Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Stephens v. Bloomfield and others (the "Great Pacific") from the High Court of Admiralty of England; delivered 5th July, 1869.

Present:

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

THERE is no contest concerning the facts out of which this appeal has arisen. The "Great Pacific" having taken an outward cargo from Liverpool to Brisbane, was, after its discharge, chartered from the latter port by the Guano Consignment Company of Great Britain to sail to Callao, and thence to the Chinchas, where she was to load a cargo of guano, and return therewith viâ Callao to such port or place within the United Kingdom as the charterers might select. Between Brisbane and Callao she was compelled to put into Sydney for repairs; and to defray the cost of these repairs the master raised the sum of 5,037*l.* 13*s.* 5*d.* on bottomry; and on the 29th of March, 1867, executed a bottomry bond, hypothecating the ship and freight for that sum with maritime interest at 45 per cent.

The vessel then proceeded on her voyage, reached the Chinchas, took in her cargo there; but on her homeward voyage was obliged to put into Valparaiso in a damaged state, and was then sold for 3,628*l.* 8*s.*, under circumstances which it is admitted would, as between assurers and assured, constitute a constructive total loss.

The money was paid into the Admiralty Court,

and the holders of the bottomry bond (the Respondents on this Appeal), brought their suit to enforce their claim against it. The suit was defended only by the Appellant, who claiming to be a mortgagee of the vessel, has intervened to protect his interest; and the sole question between the parties is, whether the Respondents as bond holders are entitled to the whole, or to any, and what part of this sum of 3,628*l.* 8*s.*

The Appellant, in his answer, set forth the bond, with its condition, which, amongst other things, provided that the obligation should be void if the obligors should pay, "in case of loss of the ship or vessel such an average as by custom should have become due on the salvage; or if, on the said voyage, the said ship or vessel should be utterly lost, cast away, and destroyed," in consequence of the perils of the sea. And the Appellant insisted, that under these provisions, and upon the facts above stated, the bond had never become payable, and that nothing was due thereon; or that if it had become payable, the Respondents were not entitled to the whole of the sum of 3,628*l.* 8*s.*, but only to such an average as by custom should have become due thereon, and to no more.

To these defences the Respondents took a proceeding in the nature of a demurrer by moving that so much of the Answer as set them up should be rejected. The learned Judge of the Admiralty Court granted that application, and this Appeal is brought against his decision.

It is obvious that if either defence is to prevail, the constructive total loss involved in the sale of the vessel at Valparaiso must be treated as a "loss" within the meaning of that stipulation, in the condition of the bond upon which the defence is founded. It was admitted at the Bar, and could not have been disputed with effect, that the vessel cannot be said, by reason of what occurred at Valparaiso, to have been utterly lost, cast away, or destroyed; and consequently that the Appeal cannot be supported in so far as it impugns so much of the learned Judge's Order as rejected the averment that nothing was due upon the bond. Therefore, the only question now to be decided is whether, on the true construction of the words "in case of loss of the ship or vessel such an average as

by custom shall have become due on the salvage," and upon the admitted facts of the case, the Respondents are entitled, not to the whole, but only to some undefined portion of the sum in Court.

The general law is succinctly stated in Kent's Commentaries, vol. iii, p. 359. Speaking of a loan on bottomry he says: "There is not, in respect to the contract, any constructive total loss. Nothing but an utter annihilation of the subject hypothecated will discharge the borrower on bottomry. The property saved, whatever it may be in amount. continues subject to the hypothecation." In support of this he cites Thompson *v.* the Royal Exchange Assurance Company, 1 Maule and Selw., 30. And the doctrine is supported by the modern Admiralty cases of the "Catherine" and the "Elephanta," 15 Jurist; the "Dante," 2 William Robinson; the American case, before Mr. Justice Story, of the "Draco," 2 Sumner, and by other authorities. The first proposition is, moreover, admitted in this case by that abandonment of the principal ground of appeal which has already been mentioned.

The learned Counsel for the Appellant have, however, argued on the authority of a passage in Valin, which is cited at page 183 of the 3rd volume of "Boulay-Paty's Cours de Droit Commercial Maritime," that when the vessel is lost, the lender on bottomry is entitled only to such a proportion of the value of the property salved as the sum lent bore to the value of the whole property hypothecated. Valin it is to be remarked, is speaking of the hypothecation of a cargo; and it is not clear that his doctrine, if true, would apply to the proceeds arising from the sale of a ship or the débris of a ship. Boulay-Paty, however, goes on to show that this opinion of Valin was contested by both Pothier and Emérigon; that it was not received in France under the old law, and is certainly not recognized by the Codes as part of the Maritime Law. The general rule undoubtedly is, that if the vessel is lost, the lender on bottomry, though his remedy is limited to the value of the property salved, is entitled to the whole of what is saved, provided it was included in his security. Therefore, that the bondholders in this case are as between themselves and the shipowners, or a mortgagee of the ship

(whose rights are as much bound in bottomry as as those of the owner of a ship not mortgaged) entitled to the whole of the proceeds of the sale of the vessel, then existing, as a vessel in specie, unless there be some special provision in this particular contract which qualifies that right, is a proposition which, in their Lordship's opinion, does not admit of reasonable doubt.

It has, however, been argued that such a provision is to be found in the words now to be considered. It is contended that the "loss" of the vessel there spoken of, when contrasted with the words in the following sentence, which import its utter loss and destruction, must be taken to mean something short of such utter loss, and to include a constructive total loss; that the proceeds of the sale may be properly described as salvage; and consequently that the effect of this clause is to make those proceeds divisible between the bondholders and the shipowners in proportions to be ascertained according to some custom of the existence and nature whereof nothing in the shape of proof has been suggested. It does not, however, follow that because the words, "the loss of the vessel," mean something short of utter loss and destruction, they, therefore, include "a constructive total loss," which, as has already been shown, they would not include upon the construction of ordinary bottomry bonds. It is obvious that a vessel may be so wrecked as to be no longer a vessel *in specie*, and so as to become a mere *congeries* of planks, and yet that there may be salvage of its materials to a considerable amount. In the case of the "Catherine," Dr. Lushington says, "If a ship was once bottomried, the bond attached to the very last plank, and the holder might have that sold for his benefit." The clause under consideration may have been intended to secure that right by making it a condition for the avoidance of the bond that the obligors should account for such salvage. Again, it seems to be a forced and unnecessary construction of the clause to hold that it necessarily implies any division or apportionment between the bondholders and shipowners. That the former, who were entitled to the security of the whole ship when in a seaworthy condition, should contract that in the event of the deterioration of their security, by a

constructive total loss or otherwise, they should share the proceeds with their debtors is so improbable an hypothesis, that the construction is only to be admitted if there is no escape from it. The clause, as Mr. Cohen showed, is not a special one, it is to be found in the form of a bottomry bond given in the Appendix to Abbott "On shipping." Whatever it means, their Lordships believe that it was intended to secure the payment to the bondholders of something which the obligors might become entitled to receive from third parties in respect of the ship, and not a division of the proceeds of the sale of the vessel between the bondholders and the shipowners. It would meet the case suggested at the Bar in which the vessel having been voluntarily stranded with a view to the preservation of the cargo, general average upon the cargo salved might become due from the owners of that cargo to the owners of the ship. That such average would become due if the ship, failing to get off, is *totally* lost, seems to be a *question upon which Jurists are not agreed* (see Abbott "On Shipping," 10th Edit., pp. 373 to 375, and 2 Phillips "On Insurance," 1315; but the clause may, nevertheless, have been designed to cover such average, if the right to it existed.

Their Lordships, however, think that they are not called upon to determine upon what particular subject the clause might operate, because it can have no operation in the present case unless there has been a *loss* of the vessel within the meaning of it.

For the reasons above given, they are of opinion that there has been no such loss; and, being of that opinion, they will humbly advise Her Majesty to affirm the order of the Admiralty Court, and to dismiss this Appeal with costs.

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