Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Owners of the "Norway" v. Ashburner (ship the "Norway"), from the High Court of Admiralty; delivered 20th July, 1865.

Present:

LORD JUSTICE KNIGHT BRUCE.
SIR JOHN TAYLOR COLERIDGE.
SIR EDWARD VAUGHAN WILLIAMS.

THIS is an Appeal from a Judgment of the High Court of Admiralty in a suit instituted under the 6th section of the Admiralty Court Act, 1861 (24 Vict., cap. 10), by which it is enacted that "the High Court of Admiralty shall have jurisdiction over any claim of the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of, the owner, master, or crew of the ship, unless it be shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales."

The Plaintiff sued, under this section, as the assignee of bills of lading.

The Defendants are the owners of the "Norway," an American vessel; and Plaintiff's petition complained (*inter alia*) that the master of the "Norway" wrongfully threw overboard part of the rice comprised in the bills of lading, and wrongfully sold a further part of the rice at the Mauritius. And, further, that on the arrival of the ship at Liverpool the master wrongfully demanded to be paid 6,500*l*. as freight, and an additional sum of 1,000*l*. by way of general average contribution as a condition pre-

cedent to the delivery of any part of the cargo, and refused to deliver the cargo on any other terms. The petition contains other complaints as to the master of the "Norway" refusing to discharge at the docks at which he was directed to discharge, and also as to improperly dealing with the cargo in other respects after arrival in Liverpool. But it is unnecessary to do more than state that the petition contained such complaints; because the Judge of the Admiralty Court decided that they were ill-founded, and the Plaintiff has not appealed from that decision.

The Defendants' answer denies many of the allegations of the petition, and justifies the jettison and sale of portions of the rice on the ground that it became, by reason of the perils of the seas, necessary and proper for the preservation of the ship and cargo to throw part of the rice overboard, and to sell another part which had been greatly damaged by salt water.

To this part of the answer the Plaintiff replies merely by denying the averments contained in it.

The answer concludes by praying that the Judge will dismiss the petition with costs, and will decree that the Plaintiff should pay to the Defendants the balance of freight and general average due to the Defendants, and interest thereon.

The learned Judge below, in a most elaborate, lucid, and able Judgment, has gone through all the points arising in the cause which ought to decide the claims of the parties. And we think we cannot do better than to follow his Judgment, and state in what respects we agree with and in what respects we differ from him.

The first question is, what is the meaning of a guarantee in the charter-party that the vessel shall carry 3,000 tons dead weight upon a draught of 26 feet water? And the materiality of this question arises from this, that she could carry the specified quantity on the specified draught in salt water, and could not in fresh. Does the guarantee then apply to salt water only, or to water fresh as well as salt? We think it applies to water fresh as well as salt. We think the learned Judge below was right in inferring from the charter that in settling the stipulations as to the capacity and draught of the ship, both parties contemplated that the cargo might be loaded in a river, and that the

guarantee meant that the vessel should be capable of carrying 3,000 tons on a draught of 26 feet during the whole time of taking in, and until and after she reached the open sea.

The next question is, whether the jettison of a portion of the cargo, and the sale of the damaged portion of it, have been sufficiently shown to have been the consequence, legally speaking, of negligence or want of skill on the part of the pilot, for which the shipowner is responsible. It was objected, on the part of the defendant, that even supposing that the grounding of the "Norway" was properly attributable to the misconduct of the pilot, yet that the injury thereby sustained by the vessel was not either the *causa proxima* or *causa causans* of the jettison or sale, inasmuch as it appears that the leak thereby occasioned would not, in fact, have rendered the ship unseaworthy, but for the tempestuous weather, which occurred some time after the "Norway" had proceeded on her voyage, and, moreover, that the damage to the rice sold, which necessitated the sale of it, would not have happened but for an accident to the steam engine, which rendered it useless in working the pumps. It is, however, unnecessary, in the view we take of the case, to express any opinion as to this contention, because we have come to the conclusion that there was not sufficient evidence that the grounding of the vessel was occasioned by any misconduct on the part of the pilot. The evidence on which the learned Judge in the Court of Admiralty relied as leading to the conclusion that the grounding was caused by negligence or want of skill in the pilot is merely, or mainly, the expression of the opinions of Captain Ward, Captain Dicey, and Mr. Duncan, that a pilot of ordinary skill and ordinary prudence might have safely navigated such a vessel to the sea. This testimony does not go further, in our opinion, than to show a reasonable possibility that the grounding may have been caused by want of skill or want of prudence on the part of the pilot. But there is no evidence given, and no suggestion made of any conduct of the pilot which amounted to such want of skill or of care. The ship was of large size and loaded as heavily as she could bear. It was necessary, under the circumstances, to let her drop down the river stern foremost, and a steamer of 60-horse power, which was

not powerful enough to tow her down, was made fast to her alongside for the purpose of sheering or canting her so as to keep her in the stream, and the grounding took place while the steamer was thus employed. The master and the mate were not asked whether there was any impropriety in thus navigating her. The witnesses on both sides agree that the tide ran very strong (although there is a conflict of testimony as to the amount of its velocity). No suggestion is made on the cross-examination of the master or the mate of anything done or omitted by the pilot which he ought not to have done or omitted, and the master swears that the steamer could not hold the ship against such a current, and that the navigation appeared to him very difficult in that current with so large a ship. And it seems to us impossible to affirm with reasonable certainty that such a vessel so navigated might not have grounded from some cause which reasonable skill and prudence on the part of the pilot could not prevent. The Plaintiff was bound to prove affirmatively, and not merely by way of conjecture, that the vessel grounded by reason of the pilot's want of skill or want of care, and we can find no such proof in the evidence he has adduced. It may be added that the silence of the Petition as to any imputed negligence affords some ground for the Defendants' complaint, that this imputation took them by surprise, so that they were not prepared with the evidence of the pilot.

The next question is whether, in respect of the rice jettisoned and that which was sold, there ought to be a deduction from the lump freight because they were not delivered. We think that there ought to be no deduction. It is obvious that this question stands on a somewhat different footing from that on which it stood when it was decided by the learned Judge below, because it was then taken for granted that the jettison and sale, and consequent failure to bring home the goods, were owing to the misconduct of the master. But in the view we take of this part of the case it must be understood that they were owing to the perils of the sea, and that the master was free from blame in the matter. Although the lump sum is called "freight" in the charter and bills of lading, yet we think it is not properly so called, but that it is more properly a sum, in the nature of a rent, to be paid for the use and hire of

the ship on the agreed voyages. The charter-party expresses that a sum of 11,250*l.* is to be paid as freight for the "use and hire of the ship," and this lump sum is to cover both the outward and homeward voyages, without any distinction as to how much of it is to be attributed to the outward and how much to the homeward voyage. If this be so, the shipper has had the full consideration for the money agreed to be paid. The ship took out the salt, and received the rice on board, and performed her homeward voyage according to her engagement, and the event that by the act of God it became impossible to carry to the port of destination the rice jettisoned and the rice sold ought not to affect the shipowner's right to receive the full amount of the stipulated payment. It was objected, on behalf of the Respondent, that, by the charter-party, the remainder of the lump sum is made payable only on "true and final delivery of the cargo at the said port of discharge." But this does not necessarily mean that the whole cargo originally shipped must be delivered. It may well have been intended merely to fix the time for payment to be the time of the delivery of such cargo as the ship brings with her to the port of discharge. And it should be observed that the "one-third in cash" is made payable "on arrival at the port of delivery," without any reference to the cargo the ship shall bring with her. It is right to add that we do not mean to express an opinion, that even if the jettison and sale had been attributable to the negligence of the master there ought to have been a deduction. Perhaps in this case the proper remedy of the shipper would have been by a cross action. But it is not necessary to decide this point which does not now arise.

The next question is whether the Plaintiff has a well-founded claim for damages against the Defendants for the non-delivery of the cargo; and this depends on the question whether the Plaintiff was excused by the conduct of the master from making a tender of the freight for which the cargo was liable.

We have felt considerable difficulty on this part of the case. It is clear that the master claimed more than was due to him. But it was conceded that this alone would not dispense with the tender. If, however, the demand of the larger sum was so made that it amounted to an announcement by the master that it

was useless to tender any smaller sum, for that if tendered, it would be refused, that would amount to a dispensation with any tender, generally speaking. And in the present case, the Judge of the Court of Admiralty having come to the conclusion of fact, that the demand was made under such circumstances that it did amount to such an announcement, we see no reason for dissenting from the conclusion he has so drawn. But our difficulty is, that in this case there is positive evidence, in our opinion, that the Plaintiff had resolved not to tender the amount unquestionably due; for his proposal was to pay a certain amount of the freight claimed, and to deposit the residue with a banker, as being a disputed portion. Now this residue was an amount to cover the whole of the alleged short delivery of 300 tons at Rangoon, where 2,700 tons had been shipped instead of 3,000 tons; whereas, the learned Judge below was of opinion that the Plaintiff had no claim for deduction in respect of even so much as 100 tons, and against this part of the Judgment there is no appeal. Consequently, it appears that the Plaintiff meant that his tender of money to the master should not cover a portion of the claim which has turned out to be due.

However, we are not prepared to hold that this varies the ordinary rule which we have stated as to dispensing with the tender altogether by announcing that it will be useless to tender anything less than the wrongfully large amount insisted on.

That the sum insisted upon in this case was wrongfully large, we think is plain; for without entering into the question whether the Plaintiff was wrong in claiming the full lump sum, the claim of 1,000*l*. for general average was altogether unfounded, as will appear when the estimate on which this claim is based is narrowly examined.

The amounts which according to the Master's estimate formed the subject of general average, were—

	£
For expenses incurred by him at the Mauritius	1,530
For loss on the cargo jettisoned and sold ..	1,200
Making a total loss, as the subject of general average, of	2,730

This amount had consequently to be apportioned between the ship, freight, and cargo.

Then the master values the ship at 10,000*l.*, and the freight he takes at 7,000*l.* then due.

The cargo he estimates at 10,000*l.*, which seems reasonable, for although the cargo sold for 20,000*l.*, yet deducting the freight and the landing charges and assorting charges, &c., the balance would probably not be much more than 10,000*l.*

Assuming, therefore, the values to be correct, there is a total of 27,000*l.*, on which has to be apportioned the total of the losses, forming the subject of general average, viz., 2,730*l.*

By the Rule of Three this will give the proportions payable by the ship, freight, and cargo as follows:—

	£
Ship	1,011
Freight	708
Cargo	1,011
Total	2,730

In other words, the owner of the ship, who is also the owner of the freight, has to pay as his proportion towards general average:—

	£
For the ship	1,011
„ freight	708
	1,719

But his losses, which form the subject of general average, are only 1,530*l.*, so that the amount payable by the owner of the ship and freight as his contribution to general average, is the difference between these two sums, or 189*l.* On the other hand, the owner of the cargo has to pay as his proportion 1,011*l.*, but his losses have been 1,200*l.*, so that he has to receive 189*l.* to make up the losses on account of general average sustained by him.

The general average account would then be balanced by the owner of the ship paying to the owner of the cargo the sum of 189*l.* If this be so, then upon the master's own estimate of general average there was nothing due to him by the owner of the cargo on account of general average, but, on the contrary, he owed the owner of the cargo a sum of 189*l.* on this account.

Being then of opinion that the peremptory claim for general average brings the case within the rule as to dispensation with the tender, it is unnecessary to

consider the other ground on which the Judge below came to the conclusion that the conduct of the master had exempted the Plaintiff from the obligation of making a tender.

It remains to be considered whether the Plaintiff has a right to deduct "address commission" from the freight. The contest in the Court below appears to have been confined to the question whether, by custom, the holder of a bill of lading comprising the whole of the cargo has a right to deduct the address commission from the freight, and the learned Judge referred this question to the Registrar and merchants. But in the argument before us the contention was that assuming the custom to be so, the address commission was never earned, inasmuch as Bushby and Co., to whom the ship was addressed as the agents of the shipper, refused to accept the ship as agents, and never acted for the ship at all; but that Taylor and Co. acted as agents of the ship for the Defendants, who will have to pay them for so doing. Under these circumstances, we think the reference to the Registrar and merchants ought to be enlarged by leaving it to them to inquire whether the Plaintiff, by his agents, so acted on the ship's behalf as to entitle him to the address commission.

The last question to be considered is whether the claim for damages for non-assortment can be supported.

An objection to this claim was taken on behalf of the Appellants, that there is no mention of it in the Petition. The answer made to this objection is that this cause of complaint did not arise till after the Petition was filed; an answer by no means satisfactory.

But upon the merits of this question we think the Plaintiff fails. We do not understand why he did not avail himself of the power conferred by the Statute 25 and 26 Vict., cap. 63, s. 67, to enter and land the goods himself. If he does not, but allows the master to do so, is the master bound to take steps to have the goods assorted, if the owner of the goods requires him so to do? If the master were to give orders for it, he would, we apprehend, render himself liable for the expenses of the assortment. No doubt the law is that such a bailee is bound to take as good care of the cargo as a prudent owner would have taken; but we have never heard

of any case where the bailee was held to be bound to incur a pecuniary liability to procure an advantage for the subject of the bailment. His duty, we think, does not go beyond safe custody and protection from injury or damage.

We therefore think that this claim cannot be sustained.

According to our opinions on the various points arising in this case, the freight due to the owners of the "Norway" is the sum contracted for by the charter, less the following deductions :—

1. The advances;

2. Address commission (if found in favour of the Plaintiff by the Registrar and merchants);

3. The proportion of freight forfeited for breach of the guarantee in the charter-party as to the capacity and draught of the vessel.

It should then be referred to the Registrar and merchants to take an account and ascertain the nett payment due on the principles we have stated, taking into account the amount which has been paid on account of freight by the Plaintiff during the progress of the cause.

On the other hand, in our opinion, the Plaintiff, under the provisions of the Admiralty Court Act, 1861, is entitled to be indemnified for the loss of interest in respect of the wrongful withholding of the cargo, and to the claim for insurance and interest, but to nothing more.

Therefore the Registrar, with the assistance of the merchants, will have to ascertain the balance due, and to report to the Court whether any interest, and if so what, is properly due on such balance; and we shall humbly recommend Her Majesty that judgment shall be given for the balance and interest thus ascertained. And that there shall be no costs on either side, either in the Court of Admiralty or here.

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