*P. C.** 1889 *January* 31, *February* 1, *and August* 1.

STRANG, STEEL & CO., AND OTHERS (DEFENDANTS) *v.* A. SCOTT & CO. (PLAINTIFFS).

[On appeal from the Court of the Recorder of Rangoon.]

Maritime law—Jettison—Right to general average contribution—Right of shippers of jettisoned cargo—Default of master—Right of shipowner—Remedies of shippers—Lien on cargo saved in consequence of jettison.

In jettison of part of a general cargo the right of those entitled to contribution, and the corresponding obligations of the contributors, originating in the actual presence of a common danger, not in the causes of it, are mutually perfected whenever the goods of some of the shippers (not being wrong-doers, or those responsible for the latter) have been advisedly sacrificed, and the property of others has been thereby preserved. Such exceptions as that recognized where the average loss has been occasioned by the ship's being unseaworthy [*Schloss* v. *Heriot* (1)], and as that made in the refusal of contribution to shippers of deck-cargo when jettisoned, are in truth but limitations on the above rule, which have been introduced from equitable considerations. Where a ship was stranded owing to the negligence of her master, and thereby ship and cargo were placed in a position of such danger as to make it necessary to jettison part of the cargo in order to save the remainder and the ship: *Held*, that innocent owners of the jettisoned cargo were entitled to general average contribution; but that the owners of the ship were not entitled (their legal relations to the shippers not having been varied by contract). The rules of Maritime law as to the rights and remedies in a case of jettison are: (1st) each owner of jettisoned goods becomes a creditor of the ship and cargo saved; and (2nd) he has a direct claim against each of the owners of the ship and cargo, for a *pro ratâ* contribution towards his indemnity. Contribution can be recovered by the owner of jettisoned goods either by direct suit, or by enforcing, through the ship-master, w his agent for this purpose, a lien on each parcel of goods saved, belon each separate consignee, for a due proportion of his claim.

APPEAL by special leave (2[illegible]ecember 1887) from a decree (15th August 1887) of the Recorder of Rangoon in favour of the respondents.

The respondents sued the appellants for Rs. 1,592, money paid by the former to the latter, under protest, to obtain the delivery of goods *ex Abington* detained as subject to a lien, and for

* *Present:* LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, and LORD MACNAGHTEN.

(1) 14 C. B. (N. S.), 59.

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Rs. 200 damages for the detention. The plaintiffs were the consignees of the goods, which had been shipped on board the steamship *Abington* from London to Rangoon with a general cargo. The defendants were the agents at Rangoon of the ship-owners, and it was on their demand that this money had been paid to them under protest, they detaining the consignment, as being subject to a lien in respect of a probable average claim, on account of the jettison of other cargo from on board the *Abington* when near the end of her voyage. The master was also joined as a defendant. The circumstances of the jettison are stated in their Lordships' judgment.

The finding of fact by the Recorder was that the jettison took place in imminent danger to the ship and cargo occasioned by the negligence of the master. The Recorder held that, as the danger was occasioned by this negligence, no claim for general average contribution could be enforced, and that consequently no right of lien had arisen. He was also of opinion that the defendants were not entitled to insist on having the asse[illegible] in their hands, so as for them to have control ove[illegible] of the shippers. The claim was accordingly d[illegible]

On the pre[illegible] appeal,

Mr. *R. P. Finlay*, *Q.C.*, and Mr. *J.* [illegible] the appellants, cont[illegible]ded that the r[illegible] contribute in respect of the cargo jet[illegible] incurred. Therefore the appe[illegible]llant money, having, as agents of the ow[illegible] respondents' goods for the amount o[illegible] pay[illegible]e by them. Although the wa[illegible] consequence of the ship's mas[illegible]'s negli[illegible] relieve[illegible] fr[illegible] entitled [illegible] general a[illegible] depende[illegible] only on [illegible] were sa[illegible] master [illegible] their [illegible]

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The owners were also exempted from liability in respect of the negligence of the master by the bills of lading, under which the respondents' goods were carried; and for this reason, as well as on the general principle, the negligence of the master did not deprive the owners of the ship of their right of lien on the cargo for sacrifices made for the common benefit. Moreover the agents of the shipowners were entitled to demand a deposit of five per cent. on the value of the goods and to refuse to release them unless the deposit should be made. It was the duty of the master to collect the general average contributions before parting with the goods, and in such case he acted not merely as agent for the shipowners, but also as agent for the shippers. Whether the contribution was for the benefit of the ship or for the benefit of the shippers was immaterial, as in either case it was the master's duty to collect it. Reference was made to *Simonds* v. *White* (1), *Crooks* v. *Allan* (2), *Schloss* v. *Heriot* (3), *Hallet* v. *Bousfield* (4), *Dobson* v. *Wilson* (5), *Burton* v. *English* (6), *The cargo ex Laertes* (7), *Glenfruin* (8). Reference was also made to Lowndes on [illegible]e, 4th Edn., 332; Abbott on Shipping, 12th Edn., [illegible]he Law of Shipping, Vol. II, 4th Edn., 285. [illegible]he general Maritime [illegible]nd the equitable [illegible] right which followed upon the obligation

Mr. *J. D. Fitzgerald*, for the respon[illegible]nt [illegible] of the Court below was maintain[illegible] stranding of the *Abington* had been [illegible] of the master. The right to general [illegible]t arise upon a jettison in tha[illegible]y [illegible]or and owners being liable f[illegible] he [illegible] or omi[illegible]ons. [illegible]ich as [illegible]and not the ship-

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pers were exempted from the consequences; the jettison not being such a one as gave rise to a general average contribution. If the shippers were called upon, the sacrifice would not be for the general benefit of all concerned, but for the benefit of the shipowners, to avert from them the consequences of the wrongful act of their servant the master. This would be contrary to the principle, which was an equitable one, in which contribution took its origin. Reference was made to Parsons on the Law of Shipping, Vol. I, Chap. IX; Abbott on Shipping, Part 6, p. 499, Edn. of 1881. To show that if the jettison was a consequence of danger into which a ship had been brought by the master's negligence, the goods saved were under no liability in respect of the goods jettisoned. Reference was made to Parsons on Marine Insurance, Vol. II, p. 285; Parsons on the Law of Shipping, Vol. I, p. 211, and a case cited in the latter; in a note on deck cargo jettisoned from Ware's State of Maine Admiralty Decisions, p. 326, *The Paragon*. The contract evidenced by the bill of lading, and the exceptions in it, did not relate to the questions of general average. On the general questions raised in the appeal, they referred to *Crooks* v. *Allan* (1), *Wright* v. *Marwood* (2), *The Norway* (3), *Huth* v. *Lamport* (4), *Aslimole* v. *Wainwright* (5), *The Ettrick* (6).

Mr. *J. Gorell Barnes*, Q.C., replied.

On a subsequent day (August 1st) their Lordships' judgment was delivered by

LORD WATSON.—The steamship *Abington*, on her way from London to Rangoon, with a general cargo, ran aground on the Baragua Flats in the Gulf of Martaban. Part of the cargo was thrown overboard in order to lighten the vessel, which was got off by that means, and was enabled to reach her destination in safety on the 19th October 1886. On the day of her arrival in the port of Rangoon, the appellants, Strang, Steel & Co., local agents for the ship, intimated to the respondents, A. Scott & Co., and other consignees of the cargo [illegible] proper [illegible] of the board, that a deposit of one per cent. upon the value [illegible] atively [illegible] reasonable [illegible] correct Cre[illegible]

(1) L. R., 5 Q. B. D., 38, 41.
(2) L. R., 7 Q. B. D., 62.
(3) Br. & Lush., 377.
(4) L. R., 16 Q. B. D., 4[illegible]
(5) L. R., 2 Q. B. D.[illegible]

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goods would be required before delivery "against probable average claim;" and on the following day they made a further intimation that the amount of deposit required would be five per cent. A correspondence ensued, in the course of which the respondents made various tenders, all of which were declined; and on the 25th October, six days after the arrival of the *Abington*, they paid the required deposit, amounting to Rs. 1,592-11, under protest, and obtained delivery of their goods.

The respondents, on the 27th October 1886, instituted the present suit in the Court of the Recorder of Rangoon for recovery of their deposit, and for damages on account of the detention of their goods, upon the allegation that they had before payment made a tender entitling them to delivery. Upon the same day on which their plaint was filed, the respondents applied to the Court, under s. 492 of the Civil Code, for an injunction to restrain the appellants, Strang, Steel & Co., from remitting to England, or removing from the jurisdiction of the Court, the deposit paid to them on the 25th October. These appellants judicially undertook to retain the amount claimed in their own possession, subject to the orders of the Court, without the issue of a formal injunction, and no further proceedings have been taken in that application.

On the 5th February 1887, the respondents were allowed to add to their original ground of action an allegation, to the effect that they were not liable to contribute for general average on account of either ship or cargo, because the grounding of the *Abington* and the consequent jettison of part of the cargo, were due to the default, negligence, and misconduct of her master. Upon the pleadings thus amended, the case was twice tried before the Recorder, who ultimately, on the 15th August 1887, gave the respondents a decree for Rs. 1,592-11, and for Rs. 200, in name of damages, with costs of suit. The learned Judge found, as a matter of fact, that the stranding of the ship upon the Baragua Flats was occasioned by the negligent navigation of the master; and he held, as a matter of law, that no claim for general average arises to the owners of cargo jettisoned when the peril which necessitated jettison was caused by the fault of the ship. Whilst resting his decision

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upon that ground, the learned Judge indicated that, in his opinion, the respondents had made a tender entitling them to demand immediate delivery of their goods, before they paid the deposit to the appellants.

In the course of the argument upon this appeal, three separate points were raised and fully discussed. The appellants argued: (1) that innocent owners of cargo, sacrificed for the common good, are not disabled from recovering a general contribution by the circumstance that the necessity for the sacrifice was brought about by the ship-master's fault; (2) that inasmuch as the bills of lading for the cargo of the *Abington* specially excepted "any act, neglect, or default whatsoever of pilots, master, or crew in the management or navigation of the ship," the owners of cargo saved are not, so far as concerns any question of contribution, in a position to plead the fault of the master; and (3) that the respondents did not, before the 25th October 1886, make a sufficient legal tender. The parties were not agreed as to the facts upon which the second of these contentions is based; but there was no controversy as to the facts upon which the first and third of them depend. It was conceded by the appellants that the *Abington* was stranded through the negligence of her master; and, on the other hand, the respondents admitted that the effect of her stranding was to place both ship and cargo in a position of such imminent danger as to make it prudent and necessary to sacrifice part of the cargo in order to preserve the remainder of it and the ship. The question whether the respondents made a legal tender depends upon the construction of the correspondence which passed between the parties in October 1886.

The first question raised is one of general importance, and, so far as their Lordships are aware, has never been made matter of direct decision in this country. It may be convenient in dealing with it to consider, first of all, the rights and remedies which the owners of cargo thrown overboard have in a proper case of jettison. Some of the qualities of their right, and of the remedies by which it may be enforced, have been authoritatively defined. Each owner of jettisoned goods becomes a creditor that of ship and cargo saved, and has a direct claim aga[illegible]

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of the owners of ship and cargo, for a *pro ratâ* contribution towards his indemnity, which he can enforce by a direct action. In *Dobson* v. *Wilson* (1) Lord Tenterden said: "If a shipper of goods, which are sacrificed for the salvation of the rest of the cargo, is entitled to receive a contribution from another shipper whose goods are saved, I know not how I can say that this may not be recovered by an action at law. This is a legal right, and must be accompanied with a legal remedy."

Again, it is settled law that, in the case of a general ship, the owner of goods sacrificed for the common benefit has a lien upon each parcel of goods salved belonging to a separate consignee for a due proportion of his individual claim. The cargo not being in his possession or subject to his control, his right of lien can only be enforced through the ship-master, whom the law of England, following the principles of the Lex Rhodia, regards as his agent for that purpose. The duty being imposed by law upon the master, he is answerable for its neglect. In the course of the argument, his liability in that respect was questioned upon the authority of certain *dicta* of Lord Eldon's in *Hallett* v. *Bousfield* (2). The circumstances of that case were very special. One of a number of persons alleging a right to contribution applied for an injunction to restrain the master from delivering the cargo without taking security, the bulk of them having consented to his so doing. Lord Eldon expressed a doubt whether it was the right of every owner of part of the jettisoned cargo to compel the captain to call on every owner of cargo saved to give security; but he dismissed the application on the ground that there was no instance of such an equitable remedy having been granted. Courts of Equity are chary of granting injunctions which may lead to inconvenient results; and it does not follow from *Hallett* v. *Bousfield* (2), that a master might not be restrained from making delivery of the cargo, at the instance of all or most of those entitled to contribution, without taking security for their claims. But their Lordships see no reason to doubt that, assuming the applicants' claim for contribution in that case to have been well founded, he would have

(1) 3 Camp., 464. (2) 18 Ves. Jun., 190.

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had his remedy at law. In *Crooks* v. *Allan* (1) Lord Justice (then Mr. Justice) Lush held that a master or shipowner is bound to exercise the power he is invested with when a general loss has arisen, and to use the means in his power for adjusting the average claims and liabilities and securing their payment, and he accordingly ordained the defendants, who had neglected to perform that duty, to pay to the plaintiffs the whole amount of contribution to which they were entitled. The learned Lord Justice observed at page 42 of the report that "the right to detain for contribution is derived from the Civil law, which also imposes on the master of the ship the duty of having the contribution settled and of collecting the amount, and the usage has always been substantially in accordance with that law, and has become part of the common law of England."

The rule of contribution in cases of jettison has its origin in the Maritime law of Rhodes, of which the text, as preserved by Paulus (Dig. L., 14, Tit. 2), is: "*Si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.*" The principle of the rule has been the frequent subject of judicial comment. Lord Bramwell, in *Wright* v. *Marwood* (2), said that, to judge from the way in which contribution is claimed in England, "it would seem to arise from an implied contract *inter se* to contribute by those interested." The present Master of the Rolls, in *Burton* v. *English* (3), disputed that view, and stated his opinion to be that the right to contribution "does not arise from any contract at all, but from the old Rhodian laws, and has been incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, when natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one, in order that the whole adventure may be saved." Whether the rule ought to be regarded as matter of implied contract, or as a canon of positive law resting upon the dictates of natural justice, is a question which their Lordships do not consider it necessary to determine. The principle upon which contribution becomes due does not appear to them to differ from that

(1) L. R., 5 Q. B. D., 38. (2) L. R., 7 Q. B. D., 62.
(3) L. R., 12 Q. B. D., 220.

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upon which claims of recompense for salvage services are founded. But, in any aspect of it, the rule of contribution has its foundation in the plainest equity. In jettison, the rights of those entitled to contribution, and the corresponding obligations of the contributors, have their origin in the fact of a common danger which threatens to destroy the property of them all; and these rights and obligations are mutually perfected whenever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby preserved.

There are two well-established exceptions to the rule of contribution for general average, which it is necessary to notice:—

When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which immediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrong-doer, and, as such, under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save. *Schloss* v. *Heriot* (1) is the leading English authority upon the point. In that case, which was an action by the shipowner against the owners of cargo for contribution in an average loss, a plea stated in defence, to the effect that the ship was unseaworthy at the commencement of the voyage, and that the average loss was occasioned by such unseaworthiness, was held to be a good answer to the claim by Erle, C.J., and Willes and Keating, JJ.

The second exception is in the case of deck cargo. The reason why relief by general contribution is denied to the owners of goods stowed on deck, when these are thrown overboard in order to save the cargo under hatches, is obvious. According to the rules of Maritime law, the placing of goods upon the deck of a sea-going ship is improper stowage, because they are hindrances to the safe navigation of the vessel; and their jettison is therefore regarded,

(1) 14 C. B. (N. S.), 59.

in a question with the other shippers of cargo, as a justifiable riddance of encumbrances which ought never to have been there, and not as a sacrifice for the common safety. But the owner of deck goods jettisoned, though not entitled to general contribution, may nevertheless have a good claim for indemnity against the master and owners who received his goods for carriage upon deck; and the exception does not apply, either (1) in those cases where, according to the established custom of navigation, such cargoes are permitted, or (2) in any case where the other owners of cargo have consented that the goods jettisoned should be carried on the deck of the ship.

It appears from the proceedings in this suit that the average claims at the instance of cargo owners exceed $30,000, and that there is a small claim on account of the ship. The fault of the master being matter of admission, it seems clear, upon authority, that no contribution can be recovered by the owners of the *Abington*, unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them and their shippers. But the negligent navigation of the master cannot, in the opinion of their Lordships, afford any pretext for depriving those shippers whose goods were jettisoned of their claim to a general contribution. They were not privy to the master's fault, and were under no duty, legal or moral, to make a gratuitous sacrifice of their goods for the sake of others in order to avert the consequences of his fault. The Rhodian law, which in that respect is the law of England, bases the right of contribution not upon the causes of the danger to the ship and cargo, but upon its actual presence; and such exceptions as that recognized in *Schloss* v. *Heriot* (1) are in truth limitations on the rule, which have been introduced, from equitable considerations in the case of actual wrong-doers or of those who are legally responsible for them. The owners of goods thrown overboard having been innocent of exposing the *Abington* and her cargo to the sea peril which necessitated jettison, their equitable claim to be indemnified for the loss of their goods is just as strong as if the peril had been wholly due to the action of the winds and waves.

(1) 14 C. B. (N. S.), 59.

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In support of the legal proposition which they induced the learned Recorder to accept, the respondents relied upon a passage which is to be found in the original text of Lord Tenterden's work on Shipping (Ed. 1881, p. 499). It is in these terms: "The goods must be thrown overboard for the sake of all, not because the ship is too heavily laden to prosecute an ordinary course through a tranquil sea, which would be the fault of those who had shipped or received the goods, but because at a moment of distress and danger their weight, or their presence, prevents the extraordinary exertions required for the general safety." It appears to their Lordships that, if Lord Tenterden had really meant to lay down the rule, that there can be no contribution for jettison in the case of a ship overladen through the fault of those who received and put her cargo on board, he would have done so in plain terms. What he does say is, that there can be no proper jettison from an overladen ship, so long as ship and cargo are exposed to no peril whatever from the action of the sea, but are merely exposed to the inconvenience of being unable to reach their destination in the ordinary course of time.

The authority upon which respondents placed their chief reliance was that of Mr. Parsons, who, in his Treatise on the Law of Insurance, Vol. II., p. 285, and also in his Law of Shipping, Vol. I, p. 211, states that "when a jettison is justified by the circumstances in which it takes place, and these circumstances are occasioned by the fault of the master, or his want of care or skill, the jettison would give no claim for contribution; but the owners of the ship would be liable to the owners of the goods jettisoned for the damages caused by the wrong-doing of the master." In both works the proposition is laid down in precisely the same terms, and the same cases are referred to. These treatises are justly regarded as of great authority in questions of Maritime law; but their Lordships are constrained to say that, in their opinion, the text above cited is inaccurate, in so far as it bears that no claim of contribution will arise to the owners of jettisoned cargo in the case supposed, and is unsupported by the decisions upon which it is founded, which, all of them, relate to one or other of the exceptions already noticed.

On the question of legal tender, their Lordships are unable

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to concur in the opinion expressed by the learned Recorder. The correspondence which passed before the deposit was paid appears to them to show that both of the parties were exceedingly unaccommodating, and somewhat unreasonable, and that neither of them was altogether in the right.

Their Lordships, even if it had been desirable to decide the second point urged for the appellants, are not in a position to do so, because there is no proof and no admission to the effect that, as alleged by them in argument, all the bills of lading for goods shipped in the *Abington* contained the same exception with those produced, of the master's act, neglect, or default in navigating the ship. But this is not a suit for recovery of contribution; and the appellants, if it be necessary, will not be precluded from substantiating their averments in the adjustment of average claims.

The result is that their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and to dismiss the respondents' action, with costs in the Court below. The respondents must also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: Messrs. *Crump & Son.*

Solicitors for the respondents: Messrs. *Badham & Gore.*

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APPELLATE CIVIL.

Before Mr. Justice Banerjee.

KAMINI DASSEE (PLAINTIFF) *v.* CHANDRA PODE MONDLE AND OTHERS (DEFENDANTS).*

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Hindu Law—Maintenance—Obligation of brothers to maintain widow of a brother who predeceased their father whose property they have inherited.

The principle that an heir succeeding to property takes it for the spiritual benefit of the late proprietor, and is, therefore, under a legal obligation to maintain persons whom the late proprietor was morally bound to support, has ample basis in the Hindu law of the Bengal School.

* Appeal from Appellate Decree No. 540 of 1889, against the decree of F. F. *Handley*, Esq., *Judge* of Nuddea, dated the 4th of March 1889, modifying the decree of Baboo Sharat Chunder Paul, Munsiff of Ranaghat, dated 30th of July 1888.