

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of William Strang Steel & Co. and others v. A. Scott & Co., from the Court of the Recorder of Rangoon; delivered 1st August 1889.

Present :

LORD WATSON.

LORD FITZGERALD.

LORD HOBHOUSE.

LORD MACNAGHTEN.

[*Delivered by Lord Watson.*]

The steamship "Abington," on her way from London to Rangoon, with a general cargo, ran aground on the Baragua Flats in the Gulf of Martaban. Part of the cargo was thrown overboard in order to lighten the vessel, which was got off by that means, and was enabled to reach her destination in safety on the 19th October 1886. On the day of her arrival in the port of Rangoon, the Appellants, Strang Steel & Co., local agents for the ship, intimated to the Respondents, A. Scott & Co., and other consignees of the cargo then on board, that a deposit of one per cent. upon the value of their goods would be required before delivery "against probable average claim;" and on the following day they made a further intimation that the amount of deposit required would be five per cent. A correspondence ensued, in the course of which the Respondents made various tenders, all

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of which were declined ; and on the 25th October, six days after the arrival of the "Abington," they paid the required deposit, amounting to Rs. 1,592. 11, under protest, and obtained delivery of their goods.

The Respondents, on the 27th October 1886, instituted the present suit in the Court of the Recorder of Rangoon for recovery of their deposit, and for damages on account of the detention of their goods, upon the allegation that they had before payment made a tender entitling them to delivery. Upon the same day on which their plaint was filed the Respondents applied to the Court, under Section 492 of the Civil Code, for an injunction to restrain the Appellants, Strang Steel & Co., from remitting to England, or removing from the jurisdiction of the Court, the deposit paid to them on the 25th October. These Appellants judicially undertook to retain the amount claimed in their own possession, subject to the orders of the Court, without the issue of a formal injunction, and no further proceedings have been taken in that application.

On the 5th February 1887, the Respondents were allowed to add to their original ground of action an allegation, to the effect that they were not liable to contribute for general average on account of either ship or cargo, because the grounding of the "Abington" and the consequent jettison of part of the cargo, were due to the default, negligence, and misconduct of her master. Upon the pleadings thus amended, the case was twice tried before the Recorder, who ultimately, on the 15th August 1887, gave the Respondents decree for Rs. 1,592. 11., and for Rs. 200, in name of damages, with costs of suit. The learned Judge found, as matter of fact, that the stranding of the ship upon the Buragua Flats was occasioned by the negligent navigation of the master ; and he held, as matter of law, that

no claim for general average arises to the owners of cargo jettisoned when the peril which necessitated jettison is induced by the fault of the ship. Whilst resting his decision upon that ground, the learned Judge indicated that, in his opinion, the Respondents had made a tender entitling them to demand immediate delivery of their goods, before they paid the deposit to the Appellants.

In the course of the argument upon this appeal, three separate points were raised and fully discussed. The Appellants argued, (1) that innocent owners of cargo sacrificed for the common good are not disabled from recovering a general contribution by the circumstance that the necessity for the sacrifice was brought about by the ship-master's fault; (2) that in respect the bills of lading for the cargo of the "Abington" specially excepted "any act, neglect, or default whatsoever of pilots, master, or crew in the management or navigation of the ship," the owners of cargo saved are not, so far as concerns any question of contribution, in a position to plead the fault of the master; and (3) that the Respondents did not, before the 25th October 1886, make a sufficient legal tender. The parties were not agreed as to the facts upon which the second of these contentions is based; but there was no controversy as to the facts upon which the first and third of them depend. It was conceded by the Appellants that the "Abington" was stranded through the negligence of her master; and, on the other hand, the Respondents admitted that the effect of her stranding was to place both ship and cargo in a position of such imminent danger as to make it prudent and necessary to sacrifice part of the cargo in order to preserve the remainder of it and the ship. The question whether the Respondents made a legal tender depends upon the construction of

the correspondence which passed between the parties in October 1886.

The first question raised is one of general importance, and, so far as their Lordships are aware, has never been made matter of direct decision in this country. It may be convenient in dealing with it to consider first of all the rights and remedies which the owners of cargo thrown overboard have in a proper case of jettison. Some of the qualities of their right, and of the remedies by which it may be enforced, have been authoritatively defined. Each owner of jettisoned goods becomes a creditor of ship and cargo saved, and has a direct claim against each of the owners of ship and cargo, for a *pro rata* contribution towards his indemnity, which he can enforce by a direct action. In *Dobson v. Wilson* (3 Campb., 484,) Lord Tenterden said, "If a shipper of goods which are sacrificed for the salvation of the rest of the cargo is entitled to receive a contribution from another shipper whose goods are saved, I know not how I can say that this may not be recovered by an action at law. This is a legal right, and must be accompanied with a legal remedy."

Again, it is settled law that, in the case of a general ship, the owner of goods sacrificed for the common benefit has a lien upon each parcel of goods salvaged belonging to a separate consignee for a due proportion of his individual claim. The cargo not being in his possession or subject to his control, his right of lien can only be enforced through the ship-master, whom the law of England, following the principles of the *Lex Rhodia*, regards as his agent for that purpose. The duty being imposed by law upon the master, he is answerable for its neglect. In the course of the argument, his liability in that respect was questioned upon the authority of certain dicta

of Lord Eldon's in *Hallett v. Bousfield* (18 Vesey, 190). The circumstances of that case were very special. One of a number of persons alleging a right to contribution applied for an injunction to restrain the master from delivering the cargo without taking security, the bulk of them having consented to his so doing. Lord Eldon expressed a doubt whether it was the right of every owner of part of the jettisoned cargo to compel the captain to call on every owner of cargo saved to give security; but he dismissed the application on the ground that there was no instance of such an equitable remedy having been granted. Courts of equity are chary of granting injunctions which may lead to inconvenient results; and it does not follow from "*Hallet v. Bousfield*," that a master might not be restrained from making delivery of the cargo, at the instance of all or most of those entitled to contribution, without taking security for their claims. But their Lordships see no reason to doubt that, assuming the applicant's claim for contribution in that case to have been well founded, he would have had his remedy at law. In *Crooks & Co. v. Allan* (5, Q. B. D., 38), Lord Justice (then Mr. Justice) Lush held that a master or shipowner is bound to exercise the power he is invested with when a general loss has arisen, and to use the means in his power for adjusting the average claims and liabilities and securing their payment, and he accordingly ordained the Defendants, who had neglected to perform that duty, to pay to the Plaintiffs the whole amount of contribution to which they were entitled. The learned Lord Justice observed (5, Q. B. D., 42), that "the right to detain for contribution" is derived from the civil law, which also "imposes on the master of the ship the duty of having the contribution settled and of col-

“lecting the amount, and the usage has always
 “been substantially in accordance with that law,
 “and has become part of the common law of
 “England.”

The rule of contribution in cases of jettison has its origin in the maritime law of Rhodes, of which the text, as preserved by Paulus (Dig. L. 14, Tit. 2), is, “*Si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.*” The principle of the rule has been the frequent subject of judicial comment. Lord Bramwell, in *Wright v. Marwood* (7, Q. B. D., 67), said that, to judge from the way in which contribution is claimed in England, “it would seem “to arise from an implied contract *inter se* to “contribute by those interested.” The present Master of the Rolls, in *Burton v. English* (12, Q. B. D., 220) disputed that view, and stated his opinion to be that the right to contribution “does not arise from any contract at “all, but from the old Rhodian laws, and has “been incorporated into the law of England as “the law of the ocean. It is not as a matter of “contract, but in consequence of a common “danger, when natural justice requires that all “should contribute to indemnify for the loss of “property which is sacrificed by one, in order “that the whole adventure may be saved.” Whether the rule ought to be regarded as matter of implied contract, or as a canon of positive law resting upon the dictates of natural justice, is a question which their Lordships do not consider it necessary to determine. The principle upon which contribution becomes due does not appear to them to differ from that upon which claims of recompense for salvage services are founded. But, in any aspect of it, the rule of contribution has its foundation in the plainest

equity. In jettison, the rights of those entitled to contribution, and the corresponding obligations of the contributors, have their origin in the fact of a common danger which threatens to destroy the property of them all; and these rights and obligations are mutually perfected whenever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby preserved.

There are two well established exceptions to the rule of contribution for general average, which it is necessary to notice.

When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrongdoer, and, as such, under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompence for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save. *Schloss v. Heriot* (14, C. B. N. S. 59) is the leading English authority upon the point. In that case, which was an action by the shipowner against the owners of cargo for contribution in an average loss, a plea stated in defence, to the effect that the ship was unseaworthy at the commencement of the voyage, and that the average loss was occasioned by such unseaworthiness, was held to be a good answer to the claim by C. J. Erle, and Willes and Keating, J. J.

The second exception is in the case of deck

cargo. The reason why relief by general contribution is denied to the owners of goods stowed on deck, when these are thrown overboard in order to save the cargo under hatches, is obvious. According to the rules of maritime law, the placing of goods upon the deck of a sea-going ship is improper stowage, because they are hindrances to the safe navigation of the vessel; and their jettison is therefore regarded, in a question with the other shippers of cargo, as a justifiable riddance of encumbrances which ought never to have been there, and not as a sacrifice for the common safety. But the owner of deck goods jettisoned, though not entitled to general contribution, may nevertheless have a good claim for indemnity against the master and owners who received his goods for carriage upon deck; and the exception does not apply, either (1) in those cases where, according to the established custom of navigation, such cargoes are permitted, or (2) in any case where the other owners of cargo have consented that the goods jettisoned should be carried on the deck of the ship.

It appears from the proceedings in this suit that the average claims at the instance of cargo owners exceed \$30,000, and that there is a small claim on account of ship. The fault of the master being matter of admission, it seems clear, upon authority, that no contribution can be recovered by the owners of the "Abington," unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them and their shippers. But the negligent navigation of the master cannot, in the opinion of their Lordships, afford any pretext for depriving those shippers whose goods were jettisoned of their claim to a general contribution. They were not privy to the master's fault, and were under no duty,

legal or moral, to make a gratuitous sacrifice of their goods, for the sake of others, in order to avert the consequences of his fault. The Rhodian law, which in that respect is the law of England, bases the right of contribution not upon the causes of the danger to the ship and cargo, but upon its actual presence; and such exceptions as that recognized in "*Schloss v. Heriot*," are in truth limitations on the rule, which have been introduced, from equitable considerations, in the case of actual wrongdoers, or of those who are legally responsible for them. The owners of goods thrown overboard having been innocent of exposing the "*Abington*" and her cargo to the sea peril which necessitated jettison, their equitable claim to be indemnified for the loss of their goods is just as strong as if the peril had been wholly due to the action of the winds and waves.

In support of the legal proposition which they induced the learned Recorder to accept, the Respondents relied upon a passage which is to be found in the original text of Lord Tenterden's work on Shipping (edit. 1881, p.). It is in these terms:—"The goods must be thrown overboard for the sake of all, not because the ship is too heavily laden to prosecute an ordinary course through a tranquil sea, which would be the fault of those who had shipped or received the goods, but because at a moment of distress and danger their weight, or their presence, prevents the extraordinary exertions required for the general safety." It appears to their Lordships that, if Lord Tenterden had really meant to lay down the rule that there can be no contribution for jettison in the case of a ship overladen through the fault of those who received and put her cargo on board, he would have done so in plain terms. What he does say is, that there can be no proper jettison from an over-

laden ship, so long as ship and cargo are exposed to no peril whatever from the action of the sea, but are merely exposed to the inconvenience of being unable to reach their destination in the ordinary course of time.

The authority upon which the Respondents placed their chief reliance was that of Mr. Parsons, who, in his Treatise on the Law of Insurance (Vol. II., p. 285), and also in his Law of Shipping (Vol. I, p. 211), states that "when a jettison is justified by the circumstances in which it takes place, and these circumstances are occasioned by the fault of the master, or his want of care or skill, the jettison would give no claim for contribution; but the owners of the ship would be liable to the owners of the goods jettisoned for the damages caused by the wrongdoing of the master." In both works, the proposition is laid down in precisely the same terms, and the same cases are referred to. These treatises are justly regarded as of great authority in questions of maritime law; but their Lordships are constrained to say that, in their opinion, the text above cited is inaccurate, in so far as it bears that no claim of contribution will arise to the owners of jettisoned cargo in the case supposed, and is unsupported by the decisions upon which it is founded, which, all of them, relate to one or other of the exceptions already noticed.

Upon the question of legal tender, their Lordships are unable to concur in the opinion expressed by the learned Recorder. The correspondence which passed, before the deposit was paid, appears to them to show that both of the parties were exceedingly unaccommodating, and somewhat unreasonable, and that neither of them was altogether in the right.

Their Lordships, even if it had been desirable to decide the second point urged for the Ap-

pellants, are not in a position to do so, because there is no proof and no admission to the effect that, as alleged by them in argument, all the bills of lading for goods shipped in the "Abington" contained the same exception with those produced, of the master's act, neglect, or default in navigating the ship. But this not a suit for recovery of contribution; and the Appellants, if it be necessary, will not be precluded from substantiating their averments in the adjustment of average claims.

The result is that their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and to dismiss the Respondents' action, with costs in the Court below. The Respondents must also pay the costs of this appeal.



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