Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Droege v. *Stuart and Simpson, from the High Court of Admiralty (ship "Karnak"); delivered 15th July*, 1869.

Present:

MASTER OF THE ROLLS.
SIR WILLIAM ERLE.
SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.

UPON this Appeal two questions have been raised; the first relating to the cargo, the second to a part of the freight.

As to the cargo, the question is, whether the circumstances in which the ship is shown to have been placed, created a necessity for hypothecation? In the Court below the answer was in the affirmative; and, in his Judgment there, the learned Judge carefully examined all the evidence and all the authorities in the Admiralty Courts relevant to the case, and their Lordships now agree in the conclusion which was there arrived at in respect of the cargo, and consider that any detailed examination of the arguments adduced here on behalf of the Appellants is rendered unnecessary thereby; but they add a reference to some common law cases containing principles confirmatory of the decision in the Court below.

In Lloyd *v.* Guibert (6 Best and Smitt, 100 and 120), the extent of the authority conferred on the captain by his appointment to bind the interest of the owner either of the ship or of the cargo, and the principles on which the limits of that authority are to be ascertained are laid down by Blackburn, J., in the Queen's Bench, and by Willes, J., in the Exchequer Chamber.

There the captain of a French ship had hypothecated ship, freight, and cargo, and the owner of the cargo sued the shipowner to indemnify him for the loss occasioned thereby; and it was decided that he could not recover, because by the law of France the captain cannot make the shipowner liable for more than the value of the ship and freight, and as the owner had abandoned both, he was exempt from farther liability. It was there laid down that the captain's authority is derived from and bounded by the municipal law of a country to which the ship belongs,—that is, by the law of the flag; and Willes, J., delivering the Judgment of the Exchequer Chamber, answers an argument, founded on the supposition of a general maritime law, contradistinguished from the municipal law of this country, by refusing to recognize the existence of a maritime law in that sense.

In accordance with the principle thereby laid down, their Lordships consider that the existence of the necessity which validates the hypothecation of cargo by bottomry is to be ascertained by evidence in the usual manner; and that the meaning of the term necessity, in respect of hypothecation by the master, is analogous to its meaning in other parts of the law. This meaning has been the subject of much discussion in Westminster Hall (see R. *v.* Winsor, 1st Law Reports, Q. B., 384); it has been described as a high degree of need; a need which arises when choice is to be made of one of several alternatives under the peril of severe loss if a wrong choice should be made.

In the case of a voyage it is probably correct to say that any alternative for the captain is better than total loss of ship and cargo, and that he is under a necessity of choosing another alternative, if any should be possible; and in respect of bottomry, any combination of events which would prevent the completion of the voyage with profit, unless money should be obtained by bottomry, would raise the question whether there was need for bottomry in such high degree as to create a necessity. These remarks are made in answer to some arguments offered to us founded upon cases supposed to decide that a bottomry bond would in all cases be void on account of the absence of necessity if the repairs were completed before the bond to

raise money to pay for them was given or contracted for, or if there was no communication with the owner of ship or cargo before the bottomry bond was given. The effect of any such fact cannot be appreciated without taking it in combination with the concomitant facts. If the repairs were complete, but the ship could not leave the port until they were paid for, the completion of repairs would be an immaterial fact in estimating the degree of need for bottomry. If the creditor could sell the ship in case of non-payment, the sale would be a total loss of the voyage for the ship, and the learned counsel for the Appellant failed to show either any duty on the captain in case of such sale, to land, warehouse, and tranship the cargo, or any possibility thereby to realize any profit for the freighter. So in respect of communication with the owner either of ship or cargo, the possibility of so doing must be construed by estimating the cost and risk incidental to the delay from the attempt to make such communication, and the probability of failure after every exertion should have been made.

The effect of any single fact upon the prospect of prosecuting the voyage with profit varies in endless permutation, according as some other fact forms a part of the combination of events which the captain has to consider in deciding whether there is a necessity for bottomry; and, as we before observed, we concur with the learned Judge in the Court below in thinking that such necessity was shown to exist in this case, although the repairs were completed before any proposal for the bond was made by the captain, and although the attempts to communicate with the owner of ship or cargo were not carried further than appeared by the evidence.

Then as to the second ground of Appeal relating to the sums borrowed by the captain from the charterer at the port of loading, viz., 632*l.* 14*s.* 2*d.* cash advanced, and 61*l.* 6*s.* 9*d.* interest and insurance thereon, the question between these parties is, whether the sums were to be repaid in any event or only by deduction from the freight if freight was earned. The charterer, on signing the charter-party, incurs a liability for the chartered freight which becomes a debt in case of safe delivery of cargo, and the captain, for the ship-owners, frequently obtains advances as well on account of this

liability, whether stipulated for in the charter-party or not; as on the personal security of his owners: in either case they are loans; in the one case they are advances of freight, in the other case they are debts from the borrower. The distinction is at times material, because if they are advances of freight, the lender has an insurable interest in an advance which is to be lost if freight is not earned, but he has no such interest in an absolute debt.

In the present case, advances are not stipulated for in the charter-party, but were obtained by the application of the captain to the charterer, and both he and the charterer state that they were advances of freight, and the receipts for the advances are so expressed as that, if effect is given to those parts of them relating to insurance, they are decisive to show that the sums obtained were advances of freight, to be repaid by deductions from freight, if earned; and if not earned, then to be lost by the charterer, unless he should have used the stipulated premium in insuring. We consider Hicks *v.* Shield (7th Ellis and Black., 638), to be an authority for this construction. On these grounds, as between the charterer and the shipowner, their Lordships come to the conclusion that the sums obtained, viz., 632*l.* 14*s.* 2*d.* cash advanced, and 61*l.* 6*s.* 9*d.* for interest and insurance thereon; together, 694*l.* 0*s.* 11*d.*, were advances of freight.

Then as between the holder of the bottomry bond and the charterer is the nature of the transaction changed?

Does the captain, by hypothecating the chartered freight to the obligee in bottomry, give a right to more freight than he, as obligor, had a right to demand from the charterer?

The learned Counsel for the Respondent adduced no authority in support of the proposition that the assignee took by assignment what the assignor had no title to. The case of the last bottomry bond taking precedence of prior bottomry bonds, stands on the known incidents to a loan on bottomry; and no such incident has been shown to be attached by known course of law to advances on account of chartered freight. But, on the contrary, in Parson's Maritime Law, America, 429, it is stated that a general hypothecation of freight includes freight whether earned or not, "provided it has not been

paid to the master or owner." He refers to the "John," 3 William Robinson, 170, where the advance was stipulated for by the charter-party, but we consider that the same principle applies to any *bonâ fide* arrangement without fraud for forehand-payment or discharge before the bottomry is required.

The learned Counsel also used as an argument the policy of the law in making bottomry a good security, but it must not be made a good security by violating the rights of others. It is a good security in this case, as the cargo must pay if the prepaid freight is exempt. The lender on bottomry had the opportunity for knowing what advances had been made on account of freight, as they were indorsed on the charter-party, which he might have seen, and there was no ground for imputing fraud.

For these reasons, their Lordships will recommend that the Judgment in the Court below should be reversed, in so far as it relates to the sums claimed as advances of freight, and for interest and insurance thereon.

There remains the sum of 33*l.* 18*s.* 4*d.*, claimed as commission due by usage for obtaining the charter; and, according to such usage, to be paid by deduction from freight, if earned. But as to this sum, the statements in the evidence do not convince their Lordships that the Appellant had the right to deduct it from the freight as against the holder of the bottomry bond; and they do not further examine into the right to this sum because as between these parties no interest depends upon the right thereto.

Their Lordships will therefore recommend to Her Majesty to affirm so much of the Judgment of the Court below, as affirms the liability of the Appellants as owners of the cargo to the holder of a bottomry bond, and denies the right of the Appellants to deduct the sum of 33*l.* 18*s.* 4*d.* from the freight for commission; and to reverse so much of the Judgment as relates to the refusal to allow, as deductions from the freight to be paid to the Respondent, the above-mentioned sums which their Lordships consider to have been advances of freight. There will be no costs of appeal on either side.

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