Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Joseph Nicosia, agent for the Compagnie des Messageries Maritimes, v. *Litterius Vallone from Her Majesty's Court of Appeal, for the Island of Malta and its Dependencies; delivered 8th June* 1877.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS case has given rise to a great deal of litigation in Malta, of a somewhat complicated character, and extending over a considerable period of time; but their Lordships, on a careful consideration of the case, do not regard it as attended with any serious difficulty.

The facts necessary for understanding the judgment are these. In 1856 Vallone entered into an agreement with the Company now represented by the Appellant, whereby he was entitled to make certain charges for the conveyance of goods of the Company under different circumstances in his lighters. It appears that in some cases he had made charges which the Company considered to be in excess of those to which he was entitled under the contract, to the amount of 80 centimes per ton. They, in consequence of this, determined to put an end to the contract in the Autumn of 1863, and also to sue him for the amount which had been overpaid by them, as they alleged, under the contract. But before proceeding in the action they availed themselves

42299. 100.—7/77. Wt. 3458.

of the process to which they were entitled by the law of Malta. Under article 846 of the laws of organisation it is provided that "Every person is allowed, without the necessity "of any previous sentence, to secure his rights "by one or more of the following precautionary "acts, which shall be issued and carried into "effect under the responsibility of the party "applying for the same, provided the conditions "prescribed by these laws shall have been "fulfilled by that party." One of those precautionary acts is the seizure of property by way of pledge, and a warrant of seizure was obtained by the Company from the Commercial Court on the 27th of August 1863, whereby the lighters of the Respondent were seized. The action against him proceeded, and finally judgment was given against the Company, on the ground, as far as their Lordships understand it, that the Court, without actually construing the contract, thought that the interpretation of it was not so clearly in favour of the Company, but that the Defendant Vallone might possibly have understood that he was entitled to make the charge; and under those circumstances they declined, the money having been actually paid, to order it to be refunded. Vallone then brought a cross action against the Company, in which he claimed payment by them for work done during a subsequent period at the higher rate, they not disputing that he was entitled to payment at the lower rate. The Court in that action construed the contract against Vallone, and gave him only the sum of 200*l.*, which was that to which he would have been entitled under the lower rate of charges. So far the case stands thus: Vallone had received some 2,000*l.* more than he ought to have received under the contract, but the Company had failed in the action brought to recover it back from him.

The seizure took place, as before observed, on the 27th of August 1863, and the lighters remained in the custody of the law for nearly nine months, being released on the 23rd of May following. Vallone applied to the Court, soon after the seizure was removed, to appoint referees for the purpose of ascertaining to what extent the lighters had been deteriorated during the time they were under seizure, and the referees made two reports, whereupon he proceeded by citation, and thereby claimed the amount of deterioration found by those reports, which would appear to be, on the whole, (together with certain law costs,) a sum of 434*l.* 15*s.* He also, about the same time, took another form of proceeding, which by the law of Malta it appears that he was entitled to take contemporaneously; namely, that by libel, and in his libel he claimed damages to a much greater extent and on different grounds. He claimed general damages on account of his credit being ruined; and damage for, amongst other things, the loss of a marriage, and humbly prayed, "that this Court do declare and "decide that the Defendant nominee is bound to "make good to the exponent all the damages "caused by him, whether directly or indirectly, "by the warrant;" and, "that this Court do "declare that the said damages," (that is, all the damages caused directly or indirectly,) are such as he states in certain prospects. The Commercial Court, on the same day, namely, the 9th of November 1865, gave judgment in both the actions, that begun by way of citation, and that begun by way of libel. The judgment on the claim by way of citation is to be found at page 183 of the Record, and it concludes in this way:—"Decided for the exclusion of "the demands of the party citing, contained in "the first paragraph of his citation, as far as the "same refer to the damages resulting from the

" two reports of the referees annexed to the same " citation, with costs. Decided for the rejection of " the demands of the party citing, regarding the " condemnation of the party cited to pay him " 159*l.* 7*s.* 9*d.* and for 162*l.* 11*s.* 11*d.*"—the sums stated in the two reports. The ground of this rejection appears in a previous part of the judgment, wherein the Court observed that they considered those damages were not such as the Defendant could be compelled to pay, because they found that Vallone might have kept the vessels in repair, and might have affreighted them if he had chosen during the time the warrant was in force. In the other action, commenced by way of libel, there is another judgment of the 9th November 1865, to some extent different in character, wherein it was held that the Company in issuing the warrant did not act maliciously, but at the same time were so much in fault as to be liable to pay the damages which directly resulted from their act, and which they could have reasonably foreseen. Accordingly this judgment decides " that the Defendant nominee " do make good to the Plaintiff only the damages " which in the above-stated sense will be held as " being the immediate and direct consequence " of the said warrant, and which will be held as " having been foreseen by the Defendant, saving " to declare what the said damages consist in, the " sum due, and to appoint referees, and to decide " on all other demands of the Plaintiff, and on " costs, after that the present sentence shall have " become absolute, unless the contending parties " shall have taken further proceedings."

These two judgments were affirmed by the Court of Appeal. The first is affirmed in general terms. The second appellate judgment of the 28th November 1866 contains the following recital:—" Whereas the liqui- " dation of damages which are said to have

" been caused by the unjust execution is to " be made at the discretion of the Judge, " not only for what regards the loss as " really sustained, but also for what regards the " profit of which the damaged party was de- " prived, taking into consideration the nature " and the circumstances of the facts which " caused the said damage, as well as the nature " and the circumstances of the loss and of the " profit. And whereas, therefore, no rule can " be laid down for the said liquidation, though " undoubtedly there is no reason in the rules " given why the sentence appealed from should " not be observed in the said liquidation, and " regard should not be had to the greater or " smaller, to the nearer or more remote con- " nection with the act wherewith the damages " were caused to the degree of fault imputable " to the party suing, and to all the circum- " stances of the case." Then it decides, "for " the confirmation, in the foregoing sense, of the " sentence given by Her Majesty's Commercial " Hall on the 9th of November 1865, with " regard to the heads definitely decided upon " and appealed from by the Plaintiff, it being " understood that, for the liquidation of the " damages therein mentioned, proceedings shall " have to be taken on the rules here above " given." Upon this the Court below pro- ceeded with the cause; and although we have no direct information what actual proceedings were taken, we collect them from the judgment which was given by the Commercial Court on the 21st February 1867. That judgment recites the judgment of the Court of Appeal, and what are the damages claimed by the Plaintiff, and then proceeds to say, " Whereas, " in consequence of the facts of the case in the " parts not as yet decided upon having been " sufficiently cleared up in the additional written

" pleading, the appointment of referees becomes " useless. Decides that the Defendant is not " bound to pay the Plaintiff any sum of money " for damages for the causes stated in the libel, " it not having resulted from the more full " instruction of the case that the Defendant is " responsible for those damages if even they do " exist, and that therefore there be any room " for their liquidation as demanded, and for the " condemnation of the Defendant: It therefore " rejects the demands not yet decided upon, " which are contained in the libel of the said " Plaintiff, with costs."

It appears, therefore, that the Commercial Court, acting under the instructions of the Court of Appeal, had some further pleadings, and took some further evidence in this case; and finally came to the conclusion that the Defendant was not bound to pay to the Plaintiff any sum of money for the damages claimed in the libel, those damages being stated in the terms which have been read, namely, direct and indirect, in fact all the damages of every description which the Plaintiff was then able to claim.

This judgment was affirmed *in toto* by the Court of Appeal; and it might, as their Lordships think, have been reasonably expected that the litigation would there have terminated. However, on the 17th of April 1868, the suit was commenced, which is the subject of the present appeal, and which their Lordships regard as essentially a new suit, and in no proper sense a continuation of the former suit. The libel puts forward a totally new cause of action, viz., the putting an end to the agreement of 1863, a cause of action apparently quite unfounded, and scarcely noticed in the subsequent proceedings, and asserts new claims for damages for the seizure of the lighters. One of the prospects is in these terms: " At the

" epoch of the warrant of seizure of the " 27th of August 1863 Vallone owned the said " 40 lighters and three water-tanks, which he " had bought for 3,411*l.* 13*s.* 4*d.*, partly in cash " and the rest at the rate of 500*l.* a year; and " he only remained a debtor in 1,000 scudi " (83*l.* 6*s.* 8*d.*) He then had a large credit, " and from the lighters alone he gained in one " year 1000 dollars. Owing to the warrant " of seizure he could not make any more gain; " he had to suffer the auction of the said " lighters, which did not suffice to cover the " consequences of that warrant, and he conse- " quently lost those lighters, which were only " subject to 500*l.*, and therefore of a net value of " 3,911*l.* 13*s.* 4*d.*;"—this claim, being explained, means that in the year 1867, more than three years after the seizure, and after the withdrawal of the seizure by the Defendants, a creditor of Vallone, named Messina, seized the lighters in execution for a debt, whereupon they were sold; and the Plaintiff seeks to recover the difference between what he alleges that he gave for them and what they sold for. That is the whole of the new claim which was relied on in the argument of the Appeal, and to which it is necessary now particularly to refer.

This action was dealt with, first by the Commercial Court, and secondly by the Court of Appeal. The Commercial Court gave this judgment upon it on the 30th June 1868:— " Whereas, if even the sentences of this Court, " the one given on the 9th of November 1865, " confirmed by Her Majesty's Court of Appeal " on the 28th of November 1866, and the other " one of this same Court given on the 21st " February 1867, and confirmed by Her Majesty's " Court of Appeal on the 8th of January 1868, " which have now become absolute, were no " obstacle to the demands made by the Plaintiff

" in his libel, still it would always have to be held " that the damages which the Plaintiff claims " from the Defendant are not due to him, " because, with regard to some of them, it was " not proved that they ever did exist, and " because, with regard to others, they are not a " more or less immediate and direct consequence " which might have been foreseen of the warrant " of seizure, owing to which the Plaintiff pre- " tends to have suffered the damages."

In their Lordships opinion this judgment is right. It is quite unreasonable to suppose that the Company, who issued a warrant on the 27th of August 1863, which remained in force some nine months, when the Plaintiff was entitled to take back his lighters, could have foreseen that three years after he would be in debt to some creditor, that that creditor would bring an action against him, and would take these vessels, and that they would be sold under an execution. It appears to their Lordships that the Court is manifestly right in holding this damage too remote, and one which could not have been reasonably foreseen.

Holding that view, it is not necessary for them to decide upon the other question—which is not, indeed, decided but referred to by the Court,—namely, whether this matter was *res judicata*. There had been a claim for all damages direct and indirect, which had been found against the Plaintiff; and it does certainly seem to their Lordships that great inconvenience would arise, and the maxim " Interest reipublicæ " ut sit finis litium " would be in a great degree contravened, if persons were allowed to bring any number of actions, at any length of time from the supposed cause of grievance, on the allegation that the damage complained of had arisen since the prior actions had been brought.

This judgment was affirmed by the Court of Appeal, on the 9th of December 1868, on the ground that the prescription provided by the law of Malta, namely, two years, of itself barred the claim. It has been contended that that prescription runs, not from the time of the act done which caused the damage, but from the actual arising of the damage caused. Their Lordships would be disposed to take the view of the Court of Appeal; but, as on the ground before stated, they are of opinion that the judgment of the Mercantile Court was right, it follows that the judgment of the Appellate Court was right in affirming it. Here, at least, the litigation ought to have stopped, and their Lordships view with regret the subsequent proceedings which have been adopted. It appears that an application was made to Dr. Conti, sitting as Judge of the Commercial Court, for a re-hearing of the case, which he granted upon insufficient grounds. It may be observed that in the course of his judgment he states, "That the "demand decided upon on the 9th of December "1868"—that is the present suit—"being based "on the sentence of primary instance of the "9th of November 1865, and on the confirmatory "one of the 28th of November 1866, there "remained to be discussed the amount of "damages to be granted to the Plaintiff agree-"ably to the two decisions." Dr. Conti, while dwelling upon these interlocutory decisions in the cause, entirely ignores the final decision, whereby it was determined that the Plaintiff was entitled to no damages whatever. That decision of Dr. Conti was affirmed by a new Court of Appeal, which seems for this purpose to have been substituted for the ordinary Court of Appeal. A re-hearing was directed. Upon the re-hearing Dr. Conti set aside the judgment of the final Court, and in so setting it aside was again supported

by the Court of Appeal. The cause was again heard, and he found damages to the amount of 2,500*l*. The Court of Appeal reduced these damages by about 500*l*., and finally gave the Plaintiff 2,000*l*. damages in respect of a cause of action, which the Commercial Court in their judgment of the 30th June 1868, and the Court of Appeal, which confirmed that judgment, were, in their Lordships' opinion, perfectly right in rejecting. The present Appeal is against all the last four judgments.

Under these circumstances their Lordships are of opinion that the judgments appealed against are wrong; and they will humbly advise Her Majesty to reverse those judgments, and to order and declare that the judgment of the Commercial Court of the 30th of June 1868, and also the judgment affirming it of the Court of Appeal, do stand confirmed; and that Respondent do pay to the Appellant the costs incurred by him in the Courts below by reason of the proceedings subsequent to the 9th of December 1868, and of this Appeal. With reference to the Cross Appeal, what has been already said disposes of it. Their Lordships are of opinion that it must be dismissed with costs. If any costs have been paid in the Island of Malta they must be refunded.