

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of  
Kleinwort, Cohen, and Company v. The  
Cassa Marittima of Genoa, from the Supreme  
Court of Ceylon; delivered January 18th,  
1877.*

---

Present :

LORD BLACKBURN.

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THE question in this case is whether a bottomry bond given by the master of the "Maria Luisa" upon the ship and cargo to the Respondents, who are a company at Genoa, is a good hypothecation as regards the cargo. The way in which the case came before the Lower Court for decision was this: An action was brought upon the bottomry bond by the Respondents against the master of the ship, and judgment was given in favour of the Respondents in that action. A second action was brought in the Lower Court by the present Appellants, the owners of the cargo, against the master for what they contended was an unauthorised sale of the cargo. In that action judgment was also given for the Plaintiffs, the present Appellants, but an order was made that the proceeds of the cargo should be sequestered until the question as to the validity of the bottomry bond could be decided, and the rights of the Plaintiffs, as owners of the cargo, and of the Respondents, as the lenders upon the bottomry bond, could be ascertained. It is unnecessary to detail at any

length what the proceedings were, but in this latter proceeding, the question which has been already stated arose.

It is admitted that the law is now settled, that a master cannot bottomry a ship without communication with his owner, if communication be practicable, and, *à fortiori*, cannot hypothecate the cargo without communicating with the owner of it, if communication with such owner be practicable.

The law has been thus laid down in several cases which have been referred to at the Bar, and it is only necessary to notice one or two of them. One of those cases was the "Bonaparte," in which the judgment was delivered by Lord Justice Knight Bruce. In that judgment, according to the corrected Report of it in the subsequent case of the "Hamburg" (Browning and Lushington, 253), it was said:—"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." Then follows the sentence which was not correctly reported in the original report of the "Bonaparte." The passage is this:  
 " 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."

This duty was affirmed, and the cases referred to, in a recent decision of this Committee in the case of *The Australasian Steam Navigation Company v. Morse*, Law Reports 4, Privy Council, 222.

The latest case on the subject, the "Onward," 4 Law Reports, A. & E. 38, is in its facts extremely like the present, and there the law was thus stated by Sir Robert Phillimore. He cites the language of this tribunal in a judgment delivered by Sir John Jervis in the case of "The Oriental," 7 Moore, P. C. 389, to this effect: "There was not only the power of communication, but an absolute communication made. It was made, and properly made, at the moment of the accident, communicated and received within a few hours, and by a means of communication in existence which must be taken to be the proper mode or channel of communication,—not to send money, as suggested, because the electric telegraph will not carry money, but to send a communication on the one hand and receive an answer on the other. Why, here being the means of communication, and the authority of the master being founded on the impossibility of a communication, their Lordships are of opinion that there was no authority in the master to raise money on bottomry." Sir Robert Phillimore's observations following that citation are: "In the opinion, therefore, of this Appellate Court, whose decisions are binding upon me, a mere statement of injuries done to the ship and of the consequent necessity of repairs which would entail considerable expense, unaccompanied by a statement that a bottomry bond must be had recourse to, was not a sufficient communication to the owners." In this view of the law their Lordships entirely agree.

It is not necessary to go at any great length into the facts of the case, but those which are material to be considered are as follow: The cargo, which was of rice, was shipped on board the "Maria Luisa" at Rangoon. The bill of lading stated that it was shipped by Gerber, Chretien, & Co., who carry on business at Rangoon. The cargo is stated to be "10,700 bags new Rangoon cargo rice," and the destination of the ship was "Queenstown, Plymouth, Falmouth, or Cowes" for orders, and the rice was made deliverable to order, that is, to the order of the shippers. It seems that the "Maria Luisa" sailed from Rangoon in July 1872, and it may be taken that in the course of her voyage she met with bad weather and received considerable damage. On the 7th September 1872 she put into Trincomalee, and there, according to the evidence of the master—and he is supported to some extent by other witnesses—the vessel required very considerable repair, she wanted re-coppering, new sails, and other things. For the purposes of the present decision—although their Lordships do not intend to affirm the facts—it may be assumed that the ship was in a state of distress requiring considerable repairs, that it was not possible to raise the money upon the personal credit of the owners of the ship or of the master, and that the security of the ship alone was not sufficient for the advances which were required to repair the ship. It seems to have been thought by the learned Judges in the Court below that the cargo was in a damaged state, and that money was wanted either for the purpose of carrying the cargo on speedily, or for some necessary expenditure for the purpose of putting the cargo into better condition by drying it, or otherwise. Upon looking at the evidence that appears to be a mistaken view of the facts. According to the master's evidence the cargo

was landed at Trincomalee, and remained there for a considerable time until he re-shipped it; but when he did re-ship it the rice was in good condition, and for anything that appears nothing had been done to it except that, of course, when taken out of the ship it had been stored. A small quantity was thrown overboard, which appears to have been at the bottom of the ship, and damaged; but there is no evidence that the bulk of the cargo was in any way damaged so as to require its being carried on speedily, or any expenditure incurred for its preservation.

The master being at Trincomalee and under the necessity of raising money— which has been, for the purposes of this decision, assumed—it appears that he communicated with the agents of the present Respondents, the Cassa Marittima, and agreed with them, on the 10th December 1872, to hypothecate the ship, cargo, and freight. The bottomry bond which was executed in pursuance of that agreement is dated the 12th March 1873. Taking the earlier of these dates, the 10th December, their Lordships are of opinion that there was before that time a reasonable possibility of communicating to the owners of the cargo or those who represented the owners what was intended to be done, and that that communication not having been made there was a want of authority on the part of the master to execute the bond on the 12th March, or indeed to enter into the agreement on the previous 10th December.

It may be stated that the ship sailed from Trincomalee on the 11th April 1873, having re-shipped the rice; that she put into Point de Galle in May, 1873; and that in August of that year the cargo, being then, according to surveys made at Galle, in a perishable condition and unfit to be carried on, was sold. In the present appeal their

Lordships have nothing to do with the question whether this sale was a justifiable one or not. The only question before them for determination is whether there was sufficient authority to execute the bottomry bond?

The duty of the master to communicate with the owners, or those who may be fairly taken to represent the owners, before taking this extreme step, being plain, let us see what he did. It appears that he considered Gerber, Chrestien, and Company as the owners of the cargo, and he had reason to do so. He knew no other owners. They were the shippers of the cargo, and had taken the bill of lading from him, making the cargo deliverable to their order, and throughout he appears to treat them as the owners of it until, at a later period, when probably the difficulty was made apparent, he says that he did not know who the real owners were, and therefore could not communicate with them. Mr. Webster, who appeared for the Respondents, has very properly admitted that if communication were necessary, Gerber, Christien, and Company were the persons to whom it should have been made; and he has not denied that the case resolves itself into the question, whether, they being the persons to whom the communication ought to have been made, that which was in fact made to them was sufficient or not? The master telegraphed to them shortly after his arrival at Trincomalee, he says two days after the ship had put into that port, that she was leaking, and in want of repair. It appears that Gerber, Chrestien, and Company telegraphed back to him requesting information with more particularity as to the state of the ship and cargo. That telegram is dated the 19th September, and no answer appears to have been given by the master to it. An important letter was put in evidence from Gerber, Christien, and Company to the master, complain-

ing of his neglect in not giving them further particulars. The letter, dated 1st November, 1872, is as follows: "Our telegram of the 19th September, requesting you to be so good as to give us particulars of the damage suffered by your cargo, having remained unnoticed, we now beg to request you will be so good as to tell us when you intend to sail from Trincomalee after completing the repairs of your ship; if you are taking on all the rice shipped by us here; or, if any has been sold, how much, and all other particulars which may be of interest to us as shippers of the cargo." Now what was the duty of the master when he received this letter? If his duty was not clear before, there was now a distinct request by the shippers of the cargo to know what the state of the cargo was; whether it would be taken on; if any had been sold, how much had been sold; and all other particulars which might be of interest to them as shippers of the cargo. The master at the time he received this letter, or shortly after, must have contemplated hypothecating the cargo, and instead of communicating to those whom he knew to be the shippers of the cargo that he was going to hypothecate it, he maintains an absolute silence. This letter is dated the 1st November. The agreement to hypothecate is not made until the 10th December, long after its receipt. The rice was, upon the evidence, receiving no damage, yet the master undertakes to hypothecate it to the Cassa Marittima upon this bottomry bond without giving the slightest intimation to the shippers that he was going to do so. This appears to their Lordships to be a strong case of dereliction of duty on the part of the master, when about to take the extreme course of hypothecating the cargo for the needs of the ship. If Gerber and Company had been communicated with they

might have said, "We will advance the money rather than you should raise it upon bot-  
"tomry interest;" or they might have given him other directions which it might have been more for their interest that he should have followed, than to have taken this unauthorised course.

Their Lordships cannot but observe that the learned Judge who decided this case on appeal from the District Judge seems to have given his decision under some mistake as to the facts. In one part of his judgment he says: "The shippers of the cargo therefore knew at a very early period that the cargo had suffered damage, and that the vessel wanted repairs. The telegram was sent, the Defendant swore, as soon as he arrived at Trincomalee. Rice, when once heated and fermented, runs rapidly from bad to worse. Mr. Spence, one of the surveyors, says that the rice was much heated and discoloured, and the stench in the hold gave evidence of rapid decay going on in the cargo." It turns out that the rice was not heated and fermented at Trincomalee, although it was subsequently in that condition at Galle; and Mr. Spence was the surveyor not at Trincomalee but at Galle. Thus the learned Judge appears to have transposed the state of things which existed at Galle to Trincomalee. Then he goes on: "The master himself swears that, so far as he knew, the shippers were the owners of the cargo, and this evidence is un-  
"butted." The learned Judge, in that passage, seems properly to have taken the view that Gerber and Company were the right persons to be communicated with. Then he says: "From September, when he sent his telegram to Gerber, Christien, and Company, till August 1873, when the rice was sold, he received no instructions or offer of funds from them or



“ from the parties who now claim the rice as “ consignees.” Their Lordships cannot but observe that this passage involves an assumption which is erroneous in point of law. The judgment of the learned Judge really amounts to this : That Gerber, Christien, and Company were the proper persons to be communicated with, but that the communication made to them was sufficient, and that it became their duty, upon the slight information they had, at once to offer money to the master for the necessary repairs of the ship. Their Lordships think no such duty was imposed upon Gerber, Christien, and Company, and that they did what men of business might reasonably be expected to do. Upon having the general information that the ship had received damage and wanted repairs, and that the cargo might also be damaged, they wrote to the master to know the particulars, and, as before observed, received no answer to that letter.

Under these circumstances their Lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court, and to affirm the decree of the District Judge of Galle. The Respondents must pay to the Appellants their costs of the proceedings in the Supreme Court, and of the appeal to Her Majesty.

THE HISTORY OF THE  
CITY OF BOSTON  
FROM THE FIRST SETTLEMENT  
TO THE PRESENT TIME  
BY NATHANIEL BENTLEY  
VOLUME I  
FROM THE FIRST SETTLEMENT  
TO THE YEAR 1780  
PUBLISHED BY  
J. BENTLEY  
1787