Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Miedbrodt v. *Fitzsimon (the "Energie"), from the Chancery Court, Ireland; delivered 24th April,* 1875.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

The "Energie."

THE question on this appeal is whether the Respondent (the Plaintiff in the cause and the owner of the cargo) has established a good cause of action against the Appellant (the master of the ship "Energie") for breach of duty or of contract in relation to the delivery of the cargo. The Judge of the High Court of Admiralty in Ireland held that he had failed to do so, and dismissed his suit. The Court of Appeal in Chancery in Ireland, to which, snbject to a final appeal to Her Majesty in Council, an appeal from the Court of Admiralty lies, reversed that decision, maintained the action, and remitted the case to the Court below for the purpose of ascertaining the damages. The present appeal is against that judgment.

As to the principal facts in the cause, there is little or no dispute. The vessel was chartered at Memel on the 8th of October, 1872, by the agent of Joseph Dowson and Co., of London, who shipped thereon a full cargo of fir timber to be delivered at the port of Dublin under a bill of lading, dated the 6th of November, and duly indorsed to the Plaintiff, the owner of the cargo. This bill of lading

describes the timber by running feet, but makes the freight payable "as per charter party;" and under the latter instrument freight is to be calculated "per load of 50 cubic feet, calliper measure." The vessel encountered severe weather in the Baltic, and had to put into Copenhagen for repairs, for the expenses of which the master passed a bottomry bond for 2,975*l.*, payable at or before the expiration of three days after the safe arrival of the ship in Dublin, and hypothecating ship, cargo, and freight. The validity of this bottomry bond is not disputed. A general average statement was adjusted by which the sum of 1,221*l.* 2*s.* 11*d.* was charged against the cargo.

The ship arrived in Dublin on the 15th of April, 1873.

There is some dispute as to what then took place. The Plaintiff by his petition (paragraph 5) alleges that on that day the master called upon him, and informed him of the claim on the foot of the bottomry bond, and that until it was settled he could not deliver the cargo. But in his evidence (page 14) he says this statement in his pleading is incorrect; that the master called upon him on the 16th, and promised to commence delivery on the following day, but on the 17th refused to do so, on the ground that he had received orders from the ship's agents in London (Messrs. Hoffman and Co.) not to deliver until he should receive further directions from them, there being a charge on the cargo. The master's evidence (page 33) supports the statement in the petition. Certain, however, it is, that on the 18th the Master called on the Plaintiff with a telegram of that date received from Messrs. Hoffman and Co., which is in these words:—"Average statement ready. Net amount due from cargo, 1,221*l.* 2*s.* 11*d.* Ask receivers whether they wish statement sent to Dublin, or delivered here. We must have this money to pay bottomry before discharging commences." And then at least, if not before, the master seems distinctly to have claimed a right of lien on the cargo for the amount due for general average.

The Plaintiff appears to have referred this question of general average to his London agents (Messrs. Tagart, Boyson, and Slee), who submitted it to the underwriters.

Between the 18th of April and the 1st of May, some correspondence went on between the Plaintiff and the master in Dublin and their respective agents in London. In Dublin the Plaintiff writes on the 28th of April to the master :—"We have got a telegram from London stating that your claim will be paid, and there is nothing to prevent your discharging our cargo, and we are ready to sign average bond, as you were told on Saturday, so we now hold you accountable for any loss sustained by us by non-delivery of the cargo." In London, on the 29th of April, Messrs. Hoffman and Co., in answer apparently to a similar application from Messrs. Tagart, Boyson and Slee, write as follows:—"It is quite correct that Captain Miedbrodt will not discharge until he receives our instructions, and those instructions we cannot give him until the amount due from the cargo is paid to enable us to discharge the bottomry bond, because by that document all the interests are hypothecated to the bottomry holder."

And on the 30th of April the master writes to the Plaintiff, reminding him that the days allowed by the charter-party for taking delivery of the cargo have expired, giving notice that if the conditions precedent necessary to delivery are not complied with within twenty-four hours, he will land the cargo at the risk and expense of the Plaintiff, retaining his lien thereon, and claiming demurrage "at 6*l.* per day, as per charter-party, for every day that may now elapse before cargo is out of the ship."

Thus matters stood on the 1st of May, when Mr. Harper, a member of the firm of Hoffman and Co., arrived in Dublin. He saw the Plaintiff on that day, and endeavoured to come to a settlement with him. He began by claiming as sums for which there was a lien on the cargo, 1,221*l.* 2*s.* 11*d.* for general average, and about 700*l.* for freight. The Plaintiff disputed both items. Calculating the freight according to the running feet mentioned in the bill of lading, he made it only 671*l.*: and he complained that in the average statement the cargo had been valued at 2,686*l.*, whereas its invoice price was but a little above 2,000*l.*, and the sum for which it was insured only 2,300*l.* Thereupon Mr. Harper agreed to calculate the average payable

by cargo upon the last-mentioned sum, reducing its amount to 1,136*l.* 2*s.* 4*d.*: and, after some further discussion, offered to release the cargo on the payment of 1,800*l.* and the execution of an agreement that if he should have received too much or too little, the error should be made good to the sufferer. The Plaintiff not assenting to these terms, offered to write a cheque for 1,700*l.*, and afterwards increased his offer to 1,750*l.*; but Mr. Harper declined to take less than the 1,800*l.*, and thus, unfortunately for both parties, the negotiation went off on this question of 50*l.* more or less. If the Plaintiff had paid the 1,800*l.*, he would have got delivery of his cargo on the payment of less than in the event proved to be actually due from him; and if the other party had taken the 1,750*l.*, they would have succeeded to that extent in their object of being put in funds to meet the bottomry bond; although their right to call upon the Plaintiff for present payment of so large a sum, whilst the bond was outstanding and unproduced, and the precise amount of freight had not been ascertained by measurement, was questionable. Neither party, therefore, evinced much prudence in rendering this attempt to compromise abortive. It is not, however, necessary for their Lordships to say which was on this occasion the less reasonable. They have only to determine whether the master by his subsequent acts incurred a legal liability enforceable in this action.

On the 3rd of May the Master, notwithstanding a letter from the Plaintiff of that date offering to pay the proportion of the average falling on the cargo in full, and to give security for the freight, proceeded to discharge the cargo, and place it in the custody of the Port and Docks Board, under the 67th and 68th Sections of "the Merchant Shipping Act Amendment Act, 1862;" putting upon it a stop order for the sum of 2,200*l.* The delivery though begun on the 3rd was not completed until the 16th of May.

In the meantime the following correspondence took place between Messrs. Waltons, Bubb, and Walton, acting as the Solicitors of the Plaintiff in London, and Messrs. Hoffman and Co. The former wrote on the 5th of May:—"We understand that you represent both the shipowner and the bottomry

bondholder, and, if this is so, there will be no difficulty. Please let us know how this is, and what amount you claim from the cargo on behalf of your respective clients. Our clients are quite prepared to pay the freight on delivery of the cargo, but we understand that the master, professing to act under your instructions is refusing to deliver unless the whole freight is paid before delivery. Please see to this." And in answer to this Messrs. Hoffman and Co., in a letter of the 6th of May, after expressing their satisfaction that the matter had got into the hands of those who were capable of understanding the position of the proprietors of the cargo, and stating that the lay days having expired, and every means having been tried whilst they were running to induce the proprietors of the cargo to pay the amount due from them, the cargo was then being landed by the Captain in the Custom-house Docks, say "The claims we make upon the cargo are: 1st, 1,221*l.* 2*s.* 11*d.* contribution to average charges as per Messrs. Hopkin's statement" (thereby reverting to their original claim): "2nd, 770*l.* for freight, demurrage, and landing charges, and on payment to us of these two sums we are willing to give a guarantee that shall be made satisfactory to you for the subsequent adjustment of either of the amounts by the repayment by us of any surplus if it should afterwards appear that such has been paid us."

Nothing appears to have come of this correspondence until the 12th of May, when the claim for general average contribution was settled by a payment to Messrs. Hoffman and Co. in London of 1,136*l.* 2*s.* 4*d.* upon the terms expressed in the following receipt, which was signed by Hoffman and Co., as agents for the master and shipowners, and also as holders, or agents for the holders of the bottomry bond:—

"Received from Messrs. Fitzsimon and Son the sum of 1,136*l.* 2*s.* 4*d.*, in full satisfaction and discharge of all claims against the cargo per "Energie" for general average or special charges, as per statement of Mr. Manley Hopkins, the contributory value of the said cargo being taken at 2,300*l.* instead of 2,600*l.*, and also in full satisfaction and discharge of all claims against the cargo under

the bottomry bond, which is to be liquidated by the shipowner."

The Plaintiff, having been advised of this payment in London through his solicitors in Dublin on the 13th of May, offered to lodge with the Port and Docks Board the full sum of 770*l.*, being the amount of the claim made by the letter of the 6th of May, exclusive of that for general average contribution; but this offer was expressly made under protest for the purpose of obtaining the cargo, and with notice to the Board not to part with the money lodged until the Plaintiff should take the necessary steps to compel the refunding of the same. The Board declined to deliver the cargo until the stop order for 2,200*l.* had been withdrawn, or that sum lodged.

Upon this the Plaintiff appears to have taken simultaneous action in London and in Dublin. In London, on the 14th of May, Messrs. Waltons, Bubb and Waltons, wrote to Messrs. Hoffman and Co. as follows:—"We have a letter from Dublin complaining that, although our clients have offered to deposit with the Port and Docks Board, or to tender under protest 770*l.*, being the amount claimed by you for freight charges, &c., the Board refused to deliver the cargo on the ground that it is stopped by you for 2,200*l.*, and that they can accept nothing short of that sum. From this we assume that you have not advised the payment of the general average, and we shall therefore be glad if you will instruct the Board by wire to deliver on the 770*l.* being deposited." Messrs. Hoffman and Co's answer to this communication was written on the 15th, and was in the following terms:—"In reply to your note of yesterday, we can only say that this matter must now take its course, as we fear that we are not justified in interfering now with the original stop."

In the meantime the Plaintiff's solicitors in Dublin had served the master of the vessel on the 14th of May with a notice in these terms: "On behalf of Messrs. James Fitzsimon and Sons, timber merchants, Dublin, we hereby require you to attend at the office of Mr. Thurgood, Superintendent of the Custom-house Dock, Dublin, to-morrow at 12 o'clock noon, at which time and

place we shall pay you the sum of 671*l.* 10*s.* 4*d.*, being the amount due by Messrs. Fitzsimons for freight of goods brought to Dublin by the ship "Energie," or such further sum as you shall show us to be due for freight only, and we shall pay such sum on your releasing the cargo of the ship "Energie," so that Messrs. Fitzsimons may remove the same."

The master and Mr. George Fottrell, one of the Plaintiff's solicitors, did meet at the place and time appointed. There is some discrepancy in their evidence as to what then took place. The master's statement is "that Mr. Fottrell had a bundle of notes in his hand. He offered me some money, but I cannot say how much." "They asked me what more I wanted; I said, demurrage and expenses, and showed them the telegram from Hoffman which I received on the 15th, telling me to take any money I could get, but not to release the cargo until the charges should be paid." Mr. Fottrell says, "The master said that he would be happy to receive the money, but that he would not release the cargo. He would not take the money on the terms I offered it. But he showed a telegram which he had from Hoffman in these words, 'Receive any money you can get, but don't release the ship.'" This telegram is not produced. Looking at the evidence by the light thrown upon it by the correspondence, their Lordships have come to the conclusion that the Plaintiff was willing to pay what was demanded for freight, though possibly under protest as to anything in excess of 671*l.* 10*s.* 4*d.*; and that, on the other hand, the master, acting under instructions from Messrs. Hoffman and Co., would not release the cargo except upon payment not only of freight, but of the sums claimed for demurrage and other charges; the whole probably amounting to the sum of 830*l.* 5*s.* 7*d.*, as shown by the subsequent letter of the 26th of May, and the account therein referred to.

The result was that the interview having proved infructuous, the present action was commenced on the same day, viz., the 15th of May.

The only other facts which require mention are, that on the 21st of May the Plaintiff paid the 2,200*l.* to the Port and Docks Board, and

obtained delivery of his cargo; that at the same time he served the Board with a letter in which he admitted the sum of 701*l.* 3*s.* 3½*d.* (the then ascertained amount of freight) to be payable to the shipowners, but required them to retain the balance pursuant to the provisions of the 72nd section of the Merchant Shipping Act; that on the 26th of May, the master expressed his willingness to receive (as he afterwards received) the amount thus admitted to be due for freight, intimating, however, his intention to take proceedings against the Plaintiff for the recovery of the difference between that sum and the 830*l.* 5*s.* 7*d.*, and to give the Port and Docks Board the statutory notice of the institution of such proceedings; but that ultimately and about the 8th of July, the Plaintiff did receive the whole balance of the 2,200*l.* being 1,498*l.* 16*s.* 8½*d.*, the shipowners having apparently determined to waive their alleged lien on the fund, and to pursue their remedy against the Plaintiff for the additional amount claimed in an independent action.

It is now to be considered upon what ground (if any) the present action is maintainable.

The judgment of the Court of Admiralty has found, and that of the Appellate Court assumes that, up to the 3rd of May, the master was acting within his strict legal rights. Their Lordships do not dissent from that conclusion.

The argument, however, that was addressed to them on behalf of the Respondent makes it desirable to consider briefly what those rights were. That the master had, by Common Law, a lien for freight, and general average contribution, and, by contract, a lien for demurrage upon the cargo, was not and could not have been successfully disputed. The freight, however, was not payable before delivery, and could only be ascertained by measurement upon delivery. The case, therefore, was one of those in which the payment of the freight and the delivery of the goods are concurrent acts, in which, as is shown by the case of Paynter *v.* James, 2 L. R., C. P., 348, and 3 Maritime Cases, 76, all that is required from the owner of the cargo is readiness and willingness to pay at the time of delivery, and in which a settlement can hardly be practically effected without some mutual trust and accommodation. In such circumstances the offer to

pay so large a proportion of the freight as 650*l.* before breaking bulk was not unreasonable.

Again, before paying the sum demanded for average, the Plaintiff had a right to be satisfied that it was the result of a proper adjustment. He did not himself see the average statement before the 1st of May, though it had been in the hands of his London Agents on the 18th of April, when it was forwarded by them to the underwriters. There seems to have been a *bonâ fide* dispute as to the principle of the adjustment, which the subsequent conduct of the shipowners shows to have been at least questionable. He had, moreover, fair grounds for declining to pay the average contribution, until he was satisfied that no claim would be made by the bottomry bondholder against the cargo. And of this he had no assurance before the 3rd, if before the 6th, of May. He offered at least, as early as the 28th of April, to sign an average bond, which, there being no doubt of his solvency, it would have been but reasonable in the shipowners to accept. It is true that their object was to get cash in order to pay the bondholder. But the owner of cargo is under no obligation to put the shipowners in funds to meet a debt, for which they are primarily liable.

Hence it appears to their Lordships that the detention of the cargo by the master up to the 3rd of May, though not wrongful, was an act done in the rigid exercise of his rights: and that it is fairly open to argument whether, if he chose to detain the cargo under the circumstances above stated, he could impute the delay in its discharge thereby caused to the Plaintiff, or make that a ground for a claim of demurrage. It does not, however, seem to them to be necessary for the determination of this case, to consider whether the lien for demurrage, which was once claimed, but finally waived, ever existed; and they abstain the more willingly from expressing an opinion upon this point, because the claim for demurrage is said to be now *sub judice* in another *forum*.

The Judgment under Appeal has found that there was a wrongful detention of the cargo on and after the 3rd of May; and that a right of action then accrued to the Plaintiff by reason of the delivery to the Port and Docks Board, begun on

that day, under a stop order for the excessive sum of 2,200*l.*

In support of this Judgment it has been argued that the delivery to the Port and Docks Board, of itself and irrespectively of the sum specified in the stop order was wrongful, inasmuch as the Plaintiff had not "failed to land and take delivery" of his goods within the meaning of the 67th section of "The Merchant Shipping Act Amendment Act." Their Lordships, however, cannot assent to this proposition. They conceive that the word "failed" need not be taken to imply wilful default in the cargo owner; but that, upon the true construction of the section, the shipowner is at liberty to land the goods under it, whenever the delivery of them to the owner within the proper time has been prevented by the force of circumstances, whether the latter is or is not to blame. They think that this construction is fortified by some of the provisions of the section which, in certain cases, throw the risk and expense of the landing upon the shipowner.

On the other hand it was argued against the Judgment that it implies, if it does not express, that the master is liable to an action for damages whenever he lands under a stop order for a sum in excess, no matter how slightly in excess, of the amount due to him. Their Lordships do not so read the Judgment. The proposition said to be involved in it is not necessary to support it, and seems to be inconsistent with the 72nd section of the statute, which assumes that the master in some cases may *bonâ fide* have claimed a lien for more than was really due to him.

The provisions of the statute which relate to this question are obviously designed both to give the master the means of discharging the cargo, retaining his lien, and to give the cargo owner the means of obtaining his goods by the deposit of a sum sufficient to cover the master's claim. But they do not extend the lien. The lien for the warehouse rent and charges occasioned by a landing under the 67th section is another and distinct lien created by the 76th section. The words of the 68th clause are: "If the shipowner gives to the warehouse owner notice in writing that the goods are to remain, subject to a lien for freight,

or other charges payable to the shipowner, to an amount to be mentioned in such notice, the goods so landed shall, in the hands of the warehouse owner, continue liable *to the same lien, if any, for such charges as they were subject to before the landing thereof.*" If, then, the master wilfully inserts in his notice a sum which he knows to be in excess of that for which he had a lien before delivery, he not only injuriously affects the cargo owner by compelling him to deposit more than the statute requires in order to release his goods, but intends to produce that result by duress of the goods; and thus the delivery to the warehouse keeper is tantamount to a wrongful detention of the goods, and, as such, an actionable breach of duty. In the present case, the sum inserted in the notice was manifestly and grossly in excess of that for which the master could *bonâ fide* claim a lien. The outside sum claimed so late as the 6th of May was 1,991*l.* 2*s.* 11*d.*, being 1,221*l.* 2*s.* 11*d.* for general average, and 770*l.* for freight, demurrage, and landing charges. On the 21st of May the latter item had been swollen to 830*l.* 5*s.* 7*d.*, but the average claim had then been settled by the payment of 1,136*l.* 2*s.* 4*d.*; and even if the sum of 830*l.* had been present to the mind of the master on the 3rd of May as the amount claimable, in addition to the larger sum claimed for average, the aggregate of the two would have fallen short of 2,200*l.* by 150*l.*

It was, however, argued that the mere insertion of an excessive sum in the notice is not actionable, because the statute gives to the cargo owner, by the 69th section, the means of releasing his goods otherwise than by a deposit of the sum specified in the notice; viz., by obtaining from the ship-owner either a receipt for the amount claimed as due, or a release of freight. But upon the hypothesis that the goods are wrongfully detained by the ship-owner for an excessive demand, it is not to be assumed in his favour that he would give such a receipt or release upon the offer of a less sum than that demanded; and a payment to the ship-owner under protest would put the cargo owner in a worse position than he would be in by the deposit of the sum claimed by the ship-owner; since, in the latter case, the ship-owner would have to establish

his claim *ultra* the amount admitted by proceedings under the 72nd section; whereas, in an action for money had and received, the burthen of proof would be on the Plaintiff, the cargo owner.

The evidence, moreover, in this case shows that the Plaintiff did his best to obtain his timber under the 69th section. He actually paid the average; he was ready and willing to pay, though under protest, the whole amount demanded for freight; but the master, under the instructions of Hoffmann and Co., refused to release the cargo upon any terms, or at all events upon any terms short of the payment of the 830*l.*; which, besides the amount claimed for demurrage, included items for which it is clear that the master when he landed the cargo had no lien. The Plaintiff, therefore, was driven to make the deposit of 2,200*l.* by the determination of the ship owners to use the stop order as the means of exacting the payment of charges for which they had no lien.

Their Lordships are of opinion that, from the evidence in the cause, the Appellate Court might fairly infer that it was with this object and intention that the excessive amount was originally inserted in the stop order, and, consequently, that the landing and detention of the cargo under that stop order was a wrongful act, which gave the Plaintiff a right of action, as from the 3rd of May.

Had their Lordships been of a different opinion the result would only have affected the date from which the wrongful detention is to be reckoned; for they entertain no doubt that the Plaintiff had a good cause of action on the 15th of May, the date of action brought. After the settlement of the claim for average by actual payment, it was clearly the duty of the master, and of the London agents for the ship, to reduce the stop order to the amount for which they then had, or could reasonably claim, a lien.

This they refused to do; they refused either to release the goods or to reduce the stop order upon the receipt of the freight, which the Plaintiff, on the 15th of May, was ready and willing to pay.

That this would have given to the Plaintiff a right of action, if he had not one before, their Lordships have felt no doubt, but for the reasons above stated they are of opinion that the Judgment

of the Appellate Court in Ireland was correct in finding that the right of action was complete on the 3rd of May.

Upon the point taken, to the effect that the Plaintiff being entitled at most to nominal damages the remand to the Admiralty Court is improper, it is sufficient to say that it is premature to say that the damages, though they may be small, will not be substantial. Their Lordships will, therefore, humbly advise Her Majesty to affirm the Judgment under appeal, and to dismiss this Appeal with costs.

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