1983 September 14

[SAVVIDES, J.]

ABI-YAGHI TRADING CO. LTD.,

Plaintiffs,

v.

1. ALIEFTIKI ETERIA MPAFAS LTD.,
2. THE SHIP "JACOB OF PETER" NOW IN THE PORT OF LIMASSOL,

Defendants.

(*Admiralty Action No.* 400/77).

Admiralty—Carriage of goods by sea—Duty of ship-owner as common carrier—Liability in case of loss or damage to goods—Exempted from liability in cases where, due to imminent danger to the ship or the lives on board, the master jettisons such amount of cargo as may be necessary to remove the danger—Ship-owners established defence that the loss of goods short-landed was due to such jettison.

Admiralty—Ship—General average—Deck cargo jettisoned—Principles applicable.

Practice—Cause of action—Court bound to adjudicate on the cause or causes of action on which the claim is based and cannot deal with causes which are not raised by the writ of summons or the statement of claim.

The plaintiffs in this case claimed damages for breach of contract of carriage of goods shipped by the plaintiffs on defendant 2 ship, the property of defendants 1, for trasportation from Limassol to Jounieh, Lebanon. Plaintiffs alleged that the defendants, as common carriers and/or carriers for reward were responsible to the plaintiffs for the damage suffered by them in respect of goods which were short landed and for goods which arrived in a bad condition and, also, for the profit which they would have realised by the sale of such goods. Part of these goods were loaded on deck with the consent of the plaintiffs but

there was no evidence that the owners of other cargo have consented to such loading.

The defendants contended that the loss of the goods short-landed was due to jettison of same as a result of imminent danger to the ship and the lives on board because of extraordinary rough weather.

Held, that though in so far as the ship-owner is in the position of a common carrier, he has a duty in respect of the custody and protection of the cargo during the voyage since he is absolutely responsible for its safety and is, therefore, liable to its owner in case of loss or damage caused by the failure of himself or his servants to exercise due care, he is exempted, however, from any liability in cases where, due to imminent danger to the ship or the lives on board of her, the Master has to jettison such amount of cargo as may be necessary to remove the danger; that to the cause of action relied upon by plaintiffs, which was based solely on the breach by the defendants of their duty as common carriers, the defendants have established a defence that the loss of the goods short-landed was due to jettison of same as a result of imminent danger to the ship and the lives on board, and there is no evidence before me that the cause of loss or damage was due to any negligent act on the part of the defendants or that any part of the cargo jettisoned was in excess of what was necessary to save the ship, the rest of the cargo and any lives on board; that, in consequence, the loss cannot be attributed to breach by the defendants of their duty in respect of custody and protection of the goods during the voyage and in the circumstances they are exempted from liability for the loss of such goods; accordingly plaintiffs' claim in respect of short-landed goods must fail.

(2) That there was no evidence to support plaintiffs' claim which concerned goods delivered in such bad condition as to be of a non-merchantable value; accordingly this claim must, also, fail.

Held, further, on the question whether the plaintiffs were entitled to general average contribution (after dealing with the principles governing general average contribution). That the owner of deck goods jettisoned may be entitled to general contribution in a case where the other owners of cargo have consented that the goods jettisoned should be carried on the deck of

the ship; that in this case the cargo was loaded on deck with the consent of its owners but that the other cargo owners have not consented to such mode of loading; and that, therefore, the other cargo owners were not liable for contribution and the defendants by delivering such cargo to them were not in breach of their duty to plaintiffs to secure contribution from the other cargo owners; that, further, irrespective of whether or not there was liability for contribution since the cause of action in this case was not one of breach by defendants for failing to secure contribution but it was solely based on the breach by the defendants of their duty as common carriers, this Court cannot deal with causes of action which are not raised by the writ of summons.

Action dismissed.

Cases referred to:

The Gratitudine [1801] 3 Ch. Rob. 240;

Strang Steel & Co. v. Scott & Co., Aspinall Maritime Law Reports Vol. 6 p. 419;

Burton v. English [1883] 12 Q.B.D. 218 at pp. 220, 221, 222;

Simond v. White, 2 B & C 811;

Crooks & Co. & Another v. Allan [1879] 5 Q.B.D. 38;

Wright v. Marwood [1881] 7 Q.B.D. 62.

Admiralty action.

Admiralty action for damages for breach of contract of carriage of goods for transportation from Limassol to Jounieh, Lebanon.

St. McBride, for plaintiffs.

P. Sarris, for defendants.

Cur. adv. vult.

SAVVIDES J. read the following judgment. The plaintiffs' claim in this action is for damages for breach of contract of carriage of goods shipped by the plaintiffs on defendant 2 ship, the property of defendants 1, for transportation from Limassol to Jounieh, Lebanon.

The amount so claimed is U.S. dollars 750 and C£4,410.- being the value of goods shortlanded and/or landed in such damaged condition so as to be of no merchantable value. Also, a sum of C£757.700 mils is claimed in respect of dispatch

expenses. In addition to the above, the plaintiffs claim 30 per cent on the value of the goods for loss of a minimum profit on the value of the goods which the plaintiffs would have realised from the sale of the said goods.

The facts before me are briefly as follows: Defendants 1 are the owners of defendant 2 ship which is a fishing trawler. Due to the prevailing abnormal situation in Lebanon at the material time and the difficulty of regular communication between Cyprus and Lebanon by cargo ships, all types of conveyance were being used for the transportation of goods from Cyprus to Lebanon. For such purpose, fishing boats and fishing trawlers were also used. Insurance companies were unwilling to insure goods destined for Lebanon. The plaintiffs, which are a Lebanese company, bought from Cyprus certain goods which, through their shipping agents, they arranged to send to Lebanon by defendant 2 ship. Such goods consisted of cartons containing epaulettes, electrical and other goods, and also drums containing putty, most of which they bought through persons who acquired them at public auctions, and a disinfectant known as "Hypton" which they bought from a commercial firm in Cyprus.

According to the evidence of the Managing Director of the plaintiffs, the goods were loaded on defendant 2 ship and a bill of lading was issued which, however, "remained in the hands of the Master of the ship because the distance from Cyprus to Jounieh is so small that the ship would have arrived earlier than sending the bill of lading by mail or by any other means."

The ship left from Limassol but on its way to Jounieh and at a distance of about 60 miles from Cyprus, according to the evidence of the Master of the ship, she encountered extra-ordinarily rough weather and a storm which endangered both the vessel and the lives of the crew and of passengers who were accompanying the goods. The Master did his best to navigate the ship, but, as the danger was becoming imminent, in order to save the ship, the lives on board and the cargo, he had to jettison part of the cargo which was stored on deck. This temporarily minimised the danger of sinking of the ship but, as the weather was not improving and the ship could not continue her trip under such weather conditions, the Master navigated her back to Limassol. Whilst at Limassol the remaining cargo

was unloaded, dried up and reloaded on the ship which finally sailed from Limassol and reached its destination where the goods were unloaded.

When the ship arrived at Jounieh and her cargo was unloaded, the plaintiffs found that 446 drums of putty, 90 cartons of baskets, two boxes of refrigerator gaskets and 180 grosses of prophylactics were shortlanded. Also, according to the evidence of the Managing Director of the plaintiffs, one carton of epaulettes was half hanging from the boat and touching the sea and the plaintiffs refused to accept delivery of same after it was unloaded. The only goods which were collected, according to the same evidence, were (a) 30 cartons of Hypton, (b) 11 cartons of epaulettes, (c) 50 cartons of baskets, (d) 11 boxes of gaskets and (e) 14 drums of putty, but when these goods were later examined by him, they were found to be so dampened by sea water that they were not of merchantable quality and, in consequence, they were a total loss and as a result they were abondoned in the port.

It is the allegation of the plaintiffs that the defendants, as common carriers and/or carriers for reward, are responsible to the plaintiffs for the damage suffered by them both in respect of the shortlanded goods and for the goods which arrived in a bad condition and also for the profit which they would have realised by the sale of such goods.

The defendants by their answer deny any liability and allege that they are relieved from any liability for the goods which had to be jettisoned in order to save the remaining cargo and the ship and that they delivered the rest of the goods to the plaintiffs.

In the course of the hearing the plaintiffs abandoned their claim in respect of one case of electrical goods valued at £400.- having admitted that such goods were received in good condition, unaffected by sea water. Also, the amount in respect of dispatch expenses was agreed at £700.- and was reduced accordingly.

One witness testified for the plaintiffs, namely, Ghassan Abi Yaghi (P.W.1), the Managing Director and person in charge of the business affairs of the plaintiff company, whereas the defendants called two witnesses, namely, Apostolos Mpafas (D.W.1), the Master of the ship at the material time, and Andreas

Omirou (D.W.2), a clearing and forwarding agent who was the person through whom the shipment was effected.

It has not been disputed that the goods in question were loaded on defendant 2 trawler for transportation from Limassol to Jounieh. I have also not the slightest doubt that the plaintiffs, either personally or through their forwarding agent, were well aware that the defendant ship was not an ordinary cargo ship but a fishing trawler.

As to whether a bill of lading was issued in respect of these goods and the other goods loaded by other consignors on the defendant ship, though the Managing Director of the plaintiffs in his evidence said that bills of lading were issued and remained in the possession of the Master of the ship, on the totality of the evidence before me I find that no proper bills of lading were issued and this appears in the evidence of D.W.2, the clearing and forwarding agent, who, in cross-examination, admitted that "it was not actually bills of lading but it was cargo declarations which were issued and we were delivering a copy of it to them". And, in answering a question as to whether bills of lading were, in fact, issued, he answered in the negative, repeating his statement that what was issued were only cargo declarations, a copy of which has been produced as exhibit 1(c). Exhibit 1(c) is a general cargo declaration describing the names of the persons who loaded cargo on the defendant ship on this particular occasion, as well as the number and kind of packages of goods and their description, but no description of the value of each particular consignment is mentioned therein. Under the column "bill of lading number" serial numbers 1 - 9 appear but these are, rather, serial numbers of the consignors than the serial numbers of bills of lading issued. From what appears from this cargo declaration, there were originally 9 consignors, one of whom at the end did not load any goods and the other goods excluding those of the plaintiffs, consisted of cartons of tuna, cigarettes, whisky, batteries and machinery. As there was not sufficient room in the hold, goods contained in iron drums or packed in a way so as not to be affected by sea water, were stored on the deck of the ship.

According to the evidence of the shipping agent, in the case of goods which were loaded on the deck, they were accompanied by their owner or his agent who was travelling with the same

ship, and in this particular case the goods which were loaded on the deck and belonged to the plaintiffs, were accompanied by an Arab who was the person who appeared to be acting on behalf of the owners and with whose consent certain goods of the plaintiffs were loaded on deck. Such person was, according to the evidence, the brother-in-law of the Managing Director of the plaintiffs and was the person who arranged with D.W.2 the shipment, paid the transportation fees and travelled on the defendant ship. Another passenger also travelled with the ship accompanying his goods.

In the answer to the petition it is alleged that the goods were jettisoned, with the consent and at the request of the agent of the plaintiffs who was accompanying the goods, for the purpose of saving their lives. In his evidence, however, the Master said that when he encountered the stormy weather and the lives of the passengers and crew were in danger and the ship ran the risk of being sunk, irrespective of the fact that the two passengers, who were accompanying the goods, were crying and requesting him to do whatever was possible to save their lives, he did not have to follow any request from anybody to jettison goods, because, as he said: "I didn't have to ask permission from them to jettison goods in the sea because though they were praying me to do whatever I could to save their lives, I was not bound to follow their instructions. It was my duty as a Captain of the ship to see that once there was imminent danger, to act according to what was the best course to follow." The course followed by the Master of the ship in the discharge of his duty to save lives and cargo, was the proper one, having acted according to his own judgment and not according to the request of anybody else.

I am satisfied in the present case that after the ship had left Limassol port in good weather and had travelled about 60 miles from Limassol, it encountered very rough sea which put the ship into imminent danger of sinking and of lives being lost which led the master to take the decision to jettison part of the cargo to save the rest and the ship, as well as the lives on board. I accept the evidence of the master in this respect.

Furthermore, from the various exhibits before me which were put in by consent, it is clear that the fact that a general average took place was not disputed by the plaintiffs. Exhibit 1(b)

which is a letter written by counsel for the plaintiffs on 25.2.77 reads as follows:

"Κυρίους
BAFAS FISHING COMPANY LTD.

Κύριον
Φίλιππον Μπάφαν
'Οδὸς 'Αθανασίου Διάκου 17
Στρόβολος.

Κύριοι,

M/V JACOB OF PETER—Γενικὴ 'Αβαρία κατὰ ἢ περ τὴν 26.11.1976

'Αναφερόμεθα εἰς τὴν ἐπὶ τοῦ ὡς ἄνω θέματος ἐπιστολήν μας ἡμερομηνίας 29.12.1976 καὶ παρατηροῦμεν μετὰ λύπης μας ὅτι παραλείψατε νὰ μᾶς ἀπαντήσετε.

Ἔχομεν ἤδη λάβει δήλωσιν τοῦ φορτίου τοῦ σκάφους κατὰ τὴν ἀναχώρησιν του ἐκ Λεμεσοῦ κατὰ ἢ περὶ τὴν 26.11.1976 καὶ ὡς φαίνεται εἰς τὴν τοιαύτην δήλωσιν οἱ λοιποὶ φορτωταὶ εἶχαν πολὺ περισσότερον καὶ πολύτιμον φορτίον ἐπὶ τοῦ πλοίου τὸ ὁποῖον διεσώθη κατόπιν τοῦ καταποντισμοῦ τοῦ φορτίου τῶν πελατῶν μας ABI-YACHI TRADING CO. LTD.

'Ως ἀσφαλῶς θὰ γνωρίζετε εἰς περίπτωσιν 'Αβαρίας οἱ ἰδιοκτῆται τοῦ διασωθέντως φορτίου ὡς ἐπίσης καὶ οἱ πλοιοκτῆται θὰ πρέπει νὰ συνεισφέρουν κατὰ λόγον τῆς ἀξίας τοῦ διασωθέντως φορτίου καὶ τοῦ σκάφους καὶ τοῦ ναύλου διὰ τὴν ἀνάλογον μείωσιν τῆς ζημίας τῶν ἰδιοκτητῶν τοῦ φορτίου τὸ ὁποῖον κατεποντίσθη.

Περαιτέρω οἱ πλοιοκτῆται ἔχουν καθῆκον νὰ διευθετήσουν τὴν συνεισφορὰν ἑκάστου ἐνδιαφερομένου καὶ νὰ λάβουν τὰ ἀναγκαῖα μέτρα καὶ νὰ προβοῦν εἰς τὰς ἀναγκαίας διατυπώσεις ἀλλ' ὡς πιστεύομεν οὐδὲν ἐξ αὐτῶν ἐγένετο.

'Εν πάσῃ περιπτώσει διὰ σκοποὺς διευθετήσεως τῆς ὑποθέσεως κατὰ τρόπον φιλικὸν δὲν θὰ ἐξετάσωμεν ἐπὶ τοῦ παρόντος κατὰ πόσον ἡ 'Αβαρία ἦτο δικαιολογημένη ὡς καὶ τοὺς λόγους οἱ ὁποῖοι ὡδήγησαν εἰς τὴν 'Αβαρίαν (καθ' ὅτι ὑπάρχει ἰσχυρισμὸς ὠφείλετο εἰς BAD STOMAGE τοῦ φορτίου) καὶ εἴμεθα διατεθιμένοι νὰ ἔχωμεν μίαν συνάντησιν μαζί σας

διὰ συζήτησιν τοῦ θέματος ἄνευ βλάβης τῶν δικαιωμάτων ἀμφοτέρων.

Παρακαλοῦμεν ὅπως μᾶς γνωρίσετε τὰς ἀπόψεις σας ὡς καὶ τὸν χρόνον καὶ τόπον τῆς συναντήσεως, ἐὰν ἐπιθυμεῖτε τὴν τοιαύτην συνάντησιν.

Μετὰ τιμῆς,
M.M. Χούρη & Σία".

The English translation of which reads:

("Messrs. Bafas FISHING COMPANY LTD.
Mr. Philippos Bafas
Athanasiou Diakou 17
Strovolos.

m/v JACOB OF PETER - General Average
on or about the 26.11.76.

We refer to our letter on the above subject dated 29.12.76 and we regret to observe that you have failed to send us a reply.

We have already received a declaration of the cargo of the ship at his departure from Limassol on or about the 26.11.76 and as it appears from such declaration the other consignors had much more and valuable cargo on the ship which was saved as a result of the jettison of the cargo of our clients ABI-YIAGHI TRADING CO. LTD.

As you are well aware, in case of general average the owners of the cargo which was saved as well as the ship-owners have to contribute proportionately to the value of the cargo saved, the ship and the freight, for minimizing the the loss of the owners of the cargo which was jettisoned.

Furthermore, the shipowners had a duty to arrange the contribution of each interested party and take the necessary steps and all necessary formalities which, as we believe, they have not done.

In any case for purposes of settlement of the case in a friendly way, we shall not examine for the time being whether the average was justified as well as the reasons which led to the average (as there is an allegation that it was due

to bad stowage of the cargo) and we are prepared to have a meeting with you to discuss the matter without prejudice to either side's rights.

Please let us know your views and the time and place of the meeting if you wish such a meeting.

Yours faithfully,
(Sgd) M.M. Houry & Co.").

By such letter the fact that there was a general average is not denied. The only matter which is disputed is whether such average and the reasons which led to it, were justified or whether same was the result of negligence due to bad stowage.

In so far as the ship-owner is in the position of a common carrier, he has a duty in respect of the custody and protection of the cargo during the voyage since he is absolutely responsible for its safety. He is, therefore, liable to its owner in case of loss or damage caused by the failure of himself or his servants to exercise due care. He is exempted, however, from any liability in cases where, due to imminent danger to the ship or the lives on board of her, the Master has to jettison such amount of cargo as may be necessary to remove the danger. He is the only person to judge as to what goods have to be jettisoned and he may select what articles he pleases and any quantity that is necessary, and in extreme cases he may jettison even the whole cargo. (*The Gratitudine* [1801] 3 Ch. Rob. 240). It is well established that, if the Master jettisons more cargo than is necessary to remedy the danger to the ship, the ship-owner is liable to make good the full value to the cargo-owner, and the ship-owner is similarly liable when cargo has been rightly jettisoned in case of necessity, but at a time when there has been a deviation from the stipulated voyage. (See Halsbury's Laws of England, 4th Edition, Volume 43, p. 139, para. 201). Under paragraph 610 of the same edition of Halsbury's Laws of England, at p. 418, we read:

"... He may, where the circumstances of the particular case justify it, sacrifice the whole or a portion of the cargo, for the purpose of preserving the ship and the rest of the cargo, by jettisoning goods to lighten the ship or by burning them to enable the fires to be kept up under the boilers..."

The common law duties of a carrier of goods by sea are sum-

marised in Carver's Carriage of Goods by Sea 12th Edition, Vol. 1, pp. 18, 19, under para. 20, as follows:

> "Where, then, a shipowner receives goods to be carried for reward, whether in a general ship with goods of other shippers, or in a chartered ship whose services are entirely at the disposal of the one freighter, it is implied in common law, in the absence of express contract -
>
> That he is to carry and deliver the goods in safety, answering for all loss or damage which may happen to them while they are in his hands as carrier:
>
> Unless that has been caused by some act of God, or of the King's enemies; or by some defect or infirmity of the goods themselves, or their packages; or through a voluntary sacrifice for the general safety:
>
> And, that those exceptions are not to excuse him if he had not been reasonably careful to avoid or guard against the cause of loss, or damage; or has met with it after a departure from the proper course of the voyage; or, if the loss or damage has been due to some unfitness of the ship to receive the cargo, or to unseaworthiness which existed when she commenced her voyage".

It is the duty, however, of the Master or shipowner when a general loss has arisen to adjust the average claims and liabilities between all cargo owners and secure their payment proportionately to the loss sustained. In this respect, he has a right to detain all the cargo till payment is made by all cargo owners or security for payment of their proportion to the loss is made. The right to detain for contribution appears to have derived from the Civil Law and the usage has always been substantially in accordance with the 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 levandea navis gratia jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est". (see *Strang Steel & Co.* v. *Scott & Co.*, Aspinall Maritime Law Reports, Volume 6, p. 419).

The origin and nature of general average contribution is briefly given by Brett, M.R. in *Burton* v. *English* [1883] 12 Q.B.D. 218 at pp. 220, 221, as follows:

"How does such a claim arise? In theory it arises from an act done by the master of the ship, not as the servant of the shipower, but as the servant of the cargo owner, a relation which is imposed on him by the necessity of the case. It arises by reason of a voluntary sacrifice by the cargo owner for the benefit of the ship and cargo, and not from any act done by the shipowner at all. By what law does the right arise to general average contribution? Lord Bramwell in his judgment in *Wright* v. *Marwood*[1] considers it to arise from an implied contract, but although I always have great doubt when I differ from Lord Bramwell, I do not think that it forms any part of the contract to carry, and that it does not arise from any contract at all, but from the old Rhodian laws, and has become 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, where 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. If this be so, the liability to contribute does not arise out of any contract at all, and is not covered by the stipulation in the charterparty on which the defendants rely..... the acts of the captain with reference to properly or improperly jettisoning part of the cargo are not both done by him in the same capacity, one is done by him as the agent of the cargo owner, and the other as the servant of the shipower"

Bowen, L.J. in the same case at p. 223, had this to say:

"General average contribution is a principle which comes down to us from an anterior period of our history, and from the law of commerce and the sea. When, however, it is once established as part of the law, and as a portion of the risks which those who embark their property upon ships are willing to take, you may if you like imagine that those who place their property on board a ship on the one side, and the shipower who puts his ship by the quay to

1. 7 Q.B.D. 62 at p. 67.

receive the cargo on the other side, bind themselves by an implied contract which embodies this principle, just as it may be said that those who contract with reference to a custom impliedly make it a portion of the contract. But that way, although legally it may be a sound way, nevertheless is a technical way of looking at it. This claim for average contribution, at all events, is part of the law of the sea, and it certainly arises in consequence of an act done by the captain as agent not for the shipowner alone, but also for the cargo owner, by which act he jettisons part of the cargo on the implied basis that contribution will be made by the ship and by the other owners of cargo. He makes the sacrifice on behalf of one principal, whose agent of necessity he is, on the implied terms, if you like to call it so, that that principal shall be indemnified afterwards by the rest".

In *Strang Steel & Co.* v. *Scott and Co.* (supra), Lord Watson in considering the above dicta in Burton's case and the question whether the rule ought to be regarded as a matter of implied contract or as a canon of positive law resting upon the dictates of natural justice, made the following remarks at p. 421:

"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 upon which claims of recompence 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".

And as to the right of the owner of jettisoned goods for contribution pro rata of the owners of the ship and cargo saved, at pp. 420, 421, Lord Watson said:

"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 may be enforced, have been authoritatively defined. Each owner of jettisoned goods becomes a creditor of ship and cargo saved, and has a direct claim against each of the owners of ship and cargo, for a pro rata contribution towards his indemnity, which he can enforce by a direct action. In *Dobson* v. *Wilson* (3 Camp. 480) 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 rights of lien can only be enforced through the shipmaster, 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* (18 Ves. 187). 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* 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 applicant's claim for contribution in that case to have been well founded, he would have had his remedy at law. In *Crooks and Co.* v. *Allan* (41 L.T. Rep. N.S. 800; 4 Asp. Mar. Law Cas. 216; 5 Q.B. Div. 38), Lord Justice (then Mr. Justice) Lush held that a master or shipower 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 Judge observed, 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' ".

In *Simonds* v. *White*, 2 B & C 811, Abbott C.J. said:

"The principle of general average, namely, that all whose property has been saved by the sacrifice of the property of another shall contribute to make good his loss, is of very ancient date and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument as upon a general rule of maritime law. The obligation may be limited, qualified, or even excluded by the special terms of a contract as between the parties to the contract, but there is nothing of that kind in any contract between the parties to this cause. There are however many variations in the laws of usages of different nations as to the losses which are considered to fall within this principle".

In *Crooks & Co. & Another* v. *Allan* [1879] 5 Q.B.D., p. 38, it was found that a shipowner, where a general average loss has occurred, may be liable to an action for damages for delivering up the cargo without taking the necessary steps for procuring an adjustment of the general average and securing its payment.

It was held in that case, first, that the bill of lading did not relieve the defendants from contribution to general average, and, secondly, they were liable to an action by the plaintiffs for their omission to take the necessary steps to secure an adjustiment of the payment of the general average.

As to the position of deck cargo, however, it has been generally accepted that the deck is not a proper place for cargo because goods so placed there obstruct the working of the ship and are under peculiar risks. Therefore, the jettison of goods which were on deck does not entitle their owner to contribution from the other cargo owners. An exception to this rule is referred to in Carver Carriage of Goods by Sea, 12th Edition, Volume 2, at p. 753, paragraph 886, as follows:

> "The rule does not however apply on voyage where the carrying of goods on deck is permitted by the established custom of navigation: nor 'where the other owners of cargo have consented that the goods jettisoned should be carried on the deck of the ship'. In those cases a loss of the cargo by jettison must be contributed to in the usual manner".

Reference is made in support of the above proposition to the cases of *Strang Steel & Co.* v. *Scott & Co.*, (supra) in which Lord Watson had this to say at p. 421 (Aspinall Reports):

> "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, in a question with the other shippers of cargo, as a *justifiable riddance of incumbrances 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 and 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".

In *Wright* v. *Marwood*, [1881] Q.B.D., p. 62, where the plaintiffs shipped certain cattle as deck cargo and as a result of a storm which arose, the master jettisoned the deck cargo by throwing the cattle overboard and such act was found necessary for the safety of the ship, it was held that the plaintiffs could not recover from the defendants a general average contribution for the loss of the cattle.

With the above legal principles in mind, I am now coming to consider whether the deck cargo, part of which was jettisoned, was put there (a) with the consent of the plaintiffs, which would have legalised the act of the master for placing it on deck, and (b) with the consent of the other cargo owners which would have made them liable for contribution to the general average.

On the evidence before me I am satisfied that Maroun Khalifi, the brother-in-law of P.W.1, was acting all along as the agent of the plaintiffs concerning the shipment of the plaintiffs' goods. He was the person who took an active part in the dispatch of the goods. He himself paid the freight for the goods and requested to accompany same during the trip to Jounieh, a fact which he did. I have not believed P.W.1 that such person was merely a passenger for whom he made arrangement to travel to Jounieh with defendant 2 ship on the occasion of the carriage of the goods by the same boat. Though such person was a close relative of P.W.1 and the allegations of the defendants that he was acting as agent of plaintiffs were made known to them by the allegations in the answer, the plaintiff did not call him as a witness to contradict the defendants. P.W.1 also, though in his evidence alleged that his forwarding agent in Limassol was Zenon Markides he did not call such person as a witness to support plaintiffs' version and contradict the defendants. Maroun Khalifi knew all along that part of plaintiffs' cargo was loaded on deck, having seen the cargo so placed and having accompanied same during the journey, but he never protested or objected to its loading on deck. The loading therefore, of part of plaintiffs' cargo on deck, was within

the contemplation of the plaintiffs and was effected with their consent through their aforesaid agent.

There is no evidence before me that the owners of other cargo have consented to the loading of part of plaintiffs' cargo on deck. The master of the ship gave evidence as D.W.1 and the plaintiffs had ample opportunity to ask him whether the other owners consented to the carriage of deck cargo to make such owners liable for contribution to the general average. Nothing of this sort was suggested to him and no evidence has been called to the effect that the other cargo owners consented to such mode of loading. In the absence of any evidence to that end, I cannot find that the other cargo owners were liable for contribution and that the defendants by delivering such cargo to them were in breach of their duty to the plaintiffs to secure contribution from the other cargo owners. Furthermore, it has not been alleged in the writ of summons or the pleadings that the ship and its freight are liable for contribution and there is no evidence as to the extent of contribution of the ship and freight. Irrespective, however, as to whether or not there was liability for contribution by the other cargo owners and by the ship and its freight and any breach of duty by the defendants for failing to secure contribution, the cause of action in the present case is not one for breach of such duty or for negligence by the defendants to secure contribution. The cause of action and the prosecution of their case by the plaintiffs was all along that the defendants are liable as common law carriers for the loss of plaintiffs' goods. From the contents of exhibit 1(c) it is clear that the plaintiffs knew long time before the institution of the action, that the defendants were relying for their defence on a general average. What appears to be their complaint in exhibit 1(c) is that the defendants failed to arrange contribution from the other cargo owners who owned much more valuable cargo and also contribution from the ship and the freight and an allegation of bad stowage of the cargo.

In civil proceedings the Court is bound to adjudicate on the cause or causes of action on which the claim is based and cannot deal with causes which are not raised by the writ of summons or the statement of claim. As I have already mentioned the cause of action is based solely on the breach by the defendants of their duty as common carriers and no cause of action is

relied upon either additionally or in the alternative for breach by the defendants of any duty for securing contribution from other co-owners in the general average or for negligence in delivering the rest of the cargo to its owners without securing contribution from them and for damages resulting thereof or for pro rata contribution of the ship and the freight. Such damages could have been easily claimed and proved, as most of the other cargo consisted of merchandise such as cigarettes, whisky, batteries and tuna, the value of which as well as the value of the ship which is also liable for contribution in case of a general average, could have been assessed by an assessor.

Therefore, the only cause of action on which I have to adjudicate is whether the defendants are in breach of their duty as common carriers. To such cause the defendants have established a defence that the loss of the goods short-landed was due to jettison of same as a result of imminent danger to the ship and the lives on board, and there is no evidence before me that the cause of loss or damage was due to any negligent act on the part of the defendants or that any part of the cargo jettisoned was in excess of what was necessary to save the ship, the rest of the cargo and any lives on board. In consequence, the loss cannot be attributed to breach by the defendants of their duty in respect of custody and protection of the goods during the voyage and in the circumstances they are exempted from liability for the loss of such goods. In the result, plaintiffs' claim in respect of short-landed goods, fails.

I come now to consider the rest of plaintiffs' claim which concerns goods which are alleged as having been delivered in such bad condition as to be of a non-merchantable value. P.W.1 said in his evidence that with the exception of one box of epaulettes which he saw soaked in sea water and which he refused to collect, all other goods landed were delivered to him and that the ship left after unloading. Upon inspection of such goods by him after delivery, he found them to be affected by sea water to such an extent as to make them of unmerchantable value and he abandoned them in the port. The plaintiffs however have not adduced any evidence either oral or documentary from any appropriate port authority, as to the condition of the goods after unloading. Nor did they call an assessor

to inspect the goods and verify the alleged damage to such goods. Without examining whether the alleged damage might have been the result of the same cause which led to the general average, as I have not heard any argument on this point, in the absence of any evidence supporting that of P.W.1 and verifying the alleged damage, I find myself unable to accept such evidence and rely on it. Needless to add, that I have not been impressed by the evidence of P.W.1 on this issue as to accept it without any supporting evidence which, in the circumstances, I deem necessary.

In the result, the action fails, but in the circumstances I make no order for costs.

Action dismissed with no order as to costs.