vessel some five or six layers of matting besides. On this question

there is undoubtedly a conflict of evidence; but it does not appear to their Lordships, in the view which they take of the case, to be necessary to decide on which side the evidence on this question preponderates. It may be taken that there was between the sand and the cargo at least one layer of matting.

The theory of the witnesses for the Plaintiff appears to have been in the first instance, at all events, that this sand was taken wet from the sea shore and the cargo was put upon this wet sand. That theory is now very properly given up by the counsel for the Plaintiffs, the evidence being overwhelming that this was not sea sand but what is called desert sand, and that when put into the ship it was perfectly dry. There is also another difficulty in the way of the Plaintiffs' case, namely, that according to their own showing the sand was perfectly dry when the vessel arrived; and, what is more, that the matting between it and the lower part of the cargo was dry also. There is only one witness, the stevedore, who gives anything like contrary evidence upon this subject, and his evidence is very properly not relied upon by the learned counsel for the Plaintiff. The sand then being admitted to have been dry when it was put in and dry when the vessel arrived, it is still contended on the part of the Plaintiffs that it must have been wet during the voyage, and wet of course with salt water, but that it had been dried by evaporation consequent on the heat of the cargo. Now there would seem to be a very good test for ascertaining whether or not the sand was wetted to any great extent or to so great an extent as to account for the whole damage to the cargo as is pretended on the part of the Plaintiffs, or even for any serious portion of it, viz., whether or not it contained salt, for according to the Plaintiffs'

theory that it had been dried by evaporation, the water would disappear, but the salt would remain. This is a test which does not appear to have occurred to any of the witnesses for the Plaintiffs, none of whom indeed are scientific, but it is a test which has been actually adopted by at least four of the witnesses for the Defendants. Mr. Hedger and Mr. Shields, the one a surveyor and the other a seed crusher and merchant, give evidence to the effect that they tasted the sand, and if it had been sea sand, or if it had been wet with salt water, they would have expected to have tasted some saltness in it, whereas they tasted none. But, further, two gentlemen of a great deal of eminence as chemists, Dr. Letheby and Dr. Voelcker, have been called who both give very important evidence upon this subject. Dr. Letheby says, "I have no hesitation in saying "that the sand was not saturated with sea "water; if it was saturated with sea water I "should tell it without a chemical examination." And then Dr. Voelcker also says, "If the sand "had been wetted by sea water, I would have "found an appreciable quantity of common salt "in the sweepings in contact with the wet sand, "but I found no salt in the sweepings;" and that is the evidence of other witnesses. No salt therefore is found in this sand, and no salt is found in the sweepings or in the portion of the cargo immediately above it.

Taking this evidence, together with other evidence not altogether unimportant, namely, to the effect, that if this sand, of which a sample has been shown to their Lordships, and which appears to be of a somewhat dusty character, had been wet, and had been subjected to a great superincumbent pressure, it would probably have caked, whereas there was no appearance whatever of caking; and the further evidence of those who have surveyed the bottom

of the vessel, and who say that they can find no trace of any quantity of water having got to the sand or at all above the ceiling of the vessel, it appears to their Lordships that the Plaintiffs have not made out so much of their case as requires them to show that the sand was wetted to a very considerable extent during the voyage. That if the sand had been wetted even to saturation the whole of the damage or the greater part of it would have been thereby accounted for, their Lordships are by no means satisfied; but upon this it is not absolutely necessary to express an opinion. There is, indeed, the evidence of two witnesses to the effect that, inasmuch as there was at one time as much as 19 inches of water in the bottom of the vessel, if the vessel rolled, the water would have got to the sand; but it is to be observed, that this is merely speculative evidence, and is opposed to the opinion of another witness probably entitled to equal weight, namely, that no water would have got to the sand unless the water had risen to the height of two feet six inches, which there is no evidence of its ever having done. But it appears to their Lordships that this evidence weighs little in the scale against the positive evidence of the state of the sand which has been before adverted to.

Their Lordships have, therefore, come to the conclusion that the Plaintiffs have not made out their case that the cargo suffered any damage in consequence of the wetness of the sand, or in consequence of improper stowage.

Upon the hypothesis that the cargo was originally shipped in a green condition, its state on arrival is accounted for simply and naturally without having recourse to ingenious and far fetched theories. If the cargo was in a green state, as several other cargoes appear to have been which were shipped about the same time from the same

port, it would naturally heat. The heating would be where it is represented to be, principally in the middle where the greatest bulk was collected, especially after a long voyage. The very top of the cargo is represented as being to some extent wet and mildewy. That would naturally result from the steam rising and becoming precipitated into water by the coldness of the deck. Some portions of the cargo, comparatively small, about the extent of which the witnesses did not quite agree, but which portions are put at the highest as between six and seven tons lying immediately on the sides of the vessel, appear to have been wetted by salt water. They stuck to the sides, they presented all the appearance of having been wetted by salt water, and they are what the witnesses called sea damaged. But these portions of the cargo were not immediately above the sand where the wettest part of the cargo might be expected to be found if the wet had been originally derived from the sand, but upon the sides of the vessel, and with respect to this there is no serious conflict of evidence. It may be here observed that the learned Judge appears to have fallen into some misapprehension upon this subject, for he treats the portion of the cargo actually sea damaged as that which was at the bottom of the cargo and in contact with the sand. If that had been so, the case might have presented a somewhat different aspect; but from the evidence of several of the witnesses, more especially of Mr. Bee, the witness for the Plaintiff, it is manifest that that is not so. Bee gives very distinct evidence upon this subject. He says some of the seed was wet and it was wet at the sides, and he subsequently represents the wet part as going all up the sides and to a certain extent adhering to the sides; and he says they cleared that away and took it out into baskets. The learned Judge appears to have been misled

by an expression which fell from one of the witnesses, Watson, who looked down into the hold of the vessel when the unloading was nearly completed, and speaks of seeing some six or seven tons lying at the bottom of the vessel which he supposes to have been there originally; but this was clearly a mistake, as appears from the evidence of Bee and of several other witnesses, and in fact from all the evidence on both sides. The damage to this small portion of the cargo is ascribed by the witnesses on both sides to small leaks which the ship had sprung when straining in heavy weather, and is not a description of damage for which the shipowner would be liable.

Under these circumstances, their Lordships have come clearly to the conclusion that the Plaintiffs have failed to make out their case. They have failed to launch their case by *primâ facie* evidence of the condition of the cargo, and they have certainly not adduced any evidence at all conclusive, or even cogent for the purpose of showing that the damage which the cargo sustained on the voyage was due to the fault of the shipowner.

Under these circumstances, their Lordships will humbly advise Her Majesty that the judgment of the Court below be reversed, and the Appellants must have the costs in the Court below and in this Appeal.