Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Australasian Steam Navigation Company v. *Morse and Another, from the Supreme Court of New South Wales; delivered* 10*th May*, 1872.

Present:

Sir James W. Colvile.
Lord Justice James.
Sir Montague Smith.
Sir Robert P. Collier.

THIS action was brought to recover the value of nineteen bales of wool shipped by the Plaintiffs at a port in Queensland, on board the Defendants' vessel to be carried to Sydney, and which were sold by the master at an intermediate port.

The defence is that the sale was justified by the necessity of the situation in which the master was placed with reference to the cargo.

The Plaintiffs, who were the owners of the wool, shipped it at Port Mackay in a general ship of the Defendants called the "Williams" for Sydney *viâ* Rockhampton, and consigned it to Messrs. Willis, Merry, and Co., who were their agents at Sydney. At Rockhampton the wool was transhipped in usual course into another steamship of the Defendants, the "Boomerang." The cargo consisted in all of about 260 bales of wool, belonging to different owners, consigned to nineteen different consignees at Sydney; besides some parcels deliverable to order.

On her voyage from Rockhampton, and about 45 miles from that port, the "Boomerang" struck on a rock, and filled; the whole of the cargo was submerged and damaged.

The ship stranded on Thursday, the 21st December, and the cargo was taken out of her and

brought back to Rockhampton. The greater part of it was landed on the 22nd and 23rd. On the latter day the wool was examined by surveyors; after the survey, the master determined to sell, and, on Saturday, 23rd, he advertised the sale for Tuesday the 26th. These general facts do not seem to be disputed, and it is not alleged that the master did not use proper care and diligence in discharging the wool, and in having it examined and surveyed.

The complaint is that he was not justified by any necessity in selling the wool, and in taking on himself to do so without communication with the owners.

The case was tried at Sydney before the Chief Justice and a special jury, and the verdict passed for the Defendants.

There was conflicting evidence at the trial as to the extent and nature of the damage done to the wool, and its condition.

It appeared from the evidence that many of the bales had burst, and the wool had become intermixed; that a great number of bales were heated; that in some fermentation had begun, which, if unchecked by speedy treatment, would destroy the staple of the wool in a few hours, or at most in two or three days. Evidence was also given that, to save wool in this condition from destruction, various processes were necessary, viz., unpacking, washing in fresh water, drying, pressing, and repacking in fresh packs, and that facilities could not be obtained by the master in the small town of Rockhampton for this treatment; and, in fact, that no person could be found to undertake the work, even if he had been disposed to pay the heavy expense of it.

There was some opposing evidence on these points; but, after the verdict, it may be taken that the jury gave credit to the case of the Defendants, which was, in substance, that the sea damage had brought the cargo into a state in which it could neither be carried on or stored, and that it would in two or three days have lost nearly all value, unless it could at once be treated in the way above described. That such treatment could not practically be obtained on a large scale, and that, consequently, there was no other course to be taken for the benefit of the owners, than to sell the wool

in parcels to numerous purchasers, who might be able, individually, to apply the proper treatment to their small lots.

The verdict having passed for the Defendants, a *rule nisi* was granted to set it aside, and for a new trial on the ground of misdirection, and that the verdict was against the evidence.

This Rule was made absolute by two Judges of the Supreme Court of New South Wales; the Chief Justice, who tried the cause, dissenting; and this judgment is the subject of the present Appeal.

The general principles of law are not in dispute, viz., that the authority of the master of a ship to sell the goods of the absent owner, is derived from the necessity of the situation in which he is placed; and, consequently, that to justify his thus dealing with the goods, he must establish (1) a necessity for the sale; and (2) inability to communicate with the owner, and obtain his directions. Under these conditions, and by force of them, the master becomes the agent of the owner, not only with the power, but under the obligation (within certain limits) of acting for him; but he is not, in any case, entitled to substitute his own judgment for the will of the owner, in the strong act of selling the goods, where it is possible to communicate with the owner, and ascertain his will.

The summing up of the Chief Justice was impugned on the ground that the learned Judge did not bring these principles with sufficient distinctness to the attention of the jury: and it was alleged that they were misled by the way in which the case was left to them.

The first specific objection was to the Chief Justice's explanation of the word "necessity," and it is referred to in the judgment of Mr. Justice Hargrave, who says that he considered the jury to have been misled by two circumstances; first, by the explanation of "necessity," as being only equivalent to "a high degree of expediency," "highly expedient," &c.; and, secondly, by the fourth written question, viz., whether the Defendants had acted "as wise and prudent men."

It appears that the Chief Justice did use the expressions thus quoted; but to ascertain in what sense they were used, the other parts of his

summing up must be looked at. The Chief Justice, after stating the circumstances which would create a necessity for selling, goes on thus:—

"But it is only in cases of the most pressing necessity that the master can thus take upon himself to act for the owners of the cargo; and if he does this without such a pressing necessity, he and his owners will be responsible, even though he may have acted in perfect good faith." Then follow the passages complained of:—

"This necessity is equivalent, for the purposes of the present inquiry, to a high degree of expediency; in other words, that course which was clearly highly expedient will be considered to have been pressingly necessary." And, at the conclusion of his summing-up, he says, "the master cannot dispose of it in any way unless under such a necessity as that already mentioned, and where he can hold no correspondence with the owner."

The learned Judge, after these observations, left some specific questions on the facts, which the Jury found for the Defendants, and added the question (No. 4), to which objection is made. "Did the Defendants, time and circumstances considered, act for the best, and as wise and prudent men, for the interest of the Plaintiffs?" which the Jury answered in the affirmative.

The learned Judges of the Supreme Court, who criticized the Chief Justice's explanation of "necessity," did not attempt themselves to define it. It has, undoubtedly, been employed in these cases to express the urgency of the occasion which must exist to justify the act of the master—but the word, "necessity" when applied to mercantile affairs, where the judgment must, in the nature of things, be exercised, cannot of course mean an irresistible compelling power—what is meant by it in such cases is, the force of circumstances which determine the course a man ought to take. Thus, when by the force of circumstances a man has the duty cast upon him of taking some action for another, and, under that obligation, adopts the course which, to the judgment of a wise and prudent man, is apparently the best for the interest of the persons for whom he acts in a given emergency, it may properly be said of the course so taken, that it was, in a mercantile sense, necessary to take it.

The Chief Justice appears to have directed the Jury substantially, to this effect—He repeatedly told them that they must be satisfied of "the necessity," "the pressing necessity," for the sale. In adding, "which means that the course taken must be clearly highly expedient," it cannot be presumed that he intended the jury to understand, that, if the sale was merely expedient, the master would have been right in resorting to it, nor can it be supposed the jury so understood the charge. It could not properly be predicated of the sale that it was "clearly highly expedient" if a better course could have been found. Considering, therefore, the language of the charge as a whole, and the terms of the 4th question, their Lordships think the jury were led to consider the right question (so far as the point now under discussion is concerned), viz., whether there existed a necessity for the sale as the best and most prudent thing to be done for the interest of the owner of the goods.

A sale of cargo by the master may obviously be necessary in the above sense of the word, although another course might have been taken in dealing with it; for instance, if in this case the wool, which had no value but as an article of commerce, could have been dried and repacked, and then stored or sent on, but at a cost to the owner clearly exceeding any possible value of it to him when so treated, it would plainly have been the duty of the master to sell, as a better course for the interest of the owner of the property than to save it by incurring on his behalf a wasteful expenditure. In other words, a commercial necessity for the sale would then arise, justifying the master in resorting to it.

It was further objected, on the argument at this bar, that the attention of the jury was not sufficiently directed to the condition of the specific bales of wool of the Plaintiffs as distinguished from the rest; but it seems to their Lordships that their attention must have been directed to the Plaintiff's wool, although, no doubt, from the circumstances of the case, the trial took very much the shape of an inquiry into the state of the entire cargo as a mass. Both sides appear to have gone into the whole matter, and the evidence of witnesses taken in another action with reference to another part of the cargo was by consent read on this trial. It is

plain that the facts that the ship was a general ship; that the wool belonged to numerous owners; that all of it was more or less damaged, and some of it intermixed, rendering it difficult within the time at the master's disposal and the small resources of the port to deal with the bales separately, must, properly, have had great weight with the jury, when they came to consider what it was practicable for the master to do with such a cargo, and the different parcels of which it was composed!

Their Lordships have now to consider the objections made to that part of the direction of the learned Judge, which related to the obligation of the master to communicate with the owners.

It is not disputed that the Chief Justice pointedly called the attention of the jury to this obligation. He told them that the master could not sell the goods "unless under such a necessity as that already mentioned, and where he could hold no communication with the owners." And after this explanation he put as the fifth question to the jury, "Had the Defendants, considering the circumstances of the case, time and opportunity to obtain instructions by the owners?" telling them their verdict must be for the Plaintiffs, if they found that question in the affirmative, whatever their opinion on the other parts of the case might be.

The possibility of communicating with the owners must, of course, depend on the circumstances of each case, involving the consideration of the facts which create the urgency for an early sale; the distance of the port from the owners; the means of communication which may exist; and the general position of the master in the particular emergency.

Such a communication need only be made when an answer can be obtained, or there is a reasonable expectation that it could be obtained before the sale. When, however, there is ground for such an expectation, every endeavour, so far as the position in which he is placed will allow, should be made by the master to obtain the owner's instructions. (See the Judgment of this Board by the Lord Justice Knight Bruce in the case of the "Bonaparte:" the corrected passage is given in the Report of the "Hamburg," Browning v. Lushington, 273.)

In the present case the sale, if justifiable at all, must have taken place speedily, for the perishable condition of the wool, which alone justified the master in selling, made it necessary there should be an immediate disposition of it; and the jury, in affirming the necessity of the sale, must be taken so to have found.

The Plaintiffs themselves were the owners of the wool. They had shipped it on their own account for Sydney, where it was to be transhipped to England. They lived at an inland station, and no means existed for communicating with them before the sale; and upon these facts it was scarcely contended by the learned counsel at the Bar that the owners themselves could have been communicated with.

The master did apply to Messrs. Rea and Co., who acted for some purposes as the agents of the Plaintiffs at Rockhampton, to take the wool on their behalf, but they declined to interfere with it, or with the master's discretion.

The principal contention on this part of the case was, that the master ought to have communicated with Messrs. Willis and Co., the consignees at Sydney, or used some endeavours to do so.

In the absence of evidence to the contrary, the presumption would properly arise that the consignees named in a bill of lading had an interest in the goods, and ought to be communicated with; but in the present case it is clear that Messrs. Willis and Co. had no interest in the wool, and were to act only as the agents of the Plaintiffs at Sydney The obligation, therefore, to communicate with them, appears to their Lordships to depend on two questions of fact:—

1st. Whether, from the nature of their agency, they were such agents as ought to have been communicated with; and, if so—

2nd. Whether there was time and opportunity, under the circumstances, to consult them before the sale.

With regard to the first of these questions, it is certainly strange, if the obligation to consult Messers. Willis and Co. was intended to be relied on, that although Mr. Morse (one of the Plaintiffs), and Mr. Willis (the Agent) were both examined *viva voce* at the trial, no information whatever was

given by them of the nature and scope of this agency. The fair inference arising from this abstinence, and from the evidence afforded by the letters of Messrs. Willis, showing what they actually did in the subsequent part of the transaction, as well as from the general course of business with regard to wool consignments, seems to be, that Messrs. Willis and Co. were shipping agents, employed to forward the wool to England, and that they were not the general agents of the Plaintiffs, nor clothed with any authority to act for them in dealing with the wool before its arrival at Sydney, and on an emergency of this kind; but, at all events, the nature and character of the agency was, in their Lordship's view, a question of fact for the jury; and it may be assumed, that a special jury of merchants of Sydney were thoroughly competent to deal with it.

On the second question, viz., whether communication with Messrs. Willis and Co. was practicable, some of the circumstances to be considered, were—that the wool was landed and surveyed on Saturday, the 23rd December, and that, on its state being ascertained, an immediate sale was resolved upon, as being necessary, and fixed for Tuesday, the 26th (the intervening days being Sunday and Christmas Day), and at once advertised. The ship was a general ship; there were twenty three consignees, most of them at Sydney, each having an equal right to the time and consideration of the master. Sydney is 900 miles from Rockhampton. No letter could have reached that place. There was, however, telegraphic communication between the two towns; and much conflicting evidence was given as to the possibility of corresponding by means of it, especially on Sunday and Christmas Day.

There can be no doubt that the master is bound to employ the telegraph as a means of communication, where it can usefully be done; but, in this case the state of the particular telegraph, the way it was managed, and how far explanatory messages could be transmitted by it, having regard to the time and the circumstances in which the master was placed, were proper subjects to be considered by the jury, together with the other facts, in determining the question of the practicability of communication.

It was contended for the Respondents that, although the above two questions of fact may have arisen on the evidence, yet that the attention of the jury was not sufficiently directed to them. Their Lordships have not had the advantage of seeing the whole of the summing up of the learned Judge; but it is apparent, from the course of the trial, the jury must have been led to consider them. A great deal of evidence was given, both as to the state of the telegraph, and the habits of business of the merchants of Sydney, with the sole object of showing the practicability of communication with Messrs. Willis and Co. It appears, also, from the Record (p. 82), that, at the very end of the case at the trial, the Counsel for the Defendants objected to the Chief Justice, that if the Plaintiffs insisted that it was the master's duty to have consulted "the consignees or the Plaintiffs," the facts out of which the duty arose should have been specially replied. The Chief Justice overruled the objection, holding that a special replication on the Record was not necessary. This discussion clearly shows that the question as to communication with the consignees was an issue, not only raised, but regarded by the Chief Justice as one to be decided by the jury. In truth, they must have had the point present to their minds during most of the trial, and must have considered it as involved in the question submitted to them.

Undoubtedly, if the Chief Justice ought to have told the jury that, in point of law, the master was bound to communicate with the consignees, his direction might be successfully assailed; for he did not so direct them: but their Lordships think that in this case the learned Judge could not properly have taken upon himself so to rule, as a matter of law, and, on the contrary, that the questions of fact before referred to were within the proper province of the jury.

A further objection is made to the Judge's summing up, on the ground that he told the jury "in effect" that, if the master could not communicate with all the owners of the cargo, he might sell without communicating with any. If the learned Judge had really so directed the jury as a matter of law, their Lordships would have considered that his direction was erroneous;

because, undoubtedly, each owner has a right to the consideration of the master, and that, acting as his agent, he should do his best to communicate with him. In the case of an owner who might be near, and easily got at, it certainly would not, alone, be a sufficient excuse for not communicating with him, that others at a greater distance could not be consulted. But it has not been shown to their Lordships that the Chief Justice did lay down any such proposition of law. He, certainly, directed the attention of the jury to the facts that the cargo was a general one, belonging to numerous owners, and the difficulty of communicating with all, as circumstances which would, in fact, increase the embarrassment in which the master was placed. Their Lordships consider that the learned Judge was justified in so doing. A merchant knows when he embarks his goods in a general ship that they cannot have the undivided care and attention of the master. It is obvious that, when such a ship is in distress at a distant port, from whence communication with all the owners is impossible, and with any of them difficult —the task of selecting (where all are entitled to consideration) those with whom he can and should communicate must add greatly to the master's labours, and might, in some cases, require an amount of time and attention which he could not give, unless he neglected more pressing duties connected with saving and dealing with the goods. Such a state of things, when it exists, is clearly within the range of the circumstances which the jury may properly be directed to consider in estimating the conduct of the master.

On the whole, therefore, their Lordships have come to the conclusion that the misdirections imputed to the Chief Justice have not been established, and that the Rule for setting aside the verdict ought not to have been made absolute on that ground.

The Chief Justice who tried the cause reports that he is satisfied with the verdict, and therefore with regard to that part of the Rule which seeks to set aside the verdict on the ground that it is against the weight of evidence, their Lordships, in accordance with the ordinary rule, would not be disposed to disturb the verdict on that ground

unless it appeared to them to be clearly wrong. Their Lordships need only say that they have not been led by the discussion of the case to this conclusion; and, in the result, they will humbly advise Her Majesty to allow this Appeal, and to order that the Rule making absolute the Rule Nisi for a new trial be set aside, and the original Rule be discharged, with costs. The Appellants will have the costs of this Appeal, and the deposit made by them as security for costs will be returned to them.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—11/5/12.