

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Durantry v. Hart and others (cargo in the "Hamburg") from the High Court of Admiralty : delivered 16th March, 1864.*

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Present :

LORD CHELMSFORD.

LORD KINGSDOWN.

SIR JOHN T. COLERIDGE.

THIS was an Appeal from the Judgment of the High Court of Admiralty, which has been pronounced for the invalidity of a bottomry bond, in so far as it applied to the cargo of the ship "Hamburg;" and the question arose under the following circumstances :—

The "Hamburg" was a schooner of 50 Hamburg commercial lasts. She was proceeding from Nicaragua to Liverpool with a cargo of Brazil wood, gum, indigo and india-rubber, and on the 25th April, 1861, she put into St. Thomas for the purpose of repairing the damage she had sustained on the voyage. On the 9th July the master advertised for tenders for a loan to defray the expenses incurred for the repairs, landing, and reshipping the cargo; and on the 24th July, 1861, executed the bottomry bond in question, whereby he hypothecated the ship, freight, and cargo for the sum of 7,592 dollars, with a maritime interest of  $33\frac{1}{2}$  per cent., the total amount of the bond in English money being 2,154*l.* The ship arrived at Liverpool on the 13th August, 1861; in September proceedings were commenced on the bond; as to the ship and freight no defence was offered, and the bondholder became entitled to the proceeds of these, amounting to 704*l.* 17*s.*; this left a deficiency of 1,449*l.* 3*s.*, for which it was sought to make the

cargo responsible, and that has sold for 895*l*. This sum was the matter in contest; the learned Judge decided against the claim, and the decision is now appealed against.

Two objections were made in the Court below to the claim of the bondholder, and were relied on in the argument on the Appeal. It was urged, in the first place, that looking to the small value of the ship, even when repaired, together with the freight, the master was not justified in incurring expenses which led to the necessity of borrowing so large a sum, but ought to have transhipped the cargo; in the second place, it was contended that considering the circumstances just stated, and some which will presently be added, it was, at all events, the duty of the master, before he incurred these expenses and signed a bond which was to bind the cargo, to communicate, or at least attempt to communicate, with the owners of the cargo in England, and to have waited at least a reasonable time for their instructions.

The facts now to be stated, which in some measure apply to both objections, but principally to the last, are these: The cargo consisted, as has been stated, of Brazil wood, gum, indigo, and india-rubber, articles not of a rapidly perishable nature; it was consigned in different proportions to three separate houses in London; and their Lordships are not prepared to differ from the learned Judge's opinion that the master, if he were ignorant of the addresses of these firms, had the means at St. Thomas of ascertaining them, or one or more of them, or of procuring a letter to be forwarded to one or more of them. The means of postal communication between St. Thomas and England are fortnightly; the "Hamburg" arrived at St. Thomas on the 25th April, and the bond was executed on the 24th July. Mail steamers left St. Thomas for England on the 29th April, 14th and 29th May, 13th and 29th June, and 15th July, and mails for St. Thomas from London were made up on the 2nd and 17th of each of the months of May, June, and July. Had the master, even if he passed over the mail of the 29th April, written by that of the 14th May (which for anything that appears he certainly might have done), he would probably have had an answer by the mail which left England on the 13th June, and might have been expected to arrive at the latter end of that

month; and it appears that the negotiation for the bottomry loan did not commence until the 11th July. It may be added that although the master's conduct is severely reflected on as unauthorized, and wanting in good sense and consideration, no fraud or collusion is imputed to him; indeed, he seems to have acted under advice which by the law of his country he deemed himself bound to be governed by; a circumstance not entirely without significance as a fact, although their Lordships entirely agree with the learned Judge of the Admiralty that the case is to be decided by the general maritime law as administered in England. Lastly, no fraud is imputed to the lender of the money on the bond.

Upon this statement of facts their Lordships have to consider the propriety of the Judgment. The first objection was disposed of by the learned Judge very shortly and without difficulty, and, as their Lordships think, quite correctly. The master was certainly not bound to tranship his cargo; indeed, his first duty was to carry his cargo to its destination in the same bottom, unless under the greatest difficulty. The learned Judge rightly thought that the true force of this objection was not as an independent one, but that the circumstances on which it was rested might have their weight in the consideration of the second; on which, indeed, the Judgment itself, and the argument on the Appeal mainly turned.

This brings their Lordships to the consideration of that objection, and it is impossible for them not to perceive that, in dealing with it in the Court below, it has been considered that it derived whatever weight it was entitled to from the decision of this Committee, in the case of the "Buonaparte," reported in 8 Moore, P. C. C., 459, which it was supposed had introduced a new rule of decision into this branch of Maritime Law. Whether this supposition be correct or not, undoubtedly if in itself that decision was both rightly understood below, and also rightly applied to the circumstances of this case, the learned Judge could only determine the case before him as he has done. The important sentence in that Judgment is to be found in page 473, and is as follows:—  
 "That it is an universal rule that the master, if in a state of distress or pressure, before hypothecating



the cargo, must communicate, or even endeavour to communicate, with the owner of the cargo, has not been alleged, and is a position that could not be maintained; but it may safely, both on authority and on principle, be said that, in general, it is his duty to do so, or it is his duty, in general, to attempt to do so."

This sentence is followed by one which in the Report is printed as follows:—

"If, according to the circumstances in which he is placed, it is reasonable that he should, it was rational to expect that he might obtain an answer within a time not inconvenient with reference to the circumstances of the case; it must be taken, therefore, upon authority and principle, that it is the duty of the master to do so, or at least to make the attempt."

This passage is obviously inaccurate. The Judgment was not written, but appears to have been printed from a shorthand writer's note. It is not, however, difficult to collect what really was said by the learned Judge, and with a slight correction of the text it would stand thus:—

"If according to the circumstances in which he is placed it be reasonable that he should—if it be rational to expect that he may obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt."

That this is the true wording of the passage we have ascertained by communicating with the Lord Justice Knight Bruce, who delivered the Judgment, It is a most important passage, and the complement and explanation of what goes before. The preceding sentence states that it is the duty of the master in certain circumstances to make or attempt to make the communication, and this sentence explains what the circumstances are in which this duty is imposed upon him. It shows what the learned Judge understood by the expression "in general," if such words were used by him. The Reporter has accurately stated in his marginal note the general rule established by the decision, though he has unfortunately omitted to correct the Press

in that portion of the Judgment in which it is expressed.

In the rule thus enunciated their Lordships are unable to discern any novelty, either in the principle on which it rests or in its application to the case of the hypothecation of the cargo of a ship by the master.

The character of agent for the owners of the cargo is imposed upon the master by the necessity of the case, and by that alone. In the circumstances supposed something must be done, and there is nobody present who has authority to decide what shall be done. The master is invested by presumption of law with authority to give directions on this ground—that the owners have no means of expressing their wishes. But when such means exist, when communication can be made to the owners, and they can give their own orders, the character of agent is not imposed upon the master, because the necessity which creates it does not arise.

It is clear that the rule as to communication must be either that, in no case and under no circumstances, is it incumbent on the master to communicate with the owners of the cargo; or that, in some cases, and under some circumstances, it is incumbent on him so to do: either the universal negative or the particular affirmative proposition must hold, and both cannot be true, although one must be. But it has not been contended, and cannot reasonably be argued, that the first proposition is true. Where the cargo belongs to a single individual, known to the master, the ship in a port in the same country, or near to it, in which that owner is resident, the means of communication sure and speedy, the probable delay inconsiderable, the cargo not of a perishable kind, the money to be borrowed so large as to be sure to bring it within the operation of the bond, it could not be contended that the master could properly hypothecate it for the repairs of the vessel without first communicating with the owner. Equally clear it is that, where all these circumstances were reversed, no such duty would be incumbent on him. But if the first proposition be false, and the latter true, what is in effect the practical conclusion, but that the question whether a master must communicate or not, is one which can only be decided

by the circumstances in each particular case? And this, which certainly seems consistent with the principle on which, as we have already observed, the maritime law makes the master, under certain circumstances, an agent for the owner in respect of the cargo, their Lordships believe to have been recognized by Lord Stowell in the case of the "*Gratitudine*." This was not the precise point for decision in that case; but no one can read that admirable Judgment attentively without perceiving that the duty of communication with the owner of the cargo before hypothecation under circumstances, and dependent on circumstances, was familiar to the mind of the great Judge who decided it.

Thus in 3 Ch. Robinson, page 259, "There are other cases also in port in which the master has the same authority forced on him. Suppose the case of a ship driven into port with a perishable cargo, *where the master could hold no correspondence with the proprietor*; suppose the vessel unable to proceed, or to stand in need of repairs to enable her to proceed."

Again, page 261, Suppose the cargo to be not instantly perishable, but that it can await the repair of the ship, what is the master to do in the situation before described, being a stranger in a foreign port, in a state of distress, *without an opportunity of communication with the owners or their agent*—what is his duty under such circumstances?

Again, page 262, It cannot be said that he is *in all cases* to wait till he hears from a distant country. The repairs may be immediately necessary; it may be hoped that the repairs will be far advanced before he can hear from the consignees. The master may not know the proprietors at all, but only the consignees; they may be mere consignees and have no power to direct him, but in the single case of an actual delivery to them; if owners, they may be very numerous, for in a carrier ship there may be a hundred owners of the cargo, and the master may be in danger of receiving a hundred different opinions, supposing it were possible for him to apply to all: what does the necessity of such a case offer to be done?

Again, page 266, he answers an extreme case, put at the Bar, of a valuable ship with a cargo of a considerable value belonging to Dover, being in



distress at Calais, and says, "Undoubtedly the master should use his utmost endeavours to correspond with the consignees or proprietors; but a *case of instant necessity* might occur even so near, the master might not be *able to receive their directions*; all communication might be interrupted, as it is sometimes for a fortnight or three weeks."

That the rule laid down in the case of the "Buonaparte" was properly applied in that case, no person who attends to the facts can entertain any doubt. There may be more doubt in the present case, but the learned Judge has examined the evidence with great care, and appears to us to have arrived at a right conclusion.

As to the supposed inconvenience of the rule, their Lordships do not forget that the lender of the money is the party interested in the event of the suit, and not the master. But there is no hardship in requiring from one who is about to advance a large sum of money under such circumstances, that he should inquire of the master whether he has communicated or made an attempt to communicate with the owners the circumstances of his distress, and what he proposes to do in regard to their goods.

And it must be remembered, on the other hand, that the owners of the goods are equally interested, and, unless communicated with, have not the same means of protecting their own interests, which the lender undoubtedly has. If it be said that a decision in their favour will tend to increase the difficulty of procuring loans in foreign ports for the repair of vessels in distress, it may also be said, on the other hand, that it will tend, very much to the benefit of commerce in general, to discourage improvident or fraudulent advances.

Their Lordships will humbly recommend to Her Majesty that this Judgment be affirmed, and the Appeal dismissed with costs.

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