THE CEYLON STEAMSHIP Co. *v.* DE JOHN & SONS.

1906.
January 19.

D. C., Colombo, 21,612.

Shipping dangerous goods—Damage—Absence of declaration—Rule for assessing damages—General average—Expenses of adjustment.

Where a person ships on board goods of a dangerous character, without making any declaration as to such goods, he commits a breach of the Common Law; and he is liable in all damages which are the natural consequences of his wrong-doing, whether of a general average character or not; he is also liable both for contribution allocated to the ship and for the expenses incidental to its adjustment.

APPEAL by the defendants.

The facts are fully set out in the judgment of Wood Renton, J.

Dornhorst, K.C. (*Sampayo, K.C.*, with him), for defendants, appellants.

H. J. C. Pereira, for plaintiffs, respondents.

Cur. adv. vult.

19th January, 1906. WOOD RENTON, J.—

In this case the material facts are not in dispute, and the only question that we have to decide is a question of damages. The appellants, who carry on business as chemists in Pettah in Colombo under the style of Messrs. Philip T. de John & Sons, shipped on board the respondent company's steamer " Lady Gordon, " for transmission to Jaffna, a case containing two jars of nitric acid. No declaration was made by the appellants as to the contents of the case. The " Lady Gordon " had a quanitity of other cargo on board. Some of the nitric acid escaped from the appellants' jars, and while the steamship was still lying in Colombo harbour a fire broke out in the hold. Water was pumped into the hold in order to extinguish the fire and save the cargo and the ship, and damage was done to the cargo in the process. The appellants admit that the fire was due to the escape of the nitric acid. They admit also, what is abundantly clear on the authorities (see *Williams v. East India Company* (1802) 3 *East*, 192 and *Brass v. Maitland* (1856) 6 *E. & B.* 470), that in failing to notify to the respondent company the dangerous character of the goods which they sent on board the " Lady Gordon " for conveyance to Jaffna they committed a breach of a duty incumbent upon them at Common Law. They concede further what I think is incontestable—that they are responsible to the company for all the damage naturally flowing from their wrongful act.

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The question that we have now to determine is, what is the proper measure of damages to be applied? Two alternative answers to this question have been put before us for acceptance. On the one hand, the respondent company maintain—and the learned District Judge has given effect to the contention—that the default of the appellants necessitated an adjustment of general average, and that the appellants are liable to them for the contribution allocated thereby to the ship and for all expenses incidental to such adjustment, as well as for any additional expenditure, whether of a general average character or not, which they were compelled under the circumstances to incur. The Steamship Company have, in fact, acted throughout on this view of the law. As soon as the damage was done, marine surveyors were called in to advise. The cargo was dealt with in accordance with their recommendations. The general average contribution was adjusted. Of the various heads of the total expenditure I shall speak presently. In the meanwhile I am considering only the question of principle involved. On the other hand, the appellants contend that in a case where a sacrifice or expenditure, which might otherwise be a general average act, has been rendered necessary by the misfeasance or non-feasance of an ascertained wrong-doer, and particularly of a wrong-doer who admits his liability—there is no need, and consequently no justification, for an apportionment of general average contribution, and that they are responsible for the actual damage resulting from their default and for that alone.

In my opinion the decision of the learned District Judge, alike on the law and on the facts in the present case, is sound and should be affirmed. In support of the argument that there should have been no adjustment of general average in the present case, Mr. Sampayo and Mr. Dornhorst referred us to the decisions already mentioned in *Williams v. East India Co.* and *Brass v. Maitland*. These cases are direct authorities only for the proposition that the shippers of dangerous goods are bound at Common Law to notify their character to the owner of any ship on board of which they are sent for conveyance as cargo. But counsel for the appellants sought to deduce from them an argument in favour of their clients in this way. In each of these cases there was a breach—similar to that with which we have here to deal—of a shipper's Common Law duty to declare the character of dangerous cargo. In each case the form of action adopted was that of an ordinary action for damages. No suggestion was made that an adjustment of general average was either necessary or proper, and in deciding *Brass v. Maitland* the Judges held that the negligent shipper would be answerable to the shipowner for the actual damages

resulting from his wrongful act or omission. It appears to me that the authorities in question do not justify the use which the appellants seek to make of them. In both cases the Courts were exclusively concerned with the Common Law obligation of the shippers of dangerous cargo. The question of the measure of damages did not arise and was in no way discussed. Moreover, as Mr. H. J. C. Pereira, counsel for the respondent company, pointed out, neither in *Williams v. East India Co.* nor in *Brass v. Maitland* was any sacrifice or expenditure of a general average character made or incurred. That here, as there, an action of damages was the proper remedy, there is, and can be, no contest. The sole issue is as to the measure of damages where an act of general average has intervened; and on that issue neither of the authorities on which the appellants rely throw any light. There is, however, direct authority on the other side. That, apart from the question of the legal effect of the identity of the wrong-doer being known, and his liability admitted, flooding of the hold of a ship for the purpose of extinguishing a fire which is endangering both ship and cargo is a general average act, is clear (see *Whitecross Wire Co. v. Savill* (1882) 8 *Q. B. D.* 653). Moreover, where a general average loss has been incurred, a shipowner may render himself liable in damages to the consignees of cargo for delivery of the cargo without taking the necessary steps to procure an adjustment of average and securing its payment (*Crooks v. Allan* (1879) 5 *Q. B. D.* 38).

Do these principles cease to be applicable when the act or omission which causes the sacrifice or the expenditure is attributable to a known and acknowledged wrong-doer? It appears to me that this very question was raised and answered in the negative in the case of *Strang Steel & Co. v. Scott & Co.* (1889) 14 *App. Cas.* 601, an appeal to the Privy Council from the Court of the Recorder of Rangoon. In that case a ship was stranded through the negligence of her master, and thereby ship and cargo were placed in a position of such imminent danger as to make it prudent and necessary to jettison part of the cargo. It was argued—and argued successfully—before the Court in Rangoon that as the jettison was occasioned by the acts of the master, no claim for general average contribution could be enforced. But it was held in appeal that the innocent owners of the jettisoned cargo were entitled to general average, although no such right belonged to the owners of the ship unless their ordinary relations to the shippers—as to this point see *Carron Park* (1890) 15 *P. D.* 203, and *Milburn v. Jamaica Fruit Import and Trading Company of London* (1900) 2 *Q. B.* 540—had been varied by contract. The appellants' counsel endeavoured to distinguish this case on the

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ground that the decision turned on the fact of the negligence being that of the master. I cannot find any such limitation of the scope of the decision either in the judgment itself or in the arguments or in the facts. On the contrary, Lord Watson, who delivered the judgment of the Judicial Committee, seems to me expressly to state (*ubi sup.* at *p.* 609) as the *ratio decidendi* the proposition that the basis of the right to contribution is not " the cause of the danger to the ship," but " its actual presence." " The innocent cargo owners," he adds, dealing with the specific case before him, " were not privy to the master's fault, and were under no duty, legal or moral, to make a gratuitous sacrific of their goods for the sake of others in order to avert the consequences of his fault." It appears to me that every line of this reasoning applies with equal force whether the cause of the danger which called for the general average act was the negligence of the master or the fault of one of the cargo owners. The shipper in default may have no claim to contribution. But his wrong-doing is not to prejudice the rights of his innocent co-owners, nor does it relieve the shipowner of the duty to protect their interests by an adjustment of general average. There remains only the question of the propriety of some of the heads of expenditure which the respondent company have by the judgment in the Court below recovered from the appellants.

In considering this aspect of the case we must keep in view the findings of law already arrived at, viz., that the appellants are liable for all the natural consequences of their wrong-doing, whether of a general average character or not, and that they are liable also both for the contribution allocated to the ship and for the expenses incidental to its adjustment. It should be premised further that the appellants take exception, not to the amount, but to the propriety only, of the challenged heads of expenditure. The items in dispute are these:—

(1) The expenses of the preliminary survey. These fall clearly under the first head of liability. I agree entirely with the learned District Judge that it is the duty of a shipowner who finds himself in the position in which the respondent company were placed to call in competent marine surveyors without delay. Where the circumstances creating that duty are traceable to the default of a shipper the expenses of the survey are in law the reasonable consequences of such default.

(2) The expenses of the adjustment itself. These include the commission of the adjustor and the cost of printing the adjustment. In my opinion both items are proper. It was found necessary, owing to the fact that there are no expert adjustors in Colombo, to

employ one in Calcutta. Each of the cargo owners was entitled to a copy of the adjustment—a course of business which has obvious advantages, by the way, from the standpoints of expedition and accuracy of reproduction. In the ordinary course of business such documents are printed. Even if these considerations did not arise, the printing bill amounts only to Rs. 139.50. The appellants would scarcely desire us to involve them in the costs of a re-adjustment for the sake of so small a sum. Messrs. Julius & Creasy's fees in connection with the preparation of the average bond and similar matters belong to, and are justifiable under, the same category of liability.

(3) Lastly, we have a miscellaneous group of items partly of a general average character under the head of expenditure properly referable to the appellants' default. To the former class belong the commissions on the collection of deposits at Jaffna, Trincomalee, and Batticaloa (see *Crooks v. Allan* (1879) 5 *Q. B. D.* at p. 427) and commission to Messrs. Walker & Sons in connection with the adjustment; to the latter, the cost of telegrams in regard to the disaster, the expenses of advertising certain cargo for sale, and the services of Customs officers on account of cargo discharged. If the warehousing of cargo and the forwarding of cargo to its destination are—in view of the decision of the House of Lords in *Svendsen v. Wallace* (1885) 10 *App. Cas.* 409; 13 *Q.B.D.* 69 (but on this point see *Atwood v. Sellar* (1880) 4 *Q.B.D.* 342, 5 *Q.B.D.* 286; *Carver Carriage by Sea, 2nd edition* (1891) 403; Arnould, *Marine Insurance, 7th edition*, II., sections 947, *et seq.*)—not to be regarded as attributable to general average, they are at all events reasonable and proper steps in the situation with which the respondent company were confronted, and the appellants must bear the cost of them. The fact that the cargo was forwarded by the company's own ships—portion of it indeed by the "Lady Gordon" herself—is, I think, immaterial, inasmuch as, but for the appellants' default, they might have earned new freight as regards those portions of the ship which were occupied by the original cargo in the subsequent voyages.

In my opinion the appeal must be dismissed with costs.

LAYARD, C.J., agreed.